

MINUTES OF CONVOCATION

Friday, 22nd June, 2001
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Aaron, Armstrong, Arnup, Banack, Bindman, Bobesich, Boyd, Braithwaite, Campion, Carey, Cass, Chahbar, Cherniak, Coffey, Cronk, Crowe, Curtis, Diamond, Divinsky, E. Ducharme, T. Ducharme, Elliott, Epstein, Finkelstein, Gottlieb, Hunter, Jarvis, Lalonde, Lamont, Laskin, Lawrence, Legge, MacKenzie, Manes, Martin, Millar, Mulligan, Murphy, Murray, Ortved, Pilkington, Potter, Porter, Puccini, Robins, Ross, Simpson, Strosberg, Swaye, Topp, White, Wilson and Wright.

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The reporter was sworn.

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TREASURER'S ELECTION

The candidates for Treasurer were Vern Krishna, Q.C., FCGA, Gavin A. MacKenzie and Ross W. Murray, Q.C.

The Secretary and Treasurer retired to count the ballots cast in the election.

The Secretary announced the results of the election.

Mr. Krishna	36
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Mr. MacKenzie	15
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Mr. Murray	6
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Mr. MacKenzie congratulated Mr. Krishna on his election.

It was moved by Mr. MacKenzie, seconded by Mr. Murray that the election of Mr. Krishna as Treasurer be made unanimous.

Carried

Mr. Murray offered his congratulations to Mr. Krishna.

Treasurer Armstrong then left the chair and Treasurer Krishna took the chair.

Mr. Armstrong then addressed Convocation thanking fellow benchers for their contributions and the staff for their assistance and support during his term as Treasurer.

The Treasurer thanked Mr. Armstrong for his service to the profession during his term as Treasurer.

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DIRECTOR OF EDUCATION REPORT

Re: Candidates for Call to the Bar

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Education asks leave to report:

B.

ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Friday, June 22nd, 2001:

Naser Abedi
Daniel Lawrence Brock
Neville Mark Ma Cave

Bar Admission Course
Bar Admission Course
Bar Admission Course

Gwen Theresa Ka Wan Cheung	Bar Admission Course
Joseph Marvin Corbiere	Bar Admission Course
Elizabeth Lucy Stephanie Corrente	Bar Admission Course
Carlo Corsetti	Bar Admission Course
Timothy Craig Edwards	Bar Admission Course
Paul Markian Grod	Bar Admission Course
Kathleen Christine Katina Marie Charlebois Hunter	Bar Admission Course
Kirk Robert Charles Maclaurin	Bar Admission Course
Daniel John Michaluk	Bar Admission Course
Aleksandar Mladenovic	Bar Admission Course
Melissa Akemi Nishioka	Bar Admission Course
Tara Leigh Parker	Bar Admission Course
Janet Elizabeth Preston	Bar Admission Course
Howard Aaron Rusak	Bar Admission Course
Marko Sekulic	Bar Admission Course
Paltu Kumar Sikder	Bar Admission Course
Indira Jane Guha Singleton	Bar Admission Course
Elizabeth Faye Stamp	Bar Admission Course

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

B.1.4. The following candidates have completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Friday, June 22nd, 2001:

Dominic Bernard Gingras	Province of Quebec
Vivian Eseoghene Rerri	Province of Saskatchewan
Andrea Elizabeth Walden	Province of Alberta

ALL OF WHICH is respectfully submitted

DATED this the 22nd day of June, 2001

It was moved by Mr. Millar, seconded by Mr. E. Ducharme that the Report of the Director of Education be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Education were presented to the Treasurer and Convocation and called to the Bar and the degree of Barrister-at-law was conferred upon each of them. They were then presented by Mr. Lamont to Mr. Justice John C. Wilkins to sign the Rolls and take the necessary oaths.

Naser Abedi	Bar Admission Course
Daniel Lawrence Brock	Bar Admission Course
Neville Mark Ma Cave	Bar Admission Course
Gwen Theresa Ka Wan Cheung	Bar Admission Course
Joseph Marvin Corbiere	Bar Admission Course
Elizabeth Lucy Stephanie Corrente	Bar Admission Course

Carlo Corsetti	Bar Admission Course
Timothy Craig Edwards	Bar Admission Course
Paul Markian Grod	Bar Admission Course
Kathleen Christine Katina Marie Charlebois Hunter	Bar Admission Course
Kirk Robert Charles Maclaurin	Bar Admission Course
Daniel John Michaluk	Bar Admission Course
Aleksandar Mladenovic	Bar Admission Course
Melissa Akemi Nishioka	Bar Admission Course
Tara Leigh Parker	Bar Admission Course
Janet Elizabeth Preston	Bar Admission Course
Howard Aaron Rusak	Bar Admission Course
Marko Sekulic	Bar Admission Course
Paltu Kumar Sikder	Bar Admission Course
Indira Jane Guha Singleton	Bar Admission Course
Elizabeth Faye Stamp	Bar Admission Course
Dominic Bernard Gingras	Transfer, Province of Quebec
Vivian Eseoghene Rerri	Transfer, Province of Saskatchewan
Andrea Elizabeth Walden	Transfer, Province of Alberta

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REPORT OF THE ADMISSIONS COMMITTEE

The Report of the Admissions Committee was stood down.

REPORT OF THE FINANCE AND AUDIT COMMITTEE

Mr. Crowe presented the Finance and Audit Committee Report for Convocation's approval.

Finance and Audit Committee
June 7, 2001

Report to Convocation

Purpose of Report: Decision
 Information

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on June 7, 2001. Committee members in attendance were: Krishna V. (c), Crowe M. (vc), Swaye G. (vc), Chahbar A., Epstein S., Porter J., Puccini H., White D., Wilson R., Wright B.. Staff in attendance were Tysall W., Grady F., White R., Cawse A..

2. The Committee is reporting on the following matters:

Decision

- Bylaw 15, Annual Fees
- J. Shirley Denison Fund - Confidential

FOR DECISION

BY-LAW 15, ANNUAL FEES

Background

3. The new Bar Admission Course, which commenced in 2001, will culminate in major call to the bar ceremonies in September 2002. By-law 15, which regulates the imposition and proration of annual fees on members, is orientated to the timing of the old BAC. The final old BAC will conclude with major call to the bar ceremonies at the traditional time in February 2002. Amendments to By-law 15 are recommended to accommodate the changes brought about by the new BAC model.
4. Subsection 11 of By-law 15 currently provides that student members admitted at any time in the first quarter of a year shall pay membership fees for the first calendar year of admittance as if they were admitted on March 31, with payment due on April 1. Persons called in the last three quarters of the year do not receive the one month exemption and By-law 15 prorates membership fees on a monthly basis for the first year of admission for all these members. According to By-law 15, all members have 120 days from when the fee is due, before suspension for non-payment can be imposed.

Recommendation

5. The Committee recommends that By-law 15 be amended so that all new members shall pay membership fees for the first calendar year of admittance as if they were admitted on the last day of the month following their call to the bar, with payment due on the day following the date of admittance. For example, members called in September, will be treated as if called on October 31, with fees due on November 1.
6. This is consistent with current provisions for the major call to the bar ceremonies, and in the interests of equity, consistency, and administrative simplicity extends the one month of free membership to all new calls to the bar. It is also the most appropriate timing for the logistics of issuing bills to new calls. It should be noted that the wording of the current by-law differentiates between students called to the bar and other numerically nominal categories such as transfers and academic calls. The amended by-law intends to end this differentiation.
7. The primary reason for the billing delay is the logistics of completing a mass billing, which will provide adequate notice to the new calls, and not complicate any subsequent administrative suspension procedures. The Education department also favours the delay as it assists new calls who may not be receiving income in the period immediately after commencing practice.

Financial Implications

8. The net financial effect of the proposed by-law in 2002 would be a reduction in revenues of \$30,000, which represents the one month grace period which will be extended to those persons not called at the major call to the bar ceremonies, but at other times of the year.

Alternative Options

9. The alternative timing options for the by-law would be to maintain the provisions of the existing by-law, or include an amendment treating calls to the bar in September 2002 as if they were called on November 30 or December 31, 2002. Each months delay reduces revenue by \$163,000 based on 1,100 students at the 2001 annual fee of \$1,782.

LPIC

10. It has been LPIC's practice to issue their premium billings to new calls on the same basis and timing as the Law Society's membership billings. LPIC have expressed a preference for treating September 2002 calls to the bar as if they were called on December 31, 2002, i.e. a fee holiday of up to three months.

2003

11. 2002 is a transition year between the two BAC models. The Admissions Committee report to Convocation in June 2001 recommends that the major call to the bar ceremonies be held in July for the 2003 year. The envisaged by-law would be applicable and consistent for any call to the bar dates in 2002, 2003 and thereafter.
12. The Finance and Audit Committee recommends that Convocation initiate amendments to By-law 15 so that an exemption from member fees is provided to all members in the month following their call to the bar, so that:
- A person who is admitted as a member shall pay, in respect of the year in which he or she is admitted as a member, the amount of an annual fee payable by a person admitted as a member on the last day of the month following the month of call;
 - Payment of an annual fee by a member in respect of the year in which he or she is admitted as a member, is due on the first day of the month following the month in which the person is admitted as a member.
13. A copy of the existing By-law 15 on annual fees, and an extract of the relevant sections of *The Law Society Act*, is attached from page 4.

J. SHIRLEY DENISON FUND - CONFIDENTIAL

14. A memorandum addressing two applications for grants from the J. Shirley Denison Fund, is attached from page 10, along with the applications.
15. The Finance and Audit Committee requests that Convocation approve the Committee recommendations on the two grants.

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

A copy of the existing By-law 15 on annual fees and an extract of the relevant sections of *The Law Society Act*.
(pages 4 - 9)

Re: Amendment to By-Law 15 - Annual Fees

It was moved by Mr. Crowe, seconded by Mr. Swaye that amendments be made to By-law 15 so that an exemption from member fees is provided to all members in the month following their call to the bar, so that:

- A person who is admitted as a member shall pay, in respect of the year in which he or she is admitted as a member, the amount of an annual fee payable by a person admitted as a member on the last day of the month following the month of call;
- Payment of an annual fee by a member in respect of the year in which he or she is admitted as a member, is due on the first day of the month following the month in which the person is admitted as a member.

Carried

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

The Report of the Professional Regulation Committee was stood down until after the Equity and Aboriginal Issues Committee Report.

REPORT OF THE STRATEGIC PLANNING COMMITTEE

Mr. MacKenzie presented the Report of the Strategic Planning Committee for information only.

Strategic Planning Committee
June 22, 2001

Report to Convocation

Purpose of Report: Information

Prepared by the Policy and Legal Affairs Department

REPORT OF THE STRATEGIC PLANNING COMMITTEE

1. Since its last report to Convocation on January 25, 2001, the Strategic Planning Committee has met twice - on April 23 and June 5, 2001 - to consider the following three outstanding matters:
 - a. proposed rules of procedure for Convocation, which will be contained in an amended by-law 8;
 - b. amended Governance Policies, with revisions to the Executive Limitations and Ends policies; and
 - c. a plan to assist sole practitioners and small law firms to provide access to legal services for individuals and small businesses.
2. The Committee wishes to inform Convocation of its progress on these matters, through this report, prior to the conclusion of the current term of Convocation.
3. The Committee has considered, in detail, two different versions of a set of rules of procedure to govern Convocation's processes. A further amended version is being drafted by staff, incorporating the Committee's most recent suggestions. This version will be considered by the Committee at its next meeting.
4. The Committee has also considered an amended set of Governance Policies, which includes a revised set of Executive Limitations, and new Ends policies reflective of current Convocation policy. The Committee will consider the Governance Policies in further detail, at its next meeting.
5. Once the current term of Convocation expires, the co-chairs of the Committee will discuss the most efficient means of completing the Committee's work with the newly-elected Treasurer. The Committee wishes to ensure that the enormous amount of work that has gone into the development of the rules of procedure for Convocation and the Governance Policies not be lost, and that Convocation work with the Chief Executive Officer to develop a plan for sole practitioners and small law firms.

MOTION - APPOINTMENT TO LIBRARYCO INC.

It was moved by Ms. Elliott, seconded by Mr. T. Ducharme that Gregory Mulligan be appointed Chair of LibraryCo Inc.

Carried

REPORT OF THE EQUITY AND ABORIGINAL ISSUES COMMITTEE

Ms. Potter presented the Report of the Equity and Aboriginal Issues Committee for Convocation's approval.

