MINUTES OF CONVOCATION

Thursday, 28th January, 2010
9:00 a.m.

PRESENT:

The Treasurer (W. A. Derry Millar), *Aaron, Anand, Boyd, Braithwaite, *Caskey, Conway, Crowe, Dray, Elliott, Epstein, Eustace, Furlong, Go, *Gold, Gottlieb, Hainey, Halajian, Hare, Hartman, Heintzman, Henderson, Krishna, Lawrie, Lewis, McGrath, *Marmur, Minor, Murray, Pawlitza, Porter, *Potter, Pustina, *Rabinovitch, Robins, *Ruby, Schabas, Sikand, Silverstein, Simpson, C. Strosberg, Swaye, Symes, Wardlaw, *Wright and *Yachetti.

* participated by telephone

Secretary: Katherine Corrick

The Reporter was sworn.

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IN PUBLIC

……

TREASURER'S REMARKS

Congratulations were extended to bencher, Professor Constance Backhouse, who received the Order of Ontario in recognition of her contributions to the law. Also appointed were members, Janet Stewart of London and Dr. Edward Ratushny of Ottawa.

On January 24, 2010, the Ontario Government announced that it would be transforming the legal aid system. The Treasurer briefed Convocation on the Government's plans. The Treasurer thanked bencher Susan McGrath and staff Sheena Weir and Julia Bass for their work with the Alliance for Sustainable Legal Aid ("ASLA") and Justice Sidney Linden for his work on this matter.

The Treasurer extended condolences to the family of David Ward, Q.C., LSM who passed away on January 13, 2010.

DRAFT MINUTES OF CONVOCATION

The draft minutes of Special Convocation of December 4, 2009 were confirmed.

MOTION – APPOINTMENTS

It was moved by Mr. Henderson, seconded by Mr. Schabas, –

THAT the following benchers be appointed to the Law Society Medal/Lincoln Alexander/Laura Legge Award Committees:

Glenn Hainey
Carol Hartman
Doug Lewis
Susan McGrath
Baljit Sikand

THAT the following benchers be appointed to the LL.D. Advisory Committee:

Glenn Hainey
Carol Hartman
Doug Lewis
Susan McGrath
Baljit Sikand

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

To the Benchers of the Law Society of Upper Canada Assembled in Convocation

The Director of Professional Development and Competence reports as follows:

CALL TO THE BAR AND CERTIFICATE OF FITNESS

Licensing Process and Transfer from another Province – By-Law 4

Attached is a list of candidates who have successfully completed the Licensing Process and have met the requirements in accordance with subsection 9.

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on
Thursday, January 28th, 2010.

ALL OF WHICH is respectfully submitted

DATED this 28th day of January, 2010

CANDIDATES FOR CALL TO THE BAR

January 28th, 2010

Leylien Shenouda Adel Baghat
Jaswinder Basra
Sherrey Dale Collier
Christine Margaret Ferguson
Genevieve Gabrielle Fournier
Ryan Daniel Garrett
Kathleen Mary Healey
Marie-Claire Suzanne Lachance
Guillaume Pierre Michaud
Geoffrey Alan Russell Pollock
Ronny George Shuldhaus
Marie Gislaine Pascale Turcotte
Pablo Andres Irribarra Valdes
Beth Pauline Younggren

It was moved by Ms. Pawlitza, seconded by Mr. Silverstein, that the Report of the Director of Professional Development and Competence listing the names of the Call to the Bar candidates be adopted.

Carried

REPORT OF THE COMPENSATION FUND COMMITTEE

Mr. Heintzman presented the Report.

Report to Convocation
January 28, 2010

Compensation Fund Committee

Committee Members
Thomas Heintzman (Chair)
Marshall Crowe
Dr. S.M. Aslam Daud
Michelle Haigh
Susan McGrath
Stephen Parker
Nicholas Pustina
Baljit Sikand
Gerald Swaye

Purpose of Report: Decision and Information

Prepared by the Professional Regulation Division
(Dan Abrahams 416.947.7626 / Zeynep Onen 416.947.3949)

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Committee met on November 11, 2009. Committee members in attendance were Thomas Heintzman (Chair), Michelle Haigh, Stephen Parker, Nicholas Pustina, and Gerald Swaye. Staff members Zeynep Onen, Maria Loukidelis and Dan Abrahams also attended.

FOR DECISION

PROPOSED AMENDMENT TO BY-LAW 12 (COMPENSATION FUND)

MOTIONS (2)

2. MOTION 1: That Convocation approve in principle, subject to formal by-law amendment, a change in the structure of the Compensation Fund Committee, to make it a committee of five (5) members with the following composition and features:

   a. A Chair who is able to vote on all matters, including grant approvals

   b. Membership as follows:
      i. Two (2) lawyer benchers, one of whom shall serve as Chair.
      ii. Two (2) lay benchers.
      iii. One (1) paralegal bencher.

   c. A quorum requirement of three members for any meeting of the Committee, with the following additional requirements for approval of grants:

      i. for any grant in excess of $5,000 in respect of lawyer dishonesty, the approval of at least one (1) of the two lawyer benchers, plus any two other members of the Committee; or
      ii. for any grant in excess of $5,000 in respect of paralegal dishonesty, the approval of the paralegal bencher, plus any two other members of the Committee.

3. MOTION 2: That Convocation seek an amendment to the *Law Society Act* that would enable persons licensed to provide legal services who are members of the Paralegal Standing Committee to be appointed by Convocation to serve as members of the Compensation Fund Committee created by the amended By-Law 12.

Background and Explanation

(a) The original proposal and the Committee's revised recommendation

4. This matter was originally brought to Convocation at its September 2009 meeting. At that time, the Compensation Fund Committee was proposing that the Committee be restructured to include a non-voting Chair, who would be a lawyer bencher, plus one other lawyer bencher, two lay benchers and a paralegal bencher. There was provision for a quorum requirement of three members but no stipulation as to which members would need to participate in the approval of specific grant recommendations.

5. Questions were raised at Convocation about the following aspects of the proposal:
   a. the fact that the Chair would not cast a vote, except to break a tie; and
   b. the fact that the lawyer benchers on the Committee would not comprise a majority; indeed, it was conceivable that with a non-voting Chair a grant in respect of lawyer dishonesty could be made with no lawyer participation whatsoever.

6. In addition, there was a question at Convocation about whether the Committee should be required to seek Convocation's approval for aggregate grants in excess of a certain threshold in relation to a particular lawyer's, or paralegal's, dishonesty.

7. These three issues were all discussed by the Committee when it met to reconsider the matter on November 11, 2009. The revised recommendations of the Committee are now set out in the motion before Convocation: a five member Committee with the same composition as that proposed in September, but with a voting Chair and certain specific quorum and voting requirements to help ensure visible accountability to those who contribute to the Compensation Fund as lawyers or paralegals.

8. Moreover, for the reasons discussed below, the Committee does not recommend that aggregate grants in excess of a certain threshold be brought to Convocation for approval.

(b) The functions of the present Committee, the Review Subcommittee and Staff

9. As noted in the September 2009 Report to Convocation, section 51 of the *Law Society Act* gives Convocation the power to make grants from the Compensation Fund. It also permits Convocation to delegate any of the powers conferred upon it under the section to a Committee of Convocation. Convocation has delegated the administration of the Fund, including its grant-making power, to the Compensation Fund Committee. The Compensation Fund Committee is established in By-Law 12 made under the *Law Society Act*.

10. The Compensation Fund Committee is responsible to Convocation for the administration of the Fund. The Committee reports to Convocation on grants paid and provides recommendations in the budget-setting process to ensure that an appropriate levy is imposed and adequate reserves are maintained. Changes to the General Guidelines for Grants from the Compensation Fund for Lawyers and for Paralegals, respectively, must be brought to Convocation for approval.

11. The Fund has counsel who assist in the processing of grant applications. Staff report to a Manager who in turn reports to the Director of Professional Regulation. Staff receive grant applications, gather evidence and make recommendations in accordance with the Guidelines.

12. Recommendations are typically supported by detailed and extensive memoranda. Recommendations are made only where there is evidence of a loss due to dishonesty on the part of the lawyer or paralegal and where the claimant has established entitlement to a grant pursuant to the Act and the Guidelines approved by Convocation.

13. Currently the Compensation Fund Committee relies on a subcommittee process to make grants out of the Compensation Fund in excess of $5000. Grants below this threshold are processed through numerous levels of staff approval, up to the level of the Director of Professional Regulation, the Chief Financial Officer and the Chief Executive Officer. The current structure dates back to 1988 when Convocation adopted a report recommending the establishment of a Review Subcommittee composed "from time to time of a panel of three members of the Compensation Fund Committee".

14. Under the current structure, recommended payments are reviewed by the Subcommittee and then reported to the Committee as a whole, which, as noted above, is fully accountable to Convocation. The Subcommittee is currently composed of two lawyer benchers and a lay bencher.

15. The maximum grant payable to a single claimant is $150,000 for a lawyer's dishonesty. This represents approximately 0.75% of an uncommitted fund balance that has remained at around $20 million over the past several years. The maximum for a grant in respect of paralegal dishonesty is $10,000.

16. In addition to its grant making powers, the Compensation Fund Committee is also responsible for the development of Fund policy, the operation of the Fund and the general oversight of Fund activities. Typically, the Committee meets approximately three or four times a year to perform these functions. The Review Subcommittee reviews grant memoranda as required throughout the year, approximately 100 per year.

17. Under the new proposed structure, existing oversight over the Compensation Fund Committee and the activities of the Fund would be carried forward. The oversight includes:

    a. the Treasurer has authority to recommend to Convocation the appointment and removal of Committee members, and the Committee reports back to Convocation on issues as they arise;
    b. the reporting of cumulative grants paid in respect of individual lawyers and paralegals (with the names of those still in the Discipline process anonymized to avoid tainting future hearing panels);

c. Convocation approves Guideline changes that may have an impact on the health of the Fund;
d. periodic detailed program reviews of the Fund conducted by the Audit Committee as part of the regular cycle of program reviews; and
e. the annual budget and levy-setting exercise, which remains within the ultimate purview of Convocation, based on the recommendation of the Finance Committee.

(c) The need for a new structure

18. In February 2009, the Committee determined that for greater efficiency and more effective oversight, the Committee should be reconstituted as a single Committee to perform all of the functions currently exercised by the Compensation Fund Committee and the Review Subcommittee.

19. The new Committee would have the following responsibilities:
a. General oversight of the Compensation Fund, to ensure its financial health and stability.
b. Oversight of Compensation Fund policy, including recommending amendments to the Guidelines from time to time to assist in determining who is eligible for compensation from the Fund and under what circumstances.
c. The review and approval of staff (and, occasionally, Referee) recommendations for grants from the Fund in excess of $5000.00.
d. Other duties and responsibilities as delegated to the Committee by Convocation in accordance with section 51 of the *Act*.

20. The present Committee has nine members, three of whom serve on the Review Subcommittee. The Committee is of the view that a smaller Committee would be most able to assume both the policy and oversight responsibilities of the current Committee and the grant review function currently exercised by the Review Subcommittee. It would be in the interests of the Fund if those performing the grant-making role could apply that experience to influence policy review and development; conversely it would make sense to ensure that those asked to consider grant recommendations were also fully accountable for, and conversant with, the policies under which recommendations were made.

(d) The proposed Committee structure: two lawyer benchers, including a voting Chair; two lay benchers; and one paralegal bencher

21. As noted, the proposal previously presented to Convocation was that the new Committee would have two lawyer benchers, one of whom would serve as Chair. Having considered the points made at Convocation and having determined that the small size of the Committee mandates a more active role for the Chair, the Committee is satisfied that it would be preferable that the Chair cast a vote on all issues, including grant recommendations.

22. The Committee has considered the opinions expressed at Convocation in September 2009 regarding the balance of lawyer, lay and paralegal benchers on the Committee. After careful consideration, the Committee remains of the view that the proposed 2-2-1 composition is the most appropriate, provided that certain additional revisions are made to the quorum requirements, as discussed below.

23. The Committee recognizes that, with the proposed composition of two lawyer benchers, two lay benchers and one paralegal bencher, no one group will have a majority on the Committee. This will mitigate any perception that Committee decisions are not balanced.

24. In fact, while it relies almost entirely on levies against lawyers and paralegals to finance its operations, the real purpose of the Fund is to compensate members of the public who are victims of lawyer or paralegal dishonesty. A Committee structure that provides a strong role for lay benchers, as well as lawyer and paralegal benchers, is in keeping with the primary mandate of the Fund. It supports the need to demonstrate that the public interest is strongly represented within the decision-making structure of the Committee.

25. Moreover, the three-person quorum and approval provisions discussed below are designed to ensure that decisions are made with the participation of lawyers and paralegals who contribute to the Fund.

26. Hence, in the proposed new composition, an appropriate balance is struck between an active and decisive role for lawyers and paralegals, both of whom actually finance the Compensation Fund's activities, and the desirability of demonstrating how the Fund is genuinely operating in the public interest.

(e) The proposed quorum and grant approval requirements: three member quorum, three members including a lawyer bencher for lawyer grants and the paralegal bencher for paralegal grants to approve all grants in excess of $5,000

27. The Committee has previously recommended that the new five-member Compensation Fund Committee would be best-served by a quorum of three members. Ordinarily, assuming that the majority would rule, a matter could be decided by the vote of as few as two members of the Committee.

28. The Committee has, however, considered the concerns noted above, particularly the need to ensure that the lawyers and paralegals who finance the Compensation Fund through the Fund levy participate in, and are accountable for, grant-related decision-making.

29. The Committee also feels that a decision by only two members to pay a grant in excess of $5,000, up to a maximum of $150,000 for lawyer dishonesty, is inherently unsatisfactory.

30. Accordingly, the Committee recommends that while the general quorum for the Committee should remain, as originally proposed, at three of the five members, the following additional stipulations should apply to grant-related decisions:

a. No grant in excess of $5000 in relation to a lawyer's dishonesty could be approved without the support of at least three members of the Committee, one of whom must be a lawyer bencher; and
b. No grant in excess of $5000 in relation to a paralegal's dishonesty could be approved without the support of at least three members of the Committee, one of whom must be the paralegal bencher.

(f) Should Convocation, rather than the Compensation Fund Committee, approve aggregate grants in excess of a defined threshold?

31. This issue was raised for the first time at Convocation in September. The respectful view of the Committee is that the institutional safeguards that already exist, and that are discussed above, coupled with the logistical challenges of implementing such a proposal, make this approach both unnecessary and unworkable.

32. Currently, no grant to an individual claimant who has suffered financially as a result of lawyer dishonesty can exceed $150,000. The equivalent figure for paralegal dishonesty is $10,000. There is, however, no restriction on the number of such grants that can be paid in respect of a specific lawyer or paralegal.

33. It was suggested at Convocation that, where the total claims in respect of a particular lawyer or paralegal exceed $500,000 ($1 million was suggested as an alternative), the entire package of grants should be brought to Convocation for approval, rather than left to the discretion of the Committee.

34. It is open to Convocation to take back all or part of the statutory authority it has delegated to the Committee pursuant to section 51 of the *Act*.

35. Table 1, below, illustrates some of the difficulties inherent in the proposal to require Convocation's approval for grants for lawyer dishonesty in excess of a certain amount. What the chart demonstrates is that, where aggregate grants in respect of lawyer dishonesty have exceeded $500,000, as has been the case with approximately ten lawyers since 2000:
    a. There is often a fairly substantial gap in time between the payment of the first grant in respect of a particular lawyer's dishonesty and the last such grant.
    b. The average amount of individual grants will vary, but most are well under the $150,000 (formerly $100,000) maximum grant payable to a single claimant.
    c. There could be a large number of claimants – as many as 105 – involved in aggregate claims that total $500,000. The average is 38.

TABLE 1:

COMPENSATION FUND
CLAIMS CLOSED JANUARY 1, 2000 TO SEPTEMBER 30, 2009
WHERE GRANTS EXCEEDED $500,000
(BY LAWYER)

Lawyer	*Total Grants Paid in Period (approximate)**	*Number of Grants*	*Average Amt. Of Grants*	*Earliest Payment (in period-approximate)*	*Last Payment (in period-approximate)*
GC	$1.5 million	23	$66,000	March 2003	September 2008
MD	$1.0 million	32	$32,500	March 2000	March 2009
DL.	$700,000	20	$35,000	October 2003	February 2006
WM	$2.0 million	92	$22,000	May 2006	September

Lawyer	*Total Grants Paid in Period (approximate)**	*Number of Grants*	*Average Amt. Of Grants*	*Earliest Payment (in period-approximate)*	*Last Payment (in period-approximate)*
					2009 (majority paid in Sept. 2006)
MM.	$770,000	20	$38,000	December 2008	February 2009 (ongoing)
WMc	$3.9 million	105	$37,000	August 2000	March 2003 (majority paid 2000/2001)
MO.	$750,000	11	$68,000	February 2001	February 2003
GR.	$520,000	15	$35,000	August 2004	April 2005
JS.	$500,000	7	$71,000	September 2005	June 2006 (new claim received 2009)
JSi.	$1.5 million	59	$26,000	May 2003	March 2006

36. As indicated, the total grants paid only includes grants paid / claims closed in the period from January 1, 2000 to September 2009. The total grants paid with respect to some of the above lawyers significantly exceed the totals paid in the period (e.g., MD, where total grants actually exceed $4 million).

37. In addition, there are other lawyers where total grant payments have exceeded (or will exceed) the $500,000 threshold, if one considers total grants paid with respect to that member, without restrictions on the timeline. An example of this is a lawyer who can be referred to as PS, where grants paid in the 2000-2009 period were $334,000 (below the proposed threshold) but total grants paid exceed $3 million.

38. In short, the table demonstrates the inherent difficulty in establishing and abiding by any threshold for requests to Convocation that would not risk delay or other prejudice to potential grant recipients.

39. As noted above, grants are already reported to Convocation for information, periodically. Lawyer or paralegal names are anonymized for matters where Discipline is still ongoing. This is part of the general oversight that Convocation must exercise in respect of the Fund.

40. Another important consideration is that benchers who participate as members of the current Review Subcommittee are precluded from sitting on hearing panels that consider the alleged professional misconduct or conduct unbecoming of lawyers or paralegals whose dishonesty has resulted in a Compensation Fund claim.

41. By extension, the involvement of Convocation in the detailed consideration of grants recommended in respect of lawyers or paralegals that exceed a certain threshold could potentially exclude all members of Convocation from sitting on Hearing Panels dealing with those individuals.

42. Alternatively, it would mean that consideration of aggregate grants in excess of a certain threshold, such as $500,000, would wait until all pertinent investigations, and all discipline proceedings, including appeals, had been concluded.

43. It is worth noting that when the Compensation Fund becomes aware of dishonesty on the part of a lawyer or paralegal licensee, staff lawyers spend time ascertaining, among other things:
    a. the extent of the dishonesty, including the acts of dishonesty committed, the extent to which these can be proven to the Fund's satisfaction (never mind the satisfaction of a Discipline panel), and whether the loss due to dishonesty meets the tests set out in the Act and the Fund's Guidelines
    b. the number of claimants and potential claimants (including persons who may not yet know they have suffered a loss)
    c. the amount to which each claimant may be entitled, with claim limits applied
    d. any extenuating factors, including those referred to in the Fund's Guidelines, that may impact on the size of an eventual grant
    e. any possible offsets or assignments

44. In summary, the Committee feels that a threshold for seeking Convocation's approval would:
    a. be challenging to administer and enforce, for the reasons set out above.
    b. slow down the payment of grants to persons victimized by dishonesty, which would be especially prejudicial to those who claims were submitted and established early in the process but who would have to wait for all other claims to reach the same stage before any grants could be issued; and
    c. result in concerns about confidentiality and real or institutional bias that could further delay the payment of grants and/or the conduct of Discipline hearings; and
    d. be unnecessary, given the careful and thorough work that already goes into the preparation and approval of grant recommendations, the historic lack of dissent when such recommendations are considered, and the general oversight role already played by Convocation in respect of the administration of the Fund.

(g) Paralegal representation on the Committee

45. In respect of motion 2, which relates to the paralegal representation on the proposed new Compensation Fund Committee, the Committee reiterates the view it put forward in September. That is, the Committee again stresses the desirability of being able to have paralegals represented on the Committee by either a person licensed to provide legal services who is a member of the Paralegal Standing Committee or a paralegal bencher. From a purely practical standpoint, this would create a larger pool of talent from which to draw, and would avoid overtaxing the two paralegal benchers whose services are already much in demand. Unfortunately, the current state of the legislation is such that only a paralegal bencher is able to sit on the Compensation Fund Committee.

FOR INFORMATION
GRANTS PAID FROM THE FUND

46. Between the last report to Convocation in September 2009 and November 2009, grants were paid from the Fund in the amounts shown. This report covers the period from August 28, 2009 to October 31, 2009. (Licensees whose discipline proceedings are completed, or who are not subject to discipline, are identified by name). Additional information about specific claims is available to the Committee on request.

Lawyers	Number of Claimants	Total Grants Paid
Solicitor #179 (Suspended June 4, 2008)	4	$ 89,685.00
Solicitor #190 (Suspended June 13, 2008)	1	$ 10,855.00
Solicitor #195 (In good standing – Discipline Pending)	1	$ 1,700.00
Solicitor #196 (Suspended June 19, 2009)	1	$ 7,101.31
Myles McLellan (Licence Revoked May 12, 2009)	1	$ 8,222.10
Ronald Filipovich (Disbarred October 24, 2002)	1	$ 32,252.70
TOTAL		$149,816.11
Licensed Paralegals	Number of Claimants	Total Grants Paid
Antonio Marrazzo (Deceased March 10, 2009)	4	$ 2,350.00
Stanislaw Obidzinski (Deceased June 4, 2009)	1	$ 120.00
TOTAL		$2,470.00

Re: Proposed Amendment to By-Law 12 (Compensation Fund)

It was moved by Mr. Heintzman, seconded by Mr. Swaye, –

MOTION 1: That Convocation approve in principle, subject to formal by-law amendment, a change in the structure of the Compensation Fund Committee, to make it a committee of five (5) members with the following composition and features:

a. A Chair who is able to vote on all matters, including grant approvals
b. Membership as follows:

   i. Two (2) lawyer benchers, one of whom shall serve as Chair.
   ii. Two (2) lay benchers.
   iii. One (1) paralegal bencher.

c. A quorum requirement of three members for any meeting of the Committee, with the following additional requirements for approval of grants:

i. for any grant in excess of $5,000 in respect of lawyer dishonesty, the approval of at least one (1) of the two lawyer benchers, plus any two other members of the Committee; or
ii. for any grant in excess of $5,000 in respect of paralegal dishonesty, the approval of the paralegal bencher, plus any two other members of the Committee.

MOTION 2: That Convocation seek an amendment to the *Law Society Act* that would enable persons licensed to provide legal services who are members of the Paralegal Standing Committee to be appointed by Convocation to serve as members of the Compensation Fund Committee created by the amended By-Law 12.

It was moved by Mr. Wright, seconded by Mr. Aaron, that the words "not less than" be added before the word "five" in Motion 1.

Lost

It was moved by Mr. Wright, seconded by Mr. Aaron, that the words "one of whom shall serve as Chair" be deleted in 2b.i. and that a further subparagraph that reads "iv. One other bencher" be added.

Lost

It was moved by Mr. Wright, seconded by Mr. Aaron, that paragraph 2c. i. and ii. be deleted so that it would then read: A quorum requirement of three members for any meeting of the Committee.

Lost

The Heintzman/Swaye motion was voted on and carried.

ROLL-CALL VOTE

Aaron	Against	Krishna	For
Anand	For	Lawrie	For
Boyd	For	Lewis	For
Braithwaite	For	McGrath	For
Caskey	For	Marmur	For
Conway	For	Minor	For
Crowe	For	Pawlitza	For
Dray	For	Porter	For
Elliott	For	Potter	For
Epstein	For	Pustina	For
Eustace	For	Robins	For
Go	For	Ruby	For
Gold	For	Schabas	For
Gottlieb	For	Sikand	For
Hainey	For	Silverstein	For
Halajian	For	Simpson	For

Hare	For	C. Strosberg	For
Hartman	For	Swaye	For
Heintzman	For	Symes	For
Henderson	For	Wright	Against

Vote: 38 For; 2 Against

Item for Information
- Grants Paid from the Fund

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Messrs. Porter and Schabas presented the Report.

Report to Convocation
January 28, 2010*

Professional Regulation Committee

Committee Members
Linda Rothstein (Chair)
Julian Porter (Vice-Chair)
Bonnie Tough (Vice-Chair)
Christopher Bredt
John Campion
Carl Fleck
Patrick Furlong
Gary Lloyd Gottlieb
Glenn Hainey
Brian Lawrie
Ross Murray
Sydney Robins
Baljit Sikand
Roger Yachetti

Purpose of Report: Decision

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

*Items deferred from December 4, 2009 Convocation

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on January 14, 2010. In attendance were Linda Rothstein (Chair), Julian Porter (Vice-Chair), Christopher Bredt, Patrick Furlong, Glenn Hainey, Brian Lawrie and Ross Murray. Staff attending were Nicole Anthony, Julia Bass, Cathy Braid, Lesley Cameron, Grace Knakowski, Terry Knott, Lisa Mallia, Zeynep Onen, Sophia Sperdakos, Arwen Tillman and Jim Varro.

PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE
(JOINT REPORT WITH THE PARALEGAL STANDING COMMITTEE AND THE TRIBUNALS COMMITTEE)

Motion

2. That Convocation approve the policy for the Pre-Proceeding Consent Resolution Conference for a two-year pilot project.

Introduction and Background

3. In April 2009, the Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who admit to conduct allegations against them and agree to a joint penalty to be submitted to a Hearing Panel to obtain an Order. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee, and culminated in a joint meeting of the Committees in November 2009.

4. This report includes the Committees' joint proposal for the new process, which is titled the Pre-Proceeding Consent Resolution Conference ("the Conference"), for Convocation's consideration.

5. If approved, amendments to the *Rules of Practice and Procedure* to implement the proposal will be required. These amendments will be presented at a future Convocation.

Why the Conference is Being Proposed

6. The Conference is intended to provide lawyers and paralegals with an alternative process to the regular investigations and hearing stream. Through this process, they may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.

7. The proposed process:
   a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;
   b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing[1] ;
   c. will save significant costs for the licensee[2] ; and
   d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

[1] In 2008, the Professional Regulation Division received 15% more cases than in the previous year, including an approximately 7% increase in conduct allegations. In 2009, this number has increased a further 3% and is expected to rise before the end of the year. The increasing number of lawyers and paralegals licensed in Ontario each year makes it unlikely that there will be an overall decrease in the number of complaints.

As the caseload increases, inevitably there is a related increase in cases that will require a formal response up to and including prosecution. An extensive investment of resources is required for any case that is taken to the Proceedings Authorization Committee (PAC) for either resolution or authorization for prosecution. Cases that are prosecuted require even more extensive investigatory and discipline resources. For example, in a mortgage fraud case, Discipline Counsel typically spend 200 to 400 hours working on each case. In more complex cases, Counsel spend in excess of 400 hours.

[2] Under the current process, where the evidence suggests that an investigation is likely to require authorization for a conduct application, the full investigation and discipline process must be deployed. This is the case even where the lawyer or paralegal who is the subject of the investigation admits to the wrongdoing and is seeking an early conclusion with sanction. There is no alternative fast track process. Although many hearings are streamlined at the hearing stage through Agreed Statements of Fact (ASF), this occurs after the completion of the full investigation (Investigation Report, Authorization Memorandum, witness statements, disclosure completed). In the absence of an ASF, Discipline Counsel must prepare for a fully contested hearing. Moreover, the experience of staff with lawyer complaints is that in cases where a lawyer considers admitting to wrongdoing to complete the matter quickly at the investigation stage, the lawyer's willingness to cooperate is significantly diminished by the time the lawyer reaches discipline. By that point, the lawyer has invested time and resources in the process and is often inclined to resist full engagement in the process.

Cases Suitable for the Process

8. The Conference would be suitable for cases that meet the criteria discussed below, regardless of the nature of the conduct. [3]

9. Since the public interest is paramount in the Law Society's regulatory processes, cases of a serious nature and that present a novel issue that should be fully tried at a hearing will not be appropriate for the process. Further, a case will not be appropriate for the process if there is a concern that sufficient facts cannot be included in the record of the hearing resulting from the Conference to satisfy the Law Society's obligation to have a transparent and fair process.

10. There will also be other cases where the public interest requires that there be a full hearing on the merits. The Proceedings Authorization Committee (PAC), which will be involved in approving a case for the process, as described below, will have the opportunity to apply these criteria when reviewing cases that may be suitable for a Conference.

Overview of the Process

11. Lawyers and paralegals would be notified of the availability of the Conference at the start of an investigation. A decision to move a matter to a Conference would be made only after an investigation sufficient to ensure that the regulatory issues are known and complete. The process would be available only where no disciplinary proceedings have been authorized in the case.