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

Report to Convocation

Purpose: Decision-Making
Information

Prepared by the Equity Initiatives Department

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TERMS OF REFERENCE/COMMITTEE PROCESS

The Committee met on Thursday, June 7, 2001 from 7 - 9:30 p.m. in the Small Dining Room. In attendance were: Paul Copeland (chair), Judith Potter (vice-chair), George Hunter (vice-chair), Leonard Braithwaite, Heather Ross, Stephen Bindman, Sanda Rogers, Susan Opler (non-bencher), Andrew Pinto (non-bencher), Jeff Hewitt (non-bencher) and Hellene Puccini (guest).

Staff present included: Charles Smith, Bob Bernhardt, Roman Woloszczuk, Rachel Osborne, Julia Bass, Margaret Froh, Geneva Yee.

The meeting was chaired by Paul Copeland and the items listed below have been brought forward for Convocation for decision-making and information.

For Decision-Making:

REVIEW OF THE DISCRIMINATION/HARASSMENT COUNSEL PROGRAM

For Information purposes:

ISSUES CONCERNING RESIDENTIAL SCHOOL LITIGATION

CONNECTING COMMUNITIES WITH COUNSEL

FOR CONVOCAION DECISION-MAKING

REVIEW OF THE DISCRIMINATION AND HARASSMENT COUNSEL PROGRAM

1. In the fall of 1998, as part of the *ADR Systems Review Report*, Convocation approved the establishment of a Discrimination and Harassment Ombudsperson (now called Discrimination/Harassment Counsel)¹. The purpose of this position was to "...ensure that members of the public and members of the legal profession who experience harassment or discrimination either in their workplace or as a result of contact with lawyers ... have access to the assistance of a knowledgeable resource person who can offer information and advice, and (if all parties are willing) act to resolve the complaint in an informal way. The ombudsperson is not intended to replace, and does not replace, other avenues of resource"².

2. To develop this further, the Equity Advisor was assigned the task of designing a job description and recruiting for this position³. As a result of this activity, in June, 1999, Convocation adopted a submission from the Treasurer's Equity Advisory Group entitled *Report on the Establishment of the Discrimination and Harassment Counsel*. This report set out the parameters for the position and, upon the recommendation of the Finance and Audit Committee, \$60,000.00 was provided to support the position on a fee-for-services basis for the first half-year of its existence. These funds were increased to \$132,000.00 in 2000, the program's first full year of operation, and reduced to \$100,000.00 for the current year.

1

The establishment of such a position was first cited in the *Bicentennial Report on Equity Issues in the Legal Profession*, at 33, paragraph 102.

2

See submission to Convocation by the Treasurer's Equity Advisory Group, *Report on the Establishment of the Law Society of Upper Canada Discrimination/Harassment Ombudsperson*, Appendix 2 'A', p.1, June 1999.

3

The recruitment was done in the winter, 1999, and resulted in 86 applications for the position. Several reports on this matter were submitted by the Treasurer's Equity Advisory Group to inform Convocation on the purpose and process of the recruitment activities. A number of benchers also participated in the interviews for the position.

3. As approved by Convocation, the Discrimination/Harassment Counsel (DHC) was set-up as a pilot program to carry out the following functions:

- a) publicize and promote the program in partnership with the Law Society's Equity Initiatives Department and Communications Department;
- b) provide services to individuals who allege that they have been harassed or discriminated against by a lawyer; and
- c) coordinate education and training within law firms⁴.

4. To assist individuals who have complaints about being discriminated against or harassed by a lawyer or within a law firm, the DHC's services include:

- ▶ *Intake* - receiving complaints of discrimination and/or harassment by lawyers or within law firms.
- ▶ *Support to complainants* - making referrals to other resources, assisting with the drafting of complaints and, upon request, accompanying complainants throughout a complaints process either with the Law Society, a law firm or the Ontario Human Rights Commission.
- ▶ *Mediation* - in appropriate cases, where both parties agree, offering services to allow for the informal resolution of the complaint.
- ▶ *Training and prevention* - in collaboration with the Law Society, developing and delivering workshops and seminars to educate members of the legal profession on the nature and effect of discrimination and harassment.

5. Operational in the last quarter of 1999, the DHC has since that time:

- ▶ received 582 calls requesting services. This represents calls from 469 individuals with 430 calls within the mandate and 332 of these callers disclosing allegations of discrimination and/or harassment and 66 callers requesting information. In addition, the overwhelming majority of calls are from the public;
- ▶ conducted public education and outreach with the Equity Advisor and staff of the Equity Initiatives Department⁵;
- ▶ participated in seminars and speaking engagements at the request of numerous legal and community organizations⁶;
- ▶ submitted three reports to the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones identifying progress, the volume of calls and other matters related to program development and delivery⁷.

⁴ Supra note 2 at 4-8.

⁵

At the start of the program and throughout 2000, the Equity Advisor and the Discrimination/Harassment Counsel held education sessions on the program in Sudbury, Thunder Bay, Ottawa, London, Windsor and Toronto. Articles appeared in the Ontario Gazette, in local English and French media regarding the program, and the Treasurer included the program's information brochure in a mailing announcing the new *Rules of Professional Conduct* to all members of the profession.

⁶

For example, with the Ontario Bar Assistance Program's *Women's Wellness*, with the Law Society of Upper Canada's *Women and Law in the new Millennium: Intersections between Gender, Race and Sexual Orientation*, at the 2000 LPAC Conference, with the Association of Law Clerk's, the Feminist Legal Analysis Committee of the CBA-O and others.

⁷

These reports were submitted in January, 2000, covering the first four months of the program's operations and then in July, 2000 covering the first six months of the year 2000.

6. Further, in response to requests from law firms, the DHC has participated with Equity Initiatives staff in providing education and training for lawyers on the issue of discrimination and harassment⁸.

7. In establishing the DHC, Convocation requested that the program be reviewed after one year of its operation. The purpose of the review was to assist in determining the program's effectiveness and its future implementation. Undertaken by James Management Consulting, the review conveys a strong message on the program's importance and effectiveness, noting that the DHC has been a valuable source of information and support for complainants and law firms in dealing with harassment and discrimination.

8. The information in the program review is available on request. In response to the James Management Consulting review as well as the DHC's year-end report for 2000, the purpose of this report is to identify those issues relevant to the Law Society and to recommend continuation of the DHC program. As such, this report notes the benefits of the DHC program in terms of:

- ▶ its relationship with the Law Society, particularly in referring complainants to the Law Society;
- ▶ the support provided to complainants referred to the program by Law Society staff;
- ▶ the support provided to individuals seeking information, advice and consultation on discrimination and harassment issues;
- ▶ the identification of policy issues to assist the Law Society in promoting equity and diversity in the legal profession; and
- ▶ the provision of education to members of the public and the legal profession.

Discussion:

9. The Law Society has been aware of allegations of harassment and discrimination within the legal profession for over a decade. Major reports and studies have documented and brought these issues forward⁹. In response, the Law Society has adopted numerous policy statements concerning such behaviour¹⁰. The establishment of the DHC constitutes a significant program response to these issues.

10. The DHC's year end report for 2000 indicates the rather significant demand for the DHC's services. Having received 582 calls within 14 months of operation, representing 469 individuals, with the overwhelming number of calls received within mandate and from the public, there are a number of significant issues for the Law Society to address, particularly given its mandate of governing the legal profession in the public interest. These issues relate to identifying and eliminating harassment and discrimination within the legal profession and, through this, increasing confidence

8

Such training has been delivered for Goodman's and Tory's and, recently, another law firm has expressed interest in similar training.

9

Various documents, including the CBA's *Touchstones for Change* and the Law Society of Upper Canada's *Transitions*, *Barriers and Opportunities*, as well as the various bulletins released to educate the profession on the implications of Rules 27 and 28, have clearly established the existence and persistence of harassment and discrimination within Ontario's legal profession. This has also been clearly established in the case of articling students who continue to be asked overtly sexist, racist and homophobic questions in interviews. As well, *Transitions* has identified that 70% female lawyers reported experiencing sexual harassment in the workplace and that 10% of racial minorities have experienced harassment and discrimination as well.

10

See *Bicentennial Report on Equity Issues in the Legal Profession*, Section II (D) *Policy Statements Adopted by Convocation*, pp. 14-17.

within the profession and the public on this matter. To do so will require the continuance of the DHC program, particularly in terms of how this program interfaces with the Law Society's core functions as recently adopted by Convocation in the Law Society Strategic Plan, i.e., complaints and improving diversity within the legal profession.

11. As noted above, the DHC program provides a number of services that enhance the Law Society's core functions. The two areas of the Law Society that the DHC interacts with most frequently are the Regulatory Department and the Equity Initiatives Department. In terms of the regulatory function, the DHC interfaces with the Client Services Department where complaints intake is initiated, with Investigations where complainants are interviewed and their statements taken and prepared, with Resolution and Compliance where resolution of complaints are negotiated between complainants and respondents, and with Discipline Counsel where conduct applications are heard by the Hearing Panel. The DHC interfaces with the Equity Initiatives Department which is responsible for promoting equity and diversity within the legal profession. Managing these relationships is key to improving the effectiveness of the DHC program and, in order to address this, it is critical to consider the relationship between these Law Society services and the DHC program¹¹.

Relationship with Investigations and Resolution and Compliance

12. The DHC has referred and supported complainants throughout the Law Society's investigative process and before the Hearing Panel. The DHC also has contributed to training provided by the Law Society to staff involved in the complaints process as well as to members of the legal profession in various law firms and in public forums. As such, it is critical that the DHC be familiar with the Law Society's processes for handling complaints, how they are received, sorted and addressed by staff in the Client Services Centre, Investigations Department and Resolution and Compliance. Further, the DHC needs to have up-to-date information as to the procedures of conduct applications on discrimination and harassment are presented by Discipline Counsel and adjudicated by the Hearing Panel. This is essential to the DHC's role of advising potential complainants and informing them on the procedures used in the Law Society's complaints processes.

13. The role of the DHC has been valuable in validating the Law Society's commitment to addressing discrimination and harassment. This is evident in the number of individuals directly referred to the Law Society, in the provision of information about the Law Society to some complainants and in the provision of confidential advice and support to other complainants. Additional effort to harmonize the relationship between the DHC and the Law Society's functions will serve to improve the effectiveness of the DHC in providing support to complainants, improving the Law Society's internal procedures for handling of complaints and making effective referrals to other venues for handling complaints of discrimination and harassment, eg., law firms, the courts or the Ontario Human Rights Commission.

11

To discuss this matter, the Equity Advisor met with key staff in the Client Services Department, Investigations, Resolution and Compliance, and with the Secretary. The purpose of these meetings was to discuss the findings of the DHC's year-end report and the consultant's program review with a view to developing and implementing changes in the complaints function that would enhance staff capacity to deliver services to individuals with complaints of being discriminated against and harassed by a lawyer.

14. Currently, the Investigations Department are investigating 31 files alleging sexual misconduct (26) and/or harassment/discrimination (5) by members of the profession¹². The DHC indicates that eight complainants have been referred to Investigations but there is no way of validly tracking whether or not other complainants have engaged in the Law Society's processes following discussions with the DHC.

15. While it is unclear whether or not some complainants have on their own accord contacted the Law Society, it is also unclear where such individuals would be referred once they have done so. This is because there are procedural changes being developed within the Regulatory function to ensure an appropriate response to complaints of discrimination and harassment, particularly respecting those handled by Investigations and by Resolution and Compliance.

16. In order to play an effective resource for referrals, it is imperative that the DHC be fully aware of the possible places that a complainant may be taken in by the Law Society to address matters of harassment and discrimination. This can only improve the effectiveness of the DHC in providing both timely and accurate information to complainants as well as to those seeking information. As such, this is a matter for the Law Society to clarify and to inform the DHC regarding the number of ways complaints may be dealt with by the Law Society.

12

Individuals calling the Law Society with complaints of harassment or discrimination are first taken into the system, as walk-in or over the telephone, by Client Service Representatives. These Complainants are referred to the two staff lawyers assigned to the Client Service Centre. The staff lawyers provide general information to Complainants about options, one of which is speaking to the DHC. Where a Complainant wishes to file a complaint about sexual misconduct or sexual harassment by a member, the staff lawyers refer the Complainant to the Investigations Department.

On receipt of a complaint alleging sexual misconduct or sexual harassment, and subsequent to obtaining the Secretary's authorization to investigate under Section 49.3 of *The Law Society Act*, Investigations staff conduct an interview with the complainant(s). This phase of the investigation is concluded on receiving a signed Statement from the complainant and any third party witnesses. Subsequently, the investigators meet with the member, discuss the complaint, provide the member with a copy of the written statement from the complainant(s) and seek the member's representations. The member's statement is prepared and signed. Any third party witnesses who may corroborate the member's position are interviewed and their statements are prepared and signed. On completion of the investigation, an Authorization Memorandum is prepared for review and approval by the Secretary and he forwards it to the Proceedings Authorization Committee, a panel of benchers appointed by Convocation, who determine whether the file should be prosecuted or dealt with in another manner, eg., closed or resolved through ADR.

Recently, Discipline Counsel have commenced providing advice to the Investigations Department during the course of an investigation. It is anticipated that this measure will improve the investigation work product by having Discipline Counsel advise on the sufficiency of evidence and scope of investigation required to support the recommendation made in the Authorization Memorandum. In addition to this development, the Manager of Investigations provides the Secretary with a monthly report on the status of sexual misconduct or sexual harassment investigations cases so that priorities and problem issues can be addressed in a timely fashion. The Secretary shares this report with the Chair of the Professional Regulation Committee, who currently is also the Chair of the Proceedings Authorization Committee.

17. It is also possible that the DHC may make a referral and the complainant not follow up and engage the Law Society. Such a gap in the referral process may lead to a situation wherein the DHC believes a complainant has been referred but Law Society staff having no record of the complaint. In making such referrals, it may be useful for the DHC to provide some kind of introduction, ideally through correspondence, to Investigations staff to enable the complainant to 'cut' through the system, minimizing the bureaucracy involved and providing a direct link between the DHC and Investigations staff. Such a letter of introduction can also serve to document the interaction and form part of the Investigations record of complaints. The DHC can then follow-up with Investigations to ensure that the complaint has been addressed.

18. Over the past year Law Society staff have referred approximately 33 complainants to the DHC for various reasons. However, there is no established process for the Law Society to refer matters to the DHC for support and assistance and some Law Society staff are aware of the DHC's services while others are not. Ensuring that all Law Society staff are aware of the DHC's services and the potential to refer complainants to the DHC may be important for complainants who do not wish to follow through with the Law Society's complaints processes, eg., through Investigations or Resolution and Compliance. It may be also important in arranging support services that the DHC can provide to complainants who are proceeding with their complaints through investigation and on to the Hearing Panel.

19. Referrals by the Law Society to the DHC are particularly important now that there are 12 conduct applications concerning sexual misconduct and/or harassment going before the Hearing Panel this year. In the past, individuals appearing before the Hearing Panel have requested the DHC to play a support role when the matter is being heard. This needs to continue as complainants may not be able to withstand the pressure of the full complaints process without having a 'support' person to assist them.

20. On the other hand, it can be very costly if this service is provided only by the DHC. It may also cause delays in the investigations process as a result of scheduling conflicts. It is possible that this function can be done by other centres which generally provide support to victims of sexual harassment, eg., rape crisis and women's centres, and Investigations staff have used such resources and have found them helpful and this is a matter which both the DHC and the Investigations Department should pursue.

Complainants Who Have Not Been Referred to the Law Society

21. A rather significant issue to address concerns the number of complainants handled by the DHC (332) and the much smaller number referred by the DHC to the Law Society (8). This is an enormous gap which may indicate a number of things, such as complainants having:

- a) reached some kind of resolution on their own;
- b) engaged another process to resolve their complaint, eg., the Ontario Human Rights Commission, the law firm's internal processes or a civil action;
- c) determined that they do not wish to pursue the matter further; or
- d) abandoned the matter altogether.

22. The DHC's year-end report provides no data to support any of the above possibilities. However, a number articles have explored issues of harassment and discrimination in the legal profession, particularly regarding how complainants address their concerns. These articles indicate a great reluctance on the part of complainants to come forward¹³.

23. While it is distressing that so many complainants do not wish to be referred to the Law Society, it is important to note that they are still being served by the Law Society through the DHC. This is a considerable improvement in the Law Society's services, validating Convocation's commitment to equity and diversity, and serving to enhance the image of the Law Society within the legal profession and the public. It also identifies the types of complaints coming forward and enables the Law Society to address these matters through public education, policy development and in the training and education provided to Law Society staff and within law firms.

24. It would be useful, however, to gain a better sense of the reasons complainants choose not to come forward to the Law Society with their complaints. As such, the DHC should undertake to get a better sense of these matters from complainants and to make recommendations to the Law Society on how best to address these concerns.

Education within the Law Society

25. Relevant to the Law Society, over the years the courts have treated sexual harassment as a form of sex discrimination to which human rights law is applicable¹⁴. The courts have also addressed the matter of examination of witnesses in proceedings on sexual assault¹⁵. In addressing such matters, the courts have recognized that many of these cases depend on assessing the credibility of the complainant and the respondent because of the nature of the complaint wherein there may be no witnesses or where the evidence is reliant on witness testimony¹⁶. In such instances, it is important for the court to ensure that its view of the complainant and respondent is not biased by the way they respond to questioning or by their personal histories, as far they can be divulged. It is also critical that the social context of gender or race relations be understood so that the court proceedings will be fair to both parties¹⁷.

26. The case law in this area is rather new, may not be well-known to those who do not practice in this area and may present challenges to Investigations staff in gathering evidence as well as Discipline Counsel in preparing for the Hearing Panel. It may also be a challenge to benchers involved in these processes who may not be familiar with developments in the case law concerning sexual harassment. These developments are known to the DHC who not only would inform complainants of these matters during any aspect of a Law Society proceeding but, equally, give such information in public education activities and in the provision of training to law firms. As such, it is important that the Law Society's systems be contemporary with developments in case law or there may be challenges by complainants which may compel the Law Society to do so.

of Departures from Law Firms, Law and Society Review Volume 31, Number 2 [1997], Fiona M. Kay, at.301; *Raising the Bar: The Gender Stratification of Law Firm Capital, American Sociological Review* [1998] at 728.

¹⁴ See *Robichaud and the Canadian Human Rights Commission v. The Queen (Treasury Board)*, [1987] 2 S.C.R.; also *Janzen and Govereau v. Platy Enterprises* (1989), 59 D.L.R. (4th) 352 (S.C.C.)

¹⁵ See *R. v. O'Conner*, [1996], 44 C.R. (4th)1(S.C.C.)

¹⁶ See *Bannister v. General Motors of Canada Ltd*, Ontario Court of Appeal, (August 27, 1998).

¹⁷ Reference to social context in judicial reasoning has been used in a number of cases related to gender and race, particularly in *R. v. Lavallee* [1990], 1 S.C.R., *R. v. Parks* (1993), Ontario Court of Appeal, *R. v. Wilson* (1996), Ontario Court of Appeal, and in *R.v. S (R.D.)* [1997], 3. S.C.R.. For an insightful discussion on this matter, see *The Promise of R.D.S.: Integrating the Law of Judicial Notice and Apprehension of Bias*, Professor David M. Paciocco, *Canadian Criminal Law Review*, [3 Can. Crim. L.R.], at 319, 1998. See also *Embodied Diversity and the Challenges to Law*, Professor Jennifer Nedelsky, (1997) 42 *McGill L.J.* 91; and *Redressing the Imbalances: Rethinking the Judicial Role After R.v.R.D.S.*, *Ottawa Law Review/Revue de droit d'Ottawa*, [Vol31:1, 1999-2000], Richard F, Devlin and Dianne Pothier, at 1.

27. Law Society staff have received education and training to assist them in this area of work¹⁸. Such education and training, however, should be ongoing for all staff and benchers participating in the process of handling, referring, authorizing or hearing conduct applications on complaints regarding discrimination and harassment. This will ensure that all aspects of the Law Society are working in tandem on contemporary approaches to these matters, thereby, providing confidence to complainants to come forward and participate in proceedings addressing harassment and discrimination.

28. This is particularly important given the number of complaints now proceeding to the Hearing Panel as well as the number being processed through the Investigations Department. Given the overall number of complaints within such a short period of time, the Law Society is faced with challenges in terms of demonstrating its commitments to equity and diversity. Many in the legal profession (particularly women, Aboriginal peoples, Francophones and members of equity-seeking groups) will look to the application of fairness afforded by the Law Society's processes. These members of the profession, as well as the public, will want to be assured that all of the Law Society's systems are aware of and use contemporary standards and that the notions and practice of fairness are consistent with these standards. The only way to ensure this is to require that the DHC, appropriate Law Society staff and benchers have the knowledge and understanding required to participate in such proceedings.

Relationship with the Equity Initiatives Department

29. In terms of relationships with the Equity Initiatives Department, there is potential for overlap in the provision of training and education to law firms. There is also potential for conflict of interest if the DHC is advising a client who is from a law firm wherein the DHC is providing training. In such instances, the primary purpose of the DHC, i.e., providing support to complainants, may be obscured because the DHC is unavailable due to training activities in law firms. As such, it is not advisable that the DHC be seen as the lead resource to the profession on education and training as these services can be better handled by the Equity Initiatives Department and its *Equity and Diversity Training Program*.

30. Two other matters relating to the relationship between the DHC and the Equity Initiatives Department include public education and identification of policy issues based on the DHC's work. These matters require no significant adjustment. It is, however, incumbent on the Equity Initiatives Department to probe some of the issues emerging from the DHC reports which have been submitted to date, particularly as they relate to incidences of harassment and discrimination articulated by women and by members of the public.

Program Costs

31. The budget for the DHC program forms part of the Equity Initiatives Department overall program spending. The annual budget for the program has been: in 1999, \$60,000.00; in 2000, \$132,000.00; and in 2001, \$100,000.00. These funds are primarily to support the direct services provided by the DHC who charges on a fee-for-services basis at \$175.00 per hour. The 2000 budget included costs for program promotion, including development of brochures and public education sessions across the province. The reduced funding in the current year's budget is for direct services only.

32. In the previous years, the program has kept within its allocated budget and, in the current year, the funding is being monitored on a monthly basis to ensure the program's services are available throughout the year.

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The Investigations Department has established a staff team to lead investigations on this matter. Discipline Counsel has established a lead counsel to take cases directly, conduct research, coordinate education and training on this matter for all counsel and support other counsel taking on sexual harassment cases. It must be noted however, that the Proceedings Authorization Committee has considered these developments as well.

Conclusion and Recommendations:

33. The discussions with Law Society staff coordinated by the Equity Advisor point to the important role played by the DHC program and the need to continue the program in the future. However, it has also been noted that to increase the effectiveness of the program, it is essential to rationalize the the program, particularly to clarify that:

- a) the DHC provides services to those who do not wish to approach the Law Society and is, therefore, a 'last resort'; and
- b) the DHC's role is primarily directed to supporting complainants. This does not mean that the DHC cannot work on other functions but, rather, places greater onus on the Law Society to ensure its full-time resources are engaged in the areas of work the DHC is mandated to provide. Again, this reinforces that the DHC program is a 'last resort'.

34. However, before this can be achieved, a number of questions require consideration. These are:

- ▶ should the DHC program continue?
- ▶ if it does not continue, how should it be shut down, including communications to complainants, the profession and public? transfer of files and functions?
- ▶ if the program is to continue, what should the parameters of program include, particularly in relation to the Law Society's regulatory and equity functions (eg, a resource of 'last resort' for complainants and provision of training for members of the profession as well as role in public education?);
- ▶ if the program continues, how should the Law Society address issues of confidentiality provided by the DHC in terms of the provision of services to complainants?
- ▶ what funding should be set aside for the DHC and should the current fee-for-services payment scheme be continued?

35. At its May 8, 2001 meeting, having reviewed the materials and following discussions and questions, the Committee requested additional information from the DHC regarding the following matters:

- ▶ the total number of calls received within the last six months that are within mandate, involve a specific complaint requesting services v. information;
- ▶ a running total and a total within the last six months of the breakdown by nature of complaints by category as well as the complainants that are lawyers (male/female) and non-lawyers (male/females);
- ▶ the number of complaints that result in 'opening a file' including a breakdown as the previous point and an indication of what has happened to the these complainants;
- ▶ the number of complaints dealing with personal harassment and how they fit within the program's mandate;
- ▶ the number of complaints resolved and a breakdown of these complaints by type, gender, lawyer v. non-lawyer, closed v. open files; and
- ▶ the time commitment/cost for ongoing (open) files.