12. Cases dealt with through the Conference process would result in a Hearing Panel Order or would be returned to the Society for further investigation.

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[3] To elaborate:

Mortgage fraud. The evidence used in a mortgage fraud case is largely documentary. In this type of case, the Society can often be certain that the lawyer's admissions are supported by the evidence, and can assess the appropriate penalty to be proposed to the lawyer and his or her counsel. Given the size of mortgage fraud investigation files, the time saved by not having to prepare the file for disclosure and for hearing, not having to prepare witnesses and forgoing the hearing, are significant.

Financial transactions. The evidence used in cases of financial misconduct is often supported by documents. Where documentary evidence is lacking, for example, where a lawyer or paralegal's books and records are not up to date, the lawyer's or paralegal's admissions would assist the Society in completing its investigation and would save the time and resources required for a contested hearing.

Fail to serve. Where a lawyer or paralegal fails to serve his or her clients, evidence is obtained from the client file, court documents and from the lawyer or paralegal and clients. Where the lawyer or paralegal does not admit to the allegations, they can take a significant amount of time to prove. If a lawyer or paralegal is willing to admit to a failure to serve his or her clients, consideration should be given to the appropriateness of the consent process.

Professionalism. Where allegations of incivility or misleading the court arise out of proceedings, the factual issue of what the lawyer or paralegal said or did may not be in dispute and is often supported by transcripts or documents. However, the lawyer or paralegal often raises a defence justifying his or her conduct, for example, on the basis of the actions of the opposing party or the adjudicator. Investigating and prosecuting these cases is very time-consuming. If a lawyer or paralegal is willing to agree to a discipline outcome and penalty, consideration should be given to the appropriateness of the consent process and the fact that it will result in a public order and record of this conduct.

13. If the parties agree on the facts and penalty, after authorization by the PAC, the agreement would be considered at the Conference (a meeting of a three-person panel similar to a pre-hearing conference). If the agreement is approved, the Notice of Application in the matter would be issued and served. The Conference panel would then convene as the Hearing Panel and order the agreed-upon result. Some matters may be heard by a single member of the Hearing Panel, selected from the three panel members who convened for the Conference.

14. If the Conference panel rejects the agreement, the Law Society would resume its investigation.

Pilot Project

15. As this is a new process, the Committees are proposing a pilot project. The pilot project would provide for a two year review on the anniversary of the approval of the policy by Convocation, at which time it could be continued, amended or ended.

Details of the Conference Process

16. The following is a narrative description of the steps in the proposed Conference. A diagram following paragraph 36 illustrates the process.

<u>Step 1 - Initiating the Conference</u>

17. Either the lawyer/paralegal or the Law Society may initiate discussion about the Conference. The Director, Professional Regulation must approve a case in order for it to be diverted to this process. The Director will only approve a case where, in the Director's opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest.

18. In addition to the general test set out in paragraph 17 above, before approving a case, the Director must ensure that the following criteria are met:
    a. The public interest can be addressed through a consent order. Cases will not be included in the process if they present novel issues, or issues which, for reasons of regulatory effectiveness or transparency, require a full hearing.
    b. There is sufficient Law Society jurisprudence on the issue of conduct and penalty for the Society to be able to agree to the process (the jurisprudence forms the basis for the Society's agreement to a penalty or range of penalties on the basis of the applicable law and facts);
    c. Discipline proceedings have not yet been authorized in the matter;
    d. The lawyer or paralegal is prepared to admit to the allegations made by the Society;
    e. There is no issue of failure to cooperate with the Law Society; for example, the lawyer or paralegal is responding promptly to the Law Society;
    f. The lawyer or paralegal agrees to abide by the timeline of 30 days to arrive at an agreement;
    g. The Law Society has no concerns about the lawyer's or paralegal's capacity to engage in negotiations;
    h. The lawyer or paralegal understands that the result of the Conference will be a public hearing, although it will be abbreviated, and a public Order;
    i. The lawyer or paralegal has legal representation, failing which the lawyer or paralegal affirms that he or she has been advised to obtain independent legal advice about his or her rights in the Conference process.

19. The Law Society has the right to decide that a case is not suitable for the Conference where any of the factors listed in paragraphs 17 and 18 above would make it unsuitable or where the Law Society is not satisfied that there has been sufficient investigation to make a determination on the suitability of the process.

20. Other matters may affect the Law Society decision to continue with the process. For example, if new evidence relevant to the subject of the Conference comes to the Law Society's attention, or if allegations of misconduct about the lawyer or paralegal arise after the process has begun, it may not be appropriate for the Law Society to continue with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

21. The Law Society and the lawyer or paralegal would negotiate a tentative agreement on admissions and penalty. The Law Society would conduct a fast-track investigation before finalizing the agreement. The Law Society would obtain the lawyer's or paralegal's admissions and such evidence as necessary to satisfy the Law Society that the admissions are accurate and would support a finding of professional misconduct or conduct unbecoming.

22. The consent proposal would be prepared by the Law Society and presented to the lawyer or paralegal. The lawyer or paralegal would have 30 days to accept or reject the agreement, or to negotiate changes with the Law Society. The consent proposal would be based on a standard template that includes the lawyer's or paralegal's admissions and the joint penalty proposal, including an explanation of the basis for the penalty recommendation. The template will include the lawyer's or paralegal's declaration that the information provided is complete and accurate.

23. Where there is no agreement on penalty, the parties may still use the process if there is agreement on a finding of professional misconduct and agreement on the range of an appropriate penalty. In that case, the parties would provide their position on the range of penalty and this will be included in the documentation filed for the Conference.

24. With agreement as described above, the case will proceed to hearing based on the penalty or the range of penalty submitted.

25. If one of the parties is unable to agree to the outcome, the consent process would terminate and the matter would be returned to the Investigation department. The documents prepared in support of the Conference would be excluded from any further proceedings.

Step 3 - Submission of the Consent Proposal to the PAC

26. Upon approval of the agreement by the Director, Professional Regulation, the consent proposal would be presented to the PAC for authorization of a conduct proceeding and authorization to proceed with the Conference.

27. As with all conduct proceedings, pursuant to By-Law 11[4] , section 51(2)), the PAC must be satisfied that there are reasonable grounds for believing that the lawyer or paralegal has contravened section 33 of the *Law Society Act.*

28. If the PAC approves the agreement, the matter would be submitted to a three-person Conference panel for consideration. The Notice of Application would not be issued at this stage.

29. If the PAC is not satisfied to the requisite standard that discipline proceedings are warranted, the consent agreement would fail and the matter would be returned to the Investigation department to proceed in the normal course.

Step 4 - Presentation to a Conference Panel

30. The proposal would be presented at the Conference for approval. The submission would include a draft Notice of Application, a draft Order and the consents from the lawyer or paralegal and the Law Society that if the individuals who convene as the Conference panel accept the proposal, they may subsequently convene as the Hearing Panel to determine the matter. The Hearing Panel would not meet until after the Notice of Application is issued and served.

31. Consistent with the current Convocation policy on joint submissions (attached as Appendix 1), the members of the Conference panel should accept the consent proposal unless the panel concludes that the joint submission on penalty is outside the reasonable range, in the circumstances.

32. Where the Conference panel does not accept the joint submission, the panel may reject the consent proposal, or may give its views to the parties about the case, including penalty. The parties may agree to adopt the Conference panel's views about the case and the penalty the panel proposes. The decision resulting from the Conference is by consent only. If the panel or either party disagrees, the proposal would fail. No costs are to be awarded to either party in a subsequent proceeding for failure to accept an alternate proposal by the Conference panel.

33. If the Conference panel does not approve the proposal, the Law Society would complete its investigation and proceed through the process in the normal manner. The draft agreement and Order are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations.

Step 5 – The Hearing

34. If the Conference panel approves the proposal, the Law Society would then issue the Notice of Application. Once issued, the Notice would be served according to the *Rules of Practice and Procedure* and would become a public document.

35. A hearing would be held before the individuals who convened as the Conference panel and who now sit as the Hearing Panel for the purpose of making a determination on the consent proposal. Some matters may be heard by a single member of the Hearing Panel, who would be selected from the three persons who convened for the Conference.

[4] Regulation of Conduct, Capacity and Professional Competence.

36. The proposal, which includes the lawyer's or paralegal's admissions, would be filed as an exhibit at the hearing to become part of the public record. The Hearing Panel would issue an Order in the normal course. Reasons for the Order are an important component of the public nature of this process.

PROPOSED CONSENT PROCESS

(see chart in Convocation file)

Key Elements of the Process

37. The following highlights some key elements of this consent process.

Transparency

38. If the proposed agreement is approved by the PAC and at the Conference, it will result in public notice, a public hearing and a public Order. From a public perspective, there is no significant difference between the current process in which matters are resolved through an Agreed Statement of Fact (ASF), and the Conference process. The following chart illustrates the similarities and differences between the two processes.

Current Process	Conference Process
Non-public investigation	Non-public investigation
Non-public, off-the-record settlement discussions	Non-public, off-the-record consent resolution discussions
	Non-public drafting of consent agreement
	Non-public agreement on disposition
Non-public consideration by PAC	Non-public consideration by PAC
Public Notice of Application	Non-public settlement conf.
Non-public Pre-Hearing Conf.	Public Notice of Application
Non-public drafting of ASF	
Non-public agreement on disposition	
Public hearing; revelation of ASF and joint submission on disposition	Public hearing; revelation of consent agreement and joint submission on disposition

39. As illustrated above, the Notice of Application is issued and served following the approval at the Conference, and this is necessary for the following reason. If the Conference panel were to reject an agreement, the proposal would fail, and the Society would complete its investigation. If the Notice was public at that time and the Conference panel rejected the proposal, it would be unfair to the licensee and difficult for the Society to complete its confidential investigation.

40. Once the Notice of Application is issued and served, it becomes public. As with all investigations, new complaints are sometimes received as a result of this public notice. If a new complaint was received after the issuance of the Notice of Application that results from the Conference, that complaint would be investigated separately from the complaint that is the subject of the consent proposal, as is done in the regular discipline stream.

Penalties and Mitigation

41. The agreed penalty in the consent proposal must be proportionate. It should reflect penalties imposed in cases with comparable findings, taking into account the costs saved by making the early admission. All penalties would be available in this process, including revocation.

42. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:
    a. The existence or absence of a prior disciplinary record;
    b. *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*
    c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;
    d. The extent and duration of the misconduct;
    e. The potential impact of the member's misconduct upon others;
    f. *Whether the member has admitted misconduct, and obviated the necessity of its proof;*
    g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);
    h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

43. The proposed process provides that the same individuals would convene for the Conference and the Hearing Panel, by consent of the parties.

44. This feature of the proposed process resembles the process that may be followed when agreement is reached on facts and issues at a pre-hearing conference before a single panelist and, with the consent of the parties, the single panelist presides at the hearing on the merits. Rule 22.10 (2) of the *Rules of Practice and Procedure* provides that a single panel member may hear a case, on consent of the parties. This is an alternative dispute resolution process which, with adequate protections, is useful for the parties and the tribunal. In the proposed Conference process, rather than a single individual convening for the pre-proceeding Conference, three individuals would convene as the Conference panel.

45. There are two reasons for having a three-person panel at the Conference. First, the agreement of a three-person panel on the outcome between the Society and a lawyer or paralegal would have greater weight. Secondly, if only one member of a three-person panel were to preside at the Conference, the Hearing Panel might reject the agreement that the Conference panel had accepted.

46. At the hearing stage that follows the Conference, in some cases, it may be appropriate for a single member of the Hearing Panel to preside at the hearing. This person would be selected from the three persons who convened as the Conference panel, as he or she would be familiar with the facts and the issues that led to the consent agreement. Similar to the process described in paragraph 44, this person would sit as a single member with the consent of the parties.[5]

Legal Representation

47. The process is predicated on the lawyer or paralegal having legal representation. The lawyer's or paralegal's admissions and agreement to the proposal are essential to the success of the consent process. While legal representation is not a prerequisite to participating in the Conference, it would be strongly encouraged by the Society. Lawyers and paralegals who participate in the process would be advised by the Law Society to obtain legal advice.

Timelines

48. Since the Conference is a diversionary, "without prejudice" process, it is not in the public interest to stall the investigation during protracted negotiations and delay. The Committees propose that the timeline for arriving at an agreement be 30 days from the time that the agreement is presented to the lawyer or paralegal by the Law Society. If agreement is not reached in 30 days, the Law Society would resume its investigation.

Documents and the Record

49. The documents filed before the Hearing Panel should be public in the normal course, with the notation that it is the result of a consent proposal that would also be public as part of the Tribunal record.

Tribunals Office's Administration of the Process

50. Attached at Appendix 2 is a proposed template prepared by the Tribunals Office for the administration of the process, with particular emphasis on ensuring the process is open and transparent and in keeping with general Tribunals administration.

Amendments to the *Rules of Practice and Procedure*

51. To implement the Conference process, amendments to the *Rules of Practice and Procedure* would be required. They would refer to the process as a "pre-proceeding consent resolution conference", and codify the procedural elements of the process described in this report. Consequential amendments to certain Rules may also be required.

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[5] Ontario Regulation 167/07 (Hearings Before the Hearing and Appeal Panels) provides as follows:

Proceedings to be heard by one member

2. (1) Subject to subsection (2), the chair or, in the absence of the chair, the vice-chair, shall assign either one member or three members of the Hearing Panel to a hearing to determine the merits of any of the following applications:

…

2. An application under subsection 34 (1) of the Act, if the parties to the application consent, in accordance with the rules of practice and procedure, to the application being heard by one member of the Hearing Panel.

52. Amendments to the Rules will be provided at a future Convocation should Convocation agree to the proposal for the Conference.

APPENDIX 1

CONVOCATION POLICY ON JOINT SUBMISSIONS
(Discipline Policy Committee Report to Convocation)

B.l. Joint Submissions of Counsel

B.1.1. The Committee was asked to consider the manner in which the joint submissions of counsel are currently treated by Discipline Panels, in light of the principles adopted by Convocation on March 27, 1992 in respect of joint submissions.

B.1.2. On March 27, 1992, Convocation adopted the recommendations of this Committee which provided, inter alia,

"5(a) Convocation encourages benchers sitting on discipline committees to accept a joint submission except where the committee concludes that the joint submission is outside a range of penalties that is reasonable in the circumstances.

"5(b) If the Committee, after hearing and considering submissions of counsel, does not accept the joint submission as to a particular penalty or as to the shared submission as to a range of penalties, the Committee will be at liberty to impose the penalty that it deems proper and should give reasons for not accepting the joint submission."

B.l.3. Some members of the Committee expressed concern that these principles are not being followed at the Committee level or at Convocation and that a lack of certainty in the process might discourage counsel from entering into Agreed Statements. The Committee noted that where, following negotiations of an Agreed Statement of Facts on the basis of a joint submission as to penalty, the proposed penalty is rejected, it might be appropriate to provide the Solicitor the option of commencing the hearing anew before another Committee.

B.l.4. Your Committee established a Sub-Committee, chaired by Robert J. Carter, Q.C., to consider the present practice regarding joint submissions at both the Committee level and at Convocation, to consider the consequences of the practice and to report to the Committee with recommendations.

…

ALL OF WHICH is respectfully submitted
DATED this 24th day of February, l995
D. Scott, Chair

THE REPORT WAS ADOPTED

APPENDIX 2

Tribunals Offices' Administration of the Proposed Consent Process

1. Discipline Counsel will request in writing a date from the Hearings Coordinator, Tribunals Office for the Pre-Proceeding Consent Resolution Conference ("the Conference"), and provide a time estimate.

2. The Hearings Coordinator will schedule the Conference date and secure a three person panel as assigned by the Chair of the Hearing Panel.

3. The composition of the Conference panel will mirror the requirements of *Ontario Regulation 167/07* to allow this panel to convert to a Hearing Panel should the parties' proposal to the Conference panel be accepted.

4. The Hearings Coordinator will advise Discipline Counsel and the lawyer or paralegal of the assigned Conference date and panel. The parties will immediately advise the Hearings Coordinator of any conflicts with the date or panel.

5. If the parties' proposal is accepted by the Conference panel, the Hearings Coordinator will attend in person at the Conference to facilitate scheduling a hearing date for the Hearing Panel and parties to convene at a future date.

6. If the matter is to be heard by a single member of the Hearing Panel, the members of the Conference panel shall elect one member to preside on the hearing date as a Hearing Panel and will so notify the Hearings Coordinator.

7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.
8. In accordance with Rule 9 of the *Rules of Practice and Procedure,* Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.

9. Once filed, the notice of application will be publicly available.

10. The notice of application will refer to the hearing date scheduled in paragraph 5 above. The matter will by-pass the Proceedings Management Conference (PMC) and go straight to a hearing date.

11. To satisfy transparency requirements, two to four weeks prior to the hearing date, the Tribunals Office will prepare a summary of the notice of application for publication on the Law Society's "Current Hearings" website.

12. During the hearing, the accepted proposal referred to in paragraph 5 above will be marked as an exhibit and thereby form part of the public record. The Hearing Panel will endorse the notice of application to reflect its Decision and Order as set out in the accepted proposal.

13. After the hearing, the Office will
    - prepare any required formal orders from the Hearing Panel's endorsement;
    - deliver the Decision and Order and reasons of the Hearing Panel, if any, to the parties;
    - publish an order summary on the Law Society's "Tribunal Orders and Dispositions" website and in the *Ontario Reports*; and
    - publish the Hearing Panel's reasons, if any on the Canadian Legal Information Institute (CanLII) and Quicklaw databases.

14. The matter will then be closed, catalogued and archived off site.

15. After the matter is closed and on request, it would be made available to the public for viewing or copies of content, unless the Hearing Panel had ordered otherwise in the course of the hearing.

CONFLICTS OF INTEREST STANDARD FOR COUNSEL IN PRO BONO LAW ONTARIO'S "BRIEF SERVICES" PROGRAMS

Motion

53. That Convocation approve

(a) the policy for a new rule in the *Rules of Professional Conduct* that modifies the standard for conflicts of interest for lawyers participating in Pro Bono Law Ontario's court-based brief services programs by permitting a lawyer to provide brief services to a person within such programs unless the lawyer knows of a conflict of interest that would prevent him or her from acting, and

(b) the draft of the new rule for review by the Law Society's Rules drafter.

Introduction

54. Pro Bono Law Ontario (PBLO) has been discussing with the Law Society the challenges PBLO faces in providing brief services to clients through its court-based programs. Many of the lawyers who volunteer for this work are younger lawyers from large law firms that represent large institutional and corporate clients.

55. A major issue affecting the ability of these lawyers to provide the services is the current conflicts of interest regime and the requirements in the *Rules of Professional Conduct.* The Rules require that a lawyer not act where there is or likely to be a conflict of interest. This means that a lawyer cannot represent a plaintiff or defendant where the lawyer's firm acts for or represents the other party in other matters, as this would breach the lawyer's duty of loyalty to that client.

56. To determine if a conflict exists, the lawyers assisting PBLO must have their firms do extensive conflicts searches before agreeing to provide the brief services. This can be very time-consuming, to the point where clients are being denied services because the conflicts checks are pending. PBLO has advised that this affects its ability to provide access to justice to those for those who access PBLO's programs, and can defeat the purpose of the programs for those most in need.

57. PBLO has requested that the Law Society consider a modification of the conflicts standard for lawyers engaged in these brief services. Two other Canadian law societies have recently adopted rules to this effect.

58. The Committee considered the matter and is proposing that Convocation agree that lawyers performing brief services through PBLO programs may act for a client unless they *know* a conflict exists that would prevent them from acting.

59. If Convocation approves the proposal, the Committee will prepare a draft rule, with the assistance of the Law Society's Rules drafter, Don Revell, to provide the necessary guidance.

Background on PBLO's Law Help Ontario Programs

60. PBLO operates programs under the banner of Law Help Ontario that assist those who cannot afford to pay for legal services (see Appendix 3, which also includes information on other PBLO initiatives).

61. The Small Claims Duty Counsel Project, launched in June 2006, provides brief services including legal merit assessments, form-completion assistance and duty counsel to low-income unrepresented litigants appearing before Small Claims Court in Toronto.

62. In late 2007, the Law Help Centre at the Superior Court of Ontario, a self-help centre in Toronto, was opened as a two-year pilot project, developed in partnership with the Ministry of the Attorney General and The Advocates' Society. Low-income unrepresented litigants with civil matters for which a legal aid certificate is not available can access basic procedural information, form completion assistance, summary advice and duty counsel services.[6]

63. Individuals must meet financial eligibility requirements to qualify for assistance, and corporations and businesses do not qualify. The Centre does not assist with family law matters, criminal cases, human rights, or other similar cases.

64. The application form to be completed by those seeking these services, attached at Appendix 4, offers information on the program, including the following:
    a. the volunteer lawyers will not become their lawyer; the scope of legal services provided is limited to brief services, and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer; and
    b. the matter must clear a conflicts check, and that if a conflict arises, this means that a lawyer (or law firm) cannot represent the person if the opposing parties are the firm's client.[7]

[6] Information from PBLO in 2007 was that there were more than 15,000 cases brought before the Court in 2006, many of which were brought by a growing number of unrepresented litigants.

[7] Information on PBLO's website about conflicts for Small Claims Court assistance is as follows:

> In the legal profession, a lawyer (or law firm) cannot represent you if the opposing parties are also their client. This is commonly referred to as a "conflict of interest." When you apply for assistance, we will confirm that the opposing parties are not being represented by the volunteer lawyer or their law firm. If a conflict of interest exists, regrettably, we will not be able to represent you in court nor offer summary legal advice.

65. Lawyers who volunteer for these programs must submit an application form to PBLO that requests a variety of information about their qualifications, practice and interests. They must also adhere to the Volunteer Guidelines.[8]

66. These PBLO projects are established pursuant to PBLO's Best Practices Manual for Pro Bono Programs. The Manual includes a number of requisites for the programs covering such things as communication to volunteers about their professional and ethical duties, policies and procedures to identify and address conflicts of interest (it is the pro bono lawyer's responsibility to ensure that conflicts of interest do not exist or arise when the lawyer decides to take on a case) and appropriate intake and co-ordination systems.

67. Law Help Ontario has developed its own guidance to lawyers within the current regulatory framework. The following excerpt from the Law Help's 2008 pilot project report, discussed later in this report, explains:

> Scope of Service: Providing Limited Scope Assistance
>
> Law Help has been developing procedures and best practices regarding the provision of limited scope assistance. An advice module for volunteer lawyers has been developed to address best practices regarding a lawyer's ethical and professional obligations in a court based context where providing limited services, such as appearing on a motion. This advice module (and others) will be posted on the Law Help website as an on-line resource for its volunteers.

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[8] *Volunteer Guidelines*

Pro Bono Law Ontario greatly appreciates the participation of pro bono volunteers. As a volunteer, you agree to adhere to the following guidelines:

1. Abide by the *Rules of Professional Conduct*.

2. Treat pro bono clients with the same level of professionalism as paying clients.

3. Stay in touch with the pro bono project coordinator who referred the case to you. The project coordinator will contact you periodically to see how the matter is progressing and to see if you require any additional support such as training and mentoring, access to resources, or will provide a referral list of social service agencies that can assist your client.

4. If you find that you are unable to devote sufficient attention to the pro bono matter assigned to you, contact the project coordinator immediately.

5. Keep track of the amount of time you work on the matter and, when the matter is completed, please let us know what your total commitment was.

6. Inform the project coordinator when the matter is complete.

7. Complete and return surveys or evaluation forms (usually just a few quick questions) to the project coordinator. Your feedback is an important means of improving the quality of our pro bono projects, and can even help PBLO tell the story of the good work being done by lawyers in Ontario.

8. If any problems or questions arise in the course of representing your client, contact the project coordinator immediately.

Limited retainer forms are in use that recognize the various types of limited scope assistance that may be offered, including single day assistance, multiple day assistance (both under the auspices of Law Help) and a private limited scope retainer between the firm and litigant.

Law Help encourages volunteer lawyers to use these written retainers in circumstances where they are providing services to litigants beyond the standard 30 minutes information and advice session. For example, where they may be drafting (or "ghostwriting") documents or appearing before Superior Court on a motion. In addition, a form is in use that the volunteer lawyer may provide to opposing counsel, court staff, and the presiding justice to notify them of the limited role of the Law Help duty counsel service.

The Manner in Which the Conflicts Issues Arise and PBLO's Efforts to Address the Issue

68. As noted earlier, PBLO has advised that the current regulatory framework with respect to conflicts of interest has created "barriers" to lawyers' participation in these brief services projects. PBLO explained that these barriers place significant administrative burdens on PBLO's operation of these projects. The concern is that this will threaten their sustainability when serving a high volume of clients, especially in Superior Court.

<u>The Rules in Question</u>

69. The regulatory framework in question includes the *Rules of Professional Conduct* on conflicts of interest:

> 2.04 (1) In this rule,
> a "conflict of interest" or a "conflicting interest" means an interest
>
> (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
>
> (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.
>
> Avoidance of Conflicts of Interest
>
> 2.04 (2) A lawyer shall not advise or represent more than one side of a dispute.
>
> 2.04 (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

70. The Committee learned that approximately 30% of Law Society complaints concern an issue that touches on conflict. The Rules do not specify the types of conflicts checks required or how extensive they need to be to find a conflict. But in response to a complaint, the Law Society would be looking for evidence that the lawyer had an appropriate process in place, and made reasonable efforts in the circumstances to determine if a conflict exists. Further, the Society would be concerned that once a conflict is identified, the lawyer responded appropriately.

71. From the Law Society's viewpoint, any amendment to the *Rules of Professional Conduct* would have to be consistent with the common law, including recently decided cases concerning loyalty and confidentiality of client information.

How PBLO Has Defined the Issue

72. David Scott, Chair of PBLO, wrote to Treasurer Gavin MacKenzie in 2007, just prior to the launch of the Superior Court Law Help Centre, and explained the issue respecting conflicts in PBLO's court-based programs as follows:

> One of the Rules of particular interest in a context such as the Law Help Centre is conflicts of interest. PBLO has learned from its other duty counsel projects (for example, the Small Claims Duty Counsel Project) that doing full conflicts screening where pro bono advice is being offered can be extremely challenging given the time-lines, volume and logistics of these settings.
>
> On the one hand, our law firm partners have indicated that the volume of conflict searching required in these settings is administratively burdensome. It should be noted that to date these firms have been large firms with sufficient administrative resources to undertake the additional conflict searches. Mid-size and smaller firms participating in the Law Help Centre will find these requirements even more challenging.
>
> On the other hand, walk-in applicants for our services have had to wait up to three hours to find out whether they can speak with a volunteer lawyer or not, many of them running out of time to obtain services. In fact, PBLO found in the course of administering its Small Claims Duty Counsel Project that 80% of all applicants who were refused services, were denied for conflict of interest reasons.
>
> In other words, the conflict of interest regime, as the firms understand the existing LSUC requirements, has created a real barrier to pro bono participation and has diminished PBLO's ability to improve access to justice for unrepresented litigants and improve the administration of justice for judges, court staff and the legal profession.

73. In 2007, PBLO's proposal was to have the Law Help Centre adopt the following policy:

> A lawyer who, under the auspices of PBLO's Law Help Centre, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided is subject to the conflict of interest provisions within Rule 2 of the Rules of Professional Conduct only where the lawyer knows that the representation of the client involves a conflict of interest within the meaning of Rule 2.

74. In March 2008, the Law Society received information about the experience of the Law Help Centre with conflicts of interest. The information was that pro bono counsel were turning away a considerable number of clients on the basis of conflicts of interest.

75. More recent information was received from PBLO this fall, at the request of the Law Society. PBLO confirmed the information disclosed in Mr. Scott's letter:
    a. The amount of time it takes to clear conflicts creates long delays for litigants trying to access legal assistance. Depending on the law firm and conflict checking process, litigants can expect to wait anywhere from 20 minutes to three hours before they can speak with a pro bono lawyer. This issue is compounded by the number of litigants who try to use the centre. Between January and September 30, 2009, the Law Help Centre had over 5800 visitors, nearly all of whom had to wait for a conflicts check to clear before they could receive assistance. The delays multiply and force the centre to turn people away. No available lawyers and running out of time in a day remain the main reasons that people are denied service at Law Help Ontario.
    b. Conflict checking impedes law firm participation, especially now that the demand from the public is so high. In the past three months, the PBLO has been informed on at least three separate occasions that law firms were cancelling their pro bono appearances because their conflicts departments were being overwhelmed by the volume of names they had to run.[9]

76. Law Help Ontario's one year report (2008) includes a discussion of how PBLO has attempted to manage the conflicts issue to date:

> Conflicts of interest continue to present a problem for servicing litigants. However, important strides in identifying the scope of the challenge and developing important institutional support to rectify the issues have occurred. The main problem is that litigants are turned away when a conflict exists or must wait--sometimes up to 3 hours--for conflicts to clear. In addition, some law firms are also reluctant to assist clients if they think the matter may pose a future business conflict. A common problem occurs where large companies or institutions (banks, financial companies, insurance companies, the city, police, etc.) are involved. Most of the larger law firms--the source of the majority of PBLO's volunteers--are conflicted when the lawyer checks with their firm. At least one firm has reported that approximately 80% of such conflicts are affiliated with financial institutions.
>
> The conflicts issue is compounded as the popularity of the projects grows. Law Help now attracts litigants from communities outside of the Toronto area. It is frustrating for litigants who have traveled great distances if they have to wait for half a day, or if they can't be served at all. Where a conflict of interest exists, Law Help staff often give out the Law Help phone number to the litigant so they can

[9] In November, 2009, the Law Society received information from PBLO that a lawyer at one firm was unable to continue with duty counsel sessions. The lawyer explained that the conflicts check system at the firm did not allow for quick checks, which caused substantial delays and hindered the volunteer process at the lawyer's last session.

call ahead to have conflict checks cleared if they choose to return on another day. This is helpful to the litigant; however, it interrupts front line staff providing direct assistance. It can also be frustrating when the litigant has a question that is procedural (such as a question regarding service of documents), because they still have to clear conflict checks in order to speak to a lawyer.