36. *The response to these questions are included in Appendix "A". Having reviewed the above questions and the additional information provided by the DHC, the Committee recommends that Convocation consider:*

- ▶ *establishing the Discrimination/Harassment Counsel program on a permanent basis, with an evaluation to take place following three years of operation; and*
- ▶ *continuing the program at current funding levels (\$100,000.00 per year) and on a fee-for-services basis at an hourly rate not to exceed \$175.00.*

FOR INFORMATION

UPDATE ON ABORIGINAL ISSUES

37. The report on *Application of the Rules of Professional Conduct in Aboriginal Residential School and Childhood Institutional Abuse Cases* has also submitted for consideration by the Professional Regulation Committee and has been prepared by the Aboriginal Issues Coordinator in consultation with staff of the Policy Secretariat. The report identifies several issues concerning the treatment of Aboriginal peoples in residential schools and other institutions, the resulting litigation to address complaints by survivors of abuse within these institutions, the manner of attaining legal counsel by these survivors and the implications this has for the legal profession, particularly respecting the conduct of lawyers and what may constitute a violation of the *Rules of Professional Conduct*.

38. While asserting that the *Rules of Professional Conduct* are clear regarding conduct of lawyers in these cases, the report identifies a number of issues regarding how well the *Rules* known by Aboriginal peoples, trust factors between Aboriginal peoples and the Law Society, the appropriate handling of complaints alleging lawyer misconduct in these cases, and the training and education of staff and benchers investigating, prosecuting or hearing these cases.

39. The report also identifies anecdotal reports from Aboriginal peoples regarding lawyer misconduct. In addition, there are several recommendations on this matter pertaining to law societies that have been adopted by the Law Commission of Canada, the Assembly of First Nations and the Canadian Bar Association. To date, the Law Society of Upper Canada has not considered these recommendations.

40. Further, Rotiio' ta-ties is conducting consultations with the Aboriginal community over the next several months on this matter. It is anticipated that this group will bring a report to Committee on its findings in the fall or winter of this year.

41. To facilitate addressing the concerns raised in this report, there are several options noted by staff and both Committees have directed staff of the Equity Initiatives Department and Policy Secretariat to begin work over the summer months to:

- ▶ prioritize the recommendations contained in this report;
- ▶ consult with Rotiio' ta-ties on this report to seek their input; and
- ▶ meet with the Committee chairs following their appointment by the incoming Treasurer to prepare a report back in September to a joint meeting of the Committees to address recommendations for Convocation.

CONNECTING COMMUNITIES WITH COUNSEL

42. This report provides an update on the development of Connecting Communities with Counsel (CCWC). CCWC is a partnership between the Law Society and various community based organizations seeking to encourage and enable members of the legal profession to take on individual equality rights cases on a pro bono basis. Members of the Steering Committee include representatives from the League for Human Rights, B'nai Brith Canada, the Urban Alliance on Race Relations, the African Canadian Legal Clinic, the Chinese Canadian National Council, the Coalition of Agencies Serving South Asians, the Aboriginal Legal Services of Toronto, Barbara Schlifer Commemorative Clinic, Oasis Centre des Femmes, Bloor Information and Life Skills Centre, the 519 Church Street Community Centre, the Ontario Council of Agencies Serving Immigrants and MIDAYNTA/Association of Somali Service Agencies.

43. CCWC has been successful in attracting community-based agencies to work with it and is now beginning to match lawyers with clients of these agencies. To facilitate this process, the CCWC has drafted an orientation binder with key information for lawyer and client intake. CCWC has also drafted education and learning materials in specific areas of administrative law for lawyers. Further, CCWC has held orientation meetings with community and lawyer groups in Toronto and Ottawa.

44. Currently, the Project Coordinator is conducting outreach to the legal profession to attract more lawyers to undertake pro bono work on behalf of individuals who have equality rights cases, are not eligible for legal aid and cannot afford legal counsel.

45. The Committee also received a copy of a speech by Justice Minister Anne McClellan to students at the University of Windsor Law School in which the Minister positively cites the CCWC program.

46. In bringing this forward, the Committee wish to inform Convocation on the progress in developing CCWC and encourage members of Convocation to become involved either directly or by encouraging their firms to support CCWC. This can be done through contacting the Equity Advisor who will bring the matter forward to the Project Coordinator.

APPENDICES

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MEMORANDUM

TO: Equity and Aboriginal Issues Committee

DATE: June 1, 2001

RE: Follow-up to Presentation of the *Discrimination & Harassment Counsel* Report, July to December 2000

Further to the presentation of my July - December 2000 Report at your May 9th Committee Meeting, I am pleased to provide you with the following information which you requested. I trust you will find this information helpful.

The information has been organized into four sections to compare two time periods: the last 6 month reporting period (July to December 2000) and the running totals for the first 14 months of the Program (November 1999 to December 2000). The only exception is in Part C, *Open Files* where all files currently open have been included, even files opened after December 31, 2000.

The sections are as follows:

Comparative Analysis of the Calls

November 1999 - December 2000

July - December 2000

Overview of Specific Complaints

November 1999 - December 2000

July - December 2000

Overview of Open Files

November 1999 - December 2000

July - December 2000

Services Requested

November 1999 - December 2000

July - December 2000

Overview of Closed Files

November 1999 - December 2000

COMPARATIVE ANALYSIS OF THE CALLS

Total # of calls, Nov. 99 - Dec. 00:	582
Total # of calls, July - Dec 00:	240
Total # callers w/in mandate, Nov. 99 - Dec.00:	332
Total # callers w/in mandate, July - Dec 00 ¹⁹ :	127
Total # of files opened, Nov. 99 - Dec. 00 ²⁰ :	39
Total # of files opened, July - Dec.00:	22
Total # of new complaints, Nov. 99 - Dec.00 ²¹ :	70
Total # of information requests, Nov.99 - Dec.00 ²² :	56
Total # of new complaints, July - Dec. 00:	35
Total # of information requests, July - Dec. 00:	16

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This figure is an estimate based on 81% of the total number of individuals calling the Program, since 81% of all calls were within the mandate. (81% x 157 individual callers = 127)

20

The decision to open files is a subjective one based on whether there will be ongoing contact with a caller requiring a file to be maintained. As such, this figure is not indicative of the number of matters dealt with under the mandate. Instead, reference should be made to the total number of calls within the mandate for the first 14 months of the Program (582 from November 99 to December 2000) and the total number of calls within the mandate during the six month period of my most recent report (240 from July to December 2000).

21

This number refers to the number of individuals calling with a complaint within the mandate.

22

This figure refers to those calls where the only service requested was information, such as providing a copy of the *Rules of Professional Conduct* or a Model Policy.

OVERVIEW OF SPECIFIC COMPLAINTS

November 1999 - December 2000

The information provided below is based on the number of new complaints raised from November 1999 to December 2000, as opposed to the number of calls received regarding a particular issue. Calls relating to administrative matters, whether the matter was within the mandate or not, have been excluded.

Overall, in the first 14 months of the Program, 582 calls were received. Of these calls, 430 were within the Program's mandate.

The 582 calls were generated by 469 individuals. Three hundred and thirty-two (332) individuals called with matters related to the Program's mandate. One hundred and thirty nine (139) calls addressed new matters within the mandate. Sixty eight (68) calls were outside the mandate.

Of the 139 calls on new matters, 70 were complaints, 56 were requests for information only, and 13 were requests for seminars and/or training.

a. Sexual Harassment: 39

Public Female: 25

Public Male: 2

Female Lawyer: 11

Male Lawyer: 1

b. Personal Harassment²³: 13

Public Female: 10

Public Male: 1

Female Lawyer: 2

Male Lawyer: 0

c. Discrimination on the basis of disability: 7

Public Female: 3

Public Male: 0

Female Lawyer: 2

Male Lawyer: 1

Unknown²⁴: 1

23

Personal Harassment is not defined in the *Ontario Human Rights Code* or the *Canadian Human Rights Code*. However, it is often included in internal policies both in law firms and other organizations. It is included in the Law Society's own internal *Workplace Harassment and Discrimination Prevention Policy and Procedures*. The term is used to identify behaviour that is physically and/or verbally abusive, demeaning, or degrading. The most common type of personal harassment is bullying, either by a supervisor or a co-worker.

24

This complaint was made by a third party who declined to identify the actual caller in any way.

d. Discrimination on the basis of Race: 5

Public Female: 3
Public Male: 0
Female Lawyer: 1
Male Lawyer: 1

e. Discrimination on the basis of Age: 4

Public Female: 1
Public Male: 0
Female Lawyer: 1
Male Lawyer: 2

f. Discrimination on the basis of Sexual Orientation: 1

Public Female: 0
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

g. Systemic Discrimination (Racial): 1²⁵

Public Female: 0
Public Male: 1
Female Lawyer: 0
Male Lawyer: 1

h. Requests for Information Only: 56

Public Female: 21
Public Male: 9
Female Lawyer: 17
Male Lawyer: 9

i. Requests for Seminars/Training: 13

Public Female: 7
Public Male: 0
Female Lawyer: 6
Male Lawyer: 1

j. Matters Outside the Mandate: 68

Public Female: 30
Public Male: 36
Female Lawyer: 0
Male Lawyer: 2

July - December 2000

The information provided below is based on the number of new complaints raised from July 1 to December 31, 2000, as opposed to the number of calls received regarding a particular issue. Calls relating to administrative matters, whether the matter was within the mandate or not, have not been included.

Of the 240 calls received during this period, approximately 195 (81%) were within the mandate, and 60 dealt with new matters within the mandate. Twenty-nine calls were outside the mandate.

Of the 60 calls on new matters within the mandate, 35 were complaints, 16 were for information only, and 9 were requests for seminars and/or training.

a. Sexual Harassment: 29

Public Female: 17

Public Male: 1

Female Lawyer²⁶ 9

Male Lawyer: 2

b. Personal Harassment: 9

Public Female: 7

Public Male: 1

Female Lawyer: 1

Male Lawyer: 0

c. Discrimination on the basis of Disability: 4

Public Female: 0

Public Male: 0

Female Lawyer: 2

Male Lawyer: 2

d. Discrimination on the basis of Race: 1

Public Female: 1

Public Male: 0

Female Lawyer: 0

Male Lawyer: 0

e. Discrimination on the basis of Age: 2

Public Female: 0

Public Male: 0

Female Lawyer: 1

Male Lawyer: 1

²⁶Law students and articling students are included in the female lawyer and male lawyer categories.

f. Requests for Information Only: 16

Public Female: 7

Public Male: 2

Female Lawyer: 4

Male Lawyer: 3

g. Requests for Seminars/Training: 9

Public Female: 4

Public Male: 0

Female Lawyer: 4

Male Lawyer: 1

h. Matters Outside the Mandate: 29

Public Female: 13

Public Male: 14

Female Lawyer: 0

Male Lawyer: 2

OVERVIEW OF OPEN FILES

November 1999 - December 2000

The following is an overview of all the files which are currently open. Included in these numbers are all open files, irrespective of when they were opened, even if they were opened after December 31, 2000.

Currently there are 34 open files broken down as follows by type of complaint and complainant:

a. Sexual Harassment: 22

Public Female: 13

Public Male: 0

Female Lawyer: 8

Male Lawyer: 1

b. Personal Harassment: 5

Public Female: 2

Public Male: 0

Female Lawyer: 3

Male Lawyer: 0

c. Discrimination on the basis of Disability: 3

Public Female: 0

Public Male: 1

Female Lawyer: 1

Male Lawyer: 1

d. Discrimination on the Basis of Race: 1

Public Female: 0
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

e. Discrimination on the Basis of Age: 2

Public Female: 0
Public Male: 0
Female Lawyer: 1
Male Lawyer: 1

f. Discrimination on the Basis of Sexual Orientation: 1

Public Female: 0
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

The following is an estimate of the projected costs of the open files in terms of the amount of time it is anticipated that they will require:

1-5 hours: 20
6-10 hours: 4
10 hours or more: 10

Please note, a small number of files exceed 10 hours. For example, I have been providing ongoing support to 4 complainants in the Discipline Hearing for Wayne Buck currently in progress. The time spent at the hearing itself during the month of May was 24 hours. This time does not include time spent with the complainants before the hearing or my travel time to and from the hearing.