Law Help tracked the actual number of conflicts for a four month period from March 1 to June 30, 2008. There were 184 conflicts of interest where litigants could not be seen and either had to return, or were not serviced at all. This averages out to 2.3 conflicts per day or 25% of all applicants for assistance during this period.

Recent developments have helped increase access to some extent. In order to decrease the wait time for clients, many participating firms have developed an expedited search process for Law Help. If the name matches a name in their database, the firm deems it to be a conflict. They eliminate the much lengthier checking process.[10]

Moreover, there is growing institutional concern about the fact that the current commercial, professional and ethical obligations around conflicts have created a barrier to justice for the neediest litigants. PBLO has struck a working group to determine whether a more satisfactory conflicts process can be identified for the provision of brief, pro bono legal services in court-based context. This has resulted in a major bank (RBC) advising its clients that lawyers from law firms that have represented RBC in the past or at present may participate in Pro Bono Law Ontario's court-based pro bono projects--notwithstanding this potential conflict--where a lawyer provides short term, limited legal services to a client in circumstances where neither the lawyer nor the client expects that the lawyer will provide continuing representation in the matter.

77. Lynn Burns, PBLO's executive director, confirmed that a very high percentage of the conflicts arose with large institutional clients, primarily financial institutions, and that not all conflicts are actual conflicts. Many law firms will not assist litigants if there is a business conflict. PBLO has tried to address this by working with some of the major financial institutions to consent to conflicts in the context of court-based pro bono services.

78. In late 2008, Ms. Burns confirmed that the correspondence from RBC was sent to at least 12 law firms advising that it was prepared to waive conflicts on the limited basis described above. She advised that this is the start of what she hopes will be a common decision among all of the major financial institutions.

Other Legal Regulators

79. PBLO provided information to the Law Society about developments in the United States and Canada.

[10] One volunteer lawyer advised the Managing Lawyer at Law Help that their standard firm conflict check could, in some cases, take a couple of days to obtain a result.

80. In the United States, a number of the courts and state bar associations have adopted rules to enhance access to justice for the unrepresented and to facilitate pro bono participation in brief services projects, especially those run through an organized assistance program. The common elements of these initiatives are:
    a. developing comprehensive plans to address the needs of unrepresented litigants, including revising judicial ethics and court procedures;
    b. informed consent on the client's part regarding the use of limited representation
    c. use of retainers to limit representation up front;
    d. adoption of special conflict-of-interest rules in high-volume, public service programs that adhere to best practices.

81. One example is the rules adopted by the Washington State Bar Association (and by the Court, in accordance with the usual practice in many states for lawyer regulation) applicable to this type of representation, which state that a lawyer who is aware of a conflict may not act in providing brief services to a person.

82. Two law societies in Canada have recently amended their rules of conduct to provide a more relaxed standard for conflicts within the narrow scope of brief services retainers. Some of the elements of the Washington rules appear in these new rules.

83. The Law Society of British Columbia adopted a report on the unbundling of legal services[11] , which included Recommendation 15 dealing with pro bono services through court-annexed and non-profit legal clinics or programs (see Appendix 5 for the text of the Recommendation and discussion). This led to the adoption of the following conflict rules (in Chapter 6) in January 2009:

> Limited representation
>
> 7.01 In Rules 7.01 to 7.04, "limited legal services" means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter.
>
> [added 01/09]

[11] Report of the Unbundling of Legal Services Task Force – Limited Retainers: Professionalism and Practice, April 4, 2008, Law Society of British Columbia. This report was provided to the Committee for information in October 2008, with the following note:

> The issue identified in paragraph 9d. above has been the subject of discussion between Law Society staff (through the CEO's office) and Pro Bono Law Ontario (PBLO), primarily from the perspective of conflicts of interest and the services that pro bono counsel in large firms provide through PBLO's programs (this issue is addressed in Recommendation 15 of the BC report). These discussions are ongoing and may result in consideration by the Committee at a future date of changes or enhancements to the *Rules of Professional Conduct*.

7.02 A lawyer must not provide limited legal services if the lawyer is aware of a conflict of interest and must cease providing limited legal services if at any time the lawyer becomes aware of a conflict of interest.

[added 01/09]

7.03 A lawyer may provide limited legal services notwithstanding that another lawyer has provided limited legal services under the auspices of the same not-for-profit organization to a client adverse in interest to the lawyer's client, provided no confidential information about a client is available to another client from the not-for-profit organization.

[added 01/09]

7.04 If a lawyer keeps information obtained as a result of providing limited legal services confidential from the lawyer's partners and associates, the information is not imputed to the partners or associates, and a partner or associate of the lawyer may

(a) continue to act for another client adverse in interest to the client who is obtaining or has obtained limited legal services, and

(b) act in future for another client adverse in interest to the client who is obtaining or has obtained limited legal services.

[added 01/09]

84. In June 2009, the Law Society of Alberta amended its conflicts rules (in Chapter 6) to add the following on the provision of short-term legal services provided by non-profit legal service providers:

5.1. (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:

(i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and

(ii) May provide legal services, unless the lawyer is aware that the lawyer or the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal services provider.

(b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being

represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

Jun2009

Commentary

C.5.1 As noted in Commentary G.1, "firm" and "firm member" are defined broadly for the purposes of this Code and, in particular, this chapter (see *Interpretation*).

For the purposes of this Rule, the term “non-profit legal services provider” means volunteer pro bono and non-profit legal services organizations, including Legal Aid Alberta. These non-profit legal services providers have established programs through which lawyers provide short-term legal services. “Short-term legal services” means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a non-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter. It is in the interests of the public, the legal profession and the judicial system that lawyers are available to individuals through these organizations. While a lawyer-client relationship is established, there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation. Such programs or services are normally offered in circumstances which make it difficult to systematically screen for conflicts of interest, despite the best efforts and existing practices of non-profit legal services organizations. Further, the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the consulting lawyer’s firm. Accordingly, Rule #5.1 requires compliance with the usual rules which govern conflicts of interest only if the consulting lawyer has actual knowledge that he or she is disqualified as the result of a relationship between an existing or former client and the consulting lawyer, the lawyer’s firm or the non-profit legal services provider. In most cases, it is expected that the existence of a potential conflict will be identified through the conflict screening processes employed by non-profit legal services organizations or by the individual lawyer who may identify a conflict before or at the time of meeting with the client receiving the short-term legal services.

The personal disqualification of a lawyer providing legal services through a non-profit legal services provider will not be imputed to other participating lawyers. If, however, the lawyer intends to represent the client on an ongoing basis after commencing the short-term limited retainer, the other Rules in this Chapter will apply.

The confidentiality of information obtained by a lawyer providing short-term legal services pursuant to this Rule must be maintained. If not, a lawyer’s partners and associates in his or her firm, or other lawyers providing services under the auspices of the non-profit legal services provider, will not be able to act for other clients where there is a conflict with the client who has obtained, or is obtaining, short-term legal services. Without restricting the scope of screening measures which may appropriately be undertaken in a particular set of circumstances, the following are some examples of proper measures which may be taken to ensure confidentiality. The lawyer who provided the short-term legal services shall have

> no involvement in the representation of another client whose interests conflict with those of the client who received short-term legal services from the lawyer, and shall not have any discussions with the lawyers representing the other client. Discussions involving the relevant matter should take place only with the limited group of firm members working on the other client's matter. The relevant files may be specifically identified and physically segregated and access to them limited only to those working on the file or who require access for specifically identified or approved reasons. It would also be advisable to issue a written policy to all lawyers and support staff, explaining the screening measures which have been undertaken.
>
> No consent is required from either the client who received short-term legal services, or the client whose interests may conflict with the client receiving short-term legal services, to allow a lawyer, the lawyer's firm or a non-profit legal services provider to act for any client whose interests conflict with those of the client who has received short-term legal services, provided there has been compliance with Chapter 6, Rule 5.1(b). Rule 5.1(a) does not contemplate that a conflict, of which a lawyer is or becomes aware when engaged in the provision of short-term legal services through a non-profit legal services provider, may be waived by consent.
>
> When offering short-term limited legal services, lawyers should also assess whether the client may require additional legal services, beyond a limited consultation. In the event that such additional services are required or advisable, the lawyer should explain the limited nature of the consultation and encourage the client to seek further legal assistance.
>
> *Jun2009*

The Committee's Assessment and Proposal

85. PBLO's view is that in order to make limited representation projects successful in Ontario, a comprehensive plan to support unrepresented litigants and make sure that the regulatory and ethical framework of the legal profession supports this plan should be developed.

86. In considering the merits of PBLO's request, the Committee believes that an appropriate balance must be struck between the public interest in helping to facilitate representation for litigants and the risks occasioned by a modified standard on for conflicts of interest. The risks include the risk to the volunteer firm's client and the risk that the pro bono client may lose his or her lawyer in the middle of a matter, something that should be fully explained to the clients in the context of such limited retainers.

87. The issue is whether it would be appropriate to change the conflicts standard for lawyers in this setting, narrowly construed to apply to brief services for PBLO's court-based programs. As noted above, two law societies have changed their rules in this way. The Committee also noted that from the perspective of clients of the large law firms, whose counsel provide pro bono services, one large institutional client has confirmed that, notwithstanding a potential conflict, lawyers in the firms that act for the client may participate in PBLO's court-based pro-bono programs.

88. The Committee believes that while the ethical rules should not impede the provision of services, the reduced due diligence standard must be justifiable. In that respect, where mechanisms are in place to ensure a high quality of legal services are provided and the legal services provided are of limited scope and brief duration, a different conflicts screening standard - where lawyers and firms would not need to screen for conflicts before participating in the limited legal services provided by the Law Help Centre – would be acceptable.

89. The Committee agreed that the Law Society should take an approach similar to that taken by the Law Society of Alberta and the Law Society of British Columbia. The committee proposes that Convocation adopt a conflict of interest standard applicable to PBLO brief services that would permit a lawyer to act in such cases unless the lawyer *knows* of a conflict of interest that would prevent him or her from acting.

Information from LawPRO

90. The views of LawPRO were sought on the Committee's proposal from the risk management perspective.

91. LAWPRO advised that generally it sees two basic types of conflicts claims: conflicts that occur between multiple current or past clients represented by the same lawyer or firm, and conflicts that arise when a lawyer has a personal interest in the matter.[12] Lawyers practicing real estate and corporate commercial law regularly act for multiple clients and/or entities and experience more conflicts claims than lawyers practicing in other areas of law. Litigators have a lower rate of conflicts claims. From a risk management point of view, LAWPRO encourages firms to have a procedure and system in place for checking conflicts at the earliest possible time.[13]

92. In LAWPRO's view, the proposed rule change will not appreciably increase the risk of conflicts claims arising for lawyers participating in Pro Bono Law Ontario's Law Help Ontario program, provided that the rule change narrowly restricts the ability to forego a conflicts check to lawyers providing brief services or advice to clients under this program, and that lawyers not act if there is a known actual or potential conflict. LawPRO noted that the Law Help Ontario program does not provide assistance on family law matters, criminal cases, human rights or other similar cases, all areas where there is a higher risk of claims in a short-term limited legal services setting.

93. From a broader risk management and claims prevention perspective, LAWPRO notes that it is important that any lawyers providing services through Law Help Ontario or similar programs be competent and have current knowledge of the law for any matters on which they are providing short-term limited legal services.

[12] Over the last ten years, conflicts of interest claims ranked fifth by count (1,288 claims) and cost ($5.9 million) or 6.2% of claims and 9.5% of costs, respectively. Conflicts claims are proportionally more costly to defend and indemnify as they tend to be complex and involve multiple parties.

[13] Ideally, the system should be electronic and include more than just client names. A system that includes individuals and entities related to the client, including corporations and affiliates, officers and directors, partners, trade names, etc. will flag more real and potential conflicts.

Amendments to the *Rules of Professional Conduct*

94. If Convocation agrees with the Committee's proposal, amendments to the Law Society's *Rules of Professional Conduct* would be required.

95. The Committee has prepared a draft of a new rule, the text of which appears on the following pages. This proposed rule would be added to the rule on conflicts of interest (rule 2.04). The proposed rule includes:
    a. A definition of the type of legal services to which the modified conflict standard applies;
    b. A knowledge standard for conflicts of interest;
    c. A requirement to protect confidential information, and establish required screens within a law office;
    d. Client management requirements; and
    e. Commentary that explains the need for the rule and that elaborates on some of the requirements.

96. The Committee requests that Convocation approve the proposed rule, with any changes it considers appropriate. This draft will then be referred to Don Revell, the Law Society's Rules drafted, for preparation of a final draft of the rule for adoption by Convocation.

PROPOSED DRAFT SUBRULE AND COMMENTARY ON CONFLICTS OF INTEREST FOR LAWYERS PROVIDING SHORT TERM LIMITED LEGAL SERVICES THROUGH PBLO

2.04 (X1) In this subrule, "short-term limited legal services" means *pro bono* summary legal services provided by a lawyer to a client through [OR "under the auspices of"] Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Ontario and Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(X2) A lawyer shall not act for a client in providing short-term limited legal services if the lawyer:

(a) knows or becomes aware of a conflict of interest between the lawyer's client and another client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or
(b) has or obtains confidential information relevant to a matter involving a current or former client whose interests are adverse to those of the client of the lawyer, the lawyer's firm or Pro Bono Law Ontario.

(X3) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a client may act for other clients of the law firm whose interests are adverse to the client receiving short-term limited legal services, provided that adequate and timely measures are in place to ensure that no disclosure of the client's confidential information is made to the lawyer acting for the other clients.
(X4) Where a lawyer knows or becomes aware of a conflict pursuant to this sub-rule, the lawyer shall not seek the client's waiver of the conflict.

(X5) In providing short-term limited legal services to a client, the lawyer shall:

(a) prior to providing the legal services, ensure that the appropriate disclosure of the nature of the legal services has been made to the client;
(b) determine whether the client may require additional legal services beyond the short-term limited legal services; and
(c) in the event that such additional services are required or advisable, encourage the client to seek further legal assistance.

Commentary

Short-term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in the subrule are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.
This subrule applies in circumstances in which the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for the client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by the lawyer representing the client who is receiving short-term limited legal services will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term limited legal services.

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (X3) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a

law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the client who is receiving or has received short-term limited legal services;
- identifying relevant files, if any, of the client who is receiving or has received short-term limited legal services and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

APPENDIX 3

INFORMATION ON PBLO ADVOCACY PROGRAMS

Law Help Ontario - Superior Court

Law Help Ontario is a court-based, self-help centre for low-income, unrepresented litigants. It operates the Superior Court walk-in centre at 393 University Avenue. The Superior Court program was launched in November 2007 and joined the existing Small Claims Court program, described later in this report, as the two court-based programs.
Law Help Ontario provides a range of services, including general information on rules and procedures of Superior Court, help in filling out court forms, legal advice (30-minute sessions), legal representation at a trial or motion and referral services.

The public is advised that the volunteer lawyers will not become their lawyer. The scope of legal services provided is limited to brief services, and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer.

Individuals must meet financial eligibility requirements to qualify for assistance, and corporations and businesses do not qualify. The Centre does not assist with family law matters, criminal cases, human rights, or other similar cases.

Individuals are also advised that the matter must clear a conflicts check.

Law Help Ontario - Small Claims Court

This service is similar to that described above and operates from 47 Sheppard Avenue East. Law Help provides Duty Counsel who offer limited services to the public on a first come, first served basis.

Duty Counsel Lawyers assist self represented litigants by attending at the trial or motion, helping individuals to identify legal issues relating to their case, providing general information on the rules and procedures of Small Claims Court, and answering general legal questions. If a person only needs legal advice, the meeting with a lawyer will be limited to 30 minutes.

As at Superior Court, the public is advised that the lawyers who volunteer will not become their lawyer. The scope of legal services provided at Law Help Ontario is limited to brief services and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer.

Conflicts are also explained to the effect that a lawyer (or law firm) cannot represent the individual if the opposing parties are also their client, and that after a conflicts check, if a conflict of interest exists, PBLO will not be able to represent the individual in court nor offer summary legal advice.

Appeals Assistance Project (The Advocates' Society)
Free legal services are available to eligible unrepresented litigants before the Ontario Court of Appeal (civil and some limited family law matters), the Divisional Court (civil and some limited family law matters) and the Federal Court of Appeal (no criminal appeals).

This project provides pro bono legal advice and representation to qualified unrepresented litigants. The Project will also help those who may choose to represent themselves but may wish to obtain legal advice on whether they have valid grounds on which to proceed.

In order to qualify for the program, the individual must have been refused legal aid, meet financial eligibility guidelines, and have a case that has some reasonable prospect of success.

The Project relies on a roster of qualified volunteer lawyers prepared by The Advocates' Society who represent litigants at the Ontario Court of Appeal, Divisional Court, and the Federal Court of Appeal. These lawyers will represent the individual pro bono but the individual is responsible for any disbursements, such as court fees or photocopying expenses.

When the case has been perfected, the individual must contact the Projects' co-ordinator will conduct a detailed intake to determine eligibility for pro bono representation. If the person qualifies, the coordinator will try to match him or her with a pro bono lawyer. The individual is responsible for contacting that pro bono lawyer chosen to arrange an initial consultation meeting. The goal of this meeting is to determine if the lawyer will be able to represent the individual and ensure he or she is comfortable with the lawyer. A retainer agreement is signed that outlines the kind of work the lawyer has agreed to do, that the lawyer has waived their hourly billing rate, and that the client will be responsible for disbursements.

The Lawyers on the pro bono roster participate on a voluntary basis and have a right of refusal if they have a conflict of interest, do not have the resources to carry the file, do not believe there is sufficient merit to the appeal, or do not accept the case for any other reason. PBLO does not guarantee pro bono representation or assistance for any applicant. PBLO advises that it may take up to three weeks before notice is received that a lawyer has accepted the case.

Child Advocacy Project (The Advocates' Society)
The Child Advocacy Project is dedicated to enhancing access to justice for children by providing free legal services to eligible families who cannot afford a lawyer. Volunteer lawyers, who are members of The Advocates' Society provide assistance on legal issues that impact upon the health and well-being of children and youth. Some programs are set up as partnerships between lawyers and community groups that serve children and youth.

The programs include the Education Law Program and the Family Legal Help Program

The Education Law Program is a free legal service available to low and moderate-income families whose children face challenges to their rights at school. Lawyers help students and their parents understand their legal rights and negotiate solutions when they feel unable to resolve conflicts with school administrators and officials. The volunteer lawyer will provide students and families with advice on their legal rights, intervene on behalf of students with school administrators (by letter, phone or in person) and will represent students at tribunals or hearings.

Each family is assessed on a case-by-case basis, and the case must have legal merit. In many cases, advice on the legal aspects of the problem at hand is all that is needed, and only a few cases go on to full legal representation.

The Family Legal Health Program is a partnership that links health care and legal care to help young children and their families. The first of its kind in Canada, the partnership includes The Hospital for Sick Children (SickKids), PBLO, law firms McMillan and Torkin Manes Cohen Arbus, and Legal Aid Ontario. The model uses legal remedies when appropriate to address issues that adversely impact child health within low-income families. The program aims to improve the health outcomes of low-income paediatric patients and, at the same time, enhance the capacity of health care professionals such as social workers, physicians, nurses and dieticians by incorporating legal advocacy and legal services into clinical practice.

The program recognizes that lawyers are beneficial interdisciplinary partners for health care practitioners treating low-income patients/families whose health may be impacted by complex, socio-economic issues. Through this program, nurses, social workers, and doctors at SickKids have access to legal resources to redress detrimental social conditions and resolve persistent issues that prevent low-income families from focusing their full attention on a sick child. As a result, clinical interventions are more effective and sustainable.
The program has three main areas of activity: advocacy and legal issue training for clinical staff, direct legal assistance to low-income patients/families and systemic advocacy.

Direct legal assistance is provided through access to an on-site Triage Lawyer, who manages an intake process and coordinates cases which are placed with appropriate lawyers from the program's legal network. Services provided are both pro bono and Legal Aid. Pressing legal issues get the attention they require so families can focus their attention on their child's health. Systemic advocacy is tool to effect change on systemic issues that impact the health and wellbeing of present and future patient populations. This can involve policy work and test cases as two effective ways that lawyers can help paediatric clinicians to address the social determinants of child health.

APPENDIX 4

LAW HELP ONTARIO APPLICATION FORM

(see Report in Convocation file)

APPENDIX 5

EXCERPT FROM "REPORT OF THE UNBUNDLING OF LEGAL SERVICES TASK FORCE – LIMITED RETAINERS: PROFESSIONALISM AND PRACTICE"
(LAW SOCIETY OF BRITISH COLUMBIA)

Recommendation 15:
Because the current conflict of interest rules, and rules regarding duty of loyalty, can create impediments to lawyers providing legal services at court-annexed and non-profit legal clinics or programs, and because of the summary nature of those services and the importance of those service for enhancing access to justice, the *Professional Conduct Handbook* should be amended to encompass the following principles:

1. The recommendations for modifying the conflicts of interest rules apply only to circumstances where a lawyer, under the auspices of a program operated by a court or a non-profit organization, provides short term limited legal services to a client in circumstances where neither the lawyer or client expect that the lawyer will provide continuing representation in the matter (the "Exempted Services").

2. In circumstances where it is practicable to do so, a lawyer should conduct a conflict of interest search prior to providing Exempted Services;

3. If the lawyer is providing legal services other than Exempted Services, the regular conflicts rules apply;

4. If a lawyer provides Exempted Services the following principles apply:

    a. The scope of the Exempted Services retainer is limited to the summary services provided through the court-annexed or non-profit program. While the duty of confidentiality and loyalty endure, the lawyer-client relationship terminates at the end of the provision of the Exempted Services;
    b. If a lawyer is aware of a conflict, the lawyer may not provide legal advice to the limited scope client ("LSC"), but may assess the LSC's suitability for services provided through the court-annexed or non-profit program and refer the LSC to another lawyer at the program or clinic;
    c. If a lawyer is not aware of a conflict, the lawyer may provide Exempted Services. As the services are summary in nature and the risk associated with not performing the conflicts search is outweighed by the social benefit of the Exempted Services, the lawyer is not required to check for conflicts prior to, or following, providing the Exempted Services;
    d. If, at any time during provision of the Exempted Services, a lawyer becomes aware of a conflict, the lawyer must immediately cease providing legal advice or services and refer the LSC and the notes taken to another lawyer at the clinic or program. If no lawyer is available, the LSC should be put in touch with a program staff person to coordinate the appointment of a new lawyer;
    e. Privileged information to anyone including other lawyers at the lawyer's firm, save as provided by law. Maintaining the LSC's confidences is an important safeguard in protecting the LSC's information and guarding against the inference that other people at the lawyer's firm possess the confidential information;

f. A lawyer who provides Exempted Services should not personally retain notes of the advice given; rather, the court-annexed program or non-profit clinic should be responsible for record keeping.

5. Because the exemption from performing a conflicts search is predicated, in part, on the concept that the Exempted Services are summary in nature, the following rules apply to circumstances where a lawyer has contact with the LSC on subsequent occasions:

   a. If the LSC contacts the lawyer, the lawyer must conduct a conflicts search prior to engaging the LSC in a new retainer;
   b. If the lawyer has advance notice that the lawyer will be speaking with the LSC on a subsequent occasion, the lawyer must conduct the conflicts search prior to that meeting;
   c. If the lawyer happens to be assigned the LSC a subsequent time while providing Exempted Services, and in circumstances not captured in 5(b), the lawyer may provide summary legal advice on that occasion but must conduct a conflicts search upon returning to the lawyer's firm.

6. If, following the provision of the Exempted Services, a lawyer becomes aware of a conflict between the LSC and a firm client:

   a. The regular rules for determining whether the lawyer may act for or against the existing client, the LSC, or a future firm client, apply. The Exempted Services will be treated as an isolated event that do not require prior informed consent;
   b. Despite the duty the lawyer owes to his or her clients, the lawyer must not divulge the confidential information received by the LSC during provision of Exempted Services, and the lawyer must not divulge the existing client's confidential information to the LSC.

7. No conflict of interest that arises as a result of a lawyer providing Exempted Services will be imputed to the lawyer's firm, and the firm may continue to act for its clients who are adverse in interest, or future clients who are adverse in interest, to the LSC.

8. In order to enhance access to justice, individuals who are adverse in interest should be able to obtain legal advice from the same court-annexed or non-profit program regarding their common dispute, provided the program has sufficient safeguards in place to ensure that lawyers who provide Exempted Services to clients opposed in interest do not obtain confidential information arising from the opposing client's consultation. If the lawyers become aware of a conflict within the court-annexed or non-profit program, the clients must be advised of the conflict and the steps that will be taken to protect the clients' confidential information.

2.3.1 Conflicts of interest in limited scope retainers

A lawyer may provide limited scope legal services as part of the lawyer's regular practice, or through a court-annexed or non-profit legal service provider. The Task Force considered whether:

> In order to enhance the delivery of limited scope legal services as a means of increasing access to justice, should the Law Society's Conflicts of Interest Rules be amended for situations where it may not be feasible for a lawyer to systematically screen for conflicts of interest while providing legal services at a court-annexed or non-profit program?

Most jurisdictions that have amended rules to allow for unbundled legal services have relaxed their conflicts of interest rules to facilitate lawyers providing legal services through non-profit and court-annexed limited legal advice programs. The SHC, Final Evaluation Report, found that "the availability of legal advice is the area of greatest unmet need identified by the evaluation" (p.74), and that:

> The provision of legal advice at the Centre is not possible under the current Law Society Rules concerning professional liability. In addition, it would be necessary to do a conflict check for each client. (p. 61)

As noted, Civil Justice Reform Working Group identified changes to the conflict of interest rules as an important component of encouraging lawyers to engage in *pro bono* work with clinics.

The Task Force believes that a lawyer who, as part of his or her regular practice, provides limited scope legal services is required to conduct the regular searches for conflicts of interest. This is not difficult, as the lawyer should have a conflicts checking system in place that captures conflicts both at the beginning of the representation, and as they arise throughout the course of the retainer. The lawyer in this scenario is presumed to have access to his or her conflicts database when approached by a potential client.

A lawyer who is providing legal services through a court-annexed or non-profit legal services provider will not likely have access to his or her conflict's database at the time of initial contact with the client. Contact may occur over the phone, and/or at an external facility and it is also possible for clients to drop-in. The Task Force has heard from representatives of the Legal Services Society and the SHC, amongst others, that there is a need to relax the current conflicts rules in circumstances where it is not feasible for a lawyer to systematically screen for conflicts of interest (e.g. at a drop-in centre where the lawyer provides limited, summary legal advice, or where the lawyer provides limited legal advice through a duty counsel program). A distinguishing feature of these services is that neither the lawyer nor the client expects that the legal services will be ongoing, although it is possible for a client to be a repeat user of a facility through which the services were provided and this should be taken into account.

2.3.2 American models for conflicts of interest in unbundled matters

ABA Model Rule 6.5 has the effect of excusing a lawyer who is participating in a non-profit or court-based program offering limited services from the obligation to check for conflicts of interest prior to providing the limited legal services. However, if the lawyer has actual knowledge of a conflict he or she may not act and the general conflict of interest rules apply, including the rules for imputed conflicts of interest. The rationale behind this approach was a desire to make it less onerous for lawyer to provide services through these programs.

The Task Force considers the approach taken by Washington State to be the most flexible and principled. The Washington State Court Rules: Rules of Professional Conduct, Rule 6.5 reads:

> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:
>
> (1) is subject to Rules 1.7, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program;
>
> (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter; and
>
> (3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) in providing limited legal services to a client if:
>
> > (i) the program lawyers representing the opposing clients are screened by effective means from information relating to the representation of the opposing client;
> >
> > (ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of information relating to the representation; and
> >
> > (iii) the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

The Washington State approach allows for lawyers who work at, or volunteer their time to, non-profit and court-annexed legal service providers to give limited term legal advice to clients without performing the standard conflicts of interest search. A lawyer who is aware of a conflict may not act for the client, but may still provide limited services sufficient to determine whether the client is eligible under the program and to refer the client to another lawyer. The rule also establishes a framework for determining whether two lawyers providing legal advice through a program can represent clients with conflicts of interest. If, during the course of providing legal advice to the client, the lawyer becomes aware of a conflict of interest the regular conflict rules apply, save that the lawyer could refer the client to a suitable lawyer within the program. If, after the initial consultation, the client desires to retain the lawyer, the lawyer will be required to perform the regular conflicts check.

The Washington State approach, the ABA Model Rule, and other models are intended to encourage lawyers to participate in non-profit and court-annexed legal service programs. The present conflict of interest rules create a barrier to lawyers providing assistance through these programs, and can frustrate access to justice. The Task Force recognizes, however, that it is not sufficient to put a rule in place that only deals with whether the lawyer is aware of a conflict at the time the limited scope legal services are being provided at the court-annexed or non-profit service. The conflicts rules have to address what happens when the lawyer returns to his or her firm and discovers that the firm is representing a client in circumstances that create a conflict between the existing client and the clinic/program client. The rules also have to address what happens in circumstances where the lawyer or his or her firm later wish to act for a person, and such a representation would create a conflict based on the prior limited scope legal work provided through the court-annexed or non-profit service.

2.3.3 Examples of how non-profit and court-annexed service providers in British Columbia deal with conflicts

The delivery of limited scope legal services is already a reality for non-profit and court-annexed legal service providers. The Legal Services Society ("LSS") has, as a result of budget cuts, had to reduce its services from prior levels. This has required providing services and programs that are limited in scope. The LSS provides legal information, legal advice and legal representation. An individual who is applying for legal aid or receiving legal information is not deemed to be a client. An individual who is receiving legal advice or legal representation is deemed to be a client. Once an individual is a client, no individual adverse in interest may receive legal information (save for written material on display or at hand), legal advice, or legal representation from that office. The individual may seek legal assistance through another office. Each legal aid office is treated as a distinct unit for these purposes.

Criminal duty counsel also provide limited scope legal services. It is less likely, but not unheard of, for a conflict of interest to arise (e.g. co-accused). The Task Force heard from duty counsel, and was advised that the standard practise is to deal with conflicts based on having actual knowledge of the conflict. While duty counsel do not wish to run afoul of the Law Society's conflicts rules, they believe their approach provides a practical method that balances the duty to protect a client's interest with making sure as many accused as possible have access to justice.

2.3.4 Justification for amending the conflicts of interest rules for lawyers providing pro bono services at court-annexed and non-profit programs

The Task Force believes that if firms were to be disqualified from continuing to represent existing clients, or would be shutting the door on potential future retainers that may be lucrative, based on a lawyer of the firm providing legal advice at court-annexed or non-profit clinics, the objectives of increasing access to limited scope legal services could be frustrated. However, the duty of loyalty to a client is a core principle of the lawyer/client relationship, and rules protecting the interest and expectations of clients regarding confidentiality and a duty of loyalty are not to be cast aside or transformed to favour expeditiousness over ethics.

The Task Force considered the potential use of waivers for conflicts of interest, but concluded that such an approach presents several problems. For the waiver to be valid, it would require both the existing client and the new client to waive the conflict, and with informed consent. This would be administratively impractical, and there are some conflicts that cannot be waived in any

event. Having a waiver that was only signed by one party would not amount to a true waiver, and while it would serve to alert the client to the concept of conflicts it would do little to resolve the concern. The Task Force is of the view that the better approach would be to clearly limit the scope of the retainer, and to have a mechanism for alerting the client to the concept of conflicts of interest and how conflicts would be handled should they arise. Providing the client with a clear and comprehensible limited retainer form is only part of the equation, however, and the Task Force recognizes that the conflicts of interest rules would have to be amended to create a narrow exemption for the conflict of interest rules. This exemption should seek to balance the competing demands of the duty of loyalty to a client with the increasing need for limited scope legal services at court-annexed and non-profit programs, to assist litigants who may otherwise be self-represented.

The Task Force acknowledges that modifying the Law Society rules that govern conflicts of interest in order to facilitate limited scope legal services at court-annexed and non-profit programs is only part of the equation. The courts have inherent jurisdiction over conflicts before the court. As such, the concern remains that a lawyer who complies with the modified conflict of interest rules will be at risk of being found in conflict when appearing before the court, or that a lawyer from that lawyer's firm will have the conflict imputed to him or her. The Task Force hopes that the judiciary will be mindful of this risk and give due weight to the important public value in litigants of modest means receiving legal advice through court-annexed and non-profit programs, and that some firms will be wary of allowing lawyers to provide such services if the firm risks disqualification with respect to present and future paying clients.

The Task Force limits its recommendations regarding conflicts of interest to situations governing lawyers providing short-term legal advice and/or representation at court-annexed and non-profit programs. The recommendations should not be taken to mean the Task Force approves of a general relaxation of the conflicts of interest rules.

Re: Pre-Proceeding Consent Resolution Conference

It was moved by Mr. Schabas, seconded by Mr. Porter, that Convocation approve the policy for the Pre-Proceeding Consent Resolution Conference for a two-year pilot project.

Carried

Re: Conflicts of Interest Standard for Counsel in PBLO's "Brief Services" Programs

It was moved by Mr. Porter, seconded by Mr. Schabas, that Convocation approve

(a) the policy for a new rule in the *Rules of Professional Conduct* that modifies the standard for conflicts of interest for lawyers participating in Pro Bono Law Ontario's court-based brief services programs by permitting a lawyer to provide brief services to a person within such programs unless the lawyer knows of a conflict of interest that would prevent him or her from acting, and

(b) the draft of the new rule for review by the Law Society's Rules drafter.

Carried

REPORT OF THE TRIBUNALS COMMITTEE

Mr. Conway presented the Report.

Report to Convocation
January 28, 2010

Tribunals Committee

Committee Members
Mark Sandler (Chair)
Alan Gold (Vice-Chair)
Thomas Conway
Jennifer Halajian
Tom Heintzman
Paul Schabas
William J. Simpson

Purposes of Report: Decision

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Committee met on January 14, 2010. Committee members Mark Sandler (Chair), Thomas Conway, Tom Heintzman, Paul Schabas and Bill Simpson attended. Staff members Nicole Anthony, Grace Knakowski, Lisa Mallia, Sophia Sperdakos and Arwen Tillman also attended. Staff members Katherine Corrick, Denise McCourtie and Jim Varro attended part of the meeting. The Committee met for part of the meeting with members of the Professional Regulation and Paralegal Standing Committees.

DECISION

PUBLIC INFORMATION ABOUT LAW SOCIETY PROCEEDINGS

Motion

2. That Notices of Application or Referrals that have been issued and served upon the parties forthwith be posted on the Law Society's website.

3. That any amendments to the Notice of Application or Referral also be posted.

4. That Hearing and Appeal Panel hearing dates continue to be posted on the website in accordance with the current procedure.

5. That once a hearing is completed and the order and reasons posted, the Notice of Application or Referral be removed from the website.

6. That the current procedure used to identify on the website that a decision is under appeal continue.

7. That the website include the contact information for the Tribunals Office so the public can inquire about other developments in a proceeding.

Background

8. In recent years the Law Society has undertaken a number of initiatives to enhance and expand the openness, transparency and accountability of its processes, particularly its regulatory processes. This evolving Law Society approach to its regulatory mandate began with the 1986 decision to open hearings to the public and continues to develop.

9. Convocation articulated a policy and appears to have reiterated it in the 1990s respecting "publication of discipline matters" as follows:

    1. Public/Media enquiries: once a complaint is authorized and issued, the Society will release, *upon request*, the name of the solicitor facing discipline together with the allegations contained in the complaint. [emphasis added]

    2. Prior notification: a list of hearings scheduled to take place in the forthcoming month is provided to the media at the end of each month. The following information is included: the name of the solicitor, the allegations in the complaint and the date and place of the hearing.

10. In its Report to Convocation in May 2005 the Tribunals Task Force recommended, and Convocation approved, expanding the use of the Law Society's website to better inform the public about Law Society Hearing and Appeal Panel matters. It did not refer to the earlier policy in making its decision.

11. Currently, the Law Society posts information concerning the activities of its Hearing and Appeal Panels as follows:

a. The hearing schedule two to four weeks in advance of the hearing date, with links to the particulars of the allegations against the affected lawyer or paralegal.

b. Hearing and Appeal Panel decisions and orders dating back to August 2001, with a link to any reasons for decision on CanLII.

12. In deciding to post the hearings information and decisions on its website, rather than sending out print information to news agencies and others who specifically request it, the Law Society recognized the importance of a more proactive approach to public information about its regulatory processes. The traditional reliance on requests as the basis for sharing information on regulatory conduct, competence and capacity matters, is no longer viewed as sufficient. The public affected by the conduct of professionals, as well as the media and government, have come to expect greater openness from regulators.

13. Typically, the website notification provides the public with information about a hearing two to four weeks in advance of the hearing date. However, the fact that a conduct, competence or capacity proceeding has been authorized becomes public at a much earlier point, namely when the Notice of Application or Referral had been filed with the Tribunals Office (issued) and served or deemed to have been served on the affected lawyer or paralegal. This is well before a hearing date has been set.

14. From the public's perspective, then, there is a potential information gap – a period of months when allegations of misconduct, conduct unbecoming, incapacity or incompetence may have been formally and publicly made against a lawyer or paralegal, but the information is not available to the public unless someone knows to ask for it. This puts the public at risk of acting on incomplete information about a lawyer or paralegal against whom formal allegations have been made.

15. The choice of the upcoming hearing date as the event used to trigger publication is not based on any public interest consideration. While lawyers and paralegals may wish to minimize the length of time that information about a proceeding against them is readily accessible, it is difficult for the regulator to justify the late stage in the process at which the information on the proceeding becomes readily accessible.

16. Having made the decision in 2005 to make use of the broader reach of the Internet and to post hearing schedules, the Law Society may wish to consider posting information about its regulatory proceedings at the earliest appropriate time, namely once a Notice of Application or Referral has been issued and served upon the parties.

17. The continuation of the policy of waiting for requests for information respecting Notices of Application during the period before the posted hearing date is difficult to justify in the face of the Law Society's mandate to regulate in the public interest and its stated commitment to transparency.

18. Recent news articles, set out at Appendix 1, illustrate the perception of a lack of transparency that can flow from the current approach. Since the Law Society cannot, pursuant to the *Law Society Act,* comment on matters under investigation, it may be all the more important that information respecting conduct, capacity and competence proceedings become openly available and easily accessible as soon as legally possible.

19. There has been some previous discussion about developing a "live" information site on which the ongoing progress of a matter would be tracked daily and reflected on the site. Typically, the Law Society handles over 150 matters a year. Within each file, the Tribunals Office is managing numerous steps including adjournments (often numerous), proceedings management processes, pre-hearing conferences, document amendments, interim orders, etc. Establishing a formal system to keep the status of every file up to-date on a daily basis would require more staff resources than are currently available.

20. The alternative proposed approach, set out in the motion at paragraphs 2 – 7 enhances transparency in a reasonable manner.

Appendix 1

Relevant Articles

Jacquie McNish

Globe and Mail Update Published on Tuesday, Dec. 08, 2009 6:20PM EST Last updated on Friday, Dec. 11, 2009 2:37AM EST

Two raucous trials in two cities tell very different stories about the boundaries of legal civility in Canada.

The first was a murder trial in a Brockville, Ont., courtroom in the late 1990s. Julia Elliott was accused of murdering an Ottawa man and her lawyer Kevin Murphy hurled so many insults and legal challenges as part of his defence that case judge Paul Cosgrove was sanctioned for failing to restrain the lawyer. "We deplore the tactics" used by Mr. Murphy, the Court of Appeal for Ontario wrote in a 2003 ruling. "One of the most disgraceful exhibitions that has ever been seen in a Canadian courtroom," independent counsel Earl Cherniak told the Canadian Judicial Council last fall.

Tempers also flared in a Toronto courtroom when defence lawyer Joe Groia railed against the tactics and motives of Ontario Securities Commission prosecutors who sought, unsuccessfully, to convict his client John Felderhof for alleged securities crimes related to the fall of Bre-X Minerals Ltd. "Appallingly unrestrained and on occasion unprofessional," ruled Mr. Justice Marc Rosenberg of the Appeal Court.

What happens when lawyers get spanked for bad behaviour?

The answer: It depends.

After Ms. Elliott was ultimately convicted of murder, Mr. Murphy was handed a new job. He is now a lawyer with the federal government's Public Prosecution Service and he declined to discuss the Elliott trial.

Mr. Groia wasn't so lucky. Next week the Law Society of Upper Canada will set a date in the new year for a hearing into allegations from the regulator that he engaged in professional misconduct by acting and communicating in a "rude," "abusive," and "offensive" manner during the Bre-X trial.

The Law Society has the right to reprimand, suspend or disbar lawyers found guilty of misconduct.

“I don't see this at all,” said Mr. Groia in an interview. “I have a lot of trouble understanding why I can be so harshly criticized.”

Ever since Canada's provincial law societies and professional associations began complaining a few years ago about the decline of civility, lawyers have hotly debated the need for regulators to police their behaviour. Some argue that the crackdown is necessary to quash insulting and unnecessarily aggressive conduct that is being fed by increased competition and pressure from clients and law firms for legal victories. Others argue that the vigilance could discourage lawyers from fully defending clients.

Derry Millar, treasurer of the Law Society of Upper Canada, which regulates Ontario's lawyers and paralegals, has helped design a number of initiatives with judges, legal associations and law firms to promote higher standards of civility and professionalism. The society estimates it has prosecuted only a half-dozen lawyers for poor conduct and the pace has stepped up in the last year with the revelation of three cases, including Mr. Groia's.

In one case, a panel ordered a lawyer to pay $500 after it ruled he swore at another lawyer outside a courtroom and called her “stupid,” “pathetic” and “unprofessional.” In another, a lawyer was suspended for 15 days after he sent an e-mail to a lawyer that insulted her legal ability.

“The public demands this and it is part of our role,” Mr. Millar said. “If you don't set standards and ask people to live up to those standards, then the standards disappear and things become worse and worse.”

Law societies in Alberta, British Columbia and Nova Scotia have also stepped up disciplinary actions against lawyers who, in some cases, were reprimanded for directing sexual insults or profanities at other lawyers.

The push for more civility in Canada gained momentum at the beginning of the decade when the Toronto-based Advocates' Society became concerned about unprofessional conduct and produced guidelines known as “Principles of Civility for Advocates.”

Ron Slaght, a veteran litigator with Lenczner Slaght Royce Smith Griffin LLP, was president of the society in 2000 when civility was targeted. He said he was frustrated with “a general malaise” in lawyers' behaviour toward opponents.

“There was a decline in the culture of co-operation and collegiality which should be at the core of our profession,” he said. While he applauds law schools, legal groups and law firms for better educating and mentoring young lawyers about the need for professional courtesy, he worries that civility is too vague and unscientific a concept to be policed by regulators.

“I always get a little uncomfortable when regulatory bodies get involved with behavioural issues,” he said.

Mr. Groia has hired as his lawyer Mr. Cherniak, the prominent Toronto lawyer who was so critical of Mr. Murphy's conduct in the Elliott murder trial.

In an interview, Mr. Cherniak said he will ask the Law Society panel hearing the Groia case to consider Mr. Groia's conduct through the prism of a “hard-fought and high-stakes” case. Mr. Groia's client Mr. Felderhof was the only executive who faced charges for the Bre-X gold-salting scandal that wiped out billions of dollars of investor savings.

“Civility has to be looked at in context,” Mr. Cherniak said.

W. A. Derry Millar

From Friday's Globe and Mail Published on Friday, Dec. 11, 2009 12:00AM EST Last updated on Saturday, Dec. 12, 2009 2:25AM EST
Your article Hardball Tactics, Or An Uncivil War? (Report on Business - Dec. 6) implies that the Law Society of Upper Canada is not taking any action against Kevin Murphy for his alleged behaviour in the course of a lengthy criminal trial. This is not the case. Mr. Murphy's actions at the trial have been investigated by the Law Society and a notice of application alleging professional misconduct was issued. A discipline hearing is scheduled for Jan. 4 at Osgoode Hall and is open to the public.

Treasurer, Law Society of Upper Canada

Law society calls for hearing into allegations against Ottawa lawyer
Wed Dec 16 2009
Page: B8
Section: Report On Business: Canadian
The Law Page incorrectly reported last week that the Law Society of Upper Canada has not targeted Ottawa lawyer Kevin Murphy for his controversial conduct between 1997 and 1999 during his defence of Julia Elliott in a murder trial.
According to documents released by the Law Society to The Globe and Mail, the society privately issued a notice of application to Mr. Murphy in June, alleging that he engaged in "dishonourable or questionable" conduct during the trial. The notice states that Mr. Murphy "abused and hectored witnesses, routinely made vitriolic submissions" and accused Crown counsel and various witnesses of participating in "conspiracies" and other misdeeds.
The Law Society issued a notice this week calling for a hearing in January to hear the allegations.

INFORMATION

PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE

21. In November 2009 the Committee met with members of the Professional Regulation Committee ("PRC") and the Paralegal Standing Committee ("PSC") to discuss a PRC proposal respecting a new consent process for the Society.

22. The Committee, along with PRC and PSC recommend to Convocation approval of the policy to implement the "pre-proceeding consent resolution conference" process for a two-year pilot project.

23. The formal motion and the supporting report are contained in the PRC Report to Convocation.

Re: Public Information about Law Society Proceedings

It was moved by Mr. Conway, seconded by Mr. Schabas, –

That Notices of Application or Referrals that have been issued and served upon the parties forthwith be posted on the Law Society's website.

That any amendments to the Notice of Application or Referral also be posted.

That Hearing and Appeal Panel hearing dates continue to be posted on the website in accordance with the current procedure.

That once a hearing is completed and the order and reasons posted, the Notice of Application or Referral be removed from the website.

That the current procedure used to identify on the website that a decision is under appeal continue.

That the website include the contact information for the Tribunals Office so the public can inquire about other developments in a proceeding.

Carried

Item for Information

- Pre-Proceeding Consent Resolution Conference

REPORT OF THE PARALEGAL STANDING COMMITTEE

Messrs. Dray and Lewis presented the Report.

Report to Convocation
January 28, 2010

Paralegal Standing Committee

Note: the first item was deferred from December Convocation

Committee Members
Paul Dray, Chair
Susan McGrath, Vice-Chair
Marion Boyd
James R. Caskey
Seymour Epstein
Michelle L. Haigh
Glenn Hainey
Paul Henderson
Brian Lawrie
Douglas Lewis
Margaret Louter
Stephen Parker
Cathy Strosberg

Purpose of Report: Decision
Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Committee met on November 11th, 2009. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-Chair), Michelle Haigh, Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter and Stephen Parker. Staff members in attendance were Katherine Corrick, Diana Miles, Elliot Spears, Sybila Valdivieso and Julia Bass.

2. The Committee further met on January 14th, 2010. Committee members present were Susan McGrath (Vice-Chair), Marion Boyd, James Caskey, Michelle Haigh (by telephone), Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter and Stephen Parker. Staff members in attendance were Malcolm Heins, Diana Miles, Zeynep Onen, Terry Knott, Roy Thomas, Sheena Weir, Nicole Anthony and Julia Bass.

FOR DECISION

REVIEW OF EXEMPTIONS IN BY-LAW 4

Motion:

3. That Convocation approve the recommendations set out below.

   a. That the following exemption be ended: *Canadian Society of Professionals in Disability Management.*

   b. That the following exemptions be amended:
      i) Acting for a family member, friend or neighbour - that this exemption be divided into two parts, one for immediate family, such as a parent representing a teenage child, and one for 'friends' narrowly limited to two or three occasions in a calendar year.
      ii) Constituency Assistants - that the by-law should be changed to define the exemption as "Members of the Provincial Parliament and their designated staff".
      iii) *Ontario Professional Planners Institute*: that this exemption be reformulated to clarify that professional planners and like professionals can appear at local committees of adjustment.

   c. That the following exemptions be given further consideration, including further consultations with affected parties:
      i) Single Employer In-house Exemption
      ii) Legal clinic employees
      iii) Other profession or occupation, member of accrediting associations:
      iv) *Human Resources Professionals Association of Ontario*
      v) *The Board of Canadian Registered Safety Professionals*
      vi) *Appraisal Institute of Canada*
      vii) Office of the Worker Adviser and Office of the Employer Adviser
      viii) Injured Workers Outreach Services (IWOS).

d. That the following exemptions be continued:
   i) Law students volunteering in legal clinics;
   ii) Law School student legal services;
   iii) Law Students *pro bono* programmes;
   iv) Not for profit organizations;
   v) Articling Students and Employed Law students, and
   vi) Trade Unions and persons designated by the Ontario Federation of Labour.

e. The Committee recommends that an exemption be added for paralegal college students on college-approved work placements.

Background

4. The Paralegal Standing Committee established a Working Group to make recommendations regarding the review required by section 33 of By-law 4. Section 33 reads as follows:

   Review
   33. Not later than May 1, 2009, the Society shall assess the extent to which permitting the individuals mentioned in sections 30, 31 and 32 to provide legal services without a licence is consistent with the function of the Society set out in section 4.1 of the Act and the principles set out in section 4.2 of the Act and determine whether the sections, in whole or in part, should be maintained or revoked.

5. The members of the Working Group are, Douglas Lewis, Chair, Marion Boyd, James R. Caskey, Paul Dray, Margaret Louter, Stephen Parker and William Simpson.

General Principles

6. On the recommendation of the Working Group, the Committee adopted the following as appropriate standards for licensed paralegals: Licensed paralegals must,
   a. enter the profession after completing a prescribed course of education or through recognition of an established expertise through the 'grandparenting' process;
   b. conduct themselves in accordance with the Paralegal Rules of Conduct established by the Law Society and be subject to discipline if they fail to do so;
   c. meet expectations regarding continuing legal education;
   d. hold professional malpractice insurance to protect the public, and
   e. place any trust funds provided by clients in trust accounts and follow the required accounting procedures.

7. The Committee is of the view that any group requesting continued exemption should be considered in light of the above standards.

8. The Committee supports the following general approach for the consideration of the exemptions in the by-law:
   a. The objective should be to reduce the exemptions over time. At the start of the regulatory model, it was recognized that it was not ideal to have so many exemptions, but their accommodation was a reality of an introduction of a new licensing regime.
   b. There are indications that paralegals in a number of the exempt groups now regret not having applied for 'grandparenting'. Thus, means for facilitating the admission of exempt persons should be considered as soon as possible.

c. If a current exemption is to be ended, consideration must be given to facilitating admission for the persons covered by the exemption, at that time.
d. Consideration should also be given to other groups wishing to apply for 'equivalency' in similar manner to the justices of the peace, e.g. the Appeal Resolution Officers at the Workplace Safety & Insurance Board.
e. Every attempt should be made to reduce the number of persons in the exemptions by negotiation and/or promotion of the advantages of membership.

9. The Paralegal Standing Committee had received briefings on the proceedings of the Working Group at the meetings in September and October, and was aware of the complexity of the issues involved in some of the exemptions. For this reason, the Committee favours proceeding with an Interim Report recommending those changes to the by-law that can currently be recommended.

10. The wording of each exemption from By-law 4 is shown in a text box before the discussion of the exemption.

Stakeholder Discussions

11. To inform discussion of the exemptions in the by-law, the Working Group held meetings with 22 different stakeholder groups on July 15th, 22nd, 23rd and 30th, typically meeting each group for at least an hour. A summary of the meeting schedule and the persons attending are shown in the charts attached at APPENDIX 1.

12. The first meeting was with the ministry of the Attorney General ('MAG'). This provided an opportunity to review the progress of paralegal regulation since the submission of the "Two Year Review" earlier this year. The MAG staff were complimentary about the progress with paralegal regulation, and noted that the ministry has virtually ceased to receive any complaints or comments on the topic.

13. With regard to the continuing existence of some exemptions, the ministry thinks it important that the 2004 Report to Convocation be borne in mind – it was expected that there would be exemptions, in fact that was part of the understanding between the Law Society and the government that made the introduction of paralegal regulation possible. There is no disagreement with the idea of some exemptions eventually fading.

14. The Working Group suggested that the ministry could play an important role by limiting its own future recruitment to licensees only. This was taken under consideration.

15. The ministry representatives mentioned that the amendment or removal of any of the exemptions could have significant implications for the government, and asked that the ministry be consulted in advance of such changes. The Working Group regarded this as a reasonable request.

16. The consultations included meetings with representatives of several boards and tribunals. They reported that the introduction of paralegal regulation has significantly improved the standard of professionalism at their hearings, and a number of tribunals provided copies of cases in which the tribunal had declined to hear from unlicensed persons.

17. In the consideration of the specific exemptions, the comments from all of the stakeholder discussions were taken into account. The exemptions to be reviewed are discussed below in the order in which they appear in By-law 4, with the stakeholder comments grouped in order. The discussion of each exemption includes the recommended approach.

Single Employer In-house Exemption

In-house legal services provider 1. An individual who, i. is employed by a single employer that is not a licensee or a licensee firm, ii. provides the legal services only for and on behalf of the employer, and iii. does not provide any legal services to any person other than the employer.

18. Comments relevant to this exemption included:
    a. Municipal Property Assessment Corporation (MPAC): MPAC is the body responsible in the first instance for determining the municipal assessment of every property in Ontario. Staff at MPAC also offer an internal first-stage review to property owners who believe the valuation that MPAC has set is too high. In this capacity, they function like a public body and must determine whether persons requesting information or making representations on behalf of home-owners are entitled to deal with them. MPAC will provide information to authorized persons who are not licensed or exempted by the Law Society, but will not discuss assessments with them. In these situations, they will discuss the assessment with the property owner instead.
    b. Property owners who wish to challenge a valuation must take the matter to the Assessment Review Board. At the ARB, representatives of MPAC can appear without a licence, under the 'single employer' in-house exemption. This has caused some concern, as there is a perception of an 'uneven playing field' between the taxpayer, who must be represented by a licensed or exempt person, and MPAC, which can send an unlicensed person to appear on the other side. In response, the ARB has revised its Rules of Procedure to create a more level playing field between parties to an appeal.
    c. MPAC strongly opposes removal of the single-employer exemption, and takes the position that there is already satisfactory consumer protection in the form of the MPAC Employees Code of Conduct, internal policies, staff training and specific legislative provisions. Further, removal of the exemption would result in increased costs that would ultimately have to be paid from tax revenue.
    d. There are however apparently about 100 staff members at MPAC who would like the opportunity to become licensed voluntarily.
    e. Prosecutors' Association of Ontario (PAO): The PAO represents 312 prosecutors, of whom 80 are lawyers and 232 are paralegals. 102 of the paralegals are licensed. Forty-two work for the ministry of the attorney general, while the rest work for municipalities. Not all prosecutors in Ontario are members.

f. Although prosecutors are exempt under the 'single employer' exemption, some prosecutors applied for licences on their own, while others were supported by their employer. The situation varies from municipality to municipality, as some encouraged their staff to become licensed and paid the fees, while others did not.

g. If the 'single employer' exemption were to be ended, the PAO would regard a further grandparenting opportunity as essential.

h. While the PAO representatives generally support the continuation of this exemption, a number of municipalities have started to require paralegal licences for any new hires. This suggests that the exemption will wither over time.

i. Municipal Law Departments Association of Ontario (MLDAO): The MLDAO was represented by staff lawyers from Mississauga, Thunder Bay and Toronto and filed a written submission. Municipal prosecutors are exempt under the single-employer exemption. The MLDAO supports the continuation of the exemption on the grounds that their employees already follow codes of conduct and are insured and well trained. In addition, they would find the ending of the exemption expensive and difficult to afford in the current economic environment.

j. The Assessment Review Board pointed out that two of the three parties to an ARB hearing (Municipal Property Assessment Corporation and the municipality) are exempted by the 'in-house' provision, and often send one person to act as both representative and witness. Thus the individual tax payer and his or her representative are the only parties bound by the Law Society *Paralegal Rules of Conduct* prohibiting the dual role of witness and advocate.

k. Paralegal Organizations: The Working Group met with representatives of three paralegal organizations: the Licensed Paralegal Association of Ontario, the Paralegal Society of Ontario, and the Paralegal Society of Canada. The PSO also submitted written comments, indicating concern about the functioning of a number of the exemptions. Among the chief concerns of the paralegal groups were the need for the application of the *Paralegal Rules of Conduct* and other ethical requirements to exempt prosecutors.

l. Legal Aid Ontario indicated that they are enthusiastic about paralegal regulation and are looking for ways to best use paralegals. All staff paralegals have been offered assistance towards becoming licensed, and in fact it would have no objection to mandatory licensing other than cost.

m. In particular, any eventual removal of exemptions should be undertaken in a manner to minimize the impact on those in currently exempted positions. Consideration should be given to further grandparenting windows or sunset clauses (i.e. permitting unlicensed paralegals to stay in their current positions, but requiring a licence if they wish to change jobs). To avoid difficulties, it would be best to avoid any sudden change.

n. Of the 34 paralegals on Legal Aid Ontario staff, five chose to become licensed. LAO managers see paralegal regulation as the professionalization of their staff and would like to see the paralegal scope of practice expanded. They believe that all large organizations should be thinking in terms of "what is your paralegal plan for the future?"

o. Landlord & Tenant Board: The Board has concerns about the operation of the 'single employer' exemption as it relates to property managers. Property managers can take advantage of the single employer exemption, where the property manager is the 'landlord' of a property within the meaning of the *Residential Tenancies Act*. The Act provides:

> *"landlord" includes,*
> *(a) the owner of a rental unit or any other person who permits occupancy of a rental unit, . . . and . . .*
> *(c) a person, . . .who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent;*

p. The use of the single employer exemption can be within the intention of the exemption where the property manager in fact runs the building, although there are difficult questions of interpretation where related and subsidiary companies are involved. There is also a serious concern that the interaction of the exemption with the *Residential Tenancies Act* creates a loophole that can be used by the unscrupulous. This issue merits further examination.

q. The Board will exclude representatives that are not licensed or exempt. However, due to the high volume of cases, the Board is not inclined to conduct an inquiry into a person's claimed exemption, and will simply note the claimed exemption on the record. Board members take the position that it is up to the Law Society to inquire into and enforce non-compliance with the *Law Society Act*. Since the consultations, there have been further discussions between the Landlord & Tenant Board and Law Society staff. The Board is of the view that the Law Society should amend the by-law to clarify the exemption.