Obviously this is not an expense that the Program can afford on an ongoing basis. Efforts are therefore underway to work in collaboration with Rape Crisis Centre volunteers and others with appropriate training to provide these support services at no cost to the Law Society.

July - December 2000

Calls that resulted in files have been included in the statistics provided under Section B, above, Overview of Specific Complaints. During this period 22 files were opened as follows:

a. Sexual Harassment: 18

Public Female: 12
Public Male: 0
Female Lawyer: 4
Male Lawyer²⁷: 2

27

Both male lawyers who reported sexual harassment complaints were raising issues that affected either other women at their firm or women in general. Neither involved a complaint where the lawyer himself had been subjected to sexual

b. Personal Harassment: 2

Public Female: 1
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

c. Discrimination on the basis of Disability: 1

Public Female: 0
Public Male: 1
Female Lawyer: 0
Male Lawyer: 0

4. OVERVIEW OF SERVICES REQUESTED²⁸

November 1999 - December 2000

a. Information and Advice: 65

Public Female: 38
Public Male: 3
Female Lawyer: 17
Male Lawyer: 7

b. Coaching: 25

Public Female: 12
Public Male: 0
Female Lawyer: 11
Male Lawyer: 2

c. Support: 30

Public Female: 16
Public Male: 0
Female Lawyer: 11
Male Lawyer: 3

harassment. This contrasts with the complaints reported by women (both lawyers and non-lawyers) who were all the victims of the sexually harassing behaviour.

28

This information has been included instead of the requested information regarding outcomes as is impossible to know the outcomes. In reviewing the intake forms, many callers asked for information and advice with no further contact. In some instances, efforts to make follow-up contact were unsuccessful due to telephone and address changes.

It may be helpful to know that of the 70 complaints, DHC support through the Law Society's internal complaint process has been requested in 8 matters, one involving multiple callers. Others may have proceeded with Law Society complaints and not requested DHC support. To date, and to the best of my knowledge, none of the complaints have been resolved.

d. Mediation: 1
Public Female: 0
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

July - December 2000

The following services were requested both for file-related matters and non-file matters. Please note, most callers requested more than one service, for example advice and coaching or advice, coaching and ongoing support. All requested services have been tracked and reveal the following results:

Information and Advice: 39
Public Female: 22
Public Male: 2
Female Lawyer: 12
Male Lawyer: 3

b. Coaching: 14
Public Female: 6
Public Male: 0
Female Lawyer: 12
Male Lawyer: 3

c. Support: 15
Public Female: 9
Public Male: 0
Female Lawyer: 6
Male Lawyer: 0

d. Mediation: 1
Public Female: 0
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

OVERVIEW OF CLOSED FILES

November 1999 - December 2000

As set out in my most recent Report, as of December 31, 2000 10 files have been closed. Below is a breakdown of these files by both type of complaint and complainant. One file involved an allegation of both sexual harassment and discrimination on the basis of race. This file has been tracked under both categories.

a. Sexual Harassment: 5
Public Female: 3
Public Male: 0
Female Lawyer: 1
Male Lawyer: 1

b. Personal Harassment: 2

Public Female: 1
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

c. Discrimination on the basis of Disability: 2

Public Female: 1
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

d. Discrimination on the basis of Race: 2

Public Female: 1
Public Male: 0
Female Lawyer: 1
Male Lawyer: 0

CONCLUSION

Thank you for your time and attention to this Memorandum. If you have any questions, please do not hesitate to contact me.

DISCRIMINATION & HARASSMENT Counsel program
SEMI-ANNUAL REPORT:
JULY 1, 2000 - DECEMBER 31, 2000

Submitted to
THE LAW SOCIETY OF UPPER CANADA

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EXECUTIVE SUMMARY

The DHC Program was established by the Law Society of Upper Canada as a part-time pilot project in June 1999. It was created in response to a report submitted to Convocation by both the Finance and Audit Committee and the Treasurer's Equity Advisory Group based on a proposal developed by the Equity Advisor to implement the recommendations from the *Bicentennial Report on Equity Issues in the Legal Profession*. The recommendations from the Bicentennial Report were based on the *Transitions* and *Barriers and Opportunities* Reports where 70% of the women lawyers who responded to the survey stated that they had been sexually harassed and/or discriminated against by a member of the profession. The purpose of the DHC Program is to help stop discrimination and harassment by lawyers and within law firms.

This report covers the activities of the Discrimination & Harassment Counsel (DHC) Program from July 1, 2000 to December 31, 2000 as follows:

Direct Services

- ▶ Overview of Calls
- ▶ Complaints
- ▶ Number and Type
- ▶ Resolution
- ▶ Costs
- ▶ Trends

Promotion and Publicity

Confidentiality

Conclusion

From July 1, 2000 to December 31, 2000, I received approximately 40 calls per month for a total of 240 calls. July was the most intense month with 70 calls. Of these calls, 15% or 30 in total (5 calls per month on average) represent repeat calls on the same matter.

Of the 240 calls, 81% were within the mandate of the DHC Program with the caller either requesting information about the Program or wanting to discuss a complaint of discrimination or harassment. This is consistent with my last report where 81% of the calls were also within the mandate. Since September 1999 when the Program was first advertised, I have received 582 calls, three-quarters of which were within the mandate.

From January 1, 2000 to December 31, 2000, 38 files were opened regarding complaints, 22 of these files were opened during this reporting period. Of the 38 files, 28 are still active and 10 have been closed.. Based on an analysis of the 10 complaints completed to date, the average cost per complaint is roughly \$700 plus GST for a total of \$749.00. This figure refers to the cost of services provided and does not include disbursements.

The percentage of calls outside the mandate has dropped dramatically and remains consistent at 19%.

(see Figure A. in Convocation file)

The average time for calls outside the mandate is still 10 minutes per call. This means that approximately 7 hours of intake time was spent on these calls in this reporting period for a total cost of less than \$1,300.00.

Figure A compares the calls received during the three reporting periods and illustrates the dramatic and consistent increase of calls within the mandate.

Figure A. Comparison of Calls from all three reporting periods
 Report #1: September - December 1999
 Report #2: January - June 2000
 Report #3: July - December 2000

DIRECT SERVICES

Overview of Calls

From July 1, 2000 to December 31, 2000 I received 240 calls. Of these calls, 195 fall within the mandate of the Program. This figure refers to all calls from people with either a specific complaint requesting direct services, or requests for information about the Program. The monthly breakdown of calls is as follows:

<u>Month</u>	<u>Total Calls</u>	<u>Calls w/i Mandate</u>	<u>Calls o/s Mandate</u>
July	70	52	18
August	20	14	6
September	35	31	4
October	29	28	1
November	53	42	11
December	33	28	5
<u>Totals</u>	240	195	45

It should be noted that these figures refer to the number of calls received, not the number of individuals calling. In some instances, particularly where the caller requires ongoing assistance, one person generated several calls. Also, these figures do not refer to the number of outgoing calls made by the DHC in relation to matters within the DHC mandate. Figure B, below, illustrates the gender breakdown of calls received for all three reporting periods.

Figure B. Breakdown of Calls by Gender and Reporting Period

(see Figure B. in Convocation file)

Although the telephone remains the most popular method of contacting the Program, there has been an increase in the number of people contacting the Program through e-mail.

Intake continues to be done on Tuesdays and Fridays. The DHC voice-mail is checked daily with call backs scheduled on the next available intake day, usually within 2 days of the original call. The average time for calls within the mandate is still 45 minutes .

Total number of calls received: 240
 Total number of individual callers: 157
 Total number of female callers: 117
 Total number of male callers: 40

Total number of calls from members from the profession (lawyers, law students): 39

a. F 25
 b. M 14

Total number of calls from the public: 201

a. F 147
 b. M 54

Figure C: Comparison of Lawyer/Non-Lawyers Within the Mandate

Blue: Female Lawyers
 Red: Female Non-Lawyers

 Yellow: Male Lawyers
 Blue: Male Non-Lawyers

(see Figure C. in Convocation file)

Complaints

m) Number and Type

During this reporting period I have opened 22 files regarding the following types of complaints broken down by gender:

- a. sexual harassment
 - F 16
 - M 2
- b. personal harassment (by lawyer/within law firm)
 - F 2
 - M 0
- discrimination - disability
 - F 0
 - M 1
- n) systemic discrimination - race
 - F 0
 - M 1

Figure D. Comparison of Complaints between Reporting Periods

(see Figure D. in Convocation file)

ii. Resolution of Complaints

Complainants typically request one or more of the following services:

Information and Advice: including what resources are available resources, copies of LSUC materials, reviewing a firm's existing policies and procedures and recommending changes.

Coaching: including tips on how to handle the problem, who to approach, strategies, and possible responses.

Support: including ongoing contact through an external resolution process (usually a LSUC complaint) and/or attendance at the hearing..

Mediation: including negotiations with both parties to achieve as satisfactory result.

All of the complainants request information and advice on their particular problem. Some are satisfied with this and indicate that they wish to proceed on their own. Others request coaching in the form of tips and strategies on how to deal with the problem. These complainants utilize the DHC as a sounding board.

A significant number of complainants either decide to file a complaint with the Law Society or have already done so. These complainants request support through the process and accompaniment to the actual hearing.

Although requests for mediation continue to be received, only one mediation has taken place to date. Often the respondent retains counsel and the parties either cannot agree on mediation or they choose another mediator.

In this reporting period, mediation was successfully introduced at a small law firm where the lawyer complaining of the sexual harassment had quit her job. Through the mediation the parties agreed that the law firm would establish a Harassment Policy and Complaints Procedure, post information on the DHC Program and schedule mandatory meetings with the DHC to discuss the policy and the complaints procedures. Through these meetings I met with all members of the firm. Subsequent follow up suggests that the problem has been eradicated.

During this reporting period I have closed 10 files. The resolutions in these files were as follows:

Advice and Information:	3
Coaching:	2
Support:	5

Of the coaching requests, both involved lawyers who were able to resolve their complaints on their own.

Of the 5 requests for support, three involved complaints to the Law Society which have now been resolved. One involved a civil law suit which has been settled. One involved a complaint to the Ontario Human Rights Commission. This complainant has now decided to proceed on her own. One involved a complaint about the Law Society's practices. This complaint has since been abandoned by the complainant.

iii. Cost of Complaints

Based on the current available date which represents an extremely small sampling, on average, each complaint costs \$700.00 plus \$49.00 GST for a total of \$749.00 in fees per complaint. This figure does not include disbursements.

This calculation is based on an analysis of the 10 files closed to date. The time spent on each matter was estimated, totalled, and then divided by the number of files. The final cost figure was arrived at by multiplying the average number of hours per file by the DHC hourly rate.

Of the ten closed files, the time estimates were as follows:

1.5 hours or less:	3 files
5 hours or less:	6 files
10 hours or more:	1 file

iv. Trends

As with the last report, there are some interesting trends in this reporting period. For example, far more women continue to contact the Program than men. Among the profession, the ratio is still almost 2:1. Among the public, the ratio has also stayed consistent at 3:1.

Calls regarding sexual harassment complaints account for the vast majority of calls within the mandate (81%). Calls regarding the combined areas of sexual and personal harassment account for 90 % of the calls within the mandate. In both of these categories, all but two calls were from women.

Lawyers continue to access the Program, albeit in small numbers. During this reporting period two lawyers requested to meet with me in Peterborough to discuss their respective situations. Both felt that the trip to Peterborough would be worthwhile as it would afford them complete confidentiality.

PROMOTION AND PUBLICITY

The promotional activities from July 1, 2000 to December 31, 2000 were focussed on the following areas:

1. external promotion with the profession
2. external promotion with law students

Attached to this Report is a list of the activities undertaken during this reporting period.

1. External Promotion with the Profession

In September, the Law Society distributed the *New Rules of Professional Conduct* to every lawyer in Ontario. The Law Society graciously agreed to include the DHC pamphlets with this mail out. As well, the Treasurer mentioned the DHC Program in his cover letter.

As a result of this distribution, I received a number of e-mail messages from lawyers. Some wanted information about the Program. Some wanted to touch base. Others wished to discuss a specific problem and obtain confidential advice.

In addition, regular is maintained with the Profession through the advertisements in the *Ontario Reports*. These ads are placed in every second edition of the OR's and are run in both English and French.

The DHC Program was included in the November issue of the *Gazette*. However, efforts to have the Program included on a regular basis, similar to the regular articles on the Ontario Bar Assistance Program, have been unsuccessful.