Discussion

19. The Committee considered whether the continuation of the single-employer in-house exemption was in the public interest. Of particular concern is the situation of vulnerable parties who may face unlicensed, unregulated persons on the other side of various proceedings, such as municipal prosecutions, assessment appeals, accident benefit cases, etc. While the Law Society has taken steps to ask that prosecutors follow the *Paralegal Rules of Conduct,* this is not guaranteed.

20. The Committee noted that removal of the exemption would help to protect the public against encountering unlicensed representative in an advocacy setting.

21. While the Committee is of the view that the phasing out of this exemption in the future is desirable, in light of all the comments received, further steps toward voluntary compliance should precede changing the by-law.

Legal clinics: employees and law students

> Legal clinics
> 2. An individual who,
> i. is any one of the following:
> A. An individual who is enrolled in a degree program at an accredited law school and volunteers in or is completing a clinical education course at a clinic, within the meaning of the *Legal Aid Services Act*, 1998, that is funded by Legal Aid Ontario.
> B. An individual who is employed by a clinic, within the meaning of the Legal Aid Services Act, 1998, that is funded by Legal Aid Ontario,
> ii. provides the legal services through the clinic to the community that the clinic serves and does not otherwise provide legal services, and
> iii. has professional liability insurance coverage for the provision of the legal services in Ontario that is comparable in coverage and limits to professional liability insurance that is required of a licensee who holds a Class L1 licence.

22. Legal Aid Ontario indicated that the 79 community clinics have 135 paralegals, of whom 50 became licensed. Legal Aid Ontario supports the idea of supervised paralegal students being able to work within the P1 scope, and would like to see the creation of a paralegal student clinic of some sort.

23. *Association of Community Legal Clinics of Ontario* (ACLCO): The clinic representatives support the concept of paralegal regulation and noted that about a third of their paralegal staff, known as Community Legal Workers or CLW's, became licensed voluntarily. However, they argued that the high quality of service provided by the clinics, together with the fact that CLW's are supervised by staff lawyers and covered by clinic insurance, means that there is no consumer protection rationale for ending their exemption. Further, the cost would have to be borne by either Legal Aid Ontario or the individual clinics. This would result in a reduction of services during what is already a difficult time for Legal Aid Ontario.

24. The 79 clinics differ considerably, and a complicating factor is the differing job description of the CLW's – some provide mostly advocacy services, some have advocacy as part of a broader mandate and some do no advocacy at all, working instead on public education, outreach and community organizing. The 'CLW' positions can thus not be considered as a whole, in terms of whether a P1 licence should be required.

25. Further, the unusual recruitment model for the clinics was discussed. Often, clinics recruit specialized staff with many years of experience in, for example, community organizing or trade union work, or with international qualifications such as lawyers and other professionals. The clinics believe it would be unfair to expect such staff members to go back to college. In response, the Committee raised the possibility of discussing a specialized course with one of the community colleges.

26. The clinics would also support the broader use of paralegal students. A number of clinics have made representations to the effect that paralegal students on work placements should be permitted to provide legal services within the P1 scope.

27. Since the consultations, a further letter from the clinic association was received, attached at APPENDIX 2.

Discussion

28. The Committee considered the fact that law firm paralegals who appear in court are required to be licensed, and that the situation of clinic paralegals who provide advocacy services is similar. Clinic staff who do not provide advocacy services would not need a licence if they are supervised by a lawyer.

29. With regard to the exemption for clinic employees, while the Committee is of the view that the phasing out of the exemption in the future is desirable, it may be premature to make this mandatory, and further steps toward voluntary compliance should precede changing the by-law. The exemption for law student volunteers in the clinics should remain.

30. The Committee was of the view that a further exemption for paralegal students on college-approved field placements such as at legal clinics was reasonable.

Student legal aid services societies

> Student legal aid services societies
> 3. An individual who,
> i. is enrolled in a degree program at an accredited law school,
> ii. volunteers in, is employed by or is completing a clinical education course at a student legal aid services society, within the meaning of the *Legal Aid Services Act*, 1998,
> iii. provides the legal services through the clinic to the community that the clinic serves and does not otherwise provide legal services, and
> iv. provides the legal services under the direct supervision of a licensee who holds a Class L1 licence employed by the student legal aid services society.

31. The students who fit under this exemption all work under the direct supervision of a lawyer. The Committee was not made aware of any problems caused by this exemption and is recommending that it continue.

Law Students *pro bono* programmes

> Student pro bono programs
> 3.1 An individual who,
> i. is enrolled in a degree program at an accredited law school,
> ii. provides the legal services through programs established by Pro Bono Students Canada, and
> iii. provides the legal services under the direct supervision of a licensee who holds a Class L1 licence.

32. The students who fit under this exemption all work under the direct supervision of a lawyer. The Committee was not made aware of any problems caused by this exemption and is recommending that it continue.

Not for profit organizations

> Not-for-profit organizations
> 4. An individual who,
> i. is employed by a not-for-profit organization that is established for the purposes of providing the legal services and is funded by the Government of Ontario, the Government of Canada or a municipal government in Ontario,
> ii. provides the legal services through the organization to the community that the organization serves and does not otherwise provide legal services, and
> iii. has professional liability insurance coverage for the provision of the legal services in Ontario that is comparable in coverage and limits to professional liability insurance that is required of a licensee who holds a Class L1 licence.

33. This exemption covers only those organizations that operate as non-profit community services and have insurance coverage, such as the Human Rights Legal Support Centre. The Committee was not made aware of any problems caused by this exemption and is recommending that it continue.

Acting for a family member, friend or neighbour

> Acting for family, friend or neighbour
> 5. An individual,
> i. whose profession or occupation is not and does not include the provision of legal services or the practice of law,
> ii. who provides the legal services only occasionally,
> iii. who provides the legal services only for and on behalf of a related person, within the meaning of the Income Tax Act (Canada), a friend or a neighbour, and
> iv. who does not expect and does not receive any compensation, including a fee, gain or reward, direct or indirect, for the provision of the legal services.

34. This exemption has been reported to cause a number of problems.
    a. Workplace Safety & Insurance Board (WSIB) & Workplace Safety & Insurance Tribunal (WSIAT): the Board and WSIAT have both requested that the Law Society define the term “occasional,” to clarify the exemption. WSIAT Decision 2268/08I involves a representative identified as Marcel Santos. Mr Santos was not licensed to provide legal services. The only exemption in the *Law Society Act* or by-laws that could apply to him was the "friend" exemption. In the decision, WSIAT Vice-Chair Morris found Mr Santos did not fall within the "friend" exemption. WSIAT records indicated Mr Santos had represented approximately 74 appellants in hearings at the Tribunal, and Mr Santos acknowledged acting in at least 50 appeals. This did not include services he has provided to persons in other matters, including claims at the WSIB. Vice-Chair Morris found that although Mr Santos did not have any particular qualifications to provide legal services, providing legal services was one of his occupations. She concluded:

For the reasons already stated, it appears to me that Mr. Santos does not fit within the exemption of acting for a friend. In my view, there is an appearance that Mr. Santos is attempting to use the exemption of acting as a friend to circumvent the paralegal regulation. This has the appearance of an abuse of process. In my view, it would bring the administration of justice into disrepute if Mr. Santos were to continue to act in this case. I therefore adjourn this matter to permit the worker an opportunity to obtain another representative or to prepare his case if he wishes to proceed unrepresented.

b. The Ontario Bar Association argued that the "friend' exemption is open to abuse by unscrupulous persons pretending to be the friend of many parties, and recommended that "occasionally" be defined. It would also be helpful if a 'collating' function could be created, at tribunals that have the necessary resources, to track every time a person claims to be a friend, or uses the exemption for "other profession or occupation".

c. Landlord &Tenant Board: The board has concerns about the operation of the 'friend' exemption.

Discussion

35. In response to the many comments about the 'family or friend' exemption, the Committee is of the view that the exemption should be broken up into separate exemptions for 'family' on the one hand, and 'friends' on the other. 'Family' could be defined fairly narrowly, but with recognition that for genuine cases of family need, the number of appearances should not be restricted – e.g. representing an elderly parent or teenage child. On the other hand, the 'friend' exemption is obviously open to abuse, since some individuals have appeared at tribunal to represent dozens of 'friends.' For these reasons, the exemption for friends should be limited to two or three occasions per year.

Constituency Assistants

Constituency assistants 6. An individual, i. whose profession or occupation is not and does not include the provision of legal services or the practice of law, ii. who is any one of the following: A. A member of Parliament or his or her designee, B. A member of Provincial Parliament or his or her designee, C. A member of a council of a municipality or his or her designee, and iii. who provides the legal services for and on behalf of a constituent of the member.

36. The Committee is aware of concerns about this exemption, including issues with the quality of services, and the fact that it can raise conflicts of interest for the staff involved, especially for the staff of government members arguing against the decisions of government tribunals. However, there are complex issues of parliamentary privilege involved. On balance the Committee was of the view that it should be addressed through consultation and education.

37. To recognize the parliamentary privilege involved, the Committee was of the view that the by-law should be changed to define the exemption as "Members of the Provincial Parliament and their designees" and that further consultation and discussions should be undertaken.

Other profession or occupation, member of accrediting associations

> Other profession or occupation
> 7. An individual,
> i. whose profession or occupation is not the provision of legal services or the practice of law,
> ii. who provides the legal services only occasionally,
> iii. who provides the legal services as ancillary to the carrying on of her or his profession or occupation, and
> iv. who is a member of,
> A. the Human Resources Professionals Association of Ontario,
> B. the Ontario Professional Planners Institute,
> C. the Board of Canadian Registered Safety Professionals
> D. the Appraisal Institute of Canada, or
> E. the Canadian Society of Professionals in Disability Management.

38. The Working Group met with representatives of each of the associations listed in this section of the by-law. In addition, the OBA requested that, if these exemptions are to remain, that they be limited to credentialed members of each organization.

Human Resources Professionals Association of Ontario

a. Human Resources Professionals Association of Ontario (HRPAO): HRPAO representatives explained that they have 19,000 members, of whom only about 1,000 are independent consultants, as most of their members work for large employers. Of the 1,000 consultants, probably only 150 to 200 provide advocacy services, generally dealing with workers' compensation or Ontario Disability Support Payments. All independent consultants are required to carry $2 million of liability insurance.
b. The HRPAO takes the position that their members are exempted within the 'normal course' of their profession by subsection 1(8) of the Act, and further that the 'normal course' of the HR profession includes appearances at related tribunals. They referred to a legal opinion they have obtained to that effect.
c. While at this point the Law Society and the HRPAO disagree, discussions with staff of the HRPAO are continuing.

Discussion

39. The Working Group was of the view that an exemption for all 19,000 members of the HRPAO was very broad and noted that, if the relatively small number of HRPAO members providing advocacy services became licensed, the remaining usual activities of the HRPAO members would be covered by the exemption in section 28 paragraph 2:

"a person whose profession or occupation is not the provision of legal services or the practice of law, who acts in the normal course of carrying on that profession or occupation, excluding representing a person in a proceeding before an adjudicative body."

40. For these reasons, the Committee favours working with the HRPAO to increase the number of their members who are licensed.

Ontario Professional Planners Institute

a. The Ontario Professional Planners Institute ('OPPI)' has about 2,145 full members and 3,500 total members. Members' usual activities focus on land use planning for developers or municipalities, but in connection with this they have historically appeared occasionally at the Ontario Municipal Board, the Assessment Review Board, the Conservation Review Board, Environmental Review Board and municipal bodies, to argue on behalf of clients.

b. The OPPI indicated that, while a few have historically played an advocacy role at provincial tribunals, one of their main concerns is with the proceedings at local committees of adjustment.

c. The operation of these committees was discussed in some detail. They are established under section 44 of the *Ontario Planning Act* for the purpose of deciding whether or not to permit minor variances from municipal zoning by-laws. All their decisions may be appealed to the Ontario Municipal Board.

d. Committees of Adjustment are designed to be informal, but jurisprudence has tended to bring them under the Statutory Powers Procedure Act. Their proceedings are often less formal than provincial tribunals such as the Ontario Municipal Board. Subsection (11) of section 44 provides as follows:

> Rules of procedure
> (11) In addition to complying with the requirements of this Act, the committee shall comply with such rules of procedure as are prescribed.

e. Generally, the property owner must hire a planner or architect to advise on the variance from the by-law. Requiring an individual homeowner to hire a lawyer or paralegal as well would arguably be unfairly onerous. The Working Group received correspondence from the legal department of the Town of Oakville arguing that taking part in proceedings at municipal committees of adjustment should not be regarded as the provision of legal service for the purpose of By-law 4. The Assistant Town Solicitor for Oakville, Denise Baker, wrote as follows:

While I have no hesitation in supporting paralegal regulation as it relates to provincial tribunals, provincial boards and provincial agencies that allow for appearances by agents, it is not appropriate for these same regulations to apply to informal municipal committees where there are appeal rights to more formal provincial courts or tribunals.

f. The Municipal Law Departments Association of Ontario (MLDAO) agrees that planners and architects should be able to appear at local committees of adjustment.

g. The Ontario Association of Architects (OAA) has argued that the OAA should be added to the list of organizations in paragraph 30 (1) 7 of By-law 4, in the same manner as the planners. The bodies at which the OAA have argued that architects should be able to appear include the Ontario Municipal Board, municipal committees of adjustment, the Conservation Review Board and the Building Code Commission.

h. However, the discussions with their representatives indicated that, like the planners, their main concern is with local committees of adjustment. If the appearance of architects at local committees of adjustment could be accommodated, most of the OAA members would not have a problem complying with the operation of paralegal regulation. The Working Group was sympathetic to this approach.

Discussion

41. The Committee was of the view that the existing partial exemption for the OPPI should be redesigned as a limited exemption to permit planners and other like professionals to assist clients at local committees of adjustment.

42. There would be two possible ways of achieving this result:
    a. Redrafting the exemption to specify that members of the OPPI and OAA are permitted to appear at local committees of adjustment, or
    b. Providing by by-law that taking part in the meetings of committees of adjustment does not constitute the provision of legal services.

43. It could be argued that the second option removes consumer protection for clients at committees of adjustment, as there would be no restriction on who could appear. Conversely, the first option would require accommodating the other regulated professions that currently provide advice at committees of adjustment, such as architects, engineers and surveyors. This may prove more difficult to draft. The Committee was of the view that a by-law amendment to achieve the desired result should be prepared for consideration.

The Board of Canadian Registered Safety Professionals

44. The Board of Canadian Registered Safety Professionals (BCRSP) has 3,000 members across Canada. Its primary certification is the Canadian Registered Safety Professional (CRSP) designation.

45. Members of BCRSP work in all areas of occupational health and safety (prevention, education, etc.), and most work in-house for employers, but a proportion have historically handled cases at the Workplace Safety & Insurance Board and WSIAT. On the basis of information provided by WSIAT, it seems likely that this exemption affects a relatively small proportion of the BCRSP membership, but that they are affected by the

Workplace Safety & Insurance Board's strict interpretation of the rules governing the release of information. An email from the Chair of the BCRSP is attached at APPENDIX 3.

46. For these reasons, the Committee favours working with the BCRSP to increase the number of their members who are licensed.

Appraisal Institute of Canada

47. Appraisal Institute of Canada ('AIC'): the AIC is a voluntary professional association founded in 1938. Members carry liability insurance and adhere to a set of Standards, Rules and Ethics.

48. The AIC representatives explained the areas in which their members work and the role they play. Although their primary role is the provision of appraisals to property owners, some appraisers occasionally appear at the Assessment Review Board in connection with the valuation and taxation of a property, although this is apparently relatively rare and affects a minority of the association membership.

49. The exemption for the AIC has caused concern on the part of the Institute of Municipal Assessors ('IMA'), a professional association incorporated by private provincial statute. It is the largest professional association in the field of property assessment with over 900 members, half of which work for Municipal Property Assessment Corporation. As part of a campaign to be granted an exemption by the Law Society, the IMA recently arranged mandatory insurance for their members.

50. For these reasons, the Committee favours working with the AIC to increase the number of their members who are licensed.

Canadian Society of Professionals in Disability Management

51. The Canadian Society of Professionals in Disability Management ('CSPDM') is the Canadian affiliate of an international association of disability professionals. The CSPDM representatives explained in detail the areas in which their members work and the precise role they play. They support injured workers in managing the return to work process after a workplace injury and advocate on behalf of the rights of injured workers. Many of their members are doctors.

52. After further discussion it was agreed with the CSPDM that the exemption was not necessary for them to continue their work.

Office of the Worker Adviser and Office of the Employer Adviser (OWA and OEA)

> Office of the Worker Adviser
> (2) An individual who is a public servant in the service of the Office of the Worker Adviser may, without a licence, provide the following legal services through the Office of the Worker Adviser:
> 1. Advise a worker, who is not a member of a trade union, or the worker's survivors of her or his legal interests, rights and responsibilities under the *Workplace Safety and Insurance Act,* 1997.
> 2. Act on behalf of a worker, who is not a member of a trade union, or the worker's survivors in connection with matters and proceedings before the Workplace Safety and Insurance Board or the Workplace Safety and Insurance Appeals Tribunal or related proceedings.
> Office of the Employer Adviser
> (3) An individual who is a public servant in the service of the Office of the Employer Adviser may, without a licence, provide the following legal services through the Office of the Employer Adviser:
> 1. Advise an employer of her, his or its legal interests, rights and responsibilities under the *Workplace Safety and Insurance Act*, 1997 or any predecessor legislation.
> 2. Act on behalf of an employer in connection with matters and proceedings before the Workplace Safety and Insurance Board or the Workplace Safety and Insurance Appeals Tribunal or related proceedings.

53. These two offices were both established by the ministry of labour pursuant to the Weiler Report, with funding ultimately coming from the Workplace Safety & Insurance Board.

54. The OWA has a staff of 97, of whom 60 to 65 would require a licence in the absence of an exemption. The OEA has a staff of 26, of whom about 19 would require a licence. Several members of both organizations became licensed voluntarily, about 20 at the OWA and about 8 at the OEA.

55. While the representatives of both offices emphasized the high quality of the services they provide and that they see no public policy rationale for requiring their staff to be licensed, a serious concern at the possible loss of the exemption would be the cost of licensing, which, in the absence of new funding, would cause the loss of staff positions and a concomitant reduction in service.

Injured Workers Groups

> "injured workers' group" means a not-for-profit organization that is funded by the Workplace Safety and Insurance Board to provide specified legal services to workers;
> Injured workers' groups
> (4) An individual who volunteers in an injured workers' group may, without a licence, provide the following legal services through the group:
> 1. Give a worker advice on her or his legal interests, rights or responsibilities under the *Workplace Safety and Insurance Act,* 1997.
> 2. Act on behalf of a worker in connection with matters and proceedings before the Workplace Safety and Insurance Board or the Workplace Safety and Insurance Appeals Tribunal or related proceedings.

56. Since the exemption is limited to "injured workers groups funded by the WSIB", there is only one, umbrella group that fits this description, the "Injured Workers Outreach Services, (IWOS).

57. The IWOS groups were represented by Scott Wilson, the Executive Director of the Kitchener-Waterloo group. Mr Wilson said the current exemption is working well and should continue. Mr Wilson said the current practice is for IWOS representatives to file claims appeals, but not usually to appear on the appeal.

58. The IWOS groups attend training sessions at the Workplace Safety & Insurance Board twice a year and try to provide good quality services, as well as taking part in courses and training locally. Mr Wilson emphasized that most of those they help would have no other source of assistance, and have often been turned away by the Office of the Worker Adviser or their local union for various reasons.

59. The Kitchener Waterloo group is a registered charity but not all IWOS groups are charities as some are informal.

60. The exemption for "injured workers groups funded by the WSIB" has caused problems for injured workers groups that are not funded by the Workplace Safety & Insurance Board, which feel that they have been placed at a disadvantage. These groups take the position that there is a critical shortage of help for injured workers.

61. The non-funded groups are members of the Ontario Network of Injured Workers Groups (ONIWG). While the volunteers who offer their services through these groups often limit their role to "peer support", which the Law Society does not regard as the provision of legal services, there is a concern that the exemption for the 'IWOS' groups indicates that an exemption is necessary. In addition, there are now difficulties in obtaining basic information from the Workplace Safety & Insurance Board, as the Board asks anyone assisting a claimant to specify their authorization in terms of a licence or exemption.

62. The Committee is of the view that the concerns of the ONIWG groups could be addressed by working with the Workplace Safety & Insurance Board to develop a protocol or definition of "peer support". This would not require the granting of an exemption, as the Law Society is of the view that peer support does not constitute the provision of legal services.

63. The Ontario Bar Association (OBA) was represented by staff and by the Chair of the OBA paralegal task force, and two members of the OBA workers' compensation section. (Some of the comments were offered on behalf of the specific sections rather than the OBA corporately).

64. The OBA representatives submitted that the IWOS exemption has had uneven results, and permits the use of uninsured and unaccountable representatives. The OBA supports the original purpose of the IWOS groups in providing 'peer support' which should not be regarded as the provision of legal services. This distinction should be clarified. There is a concern that these groups may shelter paralegal practices where a fee is charged.

65. The Law Society is currently working with the WSIB to clarify the definition of 'peer support'. If this can be resolved to the satisfaction of all stakeholders, the current exemption could become unnecessary.

Trade Unions and persons designated by the Ontario Federation of Labour

> Trade unions
> (2) An employee of a trade union, a volunteer representative of a trade union or an individual designated by the Ontario Federation of Labour may, without a licence, provide the following legal services to the union, a member of the union, a former member of the union or a survivor:
> 1. Give the person advice on her, his or its legal interests, rights or responsibilities in connection with a workplace issue or dispute.
> 2. Act on behalf of the person in connection with a workplace issue or dispute or a related proceeding before an adjudicative body other than a federal or provincial court.
> 3. Despite paragraph 2, act on behalf of the person in enforcing benefits payable under a collective agreement before the Small Claims Court.

66. The Committee was of the view that the exemption for trade unions in the by-law was in keeping with the spirit of the exemption in the Law Society Act. While for the most part this exemption has not caused problems, there are isolated reports of trade unions outsourcing paralegal work to unlicensed paralegals, usually former trade union staff members. It was agreed that staff would work with the Ontario Federation of Labour to ensure that the scope of the exemption is followed.

Articling Students and Employed Law students

> Student under articles of clerkship
> 34. (1) A student may, without a licence, provide legal services in Ontario under the direct supervision of a licensee who holds a Class L1 licence who is approved by the Society.
>
> Other law student
> (2) A law student may, without a licence, provide legal services in Ontario if the law student,
> (a) is employed by a licensee who holds a Class L1 licence, a law firm, a professional corporation described in clause 61.0.1 (c) of the Act, the Government of Canada, the Government of Ontario or a municipal government in Ontario;
> (b) provides the legal services,
> (i) where the law student is employed by a licensee, through the licensee's professional business,
> (ii) where the law student is employed by a law firm, through the law firm,
> (iii) where the law student is employed by a professional corporation described in clause 61.0.1 (c) of the Act, through the professional corporation, or
> (iv) where the law student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, only for and on behalf of the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively; and
> (c) provides the legal services,
> (i) where the law student is employed by a licensee, under the direct supervision of the licensee,
> (ii) where the law student is employed by a law firm, under the direct supervision of a licensee who holds a Class L1 licence who is a part of the law firm,

(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of a licensee who holds a Class L1 licence who practise law as a barrister and solicitor through the professional corporation, or
(iv) where the law student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, under the direct supervision of a licensee who holds a Class L1 licence who works for the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively.

Same
(3) A law student may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide if the law student,
(a) is employed by a licensee who holds a Class P1 licence, a legal services firm or a professional corporation described in clause 61.0.1 (1) (c) of the Act;
(b) provides the legal services,
(i) where the law student is employed by a licensee, through the licensee's professional business,
(ii) where the law student is employed by a legal services firm, through the legal services firm, or
(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, through the professional corporation; and
(c) provides the legal services,
(i) where the law student is employed by a licensee, under the direct supervision of the licensee,
(ii) where the law student is employed by a legal services firm, under the direct supervision of a licensee who holds a Class P1 licence who is a part of the legal services firm, or
(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of,
(A) a licensee who holds a Class P1 licence who provides legal services through the professional corporation, or
(B) a licensee who holds a Class L1 licence who practises law as a barrister and solicitor through the professional corporation.
Interpretation: "law student"
(4) For the purposes of subsections (2) and (3), "law student" means an individual who is enrolled in a degree program at an accredited law school.

67. These exemptions cover only those students working under supervision and are not regarded as raising concerns about consumer protection. The Committee is not aware of any problems caused by that these exemptions and recommends they be continued.

Summary Chart

A chart summarizing the Committee's recommendations is attached at APPENDIX 4.

Timing

68. A table showing the schedule of the further, five year review of paralegal regulation is attached at APPENDIX 5. A further exemptions review could be scheduled to commence on the same date.