In September I presented the DHC Program to the Women's Wellness Section of the Ontario Bar Assistance Program at a luncheon session. Approximately 30 women attended. In October, I presented the DHC Program at the LPAC 2000 National Workshop, *The Diversity Congress*. My topic was "*Meeting the Challenges of Diversity Through an Ombudsman Program*". Approximately 75 people attended.

2) Eternal Promotion: Law Students

In collaboration with Susan Lieberman of the Articling Services Department, I have visited University of Toronto and Osgoode Hall Law Schools to meet with third year students and present the DHC Program. These sessions have been very well attended with typically 100 or so students participating in each school. Plans have been made to visit Queens, Western, and the University of Ottawa in March.

A description of the DHC Program has been added to the Law Society's Articling Web Page. It can be viewed at: www.lsuc.on.ca.

CONFIDENTIALITY

In order to safeguard the information provided to the DHC and ensure that it is not admitted in evidence in either internal Law Society proceedings or external proceedings, efforts are underway to:

1. formally exempt the DHC from the reporting requirements under the *Rules of Professional Conduct*;
2. amend the *Law Society Act* to extend the duty of confidentiality for the DHC.

It is imperative that these initiatives are completed as soon as possible, especially since confidentiality is one of the cornerstones of the Program. Also, the Program has operated to date on the explicit understanding that all information received by the DHC is strictly confidential and that the DHC is exempt from the reporting requirements under the *Rules of Professional Conduct*.

CONCLUSION

The DHC Program continues to field a large number of calls, the vast majority of which are within the mandate. An overwhelming number of complaints deal with sexual and personal harassment between lawyers and clients and lawyers and their colleagues. This contrasts sharply with the data provided by the Ontario Human Rights Commission which shows a continuing decrease in sexual harassment complaints since 1995. Data for 1999 and 2000 shows that these complaints account for only 5% of all complaints received by the Commission. In my respectful opinion, eradicating harassment and discrimination from the profession will require a concerted effort to educate lawyers on their obligations and responsibilities pursuant to the *Ontario Human Rights Code* and the *Rules of Professional Conduct*. It will also require that complaints filed with the Law Society are dealt with expeditiously and that appropriate sanctions are imposed in cases where the allegations are proven.

Efforts to reach members of the profession have been very successful thanks to the inclusion of the DHC brochure in the mail-out to all lawyers of the *New Rules of Professional Conduct*. Contact is being maintained through regular advertisements in the *Ontario Reports*.

Efforts to reach students, particularly to ensure that articling students are aware of the Program have also been very successful. These efforts will continue in the form of visits to the Law Schools with the Articling Day team and through efforts to include the DHC Program in the Professional Responsibility section of the Bar Ads courses this fall.

Fewer efforts have been made to reach the public during this reporting period. However, several initiatives are being explored including developing a website, mail-outs to the public libraries across Ontario, and distributing information to clients through Legal Aid.

Unfortunately, the problems with the Law Society's internal list (DHC Program included, but the wrong number; my name omitted from the alphabetical section). As well, efforts to have the Program included in the *Gazette* on a regular basis have been futile. It is hoped that these problems can be resolved internally sooner rather than later.

BUDGET:

The budget for 2000 was \$132,000.00. These funds have been spent as follows.

Administration	\$ 33,232.53
Promotion and Publicity	36,060.68
Travel and Accommodation	6,237.66
Direct Services	<u>47,100.63</u>
TOTAL	\$122,631.50
Balance*	\$9,368.50

*These expenditures do not include the monies set aside to cover the cost of the consultant's fee for reviewing the DHC Program (\$15,000.00). It is therefore anticipated that all funds allocated to the Program have been spent.

Please note, all entries include fees and disbursements. For example, time spent at meetings is tracked through Administration.

LIST OF ACTIVITIES

July 2000

Meeting with Leota Embelton of the OBAP Program

September 2000

Presentation at the Ontario Bar Assistance *Women's Wellness* Luncheon

October 2000

LPAC Conference

Training at Goodmans

Meeting with CLASP re: possible joint project

Attendance at Osgoode Hall, York University Articling Day

November 2000

Attendance at University of Toronto Articling Day

Gazette Article, "*How to Bullet Proof your Practice Against Claims of Discrimination and Harassment*"

CBAO Article, "*Sexual Harassment of Clients: Family Law Context*"

UPDATE ON REQUIRED ACTION JANUARY - JUNE 2000 REPORT

- Correct errors in Law Society's Internal Telephone Directory: This is the Responsibility of the Public Relations Department. The corrections were promised for January 2001. I understand that they will be made shortly. (*Note: as of March 7th, 2001, these changes had still not been made!*)
- Include articles on the Program in each edition of the Gazette: To date this has not occurred.
- Update LSUC staff on the DHC Program through ELF and internal e-mail: To date, this has not occurred.

Query: could the Committee assist in these last two efforts which both involve the LSUC's Public Relations Department?

- Notify all members of the profession about the DHC Program: This was accomplished through the fall mail-out of the new *Rules of Professional Conduct*.

Issues Arising in the Area of Aboriginal Residential School and Childhood Institutional Abuse Cases

BACKGROUND

1. Aboriginal Peoples in Canada were forced by the Federal Government to attend residential schools from the mid 19th century through to the latter half of the 20th century. These schools were administered by various churches and religious orders and were an important tool of the assimilation policies of the Canadian Government of the time. Those Aboriginal children who attended the schools have reported suffering various forms of abuse at the hands of those involved in running the schools, including physical, sexual, and emotional abuse as well as cultural loss.
2. There are in excess of six thousand law suits estimated to be currently before Canadian Courts filed by survivors of Aboriginal residential schools. It is anticipated this number will continue to grow, as more survivors access legal services and as the litigation and various alternative dispute resolution mechanisms gain further momentum.
3. According to the Co-Chairs of Rotiio' taties, Aboriginal Peoples are generally more likely to be in greater need of legal services than many other Canadians given the need to assert Aboriginal and treaty rights, and the various social and economic issues which Aboriginal Peoples in Canada face. Survivors and their families who suffer the legacy of the residential school experience are particularly impacted by negative socio-economic factors, and their legal needs are far reaching.

4. Survivors of Aboriginal residential schools have raised concerns and filed complaints in other jurisdictions against lawyers representing them. To date, there have been no complaints filed with the Law Society by Aboriginal residential school survivors against Ontario lawyers. There have, however, been unsubstantiated third party reports brought to the attention of the Law Society referencing misconduct on the part of some unidentified Ontario lawyers acting in these types of cases. Indeed there have been complaints filed in other jurisdictions which are now part of the public record alleging similar misconduct of lawyers in those jurisdictions. In the absence of an identification of lawyers who may be in breach of the Rules, the Law Society will require further information or a formal complaint before proceeding with any investigation or subsequent disciplinary action on the concerns raised. There have been complaints filed with the Law Society by survivors of childhood abuse in other institutions.
5. Given that despite the existence of anecdotal evidence of concerns of Aboriginal residential school survivors about the conduct of their lawyers there are no corresponding complaints filed with the Law Society, it appears there are barriers preventing survivors from filing complaints with the Law Society. There is a cultural barrier present since the Law Society's process is both foreign and formal to Aboriginal Peoples which is exacerbated by a complete lack of information in Aboriginal communities about the Law Society or the role it plays.
6. To date there have been numerous recommendations made by organizations such as the Law Commission of Canada, the Canadian Bar Association and the Assembly of First Nations, which are aimed at law societies and their handling of Aboriginal residential school and childhood institutional abuse issues. These recommendations include a review of rules or codes of conduct, and amendment, where necessary, to ensure that the Rules adequately protect survivors of Aboriginal residential school abuse and childhood institutional abuse against further abuse at the hands of lawyers acting in their cases.
7. In a preliminary consideration of the issues raised, the Working Group, appointed by the PRC to consider possible amendments to the Rules, concluded that the Rules of Professional Conduct do address the concerns which have been raised via the unsubstantiated third party statements. Law Society staff in the Equity Initiatives and Policy Secretariat departments concur with this determination. While the Rules do ultimately address the concerns, nevertheless there remains a need to guide the profession as to how the Rules are appropriately interpreted in these particular cases.
8. In addition to how the Rules are interpreted to address these concerns, the Professional Regulation Committee (PRC) and the Equity & Aboriginal Issues Committee (EAIC) must also consider the unsubstantiated third party statements which, although they do not identify any specific lawyers, refer to inappropriate conduct of lawyers and the disproportionate lack of complaints from survivors. It appears from the information received that the existing structure of the Law Society's complaints and investigation process and the way the complaint system is communicated to the public is not adequate in meeting the needs of these survivors. Survivors are not accessing the complaints mechanism available largely due to a lack of trust of the Law Society, as well as a lack of information in Aboriginal communities about the Law Society, the Rules and the regulatory process. There is a great need to ensure that both the public and the profession are aware of how the Rules apply in these types of cases, and an even greater need to build 'trust' with Aboriginal Peoples and non-Aboriginal survivors of institutional abuse -- including ensuring our regulatory process is accessible to them.
9. Rotiio' tatie's Co-Chairs, Jeffery Hewitt and Kathleen Lickers have discussed the Law Society, its Rules and its roles in addressing the concerns coming forward from Aboriginal community members about the lawyers who act on their behalf. Copies of their speaking notes are available upon request.

10. Rotiio' taties, in partnership with Aboriginal Legal Services of Toronto, is undertaking a Toronto-based community outreach initiative during the summer 2001 to educate Aboriginal community members about the Law Society, its mandate and role in ensuring the legal profession delivers services and meets the needs of Aboriginal Peoples in Ontario as they relate to the residential school experience. Rotiio' taties is exploring funding sources to conduct a province wide community outreach / needs assessment in this regard as well. Rotiio' taties intends to make recommendations to the Law Society on residential school issues as well as access to legal services for Aboriginal Peoples in Ontario based on its consultation with the broader Aboriginal community. We anticipate Rotiio' taties will be in a position to provide some preliminary recommendations on these matters in the fall 2001, following this summer Toronto outreach initiative.
11. Rotiio' taties has indicated an interest in working with the Law Society in addressing these issues and has offered its members who are available to meet with Committees and provide assistance in identifying both the issues and potential solutions.

ISSUES

12. The EAIC and PRC should consider the issues raised above and, with the Chairs of EAIC and PRC, work together with the assistance of staff to determine a work plan and integrated response.
13. The EAIC and PRC should confirm the preliminary determination made by the PRC Working Group, that the Rules address the concerns raised. Assuming confirmation of this preliminary determination, the Committees should determine whether additional commentary or guidance regarding interpretation of the Rules is warranted.
14. Regardless of whether or not the Committees finds that the Rules address the concerns, the EAIC and PRC should consider whether the "Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools" (the "CBA Guidelines") issued by the Canadian Bar Association in August 2000, or the revised guidelines as adopted by the Law Society of the Yukon as detailed in paragraph 27 below, should be adopted, in whole or in part, to assist the profession in the interpretation of the Rules in these cases. The Law Society of the Yukon made some important addendums to the CBA Guidelines, noting the unique nature of residential school cases and the unique demands these cases place on lawyers and their staff.
15. There are unsubstantiated third party reports of inappropriate conduct of lawyers in Ontario with respect to Aboriginal residential school cases, yet there are no complaints filed against those lawyers by the public. In the absence of a complaint or an identification of the lawyers referred to, the Law Society does not have the necessary information to proceed with an investigation of these reports. The EAIC and PRC should, however, consider why the regulatory process is not being accessed and determine what is required to remedy this. The EAIC and PRC should consider what actions are required to ensure that the Rules, their interpretation and their application in these cases, are clearly communicated to the public and to the profession in Ontario.
16. The EAIC and PRC should explore ways to make the complaints and investigation process, as well as the discipline process, accessible to survivors of Aboriginal residential schooling and childhood institutional abuse. Finally, on this point, the EAIC and PRC should consider what is required to build trust in the relationship between Aboriginal survivors, and to a lesser extent non-Aboriginal survivors, and the Law Society to ensure that concerns from the community are forwarded to and addressed by the Law Society.