Appendix 1

EXEMPTIONS WORKING GROUP CONSULTATIONS Wednesday, July 15, 2009 - Benchers' Dining Room			
TIME	ORGANIZATION	ATTENDEES	ISSUES/NOTES
9:30-10:30	Ministry of the Attorney General (MAG)	Sunny Kwon, Policy Counsel, MAG John Twohig, General Counsel, MAG Brent McCurdy, Senior Policy Advisor to the Attorney General	
11:00-12:00	Assessment Review Board (ARB)	Rick Stephenson, Chair Marcie Bourassa, Vice Chair	
2:00-3:00	Workplace Safety and Insurance Board (WSIB) Workplace Safety and Insurance Appeals Tribunal (WSIAT)	Mike Johnston, ED, Reg. Services Div. Slavica Todorovic, ED, Appeals Div. Dan Revington, Gen. Counsel, WSIAT Debbie Dileo, Dir of Appeals Susan Adams, A/ Tribunal Director	
3:30-4:30	Financial Services Commission of Ontario (FSCO)	Asfaw Seife, Director, Dispute Resolution Services Branch	

EXEMPTIONS WORKING GROUP CONSULTATIONS		Wednesday, July 22, 2009 – Upper Barristers' Lounge	
9:30-10:30	Human Resource Professionals Association of Ontario (HRPAO)	J. Scott Allinson, Dir, Govt and External Relations Claude Balthazard, Director, HR and Acting Registrar Carmen Delmonico, Pres. Toronto chapter Bill Greenhalgh, Malcolm Heins, LSM CEO	
10:45-11:45	Ontario Professional Planners Institute (OPPI)	Dr. Wayne Caldwell, President Ann Joyner, Chair, Prof. Practice Advisory Marilyn Radman, Chair, Prof. Practice Cttee; Paul Stagl, Chair, Discipline Committee; Ron Keeble, Registrar; Brian Brophey, LL.B., Mgr, Prof. Standards Mary Ann Rangam, Executive Director Ian Lord, Weir Foulds, Counsel	
1:00-1:45	Ontario Association of Architects (OAA)	Kristi Doyle, Director of Policy Paul Roth, Architect	
2:00-2:30	Prosecutors' Association of Ontario (PAO)	Jane Moffat, President Grant Kelly, Mgr of prosecutions, Durham	
2:45-3:15	County & District Law Presidents(CDLPA) Advocates' Society	Randall Bocock, Chair Alex Chyczij, Executive Director (by phone)	
3:30-4:00	Canadian Society of Professionals in Disability Management (CSPDM)	Wolfgang Zimmerman, Exec. Director, Joyce Gravelle	
4:15-4:45	Appraisal Institute of Canada (AIC) (by phone)	Georges Lozano, CEO Robert Patchett, LLB, Prof. Practice Signe Holstein, Exec. Dir, Ontario Dan Brewer, Member Ontario Charles Johnstone, Member	

EXEMPTIONS WORKING GROUP CONSULTATIONS		Thursday, July 23, 2009 – Museum Room	
TIME	ORGANIZATION	ATTENDEES	ISSUES/NOTES
9:30-10:15	Ontario Network of Injured Workers Groups (ONIWG)	Steve Mantis, Secretary (by teleconference) John McKinnon, Legal Advisor Karl Crevar, Treasurer Peter Page	
10:30-11:15	Office of the Worker Adviser (OWA) Office of the Employer Adviser (OEA)	Kevin M. Brown, Central Client Services Michael Zacks, General Counsel/Director	
11:30-12:30	Municipal Property Assessment Corporation (MPAC)	Mark Doble, Manager, Case Management Karey Lunau, Conway Davis, Counsel to MPAC	
1:45-2:30	Paralegal Society of Ontario (PSO) Licensed Paralegal Assoc. (LPA) Paralegal Society of Canada (PSC)	Chris Surowiak, President, & Rod Walker Robert Burd, President Judi Simms, President	
2:45-3:30	Legal Aid Ontario (LAO)	Bob Ward, CEO David McKillop, VP, Policy and Research	
3:45-4:15	Injured Workers Outreach Services (IWOS)	Scott Wilson, Kitchener Waterloo Group	

EXEMPTIONS WORKING GROUP CONSULTATIONS	THURSDAY JULY 30, 2009 – Upper Barristers' Lounge

EXEMPTIONS WORKING GROUP CONSULTATIONS THURSDAY JULY 30, 2009 – Upper Barristers' Lounge				
	TIME	ORGANIZATION	ATTENDEES	ISSUES/NOTES
14	9:00- 9:45	Association of Community Legal Clinics of Ontario (ACLCO)	Lenny Abramowicz, Executive Director Ryan Peck, ED, HIV/AIDS Clinic Jill McNall, Paralegal, HIV/AIDS Clinic	
15	10:00- 10:45	Ontario Bar Association (OBA)	Louise Harris, Director, Govt Relations Steve Rosenhek, Chair, Paralegal Section Alec Farquhar, Managing Director, Occupational Health Clinics for Ontario Workers Laura Russell, CEO, CompClaim Inc. (licensed paralegal)	
16	11:00- 11:30	Municipal Law Departments Association (MLDA)	Mary Ellen Bench, Mississauga Rosalie A. Evans, Thunder Bay (by phone) Anna Kinastowski, City of Toronto Amanda Ross, City of Toronto	
17	11:45- 12:15	Landlord & Tenant Board	Dr. Lilian Ma, Chair Sean Henry, Vice-Chair, Central Region Murray Graham, Vice-Chair, Toronto North Anne Warner, Director, Legal Services Randy Schroeder, Counsel	
18	1:30- 2:15	Board of Canadian Registered Safety Professionals (BCRSP)	Jason Lakhan CRSP, Gowlings Heather Harvey CRSP, Board Member	

Appendix 3

BCRSP EMAIL SEPTEMBER 10, 2009

Julia Bass, MA, LLB
Policy Counsel
Law Society of Upper Canada

Dear Ms Bass:

On behalf of Canadian Registered Safety Professionals (CRSP)® providing paralegal services to clients requiring access to Workplace Safety and Insurance Board (WSIB) case files/information, we respectfully request that any changes being considered by the Law Society of Upper Canada (LSUC) to the current exemption status, critical to the work of most CRSP certificate holders, be deferred until such time as the current requirement of the WSIB for an exemption status number for basic requests of information has been resolved and is no longer required.

Sincerely,
BOARD OF CANADIAN REGISTERED SAFETY PROFESSIONALS

Edward J. Miller, BSc, MPA, CRSP
Chair, Governing Board

cc. D. Heather Harvey, RN, COHN-S(R), CRSP, CHRP, Member Governing Board; Chair, Certification and Examination Committee; Vice Chair, Foreign Credentials Recognition Committee
Jason Lakhan, CRSP, Gowling Lafleur Henderson LLP

Board of Canadian Registered Safety Professionals
6519B Mississauga Rd
Mississauga, Ontario L5N 1A6

tel: (905) 567-7198
toll free - 1-888-279-2777
fax: (905) 567-7191
pfletcher@bcrsp.ca
www.bcrsp.ca

Accreditations:
ISO 17024:2003 (Personal Certification Body)
ISO 9001:2008 (Quality Management System)

Appendix 4

PSC REPORT TO CONVOCATION: SUMMARY OF RECOMMENDATIONS ON EXEMPTIONS 12/11/2012

EXEMPTION OR EXCLUSION BY-LAW 4, PART V:	*RECOMMENDATION*
Section 30 (1) In-house legal services provider	• Further consideration required • Ask for future compliance plans, encourage voluntary licensing
Legal Clinics: employees	• Further consideration required • Ask for future compliance plans, encourage voluntary licensing
Legal Clinics: law students	• Continue exemption
Law school student legal services	• Continue exemption
Law student *pro bono* programs	• Continue exemption
Not for profit organizations	• Continue exemption
Acting for family, friend or neighbour	• Break into : 'family' (broad) and 'friends' (narrow) • develop standard form for use by tribunals
Constituency assistants	• Re-word the by-law and continue exemption
Other profession or occupation – member of A. Human Resources Professionals Association of Ontario B. Ontario Professional Planners Institute C. Board of Canadian Registered Safety Professionals D. Appraisal Institute of Canada E. Canadian Society of Professionals in Disability Mgmt.	A: Further consideration required, encourage voluntary licensing B: permit work at Committees of adjustment C: Further consideration required, encourage voluntary licensing D: Further consideration required, encourage voluntary licensing E: Remove exemption as unnecessary for their work
Section 31 Office of the Worker Adviser Office of the Employer Adviser	• Ask for future compliance plans and encourage voluntary licensing
Injured Workers groups funded by the WSIB	• Encourage voluntary licensing
Section 32 (2) trade unions and persons designated by the Ontario Federation of Labour	• Continue exemption as consistent with intent of statute
Section 34 Articling Students Employed law students	• Continue exemptions
Additional exemption to be added	• Add exemption for paralegal students on work placement

APPENDIX 5

PARALEGAL REGULATION - REVIEW SCHEDULE
FIVE-YEAR REVIEW PERIOD STARTS MAY 1, 2007

	JANUARY TO JUNE	JULY TO DECEMBER
2009		EXEMPTIONS REPORT TO CONVOCATION
2010		
2011		
2012	FIVE YEAR REVIEW PERIOD ENDS MAY 1, 2012	LAW SOCIETY TO FILE REPORT BY AUGUST 1, 2012 ATTORNEY GENERAL'S APPOINTEE TO FILE REPORT BY NOVEMBER 1, 2012

AMENDMENT TO PARALEGAL RULES - DUTY TO REPORT TO INSURER

Motion

69. That Convocation approve the following addition to the *Paralegal Rules:*

> 8.04 (2) A paralegal shall give prompt notice of any circumstance that the paralegal may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Background

70. In September, the Committee approved additions to the list in section 2 of Ontario Regulation167/07, setting out the types of cases that a single panel member may hear. The Report was submitted to Convocation and approved on September 24.

71. At the time the policy change was discussed, it was noted that there was a difference in the obligations for lawyers and paralegals, in that the lawyers' *Rules of Professional Conduct* contain a requirement to report an incident that may give rise to a claim on a professional liability insurance policy, while the Paralegal Rules do not contain such a provision.

72. Although there is no requirement to report in the *Paralegal Rules,* the approved form of insurance for paralegals contains a duty to report. The wording from the currently approved form is attached APPENDIX 6.

73. The Committee determined that a comparable provision for the Paralegal Rules should be prepared. The proposed wording follows the wording in the lawyers Rules.

74. The complete Rule 8.04, as it would read with this amendment, is attached at APPENDIX 7.

APPENDIX 6

REQUIRED WORDING IN ALL PARALEGAL INSURANCE POLICIES

B. NOTICE OF CLAIM:

If during the POLICY PERIOD the INSURED first becomes aware of any CLAIM or circumstances of a WRONGFUL ACT which any reasonable person or INSURED would expect to subsequently give rise to a CLAIM hereunder, the INSURED shall promptly give notice thereof or cause notice to be given to:
Name, address, phone and fax numbers of INSURER

The INSURED shall furnish promptly thereafter to the INSURER all information on the CLAIM which is in the INSURED'S possession or knowledge. If a CLAIM is brought against the INSURED, the INSURED shall promptly forward to the INSURER every demand or originating process received by the INSURED.

C. NOTICE BY THE LAW SOCIETY OF UPPER CANADA:

In the event that any INSURED refuses or fails to comply with these reporting provisions, the Law Society of Upper Canada may, at its sole and absolute discretion, take the place of the other INSUREDS to ensure such compliance or reporting provided that any act of the Law Society of Upper Canada in so complying or reporting on behalf of an INSURED with the requirements of this or any Condition in respect of any one CLAIM, shall not affect the rights of the INSURER to rely upon a breach of this or any other Condition by such INSURED with respect to the CLAIM in question, nor require the Law Society of Upper Canada to perform such substitute compliance or reporting in respect of any other CLAIM.

APPENDIX 7

REVISION TO RULE 8.04 OF THE PARALEGAL RULES – RE DUTY TO REPORT

8.04 Compulsory Errors and Omissions Insurance

Duty to Obtain and Maintain Insurance

8.04 (1) All paralegals practising in Ontario shall obtain and maintain adequate errors and omissions insurance as required by the Law Society.

new (2) A paralegal shall give prompt notice of any circumstance that the paralegal may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

(3)~~(2)~~ When a claim of professional negligence is made against a paralegal, he or she shall assist and cooperate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

(4)~~(3)~~ In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, the paralegal shall pay the balance.

FOR INFORMATION

PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE

75. The Committee met with members of the Professional Regulation Committee ("PRC") and the Tribunals Committee on November 11th 2009 to discuss a PRC proposal respecting a new consent process for the Society, now referred to as a "Pre-Proceeding Consent Resolution Conference".

76. Together with PRC and Tribunals, the Committee recommends to Convocation approval of the policy to implement the pre-proceeding consent resolution conference process for a two-year pilot project.

77. The required changes to the *Rules of Practice & Procedure* will be brought forward at a later date.

78. The formal motion and the supporting report are contained in the PRC Report to Convocation.

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

(1) A Copy of a letter from the Association of Community Legal Clinics of Ontario dated August 10, 2009 re: Exemptions Working Group Consultation with Community Legal Clinic Employees – Meeting of July 30, 2009.

(Appendix 2, pages 32 – 37)

Re: Amendment to *Paralegal Rules* – Duty to Report to Insurer

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve The following addition to the *Paralegal Rules*:

> 8.04 (2) A paralegal shall give prompt notice of any circumstance that the paralegal may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Carried

Re: Interim Report on Exemptions

It was moved by Mr. Lewis, seconded by Ms. McGrath, –

That Convocation approve the recommendations set out below.

a. That the following exemption be ended: *Canadian Society of Professionals in Disability Management*.

b. That the following exemptions be amended:

   i) Acting for a family member, friend or neighbour - that this exemption be divided into two parts, one for immediate family, such as a parent representing a teenage child, and one for 'friends' narrowly limited to two or three occasions in a calendar year.
   ii) Constituency Assistants - that the by-law should be changed to define the exemption as "Members of the Provincial Parliament and their designated staff".
   iii) *Ontario Professional Planners Institute:* that this exemption be reformulated to clarify that professional planners and like professionals can appear at local committees of adjustment.

c. That the following exemptions be given further consideration, including further consultations with affected parties:

   i) Single Employer In-house Exemption
   ii) Legal clinic employees
   iii) Other profession or occupation, member of accrediting associations:
   iv) *Human Resources Professionals Association of Ontario*
   v) *The Board of Canadian Registered Safety Professionals*
   vi) *Appraisal Institute of Canada*
   vii) Office of the Worker Adviser and Office of the Employer Adviser

viii) Injured Workers Outreach Services (IWOS).

d. That the following exemptions be continued:

i) Law students volunteering in legal clinics;
ii) Law school student legal services;
iii) Law students *pro bono* programmes ;
iv) Not for profit organizations;
v) Articling students and employed law students, and
vi) Trade unions and persons designated by the Ontario Federation of Labour.

e. The Committee recommends that an exemption be added for paralegal college students on college-approved work placements.

Carried

Ms. Minor abstained from the vote on the Paralegal Exemption Report.

Item for Information

- Consent Process

Dr. Patricia Hughes, Executive Director of the Law Commission of Ontario addressed Convocation on the work of the Commission.

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

Mr. Anand presented the Report.

Report to Convocation
January 28, 2010

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones

Committee Members
Janet Minor, Chair
Raj Anand, Vice-Chair
Paul Copeland
Mary Louise Dickson
Avvy Go
Susan Hare
Doug Lewis
Dow Marmur
Judith Potter
Linda Rothstein
Beth Symes

Purpose of Report: Decision and Information

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

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on January 13, 2010. Committee members Janet Minor, Chair, Raj Anand, Vice-Chair, Avvy Go, Mary Louise Dickson, Susan Hare, Judith Potter and Beth Symes participated. Milé Komlen, representative of the Equity Advisory Group/Groupe consultatif en matière d'équité, and Chantal Brochu, representative of the Association des juristes d'expression francaise de l'Ontario, also participated. Staff members Josée Bouchard and Mark Andrew Wells attended.

DECISION

HUMAN RIGHTS MONITORING GROUP
REQUEST FOR LAW SOCIETY INTERVENTIONS
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INFORMATION

MOVING FORWARD – HUMAN RIGHTS MONITORING GROUP

Purpose of Report

105. On the recommendation of the Monitoring Group, the Equity Committee considered and approved the following report on January 13, 2010 and presents the report to Convocation for information. The report proposes a new process for the Monitoring Group.

Background

106. The mandate of the Law Society of Upper Canada is to govern the legal profession in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct, and by upholding the independence, integrity and honour of the legal profession, for the purpose of advancing the cause of justice and the rule of law. It is fundamental to our justice system that the legal profession be independent and be perceived to be so, and that lawyers and judges be able to perform their legitimate professional duties without undue or illegal interference.

107. In light of these values and of the Law Society's mandate, Convocation approved in March 2006, a policy "to systemically respond to the human rights violations that target members of the legal profession and judiciary as a result of the discharge of their legitimate professional duties and that a group of benchers be charged with monitoring human rights violations that target members of the legal profession and judiciary as a result of the discharge of their legitimate professional duties. The composition of the group and particulars of its mandate are to be determined following Convocation's approval of the proposal." (See excerpts of March 23, 2006 transcript of Convocation reproduced as an addendum) The policy was based on a report of a working group chaired by bencher Paul Copeland and the initiative was championed by bencher Heather Ross through the Emerging Issues Committee.

108. Then bencher Derry Millar presented the Emerging Issues Committee report to Convocation and suggested that once Convocation approved the motion, the group would come back to Convocation for approval of its mandate. It was noted that, once appointed, the Monitoring Group would report to the Equity and Aboriginal Issues Committee (the "Equity Committee"). Convocation approved a motion, brought by bencher Derry Millar, seconded by bencher Heather Ross, that a Monitoring Group be created.

109. In April 2006, Convocation adopted a motion to "appoint a group of benchers, to be responsible for monitoring human rights violations that target members of the legal profession and judiciary, here and abroad, as a result of the discharge of their legitimate professional duties". The group of benchers was mandated "to report to Convocation through the Equity Committee" and was chaired by bencher Paul Copeland.

110. In June 2008, Convocation appointed the Monitoring Group as a working group of the Equity Committee. However, the Monitoring Group has never reported to the Equity Committee. Instead, it reports to Convocation through the Equity Committee without the Equity Committee's input. For the reasons described below, the Monitoring Group proposed to the Equity Committee a revised process where the Monitoring Group would report to the Equity Committee and the Equity Committee would report Monitoring Group matters to Convocation.

Mandate

111. The original mandate of the Monitoring Group approved by Convocation was to,
    a. review information that comes to its attention about human rights violations that target members of the profession and the judiciary, here and abroad, as a result of the discharge of their legitimate professional duties;
    b. determine if the matter is one that requires a response from the Law Society; and
    c. prepare a response for review and approval by Convocation.

112. The mandate was further expanded to state that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation's place and take such steps as he or she deems appropriate. In such instances, the Monitoring Group shall report on the matters at the next meeting of Convocation.

113. On September 20, 2007, Convocation approved the following recommendations, which expanded the Monitoring Group's mandate:

    a. That the Monitoring Group explore the possibility of developing a network of organizations, and work collaboratively with them, to address human rights violations against judges and lawyers;
    b. That the Monitoring Group be authorized to collaborate with the Law Society of Zimbabwe (the "LSZ") to assist it in strengthening its self-regulation capabilities and the independence of the profession.

114. This report outlines the work that the Monitoring Group has done to date, and a new process for moving forward.

Monitoring Group Activities
Monitoring Group Interventions

115. Since its inception in 2006, the Monitoring Group has recommended interventions to Convocation in support of lawyers and judges generally through letters of intervention to foreign authorities and public statements.

116. These letters and public statements are written in response to incidents of human rights violations against judges and lawyers which are brought to the Monitoring Group's attention by advocacy organizations. The cases are verified through research and contacts with those organizations. It is sometimes difficult to assess the reliability of the information provided, but all cases brought to the attention of the Monitoring Group are confirmed by at least two sources.[85]

117. It is difficult to assess whether the intervention activities of the Law Society are effective, as the Law Society has received very few responses to its intervention efforts. However, it is believed that there is value in the Law Society's intervention activities.[86] The legal profession reacted very strongly and positively to the Law Society's actions in support of lawyers in Pakistan, and numerous lawyers from foreign countries have noted that public interventions from organizations such as the Law Society are helpful in informing the community that human rights violations of lawyers and judges do not go unoticed. The activities show support to the civil societies and legal organizations involved, enhance the public scrutiny of the authorities' treatment of lawyers and judges and increase the profile and awareness of cases within the legal profession.

118. To date, the Monitoring Group recommended, and Convocation approved, Law Society interventions in more than thirty matters originating from countries such as Algeria, China, Democratic Republic of Congo, Egypt, Georgia, Honduras, India, Iran, Kenya, Malaysia, Nepal, Pakistan, Philippines, Saudi Arabia, Sudan, Syria, Tunisia, Vietnam and Zimbabwe.

119. The interventions relate to cases of human rights violations against both judges and lawyers as a result of the discharge of their professional duties. Reports of the incidents indicate that the lawyers and judges have been subjected to various forms of persecutions, including,

    a. harassment and intimidation;
    b. unlawful detentions and incommunicado detentions;
    c. unlawful house arrests;
    d. violence, abuse and torture; and
    e. assassinations.

[85] The Human Rights Monitoring Group relies on information provided by external organizations dedicated to promoting the rule of law and human rights internationally. The organizations that the Human Rights Monitoring Group relies on for information include Lawyers' Rights Watch Canada, World Organization against Torture – The Observatory, Human Rights Watch, Amnesty International and the Law Society of England and Wales.

[86] To date, the Law Society has received two responses from its letters of intervention. The Law Society sent an intervention letter dated November 27, 2006, to the government of the Philippines expressing concern over reports of attacks and killings of lawyers in the Philippines. The Law Society received a reply dated February 14, 2007, from the National President of the Integrated Bar of the Philippines, acknowledging receipt of the letter and thanking the Law Society for its concern. In February 2007, the Law Society sent a letter of intervention to the Georgian authorities in support of a lawyer who had been accused of corruption while he himself was investigating allegations of corruption in a prison. The Law Society received a reply dated March 28, 2007 from the Office of the Prosecutor General of Georgia assuring the Law Society that all necessary measures were being taken to ensure the interests of justice in this case

Collaborating with other Organizations

120. In 2007, the Monitoring Group considered options to enhance its intervention strategy. Having recognized that the Law Society is not the only Canadian organization involved in promoting and protecting the human rights of judges and lawyers internationally, the Monitoring Group began to informally explore options for collaboration, exchanging information and strategizing with some of these organizations as to how best to positively impact on judges and lawyers who are the subject of human rights violations as a result of the discharge of their legitimate professional duties.

121. In September 2007, the mandate of the Monitoring Group was expanded to include the possibility of developing a network of organizations with which to work collaboratively to address human rights violations. Since then, the Equity Initiatives Department has been working collaboratively with numerous human rights organizations in its intervention and education activities.

122. The Law Society has been working in collaboration with the following:

a. Amnesty International Canada;[87]
b. Lawyers' Rights Watch Canada;[88]
c. Canadian Lawyers for International Human Rights ("CLAIHR");[89]
d. Canadian Lawyers Abroad;[90] and
e. Human Rights Watch – Canada Committee.[91]

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[87] Amnesty International's vision is of a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights* standards. In pursuit of this vision, Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is independent of any government, political ideology, economic interest or religion.

[88] Lawyers' Rights Watch Canada ("LRWC") is a committee of Canadian lawyers who promote human rights and the rule of law by providing support internationally to human rights defenders in danger. LRWC promotes the implementation and enforcement of international standards designed to protect the independence and security of human rights defenders around the world.

[89] Canadian Lawyers for International Human Rights ("CLAIHR") is a non-profit, non-governmental organization, established to promote human rights globally through legal education, advocacy and law reform. CLAIHR analyses laws, institutions and practices affecting human rights; contributes to developing and strengthening laws and institutions that protect human rights; promotes awareness of human rights issues within the legal community; supports lawyers, legal organizations and others dedicated to achieving human rights.

[89] Canadian Lawyers Abroad ("CLA") provides opportunities for the Canadian legal community to become more actively involved in understanding and providing solutions to pressing good governance, rule of law and human rights issues. CLA pursues its mission by: running a national student chapter and internship program; developing innovative legal projects focused on systemic change; and raising awareness about pressing international legal issues.

[90] Canadian Lawyers Abroad ("CLA") provides opportunities for the Canadian legal community to become more actively involved in understanding and providing solutions to pressing good governance, rule of law and human rights issues. CLA pursues its mission by: running a national student chapter and internship program; developing innovative legal projects focused on systemic change; and raising awareness about pressing international legal issues.

123. The most successful Law Society of Upper Canada interventions are done in conjunction with other organizations and it appears that interventions are more meaningful when they condemn governments' systematic violations of the rule of law. This was true, for example, of interventions in partnership with Lawyers' Rights Watch Canada in the case of China and the Philippines.

124. The Law Society has also been approached by, and met with, the Executive Director of Lawyers without Borders[92] to collaborate with the organization in human rights activities that relate to lawyers and judges.

125. It should also be noted that the Law Society of England and Wales has been particularly active in promoting the human rights of lawyers and judges abroad. The International Division of the Law Society of England and Wales provides practical support, information and advice for firms working abroad, or solicitors exploring opportunities overseas, and lobby on key issues affecting solicitors' interests. The International Division was launched in November 2007 and is dedicated to providing a service tailored to law firms, solicitors and foreign lawyers seeking to develop their international business and build global relationships and profile. Their international role includes working closely with governments and Bar Associations in other countries to open new markets for lawyers; protecting solicitors' interests when new legislation or professional rules are being implemented abroad; organising trade missions to key jurisdictions and hold events that promote a greater international awareness of the services solicitors can provide; representing solicitors abroad through professional organisations that lobby on behalf of lawyers, or provide networking opportunities; lobbying the European Union institutions on proposals for EU legislation; and lobbying for human rights, both in terms of developments in law, and on individual breaches of human rights. Further information about the Law Society of England and Wales' international activities is available at http://international.lawsociety.org.uk/aboutus

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[91] Human Rights Watch is the largest human rights organization based in the United States. Human Rights Watch researchers conduct fact-finding investigations into human rights abuses in all regions of the world. Human Rights Watch then publishes those findings in dozens of books and reports every year, generating extensive coverage in local and international media. This publicity helps to embarrass abusive governments in the eyes of their citizens and the world. Human Rights Watch then meets with government officials to urge changes in policy and practice -- at the United Nations, the European Union, in Washington and in capitals around the world.

[92] Lawyers without Borders Canada / Avocats sans frontières Canada ("LWB") is a non governmental, not for profit, non partisan and volunteer organization. Established on October 23, 2002 as a legal person, it is registered as a charity. LWB is the Canadian branch of the *Avocats sans frontières* international movement.
LWB's fundamental objective is to contribute to the defence of the rights of the most vulnerable individuals or groups in the developing world or in countries facing a crisis, particularly by reinforcing the capacity of lawyers and other officials of justice. LWB thus allows Canadian lawyers and other volunteers to become involved in international cooperation and to take part in solidarity actions aiming at:defending and promoting human rights; reinforcing the rule of law and democratic governance; fighting against impunity; strengthening the security and independence of human rights defenders; insuring that fair trials are held; and training officers of justice and the civil society on human rights issues.

Mandate to Collaborate with Law Society of Zimbabwe

126. In 2007, the Monitoring Group's mandate was expanded to allow the group to collaborate with the Law Society of Zimbabwe to assist it in strengthening its self-regulation capabilities and the independence of the profession. This recommendation was approved in part as a result of a request made by Arnold Tsunga, then Acting Executive Secretary of the Law Society of Zimbabwe, for assistance for lawyers in Zimbabwe. The Law Society of Upper Canada made numerous attempts to contact Mr. Tsunga and his colleagues following the adoption of the recommendation, but all attempts failed. We understand that Mr. Tsunga was appointed to the International Commission of Jurists and no longer works for the Law Society. Because time has passed and the legal, political and social situation in Zimbabwe has evolved since the adoption of the 2007 recommendation, the Law Society may wish to revisit whether further action is warranted in this area.

Education of the Profession

127. In 2009, the Monitoring Group launched its Rule of Law Education Series, aimed at raising awareness on the relationship between stability in the rule of law and full enjoyment of human rights. The event was organized in partnership with Amnesty International Canada, Lawyers' Rights Watch Canada, CLAIHR, Canadian Lawyers Abroad, and Human Rights Watch – Canada Committee. The first event was a great success with 250 participants. It is anticipated that the Law Society will continue to hold such events on an annual basis.

128. The Rule of Law Education Series could also be enhanced by other types of educational activities, such as workshops, organized throughout the year to raise the legal profession's knowledge of human rights violations of lawyers and judges.

Systemic Approach

129. In 2007-2008, the Monitoring Group began taking on a more strategic approach to its interventions in countries where human rights violations against lawyers and judges appear to be more systemic. It began working more closely with other human rights organizations to undertake joint interventions, and it released a number of public statements.

130. This strategic approach to interventions was taken in the case of countries such as Zimbabwe, China, Pakistan and the Philippines. The Law Society issued public statements with respect to the decline of the rule of law and the consequent threat to human rights in these countries. In the case of Pakistan, the Law Society, along with the Ontario Bar Association, organized a public gathering of the legal profession to protest violations of the rule of law.

131. Although it is difficult to assess whether the work of the Monitoring Group has been effective, the Law Society's increasing use of a systemic approach appears to have increased the awareness of the profession to human rights violations against lawyers and judges. The use of a systemic approach has helped to focus the work and resources of the Monitoring Group on cases where the violations against judges and/or lawyers is symptomatic of broader rule of law violations.

Concerns Raised

132. Some concerns have been raised about the work of the Monitoring Group, which may easily be rectified. The concerns are listed below:

a. There have been concerns about the high volume of letters of intervention sent by the Law Society each month to various heads of state and the perception that the Law Society intervenes in most cases brought to its attention. Some have noted that Monitoring Group cases should be highly scrutinized and thoroughly considered and debated before they are presented to Convocation. This concern could be alleviated by bringing the cases forward for consideration and approval to a larger group of benchers prior to proceeding to Convocation.
b. Some have asked whether intervening by writing letters to foreign authorities is the most effective way for the Law Society to address human rights violations against lawyers and judges.
c. Some have noted that the intervention strategy used by the Monitoring Group to date has not considered the impact of interventions on the relationship between the Law Society and the Canadian government and it may be beneficial for the Law Society to consider such impact in cases where the intervention proposed might strain such relationship.
d. Some have concerns that the Monitoring Group requires a high deployment of resources by the Equity Initiatives Department.

Moving Forward

133. Based on the concerns noted above, the Monitoring Group proposed and the Equity Committee decided that the Monitoring Group's process would be changed so that it function as a working group of the Equity Committee and report to the Equity Committee prior to presenting recommendations to Convocation. It is believed that this will lead to more thorough discussions of the issues, as cases and approaches will be discussed by the Monitoring Group and the Equity Committee, where quorum is obligatory. By giving the Equity Committee the mandate to consider and approve recommended interventions, one would expect increased scrutiny by benchers prior to recommendations to Convocation.

134. It is understood that, even if the Monitoring Group is a working group of the Equity Committee, it can still be composed of benchers who are members and non-members of the Equity Committee.