17. The EAIC, PRC, and the Proceedings Authorization Committee (PAC) should consider what standards ought to be applied in the authorization of a conduct application, should it be warranted, in these types of cases. Specifically, the Committees should consider the application of a similar standard in investigations as applies in complaints alleging sexual impropriety: "if the complainant is believed, are there reasonable and probable grounds to believe that the Solicitor is guilty of professional misconduct."
18. The PRC should consider making similar proposals for investigation as was made in a report to Convocation in March 1998 regarding sexual impropriety complaints, where it recommended that given the lack of understanding amongst regulatory staff and benchers as reflective of the lack of understanding in the profession and society at large, training must be provided to heighten the level of awareness of the issues involved in those types of complaints. In this case, training would be provided on Aboriginal issues generally as well as training on residential school abuse and childhood institutional abuse issues specifically.

REFERENCES TO LAWYERS' MISCONDUCT

19. To date, the Law Society has not received any formal complaints against its members from Aboriginal residential school survivors. However, several people from across Ontario have offered unsubstantiated third party statements referencing misconduct of unidentified Ontario lawyers in these types of cases, which the Aboriginal Issues Coordinator and Rotiio' tities have brought to the Committees' attention. Survivors are generally not aware of the Law Society, the Rules, or the role it plays in governing lawyers in Ontario, and there is a complete lack of trust that the Law Society would listen to or address the concerns of Aboriginal survivors.
20. It was only with the amendments to the *Indian Act* in the 1950's that 'Indians' as defined in the *Act* were permitted to retain lawyers. For many Aboriginal peoples, particularly those who have suffered physical, sexual, and/or emotional abuse in their childhood from European or Canadian authority figures, filing a complaint against an authority figure such as a lawyer is inconceivable. The more foreign and formal the institution and complaints process is to Aboriginal people, the less functional it is.
21. The unsubstantiated third party statements referencing misconduct include reports of the following conduct on the part of some unidentified lawyers in these types of cases:
 - ▶ Lawyers sending unsolicited letters to residential school survivors which often times include very detailed and lengthy questionnaires requesting explicit information about experiences in residential school including accounts of physical and sexual abuse from the survivor. These form letters are sent out to survivors without any offer or referral for support. The questionnaires also typically include questions about the names and contact information for any other survivors which the recipient is aware. This is apparently a typical strategy of some lawyers to locate potential clients.
 - ▶ Lawyers requiring survivors to sign retainer agreements which do not set out a defined fee, but rather indicate that the fees will be determined by an hourly rate, the complexity of the case, the results obtained in the case, with allowances for the delay in payment for the lawyer's fees. While retainer agreements are not stating how much the client will be billed, they are stating that if the client does not receive damages they will not be billed for services, and if they do receive damages they will be billed at approximately 20% to 25% of the damages awarded.
 - ▶ Lawyers coming into communities and setting up in a local community centre, putting up posters that they are there to sign clients up in residential school cases and actively recruiting clients, without any concern whether that survivor is already represented by counsel. This includes reports of lawyers coming into Northern Ontario from Manitoba to sign up Ontario survivors.

- ▶ Lawyers offering to pay survivors \$50 cash if they agree to just sign a retainer agreement with the lawyer.
 - ▶ Lawyers signing on clients in bulk fashion but not delivering on legal services. Lawyers not doing the work required on the case. Lawyers not being knowledgeable of the work required in residential school claims.
 - ▶ Lawyers not keeping survivor clients informed on the status of their case or the legal process. Lawyers not returning phone calls from clients. Lawyers sending clients detailed opinion letters with complicated instructions requiring clients to opt in or out of certain processes, etc. without making themselves available to the client to discuss and explain the opinion. Lawyers refusing to accept collect phone calls from indigent clients and thereby denying communication with the client altogether.
 - ▶ Lawyers requiring aging survivor clients to amend their wills naming the lawyer as Executor of their estates prior to agreeing to proceed with their cases.
22. It is anticipated that further details will be forthcoming as Rotiio' taties undertakes the community outreach planned in the Toronto area, as well as provincially (providing they obtain funding), to educate Aboriginal Peoples in Toronto and across the province of the existence of the Law Society, the Rules, the Discrimination & Harassment Counsel, and the complaints process.

OPTIONS FOR THE LAW SOCIETY'S CONSIDERATION

23. As indicated throughout this memorandum, there are a number of matters for the EAIC and PRC to consider, including recommendations made specifically to law societies, recommendations regarding the Rules and their interpretation, communication with the public and the profession, and recommendations regarding internal Law Society matters including education and training and working to build trust with the public.
24. Several organizations have made specific recommendations pertaining to law societies and are summarized below for the Committees' ease of reference. These submissions are also referred to in detail in the information package entitled "Residential Schooling Issues" which is available to Benchers upon request.

The Law Commission of Canada

25. In its report "Restoring Dignity: Responding to Child Abuse in Canadian Institutions" issued in March 2000, the Law Commission of Canada made several recommendations specific to law societies with regard to:

The Criminal Justice Process

- ▶ Those involved in investigating, prosecuting, defending and judging allegations of institutional child abuse should have special training, expertise or experience and should have access to survivor-sensitive protocols that have been developed for this purpose.

Civil Actions

- ▶ Prospective plaintiffs should have access to basic information about civil actions at no cost. Considerations: Provincial governments, Law Societies, professional organizations and law faculties should continue to develop public legal information programmes that provide accessible information about legal options available to survivors of institutional child abuse. This information should relate to matters such as how to contact a lawyer, the procedure, costs, possible outcomes, and the length of the process.
- ▶ Prospective plaintiffs should have access to support services to assist them in coping with the stress of civil litigation.

Considerations: Professional associations should compile a roster of therapists experienced in working with abuse survivors.

- ▶ Law Societies and Bar Associations should continue to organize professional development programs on how to conduct cases involving allegations of past institutional child abuse.
Considerations: Law Societies may also wish to consider adding civil litigation dealing with child sexual and physical abuse to the list of specialties that maybe certified. Certification should require not only expertise in litigation, but also training in how abuse affects survivors, and the implications for the desirability and conduct of the litigation. Certification lists should be promoted in appropriate communities, including within therapeutic communities.
- ▶ Law Societies should review their *Codes of Professional Conduct* to ensure appropriate rules are in place to safeguard against the exploitation of survivors of institutional child abuse, especially with respect to recruitment of clients and fee arrangements.

Considerations: The recent revisions to rule 1602.1 of the *Code of Professional Conduct* made by the Law Society of Saskatchewan could serve as a model. The potential for exploitation inherent in contingency fees for class actions involving survivors of institutional child abuse could also be minimized or eliminated through a variety of means:

- ▶ Establishment of a provincially-run class action fund to cover initial disbursements.
- ▶ Mandatory taxation of contingency accounts, or a requirement of prior judicial approval of contingency fee arrangements.
- ▶ Governments or other institutional defendants could refuse to negotiate settlements where contingency fee is inflated.

The Canadian Bar Association

26. The Canadian Bar Association (CBA) has made several recommendations specifically aimed at law societies in its Resolution 00-04-A "Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools", unanimously passed by the CBA National Council at the August 2000 CBA Annual Conference. The Resolution urged each law society in Canada to adopt the guidelines "for recommended conduct for lawyers acting or seeking to act for survivors of Aboriginal residential schools, that recognizes their vulnerability and need for healing."
27. The CBA Guidelines are as follows:

- i) Lawyers should not initiate communications with individual survivors of Aboriginal residential schools to solicit them as clients or inquire as to whether they were sexually assaulted;
 - ii) Lawyers should not accept retainers until they have met in person with the client, whenever reasonably possible;
 - iii) Lawyers should recognize that survivors had control taken from their lives when they were children and therefore, as clients, should be given as much control as possible over the direction of their case;
 - iv) Lawyers should recognize that survivors may be seriously damaged from their experience, which may be aggravated by having to relive their childhood abuse, and that healing may be a necessary component of any real settlement for these survivors. Lawyers should therefore be aware of available counselling resources for these clients to ensure that they have opportunities for healing prior to testifying;
 - v) Lawyers should recognize that damage to the survivors of Aboriginal residential schools may well include cultural damages from being cut off from their own society, and should endeavour to understand their clients' cultural roots;
 - vi) Lawyers should recognize that survivors are often at risk of suicide or violence towards others and should ensure appropriate instruction and training for their own employees, including available referrals in time of crisis.
28. The Nova Scotia Barristers' Society (NSBS) has posted the CBA Guidelines on its website. The NSBS's Legal Ethics Committee instructed that the guidelines be made available "for the information of the membership."

The Law Society of the Yukon Guidelines

29. The Law Society of Yukon recently approved the CBA guidelines with some notable revisions at its May 10, 2001 Annual General Meeting. In addition to the guidelines as set out in paragraph 25 above, the Law Society of Yukon added the following preamble and three new guidelines of importance in guiding the profession. These addendums are as follows:

"WHEREAS some Canadian lawyers have aggressively solicited residential school survivors as clients in an inappropriate manner and have caused serious harm to them, including some suicides;

WHEREAS the National Council of the Canadian Bar Association in August 2000 adopted "Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools" to assist lawyers dealing with these types of cases, and has recommended that these guidelines be adopted by Law Societies;

WHEREAS the CBA-Yukon Aboriginal Law Section has met to consider these guidelines and consulted with the Committee on Abuse in Residential Schools;

THEREFORE, BE IT RESOLVED THAT:

The Law Society of the Yukon adopt the following guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools:

- Lawyers should recognize the unique nature of residential school cases and appreciate that they have a special responsibility in these cases to facilitate their client's healing process through, where possible:

- ▶ identifying community resources to assist the client
 - ▶ referring their client to drug and alcohol treatment programs, if appropriate
 - ▶ recognizing the need for the client to develop a personal support network.
 - ▶ Lawyers should recognize that residential school cases place unique demands on the lawyer and other law office staff by virtue of the emotional nature of such cases; the amount of time and resources required for each case; and the lawyer's role in facilitating the client's healing process. These demands place a practical limit on the number of cases which a lawyer can appropriately take on at any one time.
- ▶ Lawyers should not initiate communications with individual survivors..." (continued as per the CBA Guidelines).

Assembly of First Nations

30. In a letter dated October 26, 1998 to Richard Tinsley, Secretary of the Law Society, National Chief Phil Fontaine of the Assembly of First Nations (AFN) raised several concerns regarding Aboriginal residential school litigation issues. In particular, concerns were raised regarding the aggressive solicitation of clients in some jurisdictions, the unique needs of Aboriginal residential school survivors and lack of care exercised by some lawyers in providing legal services to survivors, and the wording in contingency retainer agreements and high contingent fees.
31. The Law Society responded to the AFN National Chief, a letter to the National Chief from Richard Tinsley dated December 9, 1998. There has been no further follow up on this matter.
32. The concerns as stated in paragraph 30 above, were echoed in a speech to the CBA conference in Winnipeg, in April 2000 (see "Residential Schooling Issues" information package). The AFN National again called upon law societies to address concerns of the AFN regarding the use of contingency fees and marketing practices in order to ensure fair, just and equitable results for all.

RULES OF PROFESSIONAL CONDUCT

33. The Rules as amended in 2000 do appear to address many of the concerns raised by members of the Aboriginal community in regards to residential school litigation in other jurisdictions as well as the unsubstantiated third party reports referencing misconduct of unidentified lawyers in Ontario, primarily surrounding recruiting tactics, lack of competence, inappropriate fee arrangements, and high contingent fees. However, the Rules are not as specific as the CBA Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools or the amended and improved Law Society of the Yukon guidelines.
34. Given this, the EAIC and PRC may wish to review the following issues which the Rules and Commentaries currently address, either generally or specifically:
Quality of Service and Fees and Disbursements:
 - ▶ unclear retainer agreements
 - ▶ failing to disclose fee
 - ▶ fees which are not fair or reasonable
 - ▶ contingent fees

Competence & Quality of Service:

- ▶ failing to deliver legal services required
- ▶ lack of knowledge of issues involved and work required on a claim
- ▶ failing to keep clients informed about their case or the legal process
- ▶ failing to return clients' phone calls
- ▶ sending complicated correspondence without ensuring client comprehension
- ▶ compromising clients' ability to communicate with lawyer
- ▶ inappropriate conditions upon which legal services are offered

Making Legal Services Available & Offering Professional Services:

- ▶ aggressive solicitation of clients
- ▶ aggressive and inappropriate solicitation of vulnerable clients

35. The unsubstantiated third party reports referencing misconduct all offend the spirit of the Rules and the Standards of the Legal Profession (Rule 1). They further offend the requirement dealing with Responsibilities to the Profession and to Lawyers, to act with integrity, in good faith, and in the public interest (Rule 6).
36. Offering legal services which are systemically below standards to a class of clients in a targeted community protected under human rights legislation, such as Aboriginal residential school survivors, offends the Discrimination prohibition (Rule 5).