135. Consideration was given to the possible impact of some interventions on the relationship between the Law Society and the Canadian government. It was suggested that, in the few cases where there could be a serious negative impact on that relationship, the case could be considered by the Government Relations Committee. This practice has been followed by the Equity Committee, for example in the case of Khadr, and should continue on a case-by-case basis when advisable.

136. It is anticipated that the Equity Committee will have the mandate to consider how best to increase the effectiveness of Law Society interventions. It may wish to focus its efforts on letters in support of lawyers and judges to foreign law societies or association and, in cases of systemic violations, on public statements.

137. Support for the Monitoring Group as a working group of the Equity Committee will continue to be provided by staff of the Equity Initiatives Department, as staff support to the Equity Committee. The Equity Initiatives Department already provides support to other working and advisory groups, such as the Aboriginal Working Group, the Equity Advisory Group, the Women's Equality Advisory Group and the Justicia Working Groups. It is anticipated that the shift from a separate Monitoring Group to a working group of the Equity Committee would not require significantly more or less resources.

Addendum

Excerpt of Transcript of Convocation - March 23, 2006

EMERGING ISSUES COMMITTEE REPORT:
22 MR. MILLAR: Thank you very much,
23 Treasurer.
24 The emerging issues report is at tab 9
25 of the material. The only item for decision is at tab
0014
1 A of tab 9 and this matter first came before
2 Convocation on January 23rd, 2006. I was not at
3 Convocation on that day and I was surprised to learn
4 that the item was tabled, perhaps it was because of the
5 lateness in the day, and it appears that the item was
6 near the end of the agenda.
7 The motion before Convocation is at
8 paragraph 2. It calls for Convocation to approve "a
9 policy to systemically respond to the human rights
10 violations that target the members of the legal
11 profession and judiciary in retribution for the
12 discharge of their legitimate professional duties" and
13 (b) "that a group of Benchers be charged with
14 monitoring human rights violations that target members
15 of the legal profession and judiciary in retribution
16 for the discharge of their legitimate professional
17 duties, the composition of the group and particulars of
18 its mandate to be determined following Convocation's
19 approval of the proposal."
20 After that would happen the mandate
21 would come back to Convocation for approval.
22 Noted in the report, the Law Society's
23 tradition of responding to human rights violations that
24 involve lawyers or members of the judiciary. The Law
25 Society also took the position with respect to the
0015

anti-terrorism legislation of the federal government, among other things.
The proposal before you, as again noted in the report, was based on a report of a working group that was chaired by Paul Copeland and on whom Anne Marie Doyle and Tom Heintzman sat.
The report came to the emerging issues committee. It also was considered by the equity and aboriginal issues committee and approved by both committees.
As noted, the group of interested Benchers will develop a mandate for Convocation's approval, will limit their work to members of the legal profession and judiciary who have been targeted in retribution of their work as lawyers; will determine a response based on the criteria set out in paragraph 18 of the report at page 9; will report to the equity and aboriginal issues committee; and will take no action without the approval of Convocation.
There are no financial implications of this proposal. The work that needs to be done of monitoring, of obtaining information, can be done and will be done by the current staff of the equities initiative department and, in fact, they do some of this work already as part of their ongoing work of the
0016
committee.
They will be asked to establish liaison with groups in the country to make sure that they identify situations where lawyers or members of the judiciary are involved in human rights, being attacked and their human rights being violated.
There is a discussion in the material about the mandate of the Law Society and how the proposal fits within the mandate. I understand from the transcript that that was an issue raised at the January 23rd meeting.
Our committee, as was the equity and aboriginal issues committee, were of the opinion that this proposal fits within our -- the mandate of the Law Society.
The mandate concludes upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.
As noted in paragraph 13 of the report at page 7, "Human rights abuses, whether here or abroad, resulting in the persecution of lawyers for discharging their legitimate professional duties may directly or indirectly threaten the independence of the

25 bar and the freedom of lawyers to make their services
0017
1 available to those who need them. Statements of
2 concern by the Society in response to threats or
3 incursions to the profession's independence would
4 appear to fall within the scope of the Society's
5 activities."
6 At paragraph 20 on page 10 set out the
7 committee's views with respect to a number of points
8 that I'm not going to repeat that support the -- this
9 matter falling within our mandate, but I would like to
10 highlight a couple of them.
11 Item b, "basic tenets of a fair and
12 accountable justice system are achieved when members of
13 the legal profession and judiciary are free to
14 discharge their legitimate professional duties without
15 threat of persecution;"
16 C, "justice is denied where lawyers are
17 persecuted for performing their professional duties;
18 D, "the legal profession is becoming
19 globalized, and the erosion of respect for the rule of
20 law elsewhere threatens its tenuous position even in
21 the most democratic societies; as Martin Luther King,
22 Jr. observed, 'A threat to justice anywhere is a threat
23 to justice everywhere'."
24 My submission and the submission of the
25 emerging issues committee is of interest to lawyers and
0018
1 their regulator when lawyers and judges are attacked
2 for doing their duty and carrying out the
3 responsibilities as lawyers and judges. It diminishes
4 the rule of law when this occurs.
5 Ask yourself where human rights
6 violations usually occur against lawyers and judges for
7 carrying out their responsibilities. It is normally in
8 totalitarian states carrying on under the guise of
9 democracy.
10 The famous phrase in Shakespeare's
11 "Henry VI" said by the butcher, who was a participant
12 in the rebellion, "The first thing we do, let's kill
13 all the lawyers," that was not spoken, as many people
14 think, in jest. It was spoken because the lawyers were
15 seen to be the upholders of the rule of law and that to
16 get rid of the rule of the law you get rid of the
17 lawyers.
18 I move seconded, by Heather Ross, the
19 motion set out in paragraph 2. I urge you to support
20 this proposal.
21 In closing, I would remind us all of the

famous words of Martin Niemoller, a Lutheran minister and president of the World Council Churches, who opposed Hitler in Germany, and he wrote these words while in a gestapo prison before being sent to the
0019
concentration camps.
"First they came for the communists, but I was not a communist so I did not speak out.
"Then they came for the socialists and the trade unionists, but I was not one of them, so I did not speak out.
"Then they came for the Jews, but I was not Jewish, so I did not speak out.
"When they came for me there was no one left to speak out."
Thank you very much.
TREASURER: Thank you, Mr. Millar.
Mr. Campion, you wish to speak?
MR. CAMPION: I do, thank you, Mr. Treasurer.
My first reaction was a somewhat conservative one and that was surely this is not in our mandate and there are other organizations, such as the Canadian Bar Association, who take on broader public policy roles to concern themselves with these issues.
That was my sort of first reaction and it was, indeed, a reaction.
I'm somewhat moved by the fact that the committee thinks that we have a mandate to do it and they made a very high call to a number of people that
0020
deal with notions of justice.
And then I decided just to drop down to self-interest, and that is our own self-interest, and I have a cocktail party question and that is what is the most important photograph ever taken in the history of photography from the 1840s to date, when daguerreotypes were first used in France? And you can choose any one you want, but I have to choose the picture taken of Earth from the moon in 1969, because you can see the ball sitting in a hostile environment and you realize that we are just one little teeny weeny place and everything else seems very distant and certainly not lifelike and we are a very small group of human beings on the face of this Earth.
And with that focus we do have that kind of responsibility that Derry just spoke about.
And so my initial reaction is easily overwhelmed by not just to a call to high words and

high notions of justice, but also self-interest, because as we focus on the world beyond our borders I think we will soon see that we have problems and impediments in our own world and for our own lawyers and they become much clearer when you look at the world beyond.
And while our members want us to
0021
concentrate on our regulatory role and the well-being of the profession within our own borders, I see very clearly that this focus has an enormous self-interest as we begin to look at our own world and whether those kind of impediments are there or not.
I suppose one last little point is that poetry shouldn't be left to the poets and it should be left to those in the world and Derry has reminded us of that through this.
These are very significant things. They can be very grand, they can very basic. In my view they are both and we should adopt this resolution.
TREASURER: Thank you, Mr. Campion.
Mr. Crowe?
MR. CROWE: Thank you, Treasurer. I have a very narrow point. I was surprised to see the word "retribution" in this resolution and (inaudible) and the current use and I think the only established use of the word "retribution" is as a punishment, punishment or just recompense for the evil that we have done and anybody who was sent to a Sunday school at the Presbyterian Church or the Methodist Church knows what "retribution" means.
I think the word is wrongly used and gives a wrong connotation and we should use some word
0022
like "persecution".
MR. MILLAR: Well, frankly, the words, "violations that target members of the legal profession and judiciary as a result of the discharge of their legitimate professional duties," and if my seconder would agree, perhaps we could change it to "that target members of the legal profession and judiciary as a result of the discharge of their ..."
Thank you very much, Mr. Crowe.
TREASURER: Any further discussion? If not, we have the motion brought by Mr. Millar, seconded by Ms. Ross. All in favour?
Mr. Chahbar, you're in favour?
MR. CHAHBAR: Yes, I am.
TREASURER: And Ms. Backhouse?

16 MS. BACKHOUSE: Yes, I am.
17 TREASURER: Ms. O'Donnell?
18 MS. O'DONNELL: Yes.
19 TREASURER: Any opposed? If not the
20 motion is carried.
21 MR. MILLAR: Thank you very much.
22 TREASURER: Mr. Copeland?
23 MR. COPELAND: If I could just point out
24 to Convocation that the initiation of this particular
25 policy was done by Heather Ross and she's the one that
0023
1 asked the subcommittee or got the emerging issues
2 committee to look at this issue. Thank you.
3 TREASURER: Thank you, Mr. Copeland.
4 Thank you, Ms. Ross, for taking the initiative.

INFORMATION
THE CASE OF THE EXTRAJUDICIAL KILLINGS OF LAWYERS AND JUDGES IN THE PHILIPPINES

Action Taken

138. The Monitoring Group approved the following case on December 2, 2009. In light of the urgency to intervene, the Monitoring Group asked the Treasurer to intervene in accordance to the following mandate:

    a. The mandate further states that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation's place and take such steps, as he or she deems appropriate. In such instances, the Human Rights Monitoring Group shall report on the matters at the next meeting of Convocation.

139. As a result, the Treasurer sent the letter dated December 8, 2009 to Lawyers` Rights Watch (presented at Appendix 9).

Sources of Information

140. This case is based on the following sources of information:
    a. Amnesty International;
    b. Asian Legal Resource Centre;
    c. Canadian Broadcasting Association (CBC);
    d. Human Rights Watch;
    e. Lawyers' Rights Watch Canada; and
    f. The Guardian.

Background

141. In July 2006, an investigative report entitled *From Facts to Action: Report on the Attack against Filipino Lawyers and Judges*[93] was published and documented findings of serious harassment, intimidation and killing of lawyers and judges in the Philippines as a result of the performance of their professional duties.

142. In 2006, the Law Society sent a letter to the authorities in the Republic of the Philippines about the extra-judicial killing of lawyers and judges.

143. In February 2008, the Lawyers' Rights Watch Canada attended the 7th Session of the United Nations Human Rights Council (UNHRC) in Geneva and made submissions about the extra-judicial killings of lawyers and judges in the Philippines. The Law Society endorsed the recommendation of the report *From the Facts to Action: Report on the Attack against Filipino Lawyers and Judges*, along with the Asian Human Rights Commission, Amnesty International, the Bar Human Rights Committee of England and Wales and Lawyers' Rights Watch Canada.

144. Hina Jilani, Special Representative of the UN Secretary General, recommended that the situation of human rights defenders in the Philippines be examined in the UN's upcoming Universal Periodic Review.

145. In April 2008, the Law Society sent a letter to the UN Special Representatives of the UN Secretary General in support of examining the situation of human rights defenders in the Philippines.

Extrajudicial Killings in the Philippines

146. Since 2001, when President Arroyo took office 37 jurists and over 800 other members of the Philippine society have been murdered, and all of them in some way were opponents or critics of the Arroyo regime.[94]

147. The killings surged after President Arroyo announced her disproval of the communist New People's Army and her plan to dismantle it.[95]

148. In 2007, Philip Alston, United Nations Special Rapporteur for extra-judicial, summary or arbitrary executions, made a number of recommendations to prevent further and punish past extrajudicial killings.[96]

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[93] The International Fact Finding Mission, From Facts to Action: Report on the attacks against Filipino lawyers and judges, released by the Dutch Lawyers for lawyers Foundation, July 24, 2006.

[94] See Letter from Asian Legal Resource Centre and Lawyers Watch Canada (25 November 2009) to the international community condemning the November 23, 2009 massacre of 57 people in the Philippines at 1[Letter].

[95] *Ibid* at 2

[96] *Ibid.*

149. His recommendation included that the Inter-active Legal Agency Group should be abolished and the criminal justice system should refocus on investigating and prosecuting those committing extrajudicial execution and other serious crimes. Mr. Philip Alston also recommended that human rights should be safeguarded within the peace movement; however, none of his recommendations have been implemented.

150. The Philippine government has failed to take effective steps to prevent or punish those extrajudicial killings, in spite of Mr. Philip Alston recommendations. That failure to punish extrajudicial killings created a climate of impunity that encouraged and allowed the November 23, 2009 massacre in Maguindanao Province.[97]

Massacre in Maguindanao Province

151. On November 23, 2009, a convoy of over 50 people was on its way to register Vice Mayor Ismael Mangudadatu as a candidate for governor of Maguindanao province in the May 2010 election.[98]

152. The convoy included Mr. Ismael Mangudadatu's wife, sister, relatives, journalists and lawyers. Mr. Ismael Mangudadatu was not part of the convoy, because he had received death threats and believed that the presence of women would ensure the safety of the convoy.[99]

153. On November 24, 2009, Human Rights Watch reported that on November 23, 2009 approximately 100 armed men stopped the convoy on a remote section of highway near the Town of Ampatuan. The armed men abducted the group and later executed them.[100]

154. In a joint letter (presented at Appendix 10), Lawyers' Rights Watch Canada and the Asian Legal Resource Centre (dated November 25, 2009) indicated that many of the 57 people murdered were subjected to terrible acts prior to their deaths.[101] Two of the victims were lawyers, Concepcion Brizuela and Cynthia Oquendo.[102]

155. According to a Human Rights Watch report dated November 24, 2009, there are indications that the attack was politically motivated. Andal Ampatuan, the current governor of Maguindanao province wanted his son, Andal Ampatuan Jr., to succeed him in the May 2010 elections.[103]

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[97] *Ibid*.
[98] Letter, *ibid.* See Mark Tran, "Clan allied to Philippine president suspected of being behind massacre" *The Guardian* (25 November 2009) online: The Guardian <http://www.guardian.co.uk> at 3 [Guardian].
[99] See Letter, *ibid.* See Letter from Lawyers Right Watch Canada (25 November 2009) to President Gloria Arroyo about the Massacre in Maguindanao Province. See Guardian, *ibid.*
[100] Human Rights Watch, News Release, "Philippines: Massacre Shows Arroyo's Failure to Address Impunity" (24 November 2009) [Human Rights Watch].
[101] Letter, *supra* note 94.
[102] *Ibid.*
[103] Human Rights Watch, *supra* note 94 at 1.

156. Police are investigating reports that Andal Ampatuan Jr. was present when dozens of police and militiamen stopped the convoy.[104]

157. Philippine President Gloria Macapagal-Arroyo declared a national day of mourning and promised justice for the victims.[105]

158. The Ampatuan family, which has ruled Maguindanao Province since 2001, helped secure votes for President Gloria Macapagal-Arroyo in the 2004 election.[106]

159. Human Rights Watch expressed deep concern that the President Gloria Macapagal-Arroyo's relationship with the Ampatuan family could hinder an impartial investigation into all those responsible for the killings.[107]

160. Lawyers' Rights Watch Canada and the Asian Legal Centre are calling for an international inquiry into the massacre of the 57 victims.[108]

161. On November 27, Lawyers' Rights Watch Canada wrote to Ambassador Desjardins (letter presented at Appendix 11), the ambassador for Canada to the Philippines since 2007, asking the government of Canada to immediately provide protective measures for the survivors of the massacre, who were witnesses to the massacre.[109]

Factors Considered

162. The Monitoring Group was of the view that it is within the mandate of the Monitoring Group to recommend an intervention in the case of the extra-judicial killings of jurists as a result of the performance of their professional.

163. The Monitoring Group also believed that it is within its mandate to approve the second request, to endorse Lawyers' Rights Watch Canada's letter to Ambassador Desjardins urging the government of Canada to provide protective and safety measures to witnesses of the massacre. Considering the state of impunity in the Philippines, the protection programme could benefit jurists who are and become witnesses to extrajudicial executions and require protection. A systemic approach may bring more attention to extrajudicial killings and the need for protection programs for witnesses in the Philippines.

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[104] Guardian, *supra* note 98.

[105] "Police, politician in Philippine massacre probe" *CBC News* (25, November, 2009) online: CBC News <http://www.cbc.ca> [CBC].

[106] Human Rights Watch, *supra* note 100 at 2.

[107] *Ibid.*

[108] Letter, *supra* note 94

[109] Letter from Lawyers Watch Canada (26 November 2009) to Ambassador Desjardins asking the Canadian government to provide protective measures to the witnesses to the November 23, 2009 massacre in the Philippines.

LAWYERS IN IRAN - ABDOLFATTAH SOLTANI

Action Taken

164. The Monitoring Group approved the following case on December 2, 2009. In light of the urgency to intervene, the Monitoring Group asked the Treasurer to intervene in accordance to the following mandate:

    a. The mandate further states that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation's place and take such steps, as he or she deems appropriate. In such instances, the Human Rights Monitoring Group shall report on the matters at the next meeting of Convocation.

165. As a result, the Treasurer sent letters of intervention dated December 8, 2009 to Iranian authorities (presented at Appendix 12) and to Iranian bar associations (presented at Appendices 13 and 14).

Sources of Information

166. The report is based on the following sources of information

    a. Amnesty International;[110]
    b. Observatory for the Protection of Human Rights Defenders ("the Observatory").[111]

Background Information

167. On October 2, 2009, Amnesty International as well as the Observatory reported that human rights lawyer Abdolfattah Soltani had his passport confiscated from Iranian officials. He was therefore barred from leaving Iran. Mr. Soltani had been on his way to Germany to receive the Nuremberg International Human Rights Award. The Observatory also reported that he was summoned by the Secretariat of the Presidency of the Republic for October 5th.

Previous Information Reported about Abdolfattah Soltani Human Rights Violations

168. Violations of Mr. Soltani's human rights by Iranian authorities for discharging his professional duties date back to at least 2005. On July 31, 2005, Mr. Soltani was arrested for having illegally disseminated information from one of his clients who was charged with revealing Iran's nuclear secrets. He was held incommunicado until January 2006 when he was finally allowed to meet with his lawyer. On March 6, 2006, Abdolfattah Soltani was released after bail of 100,000 Euros (at the time approximately $140,000 CDN) was paid.

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[110] Amnesty International (AI) is an international non-governmental organisation. Its mandate is to conduct research and generate action to prevent and end human rights abuses, as well as demanding justice for those whose rights have been violated.

[111] The Observatory for the Protection of Human Rights Defenders is a joint programme of the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT). It is an action programme based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression against defenders.

169. On July 16, 2006, Mr. Soltani was informed that the Revolutionary Court of Tehran had sentenced him to five years in prison and the loss of his civic rights, for leaking documents in a case related to Iran's controversial nuclear program and for spreading propaganda against the regime.

170. In May 2007, the Court of Appeal of Tehran rejected the case against Abdolfattah Soltani, saying that there was not enough evidence to support a case against him. Later that month, Mr. Soltani was acquitted of all charges brought against him since his arrest in July 2005. Notwithstanding, he was banned from travelling outside of Iran.

171. In 2008, Soltani wanted to stand for election to the Board of the Central Bar Association, but his candidacy was rejected on grounds of "unsuitability".

172. On June 16, 2009, Mr. Soltani was arrested again, at his office, and held *incommunicado.* The arresting officials, who did not have a search warrant, a summons or an arrest warrant, searched Mr. Soltani's office and confiscated his files, computers and his cell phone before taking him away. For several weeks, his whereabouts were unknown. Prior to his arrest, Mr. Soltani had called on the Iranian government to recount all of the votes cast in the June 12, 2009 disputed presidential election, in which President Mahmoud Ahmadinejad was declared the winner.

173. On July 8, 2009, it was determined that Mr. Soltani was being held in section 209 of Evin prison, the section where political prisoners are detained. No information could be obtained as to whether charges had been brought against him.

174. Mr. Soltani is also well known for his involvement in the case of Ms Zahra Kazemi, an Iranian-Canadian photographer, who died in 2003 from acts of torture and ill-treatments to which she was subjected to during her detention. Mr. Soltani, as the lawyer for the Kazemi family, had questioned the independence and fairness of the trial. In addition, Mr. Soltani is a member of Nobel laureate Shirin Ebadi's Defenders of Human Rights Centre, and was recently named to serve alongside Ebadi on the defense team of Haleh Esfandiari, an Iranian-American scholar detained in Iran since early May and accused of subversion.

Mandate

175. The Monitoring Group discussed whether the case falls within its mandate, more particularly whether the lawyer was targeted as a result of the discharge of his legitimate professional duties. It appears from the information published that Mr. Soltani's passport was confiscated to prevent him from receiving the Nuremburg International Human Rights Award. Therefore, his passport was not confiscated because he was performing his professional duties. Further, Mr. Soltani's confiscation of his passport does not alone prevent him from fulfilling his professional duties.

176. However, given that the constraint on Mr. Soltani's ability to travel is indirectly related to his role as a lawyer and the history of interventions by the Law Society for Mr. Soltani, the Monitoring Group was of the view that another Law Society response would be appropriate.

Interventions

177. The Law Society has intervened on two occasions with respect to Mr. Soltani in the past. In February 2007, the Law Society sent a letter to the Leader of the Islamic Republic of Iran, Ayatollah Sayed Ali Khamenei, expressing concerns over Mr. Soltani's arrest, conviction and five-year prison sentence, without having had a reasonable opportunity to defend himself.

178. In January 2008, the Law Society sent another letter expressing support for the acquittal of Mr. Soltani in May 2007 and expressing concern over reports that Mr. Soltani had not been allowed to travel abroad because his travel documents had been confiscated.

PUBLIC EDUCATION EQUALITY AND RULE OF LAW SERIES
2010

179. ACCESS AWARENESS - DISABILITY ISSUES AND LAW FORUM
    a. February 3, 2010
    b. Lamont Learning Centre (3:00 p.m. – 8:00 p.m.)
    c. Topic: Parenting with a Disability and the Legal System

    d. Description: The Ethno-racial People with Disabilities Coalition of Ontario (ERDCO) in collaboration with ARCH Disability Law Centre and the Law Society of Upper Canada, and Community Partners, Present a symposium on "Parenting with a Disability & the Legal System."

180. BLACK HISTORY MONTH
    a. February 10, 2010
    b. Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
    c. Convocation Hall (6:00 p.m. – 8:00 p.m.)
    d. Topic: The Rule of Law, Human Rights, and Development in Africa

    e. Description: The Canadian Association of Black Lawyers (CABL) and the Law Society of Upper Canada are pleased to present their annual Black History Month forum featuring a panel of leading scholars and lawyers, who will examine the interconnection of law, commerce and development in different regions in Africa, and discuss how Africa has shaped international law, democratic building, and human rights.

181. WOMEN'S LAW ASSOCIATION & LAW SOCIETY SYMPOSIUM
    a. February 22, 2010
    b. Lamont Learning Centre (5:00 P.M. – 7:00 P.M.)
    c. Topic: Guide to Success – A Dialogue with Women in Law

    d. Description: The Women's Law Association of Ontario and the Law Society of Upper Canada are pleased to host a forum that will feature a panel of successful and influential women lawyers who will share their stories from diverse areas of legal practice and work environments.

182. INTERNATIONAL WOMEN'S DAY
    a. March 8, 2010
    b. Lamont Learning Centre (time to be determined)
    c. Convocation Hall (time to be determined)

183. RULE OF LAW SERIES
   a. March 22 or 24, 2010
   b. Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
   c. Convocation Hall (6:00 p.m. – 8:00 p.m.)

184. JOURNÉE DE LA FRANCOPHONIE 2010 RECEPTION
   a. March 25, 2010
   b. Convocation H all (6:00 p.m. – 8:00 p.m.)

185. HOLOCAUST MEMORIAL DAY
   a. April 12, 2010
   b. Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
   c. Convocation Hall (6:00 p.m. – 8:00 p.m.)

186. ASIAN HERITAGE MONTH
   a. May 10, 2010
   b. Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
   c. Convocation Hall (6:00 p.m. – 8:00 p.m.)

187. NATIONAL ABORIGINAL DAY
   a. June 14, 2010
   b. Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
   c. Convocation Hall (6:00 p.m. – 8:00 p.m.)

188. PRIDE WEEK
   a. TBD
   b. Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
   c. Convocation Hall (6:00 p.m. – 8:00 p.m.)

APPENDIX 9

LAW SOCIETY LETTER TO LAWYERS' RIGHTS WATCH

December 8, 2009

Gail Davidson
Executive Director
Lawyer's Rights Watch Canada
3220 West 13th Avenue
Vancouver, BC

Dear Ms. Davidson,

Re: Massacre of Lawyers Concepcion Brizula and Cynthia Oquendo and 55 others, November 23, 2009 in Maguindanao Province

The Law Society of Upper Canada is the governing body for some 41,000 lawyers in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. Our mandate is to govern the legal profession in the public interest. Fundamental to our system of democracy in Canada is the maintenance of an independent bar. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

In this regard, a working group of the governing board of the Law Society of Upper Canada, the Human Rights Monitoring Group, has requested that I write to you to express our deep concern over the execution of two human rights lawyers Concepcion Brizula and Cynthia Oquendo and 55 others, on November 23, 2009 in Maguindanao Province. The Law Society of Upper Canada has repeatedly condemned the extrajudicial killings of lawyers and judges in the Philippines. Reports confirm that since 2001, over one thousand people including 15 judges and 22 lawyers have been killed. The Law Society deplores the continued attacks on peasants, lawyers, judges, opposition politicians, journalists and other members of civil society.

The Law Society of Upper Canada endorses Lawyers' Rights Watch Canada's intervention efforts in the Philippines, including the letter to the authorities dated November 25, 2009 condemning the executions, and the letter to Ambassador Desjardins dated November 27, 2009 calling on the government of Canada to immediately provide protective measures to protect the witnesses to the massacre.
Yours very truly,

W. A. Derry Millar
Treasurer

APPENDIX 10

LAWYERS' RIGHTS WATCH LETTER TO PHILIPPINE AUTHORITIES

November 25, 2009

President Gloria Arroyo
[address]

Dear Madame President

Re: Massacre of Attys. Concepcion Brizuela and Cynthia Oquendo and 55 others, November 23, 2009 in Maguindanao Province

Lawyers' Rights Watch Canada (LRWC) condemns the execution of two human rights lawyers, Concepcion Brizuela and Cynthia Oquendo, along with 55 others in the November 23, 2009 massacre in Maguindanao province of the Philippines.

The group, including 24 women, was en route to file election papers for Vice Mayor Ismael Mangudadatu who is running for governor of Maguindanao province in the May 2010 election, when they were attacked by a group of an estimated 100 gunmen. There were so many women in the group (24), including the two lawyers and the candidate's wife and sisters, because

people thought that women were less likely to be attacked. The group was ambushed by approximately 100 gunmen who abducted them and then executed them. Reports indicate that many of the 57 people murdered were subjected to terrible acts prior to their deaths. At least 22 journalists were killed in the attack, according to the Reporters without Borders, the largest killing of journalists in a single day. Police have named as the chief suspect, Andal Amputuan whose father is the three-term governor of Maguindanao province and a powerful supporter of the Lakas Kampi coalition led by Arroyo.

Since 2001 over a thousand people including 15 judges and 22 lawyers have been killed, all of them in some way seen as opponents or critics of the Arroyo regime and dubbed as enemies of the state. The dead include peasants, lawyers (22), judges (15), opposition politicians, journalists and other members of civil society. Killings of people seen as opponents had slowed since 2007 due in large part to the attention of international human rights organizations and the United Nations.

These extra-judicial killings were thought to be a result of the U.S. initiated counter-insurgency plan to eliminate the New People's Army—Operation Plan Freedom Watch (Oplan Bantay Laya)--first created by the Arroyo regime as a 5-year plan in 2002 and extended in 2007 extended. TOBL was to eliminate the New People's Army. There have been no proper investigations of these murders and only one prosecution and conviction.

United Nations Special Rapporteur for extra-judicial, summary or arbitrary executions, Philip Alston concluded urged the Arroyo regime to "…take concrete steps to put an end to those aspects of counterinsurgency operations which have led to the targeting and execution of many individuals working with civil society organizations." And that, "Extra-judicial executions must be eliminated from counter-insurgency operations."

The UN Investigation Principles reflect a global consensus on the appropriate standards for such investigations. The initial remedy for the loss of life by violence is an investigation which is capable of effectively determining if the death occurred by an illegal use of force. If the loss of life was the result of illegal violence, the state has a duty to prosecute and try the perpetrator(s), to punish those convicted and to afford access to civil remedies.

The Philippine government has violated its primary legal duty to protect citizens' right to life and to ensure adequate criminal and civil remedies when that right is violated. They have failed—for a period of 8 years to conduct the investigations required by international law binding on the Philippines and by Philippine domestic law. The law requires that extra-judicial killings be promptly investigated

The law binding on the Philippines is as stated by the European Court of Human Rights,

> "The obligation to protect the right to life… requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. …The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances."[112]

[112] *Finucane v. The United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003,

LRWC calls upon the international community to condemn the attacks which have left members the legal community around the world in shock. LRWC also calls upon the international community to insist on and to take all measure to ensure:

1. The appointment of a team of professional investigators from outside the Philippines who are:

    a) qualified in the various necessary aspects of criminal investigations,
    b) absolutely independent of the Arroyo regime and its supporters; and
    c) authorized to subpoena evidence, and examine witnesses; and,
    d) mandated to conduct an thorough, transparent and accountable inquiry into the 57 murders that occurred on November 23, 2009 and to make recommendations for the prosecution of the suspected perpetrators identified by the inquiry and to make recommendations of alternatives in the event that the Philippine courts are unable or unwilling to proceed with the prosecutions recommended.

2. Monitor the safety of others likely to be under attack.

Yours sincerely,

Gail Davidson
Executive Director, Lawyers' Rights Watch Canada

APPENDIX 11

LAWYERS' RIGHTS WATCH LETTER TO AMBASSADOR DESJARDINS

Dear Ambassador Desjardins;

Re: Massacre of 57 people in Philippines on November 23 2009.

We understand that there are 3 or 4 witnesses who survived this massacre. We are writing to ask what the Canadian government through the embassy can do to ensure the safety of these witnesses.

As you are no doubt aware, recommendations made in 2007 to the Philippine government by Philip Alston, UN Special Rapporteur on Extrajudicial Killings, regarding the creation of a witness protection programme have not been implemented. These recommendations were made to encourage witnesses to extrajudicial executions to come forward and to ensure their safety. There was a perception that heightened security because of allegations of complicity by government agents.

Professor Alston made four recommendations, none of which have been implemented. His recommendations were:

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at para. 67.

"The witness protection programme should be reformed and fully implemented: a) It should be proactively administer by an office independent of the NPS;
b) Witness protection should be unstintingly provided to all those who will be put at risk by an individual testimony;
c) Individual should be permitted to remain in the witness protection system for as long as they are at risk, even if a case stalls;
d) Housing and other benefits provided under the witness protection programme should ensure the security and conform of those protected."

Lawyers Rights Watch Canada (LRWC) and the Asian Legal Resource Centre (ALRC) have called for an independent international inquiry into the massacre of these 57 people.

LRWC calls on the government of Canada to immediately provide protective measures to protect the witnesses to the massacre. It is necessary that adequate security be provided immediately, as a preliminary step to ensuring that the perpetrators—including those who authored, planned and executed the terrible crimes--are properly identified and punished through investigations, prosecutions and trials.

I look forward to receiving a reply from you.

Gail Davidson, Executive Director, LRWC

APPENDIX 12

LETTER TO IRANIAN AUTHORITIES – SOLTANI

December 8, 2009

His Excellency Ayatollah Sayed Ali Khamenei
Leader of the Islamic Republic of Iran
The Presidency
Palestine Avenue, Azerbaijan Intersection
Tehran, Islamic Republic of Iran

Your Excellency,

Re: Lawyer Abdolfattah Soltani

The Law Society of Upper Canada is the governing body for some 41,000 lawyers in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. Our mandate is to govern the legal profession in the public interest. Fundamental to our system of democracy in Canada is the maintenance of an independent bar. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

In this regard, a working group of the governing board of the Law Society of Upper Canada, the Human Rights Monitoring Group, has requested that I write to you to express our deep concern

over the situation faced by human rights lawyer Abdolfattah Soltani. According to reports, Mr. Soltani has not been allowed to travel abroad because his travel documents, such as his passport and record book, have been confiscated. This appears to be in violation of Article 12.2 of the 1966 *International Covenant on Civil and Political Rights*, which provides "everyone shall be free to leave any country, including his own."

We are concerned about situations where lawyers who work to defend human rights are themselves targeted for exercising their freedoms and rights under the law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

Also, the *UN Declaration on Human Rights Defenders*, protects the right of an individual to promote the protection and realization of human rights freedoms; guarantees the right of individuals to communicate with non-governmental and intergovernmental organizations for the purpose of promoting and protecting human rights and freedoms; and requires States to take all necessary measures to ensure the protection of everyone against violence, threats, retaliation, adverse discrimination, or any other arbitrary action as a consequence of the legitimate exercise of their rights.

The Law Society of Upper Canada hopes that the government of Iran will,

a. guarantee in all circumstances the physical and psychological integrity of Mr. Abdolfattah Soltani;
b. put an immediate end to any kind of hindrance on Mr. Soltani's freedom of movement by returning him all his personal documents, including travel documents;
c. put an end to acts of harassment against Mr. Soltani and all human rights lawyers in Iran;
d. conform in all circumstances with the provisions of the *United Nations Basic Principles on the Role of Lawyers and the Declaration on Human Rights Defenders*; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments ratified by Iran.

Yours very truly,

W. A. Derry Millar
Treasurer

Cc: His Excellency Mahmoud Ahmadinejad, President of the Islamic Republic of Iran
His Excellency Ayatollah Mahmoud Hashemi Shahrudi, Minister of Justice
His Excellency Mr. Manouchehr Mottaki, Minister of Foreign Affairs

His Excellency Mr. Seyed Mouhammad Ali Moosavi, Ambassador of the Islamic Republic of Iran in Canada
His Excellency Mr. Ayatollah Sadeq Larijani, Head of the Judiciary
The Honourable Lawrence Cannon, Minister of Foreign Affairs
The Honourable Robert Nicholson, Minister of Justice and Attorney General of Canada

APPENDIX 13

LETTER TO BAR ASSOCIATION - SOLTANI

December 8, 2009

Mr. Mohammad Gandaghi Kermanipoor
President
Iranian Central Bar Association
No. 3, Zagros Street, Argentina Square
Tehran, Iran
15149

Dear Mr. Kermanipoor,

Re: Abdolfattah Soltani

The Law Society of Upper Canada is the governing body for some 41,000 lawyers in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. Our mandate is to govern the legal profession in the public interest. Fundamental to our system of democracy in Canada is the maintenance of an independent bar. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

In this regard, a working group of the governing board of the Law Society of Upper Canada, the Human Rights Monitoring Group, has requested that I write to you to express our deep concern over the situation faced by human rights lawyer Abdolfattah Soltani. According to reports, Mr. Soltani has not been allowed to travel abroad because his travel documents, such as his passport and record book, have been confiscated. This appears to be in violation of Article 12.2 of the 1966 *International Covenant on Civil and Political Rights*, which provides “everyone shall be free to leave any country, including his own.”

We are concerned about situations where lawyers who work to defend human rights are themselves targeted for exercising their freedoms and rights under the law. We are wondering if the Iranian Central Bar Association has any insight into Mr. Abdolfattah Soltani’s situation, and whether any action has been initiated by the legal community to support and advocate for him.

The Law Society of Upper Canada would be interested in collaborating with the Iranian Central Bar Association in this regards if you think it would be of assistance. We would welcome your advice on a possible collaboration and yours views on whether such efforts would impact negatively on the safety and security of Mr. Abdolfattah Soltani.

Yours very truly,

W. A. Derry Millar
Treasurer

APPENDIX 14

LETTER TO BAR ASSOCIATION UNION - SOLTANI

December 8. 2009

Mr. Bahman Keshavarz
President
Iranian Bar Association Union
No. 3, Zagros Street, Argentina Square
Tehran, Iran
15149

Dear Mr. Keshavarz,

Re: Abdolfattah Soltani

The Law Society of Upper Canada is the governing body for some 41,000 lawyers in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. Our mandate is to govern the legal profession in the public interest. Fundamental to our system of democracy in Canada is the maintenance of an independent bar. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

In this regard, a working group of the governing board of the Law Society of Upper Canada, the Human Rights Monitoring Group, has requested that I write to you to express our deep concern over the situation faced by human rights lawyer Abdolfattah Soltani. According to reports, Mr. Soltani has not been allowed to travel abroad because his travel documents, such as his passport and record book, have been confiscated. This appears to be in violation of Article 12.2 of the 1966 *International Covenant on Civil and Political Rights*, which provides “everyone shall be free to leave any country, including his own.”

We are concerned about situations where lawyers who work to defend human rights are themselves targeted for exercising their freedoms and rights under the law. We are wondering if the Iranian Bar Associations Union has any insight into Mr. Abdolfattah Soltani’s situation, and whether any action has been initiated by the legal community to support and advocate for him.

The Law Society of Upper Canada would be interested in collaborating with the Iranian Bar Association Union in this regards, if you think it would be of assistance. We would welcome your advice on a possible collaboration and yours views on whether such efforts would impact negatively on the safety and security of Mr. Abdolfattah Soltani.

Yours very truly,

W. A. Derry Millar
Treasurer

Re: Human Rights Monitoring Group Request for Interventions

It was moved by Mr. Anand, seconded by Ms. Minor, that Convocation approve the proposed interventions in the following cases and make public the report and interventions of the Monitoring Group:

a. China –Suspension, Disbarment, Detention and Disappearance of Human Rights Lawyers;

b. Colombia –Illegal Surveillance and Harassment of Lawyers and Judges;

c. Syria- Lawyers Haytham al-Maleh and Muhannad al-Hassani;

d. Turkey – Lawyer Filiz Kalayci.

Carried

Items for Information

- Moving Forward – Human Rights Monitoring Group Process
- Human Rights Monitoring Group Interventions
- Public Education Equality Series 2010

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IN PUBLIC

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REPORT OF THE AUDIT COMMITTEE

Ms. Symes presented the Report for information.

Report to Convocation
January 28, 2010

Audit Committee

Committee Members
Beth Symes (Chair)
Marshall Crowe
Seymour Epstein
Glen Hainey
Doug Lewis
Bill Simpson

Purpose of Report: Information

Prepared by
Wendy Tysall, Chief Financial Officer – 416-947-3322

COMMITTEE PROCESS

1. Third quarter financial statements for the Lawyers' Professional Indemnity Company and LibraryCo Inc. were circulated to members of the Audit Committee ("the Committee") by e-mail during December. Third quarter financial statements for the Law Society were included in materials for Convocation on December 4, 2009.

FOR INFORMATION

LAWYERS' PROFESSIONAL INDEMNITY COMPAY FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2009

2. Convocation is requested to receive the financial statements for LAWPRO for the third quarter of 2009 for information.

FOR INFORMATION

LIBRARYCO INC. FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2009

3. Convocation is requested to receive the financial statements for LibraryCo for the third quarter of 2009 for information.

FOR INFORMATION

LAW SOCIETY FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2009

4. Convocation is requested to receive the financial statements for the Law Society for the third quarter of 2009 for information.

Background

5. The Law Society previously produced three separate, audited, annual financial statements for the General Fund, the Compensation Fund and the Combined Errors & Omissions Insurance Fund. The latter includes a stand-alone Errors and Omissions Insurance Fund [1]("E&O Fund"). LAWPRO has run the E&O Fund under the terms of an administrative agreement with the Law Society. There have been no separate, published audited annual financial statements for the E&O Fund. Unaudited financial statements for the E&O Fund have been presented to the Audit Committee and Convocation (in camera) on a quarterly basis.

6. The Committee has previously communicated to Convocation the implications of changes in financial reporting, particularly the adoption of International Financial Reporting Standards ("IFRS"). Canadian accounting standards for Publicly Accountable Enterprises will be replaced with International Financial Reporting Standards (IFRS) for fiscal years beginning on or after January 1, 2011. LAWPRO is a publicly accountable enterprise as it reports to the insurance regulatory authorities, so LAWPRO will adopt IFRS. The Law Society, including the E&O Fund, will continue to use Canadian Generally Accepted Accounting Principles until updated standards for not-for-profits are finalized.

7. LAWPRO's adoption of IFRS means the existing combination of the E&O Fund with LAWPRO will not be appropriate. It is necessary therefore, to establish a new reporting regime for the E&O Fund.

8. As the E&O Fund is in fact a separate fund of the Law Society, like the General Fund and Compensation Fund, it makes most sense for it to be included in the Law Society's regular financial reporting. Financial reporting based on the combination of these three funds, combining the General Fund, the Compensation Fund and the E&O Fund into one entity report, presents a more accurate and comprehensive picture of Law Society operations.

9. Both our auditors and LAWPRO are in agreement with the proposed new presentation.

10. Therefore, beginning with this quarter, the Society's operational results will be presented on a single set of entity statements that include the General, Compensation and Errors and Omissions Insurance Funds.

[1] The E&O Fund administers claims provisions for losses incurred prior to 1995. After this date the Law Society's insurance program was administered by the Lawyers Professional Indemnity Company ("LAWPRO").

Fund Descriptions

11. The General Fund is the Society's operating fund representing the bulk of its revenues and expenses relating to the licensing and regulation of lawyers and paralegals.

12. The Compensation Fund, set up by statute, and maintained by the Law Society, exists in order to mitigate losses sustained by clients as a result of the dishonesty of a member of the Society. The fund is financed primarily through annual levies on lawyers and paralegals and income earned on the investment of reserves surplus to the operating needs of the fund. The annual Compensation Fund levy for the 2009 year was set at $226 for lawyers and $145 for paralegals. The respective figures for the 2008 year were $220 and $145.

13. The Errors and Omissions Insurance (E&O) Fund accounts for the mandatory professional liability insurance program of the Society which has, since 1995, been administered by LAWPRO. Insurance premium expense, as well as related levies and income from their investment are tracked within this fund. The Society is insured for lawyers' professional liability and recovers annual premium costs from lawyers through a combination of annual base levies and additional levies that are charged based on a lawyer's claims history, status, and on the volume of specified categories of legal transactions.

14. The Premium Stabilization Fund (PSF) provides the ability to smooth annual insurance premium levies for the E&O Fund. Included in the insurance contract for 2009 is a retrospective premium adjustment rider which provides that in years where levies exceed premiums, the surplus is transferred to the fund. In the event of a shortfall, surplus funds are transferred from the fund to meet premium requirements.

15. The Capital Allocation Fund is the source of funding for the Society's acquisition of major capital assets and the repair and upgrade of Osgoode Hall. The fund is replenished by a dedicated annual levy, $45 in 2009 and $75 in 2008, on all lawyers and paralegals.

16. The Invested in Capital Assets Fund represents the net book value of the Society's physical assets. Additions to the fund are made by the capitalization of assets acquired through the Capital Allocation Fund. Additions are recorded annually by means of an inter-fund transfer on the Statement of Changes in Fund Balances. Amortization is reported as an expense of the fund.

17. The County Libraries Fund reports the transactions between LibraryCo Inc. and the Law Society. The Law Society levies an amount on lawyers as approved by Convocation in the annual budget, currently $220 in 2009 and $235 in 2008 per lawyer. This levy is reported as income of the fund and transfers to LibraryCo Inc. are reported as an expense of the fund.

- Other Restricted Funds:

    - The Parental Leave Assistance Plan for lawyers has been established with $540,000, representing the entire annual fee allocation for the fiscal year. Under the program, which commenced on March 12, 2009, the Law Society will provide sole and small firm practitioners a fixed sum of $750 per week for up to twelve weeks to cover, among other things, expenses associated with maintaining practice expenses during a maternity, parental or adoption leave. As of September 30, 2009, we have approved 31 applications and have three applications being processed.
    - The Repayable Allowance Fund is used to provide financial assistance to those enrolled in the Society's Lawyer Licensing Process. The fund is replenished annually through the budget process by a $100,000 annual contribution.
    - The Society's Endowment Fund is the J. Shirley Denison Fund, administered under the terms of the will by Convocation for the relief of poverty for lawyers and licensing process lawyer candidates.
    - The Special Projects Fund is used to carry forward funding to a future fiscal period for a program or activity for which funding is not provided in the current year budget. For 2009, the fund is primarily comprised of funding for the Governance Task Force and Women in Private Practice which will be completed in the fourth quarter of 2009. Also included is the ongoing maintenance of the Society's lawns, gardens and trees.

18. The Working Capital Reserve is maintained by policy of Convocation to ensure cash is available to meet the operating needs of the Society. By policy, the fund is maintained at a balance of up two months operating expenses.

Financial Statement Highlights

19. The Financial Statements are prepared under Generally Accepted Accounting Principles for Canadian not-for-profit organizations using the restricted fund method of accounting. Revenues are recognized when earned and expenses are recognized when incurred.

20. The Financial Statements for the nine months ended September 30, 2009 comprise the following statements with comparative numbers for September 30, 2008:

    - Balance Sheet
    - Statement of Revenues and Expenses
    - Statement of Changes in Fund Balances

21. Supplemental schedules include Schedules of Revenues and Expenses and Change in Fund Balance for both the Lawyers and Paralegal General Funds (in camera), the Compensation Fund and the Errors and Omissions Insurance Fund.

Balance Sheet

22. Current assets at the end of September 2009 have increased to $78.6 million from $73.4 million due to the increased members levies and premiums receivable, higher prepaid insurance premiums and higher prepaid expenses. At September 30, 2009, current assets comprise $5.7 million in cash, $31.2 million in short-term investments, $19.5 million in accounts receivable (annual fees, insurance premiums and levies owing) and $22.2 million in prepaid expenses.

23. Short-term investments are shown at fair value of $31.2 million compared to $33.6 million in 2008. Investments are held in the following funds:

Fund	2009	2008
General Fund	$23,338	$23,194
Compensation Fund	6,381	10,362
E&O Fund	1,494	-
Total	$31,213	$33,556

24. Prepaid expenses have increased to $22.2 million from $20.2 million. Most of this balance relates to annual E&O insurance premiums paid for the year, the remainder of which will be expensed over the final three months of 2009.

25. The investment in LAWPRO is made up of two parts. The investment represents the share capital of $4,997,000 in LAWPRO purchased in 1991 when LAWPRO was established plus the contributed capital of $30,645,000 accumulated between 1995 and 1997.

26. Portfolio investments are shown at fair value of $83.5 million compared to $87.9 million in 2008. The decline is attributable to cash transfers to LAWPRO. Investments are held in the following funds:

	2009	2008
Errors & Omissions Insurance Fund / Premium Stabilization Fund	$45,191	$54,215
Compensation Fund	26,460	23,164
General Fund	11,884	10,499
	$83,535	$87,878

27. The decrease in capital assets to $17.4 million from $19.3 million reflects the accumulated amortization for the period offset by $1.1 million in additions, recorded in December 2008, for projects such as upgrading the barristers' lounge area, various mechanical and electrical upgrades, as well as software upgrades.

28. Deferred revenue has increased to $36.6 million from $35.3 million. This relates to annual E&O insurance premiums and general fund fees received for the year, the remainder of which will be recognized over the final three months of 2009.

29. The amount due to LAWPRO has increased to $26.0 million from $21.3 million. The payable is expected to be eliminated by year-end and is made up of levies owing for the remaining three months of 2009.

30. The increased provision for unpaid grants/claims to $15.6 million from $13.7 million is mainly due to the actuarial valuation of the Compensation Fund. The reserve for Compensation Fund grants has increased to $13.9 million in September 2009 from $11.6 million in September 2008 in line with the net increase in open claims and inquiry files over the period. At the end of September 2009, the estimated paralegal claim liabilities comprised $139,000 of the total $13.9 million reserve for unpaid grants. The remainder is $1.7 million in E&O reserves for claims pre-dating 1995.

31. Unclaimed trust funds continue to increase, now totaling $1.9 million compared to $1.8 million at September 30, 2008.

32. Fund Balances have decreased to $131.1 million from $139.6 million with 2009 activity analyzed on the Statement of Changes in Fund Balances. The lawyer general fund balance has increased by $1.3 million from September 2008 reflecting the operating surplus after inter-fund transfers.

Statement of Revenues and Expenses

33. The General Fund incurred a deficit of $130,000 at the end of the third quarter of 2009, compared with a surplus of $2.6 million in 2008. This is due to a decrease in revenues of $2.4 million compounded by an increase in net expenses of $350,000.

34. The Society's restricted funds report a deficit of $8.9 million for the period. The deficit arises primarily as a result of deficits in the E&O Fund ($7.3 million) and in the Invested in Capital Assets Fund ($2.1 million).

35. The deficit in the E&O Fund was largely planned for as part of the 2009 insurance program approved by Convocation in September 2008. The insurance program authorizes transfers from the Premium Stabilization Fund to supplement shortfalls in premium and transaction levies. The transfer ($10.8 million) from the Premium Stabilization Fund to the E&O Fund is reported on the Statement of Changes in Fund Balances.

36. The deficit in the Invested in Capital Assets Fund arises from the amortization of the Society's capital assets. This is a non-cash expense that is not budgeted as part of the Society's annual budget process, and therefore no revenue is raised to apply against this expense.

37. General Fund annual fee revenue is recognized on a monthly basis. Annual fees have increased to $29.8 million in 2009 from $28.0 million in 2008, with an increased number of lawyers and a fee increase of $50 per lawyer. Paralegal billings for the full nine months of 2009 are also reflected. The prior year comparator has May 1, 2008 as the start date for the paralegal licensing process. There were approximately 2,300 paralegals at the start of 2009 and their annual fee is $900 ($845 in 2008).

38. Professional development and competence revenues have decreased to $7.8 million from $11.9 million in 2008. This is due to an expected decrease in the number of paralegal applicants for the licensing program as the 2008 year was the first in which paralegal licensing occurred, resulting in a high initial volume of candidates. In addition, there has been a reduction in continuing education registration revenue as the recession has decreased demand for courses, resulting in fewer course offerings and fewer attendees. Finally, there has been a budgeted decrease in lawyer licensing process fees from $2,940 in 2008 to $2,400 per candidate as a result of changes to the licensing process approved by Convocation.

39. Restricted fund annual fees and premiums have decreased to $63.6 million from $66.0 million. This decrease is primarily a result of decreased transaction levies between 2008 and 2009.

40. Investment income in the restricted funds has increased to $5.3 million from $1.8 million due mainly to net gains of $1.6 million on investments in the E&O Fund and in $1.4 million in the Compensation Fund.

41. Regulatory expenses of $13.3 million are higher than the same period in 2008 by just under $1 million. The 2009 budget envisaged these expenses increasing by $3.1 million for the year in response to the increasing number of complaints and continuing influx of mortgage fraud complaints. Year-to-date, the increase in actual expenses is concentrated in Investigations, Discipline and Complaints for the budgeted staffing increases and the costs of paralegal good character hearings.

42. Professional development and competence expenses are $200,000 less than for the same period in 2008 ($12.1 million versus $12.3 million) primarily as a result of operational changes to the licensing process. The most significant of these changes has been the move to providing the Professional Responsibility and Practice course online. These budgeted reductions are partially offset by planned increases in staffing for spot audit and practice review.

43. Administrative expenses are $151,000 more than the same period in 2008, consistent with budgeted increases.

44. Other expenses include bencher related payments, payments to the Federation, insurance, catering costs and other miscellaneous expenses and total $4.5 million for the first nine months of 2009.

45. Compensation Fund expenses have increased to $8.2 million from $6.5 million. The main contributor to this increase has been the provision for unpaid grants which is at $3.6 million, compared to a prior year figure of $2.6 million based on estimated liabilities. Starting in 2009, the provision is adjusted monthly based on the number of new inquiries and open claims net of claims paid and cases closed. In 2008, this calculation was recorded in June, based on actuarial estimates. In addition, costs for spot audit, investigations and discipline allocated from the general fund have increased over 2008, as budgeted.

46. County libraries fund expenses are $430,000 less than for the same period in 2008 ($5.6 million versus $6.0 million) primarily due to the timing of transfers.

Statement of Changes in Fund Balances

47. This statement reports the continuity of the Society's various funds from the beginning of the year to the end of the current period. Details related to the revenues, expenses and interfund transfers summarized on this statement are reported on in detail in the accompanying Statement of Revenues and Expenses as well as supporting schedules relating to the Lawyer and Paralegal General Funds, the Compensation Fund and the Errors and Omissions Insurance Fund.

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Report to Convocation
January 28, 2010

Access to Justice Committee

Access to Justice Committee
Marion Boyd, Co-Chair
Paul Schabas, Co-Chair
Avvy Go, Vice-Chair
Paul Dray
Carl Fleck
Glenn Hainey
Susan McGrath
Julian Porter
Jack Rabinovitch
William Simpson
Catherine Strosberg
Bonnie Tough

Purpose of Report: Information

Prepared by the Equity Initiatives Department
(Marisha Roman, Aboriginal Initiatives Counsel - 416-947-3989)

COMMITTEE PROCESS

1. The Access to Justice Committee ("the Committee") met on January 13, 2010. Committee members Marion Boyd (Co-Chair), Paul Schabas (Co-Chair), Avvy Go (Vice-Chair), Susan McGrath, Catherine Strosberg, and William Simpson participated. Staff members Marisha Roman, Julia Bass, and Sheena Weir attended. Barbara Haynes, Chief Executive Officer, DAS Canada, Jas Basra, Vice President, DAS Canada, and Lenny Abramowicz, Executive Director, Association of Community Legal Clinics of Ontario, attended as guests to make presentations.

FOR INFORMATION

LEGAL EXPENSE INSURANCE - PRESENTATION BY
BARBARA HAYNES, CHIEF EXECUTIVE OFFICER, AND
JAS BASRA, VICE PRESIDENT, DAS CANADA

BACKGROUND

2. Following the release of the Legal Aid Review 2008 on July 25, 2008, the Access to Justice Committee agreed at its September 10, 2008 meeting to update its work plan

and include the issue of legal expense insurance as a priority item for consideration.

3. After reviewing historical research into legal expense insurance at its January 14, 2009 meeting, the Committee decided to continue researching legal expense insurance programs in Canada and internationally as well as the feasibility of a legal expense insurance program in Ontario.

4. At its meeting on May 13, 2009, the Committee considered information regarding the proposed products and services of DAS Canada. DAS Canada is a subsidiary of the DAS group of companies in Europe. DAS' parent company, ERGO Insurance Group, is part of the Munich Re Group. DAS provides legal expense insurance products in 16 countries throughout Europe.

5. In early 2009, DAS Canada applied to the Office of the Superintendent of Financial Institutions Canada (OSFI), the national governing body for insurers. Approval by OSFI and the relevant provincial regulatory bodies is required for DAS Canada to begin marketing its proposed legal expense insurance products.

6. The Access to Justice Committee invited Chief Executive Officer, Barbara Haynes, and Vice President, Jas Basra, to attend at the Committee's January 13, 2010 meeting and present an update on the current activities of DAS Canada and the company's proposed legal expense insurance products.

7. Ms. Haynes and Ms. Basra provided general information on the history of DAS Canada's parent companies, its proposed legal expense insurance products for Ontario, and the next steps required for regulatory approval. Following approval by OSFI, DAS Canada must receive approval from the Financial Services Commission of Ontario (FSCO) in order to commence marketing its products in Ontario.

8. The Committee will continue to monitor developments in the legal expense insurance market, including DAS Canada's plans for its products in Ontario.

FOR INFORMATION

PRESENTATION BY THE EXECUTIVE DIRECTOR OF THE ASSOCIATION OF COMMUNITY LEGAL CLINICS OF ONTARIO

BACKGROUND

9. Throughout its regular meeting schedule, the Access to Justice Committee invites representatives from legal organizations to provide updates on their current programs, initiatives and projects. The Committee provides this report to update Convocation.

10. Lenny Abramowicz, the Executive Director of the Association of Community Legal Clinics of Ontario (ACLCO), attended to present an update on the current activities of the ACLCO and its member community legal aid clinics.

11. The ACLCO is the representative body for Ontario's community legal aid clinics. It is a non-profit corporation and receives its funding from both Legal Aid Ontario and from its member clinics. There are 79 community legal clinics in Ontario. Sixty of these serve specific geographic communities. Nineteen are "specialty clinics" that serve specific communities that are not defined geographically.

12. The ACLCO serves its members as the voice of the clinic system to various stakeholders, including: Legal Aid Ontario, the Law Society of Upper Canada, all levels of government, law schools, the media, and the general public. The ACLCO has worked with the Law Society to provide submissions on consultations, including the licensing of paralegals and continuing professional development, and is also a member, along with the Law Society, of the Association for Sustainable Legal Aid (ASLA).

13. Further information about the work of the ACLCO can be accessed through its website at http://www.aclco.org/index.html.

14. The Committee will continue to monitor the work of the ACLCO and Ontario's community legal clinics.

CONVOCATION ROSE AT 12:55 P.M.

Confirmed in Convocation this 25th February, 2010.

Treasurer