Connecting Communities With Counsel Program

The *Connecting Communities With Counsel (CCWC)* program is a joint project involving the Law Society of Upper Canada, in particularly with numerous community-based agencies (Anti-Racism Action Centre, African Canadian Legal Clinic, Barbara Schlifer Clinic, Ontario Council of Agencies Serving Immigrants, Coalition of Visible Minority Women, 519 Church Street Community Centre, Midyanta Somali Community Services, League for Human Rights of B'nai Brith Canada, Ontario Pro Bono Initiative, Pro Bono Students Canada, Volunteer Lawyers Service). Responsive to community concerns, the CCWC was established by the Equity Initiatives Department, LSUC, in partnership with the Anti-Racism Action Centre and the 519 Church Street Victim Assistance Program, in Fall of 1999, in an effort to attract lawyers to do work on a pro bono basis for individuals from Aboriginal, Francophone and equity-seeking groups who require legal counsel to address equality issues before courts, tribunals and in mediation process. The mandate of the project is to understand and take into consideration the needs and concerns raised by the various groups and work with the legal profession to encourage providing pro bono services related to human rights and equity issues.

Terms of Reference - CCWC Steering Committee & Sub-Committees

The objective and mandate of the Steering Committee and its Sub-Committees' shall be to guide and assist the CCWC project in the initiation, development, establishment and promotion of the project. The members shall also encourage the provision of pro bono legal services to Aboriginal, Francophone and equity seeking groups, to enable them to make informed decisions about their legal needs. The members shall focus on understanding various human rights and equality issues and concerns and in particular matters raised by victims of hate motivated/violent crimes based on race, sexual orientation, gender, ability, within Ontario and facilitate in resolving these concerns/matters by:

- identifying community needs and developing strategies for addressing issues affecting Aboriginal, Francophone and equity seeking communities, in particular infringement and violation of human rights;
- providing regular input towards the development of the project, especially in planning, development and implementation of policies and procedures;
- providing advice, informing and direction about on-going developments and activities related to the project;
- assisting in forming productive and conducive partnerships with community representatives, clients, other related organisations and members of the legal profession, e.g Pro Bono Students Canada, Volunteer Lawyer Services); and
- taking up any other matter affecting the project or its activities.

Organisation & Structure

Sub-Committees

- There shall be two sub-committees, namely the Program & Budget Sub-Committee and the Education & Orientation Sub-Committee.

Membership

- The Steering Committee shall have no fewer than 11 members and no more than 17 members, with no fewer than 2 members representing the LSUC.
- The Sub-Committees shall have no fewer than 3 members and no more than 5 members, with no fewer than 1 member representing the LSUC.
- Members shall have direct experience, knowledge and commitment to matters related to accessing equity and justice needs for minority communities.
- The membership shall reflect balance amongst the various equity seeking groups. The Steering Committee shall strive to ensure that they reflect not only the diversity of the community but also take into consideration the geographic aspects of the project.

Appointment of Chair and Vice Chairs

- The Steering Committee shall have a Chair who shall be a LSUC benchner and two Vice Chairs who shall be members of the Steering Committee from community based organisations.

Meetings

- The Steering Committee and Sub-Committees' shall meet once every three months [except in the months of July and August], with the schedules being established by each Committee in their initial meetings.

- Special meetings of the Steering Committee shall be convened by the Chair, on advise of any member of the Steering Committee or upon necessity.

Special meetings of the Sub-committees' shall be convened upon necessity, or on advise by any of the Sub-Committees' member.

- Members shall attend meetings regularly either in person or by electronic means such as teleconference.
- Failure to attend more than three consecutive meetings without explanation shall constitute resignation from the Committees'.

Quorum

- Four members of the Steering Committee shall constitute a quorum for the purposes of the transaction of business.
- Two members of the Sub-Committee shall constitute a quorum for the purposes of the transaction of the business.

Term of Membership

- Committee members shall be part of the Committee for a period of three years.
- Every three years at least four members of the Steering Committee shall be replaced by new members.
- Every three years at least two members of the Sub-Committees' shall be replaced by new members.

Staff

- Research and administrative support shall be provided by the CCWC Project Coordinator and staff of the Equity Initiatives Department.

Outcomes of Canadian Heritage funding, Phase I: February 15, 2000 - December 30, 2000

During phase I the Steering Committee²⁹ met often to discuss various issues, and in order to undertake activities that would contribute towards the setting up of the project. Some of the matters discussed and outcomes of the initial months work/brainstorming are as follows:

Vision Statement and Mandate

The vision statement and mandate of the organisation finalised/drafted. The Steering Committee also met to discuss and develop agreed upon structures that would ensure long-term objectives of the project are met.

²⁹ Members of the Steering Committee are listed on page 4 of the interim-report dated January 30, 2001, which has already been submitted to Canadian Heritage Department.

Review of Orientation Package

Material for the orientation binder (finalised later during the year) was collected and reviewed by the Steering Committee. An Education & Orientation Sub Committee was formed with representatives of various community organisations to enable a through review of the orientation package. The Sub-Committee comprised of Sudabeh Mashkuri (Barbara Schlifer Clinic), Erica Lawson (African Canadian Legal Clinic), Howard Shulman (the 519 Centre) Josee Bouchard (Equity Initiatives Department of the Law Society of Upper Canada) and Rachel Osborne (Equity Initiatives Department).

Development of Orientation Session

An information gathering and orientation session was held in January 2000, to introduce the Connecting Communities With Counsel initiative, as well as to provide an opportunity to the legal profession and community agencies to explore issues in-depth. Participants included several members of the legal community and representatives from the following community organisations: Community & Race Relations Committee of Petersborough, Folk Arts Council of St. Catharines, Bloor Information & Life Skills Centre, Women's Health in Women's Hands, African Canadian Legal Clinic, the 519 Church Street Victim Assistance Program, and the Barbara Schlifer Clinic. Benchner, Heather Ross chaired the session. Additionally, during phase I, the Steering Committee prepared for the next Orientation Session to be held later on during the year, e.g. identified speakers, reviewed material to be used in the session, as well as reviewed protocols for lawyer/community participation etc.

Promotion and Outreach Activities Discussed and Undertaken

- Sub-Committees' formed (Education & Training and Budget).
- CCWC advertisement already placed in Ontario Reports. Second ad prepared for the OR's.
- Reviewed sample models of structure mechanism of project.

Outreach to Lawyers

- Lawyer In-take forms designed and distributed.
- Need for lawyers who speak different languages and as well as those who can understand sensitive matters related to human rights and equity issues discussed. Explored info/data on lawyers who would be willing to undertake pro bono legal work on behalf of CCWC.
- Consultations and meetings undertaken with lawyers about structure of the organisation and how services can be best delivered through the province of Ontario.

Outreach to Community Agencies

- Needs Assessment Survey of community agencies undertaken prior to February 2000. Results compiled and discussed.
- Client In-take forms designed and distributed.
- Evaluation forms designed and evaluations undertaken.
- Consultations and meetings undertaken with community agencies about structure of the organisation and how services can be best delivered through the province of Ontario.

Staff Recruited

The Steering Committee initiated process for recruitment of staff, to undertake promotion and outreach activities, as well as to provide support to the Steering Committee.

CCWC's Participation in Pro Bono Law Ontario

The Pro Bono Law Ontario is being developed and established under the auspices of the Chief Justice of Ontario, Ontario Legal Aid, the Law Foundation of Ontario, the Law Society of Upper Canada and the University of Toronto Faculty of Law. Over the past few years a number of organisations, e.g. Pro Bono Students Canada, Volunteer Lawyer Services, the Dickson Circle, and Legal Aid Ontario Mentorship Services, have developed to facilitate the delivery of pro bono legal services in Ontario. CCWC has also been actively participating in the initiative by attending meetings, rendering advice and discussing the delivery of pro bono legal services in Ontario. The objective of the initiative is to ensure that the pro bono initiatives complement each others services and programs and further, to ensure that high quality pro bono legal services are available to those in need.

Equity and Diversity Training Program

A Committee comprising of Erica Lawson, Howard Shulman, Sudabeh Mashkuri, Rachel Osborne and Josee Bouchard was formed to commence work and establish foundations for the Equity and Diversity Training Program by discussing fundamentals of the project in-depth.

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Re: Discrimination and Harassment Counsel Program (HDC)

It was moved by Ms. Potter, seconded by Mr. Hunter that the DHC program be established on a permanent basis with an evaluation to take place following three years of operation; and that the program be continued at current funding levels (\$100,000.00 per year) and on a fee-for-services basis at an hourly rate not to exceed \$175.00.

An amendment by Ms. Ross was accepted by the mover and seconder that Convocation receive copies of the Discrimination and Harassment Counsel Program as provided to the Committee every 6 months.

An amendment by Mr. Wright was accepted by the mover and seconder that the second recommendation set out on page 14 be changed to read as follows:

- continuing the program at current funding levels (\$100,000.00 per year) including fees-for-services at an hourly rate not to exceed \$175.00.

The Potter/Hunter motion as amended was adopted.

MOTION - DRAFT MINUTES

It was moved by Ms. Ross, seconded by Ms. Potter that the Draft Minutes of Convocation of May 24th, 2001 be adopted as amended.

Carried

MOTION - APPOINTMENT TO CHIEF JUSTICE ADVISORY COMMITTEE

It was moved by Ms. Ross, seconded by Ms. Potter That in addition to the President of the Council of the Ontario Law School Deans, all other Ontario Law School Deans be appointed to the Chief Justice Advisory Committee on Professionalism.

Further that, the President of the Ontario Crown Attorneys' Association be appointed to the Chief Justice Advisory Committee on Professionalism.

Carried

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:45 P.M.

The Treasurer had as his guest his wife Linda Krishna.

CONVOCATION RECONVENED AT 2:15 P.M.

PRESENT:

The Treasurer, Banack, Bindman, Bobesich, Boyd, Campion, Carey, Cass, Chahbar, Cherniak, Coffey, Cronk, Crowe, Diamond, T. Ducharme, Gottlieb, Hunter, Lalonde, Laskin, Lawrence, MacKenzie, Millar, Mulligan, Potter, Puccini, Ross, Simpson, Swaye, White, Wilson and Wright.

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IN PUBLIC

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DISCIPLINE MATTER

Re: Kenneth Leo CLARKE, Toronto

The Secretary placed the matter before Convocation.

Messrs. Banack, Carey, MacKenzie and Wright withdrew for this matter.

Ms. Lesley Cameron appeared on behalf of the Society.

Mr. David Humphrey and Mr. Peter Copeland appeared on behalf of the solicitor. The solicitor was not present.

Both counsel for the Society and the solicitor requested that the matter be adjourned sine die pending determination that the solicitor is fit to return to practice.

It was moved by Mr. Millar, seconded by Ms. Puccini that the matter be adjourned sine die.

Carried

Mr. Banack thanked Mr. Humphrey for his representation of Mr. Clarke and indicated that the profession and the bench owed a debt of gratitude to those members who have come forward to represent colleagues who are in difficult circumstances.

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Mr. MacKenzie presented the Report of the Professional Regulation Committee for Convocation's approval.

Professional Regulation Committee
June 7, 2001

Report to Convocation

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on June 7, 2001. In attendance were:
Gavin MacKenzie (Chair)
Heather Ross (Vice-Chair)

Andrew Coffey
Carole Curtis

Staff: Janet Brooks, Audrey Cado, Margot Devlin, Margaret Froh, Charles Smith, Elliot Spears,
Richard Tinsley, Jim Varro, Andrea Waltman and Jim Yakimovich.
2. This report contains policy reports on

- an amendment to the *Rules of Professional Conduct* respecting advice on French language rights
- confidentiality issues relating to the office of the Discrimination and Harassment Counsel (DHC) (originally reported to January 2001 Convocation but deferred pending a report on the DHC pilot project),

and information reports on

- ethical issues relating to lawyers and residential school matters
- amendments to the guidelines for suspended, resigned or disbarred members and members who have given an undertaking not to practice
- file, caseload management and staffing issues in the complaints resolution and compliance, investigations and discipline departments.

I. POLICY

AMENDMENT TO THE RULES OF PROFESSIONAL CONDUCT RESPECTING ADVICE ON FRENCH LANGUAGE RIGHTS

A. *THE ISSUE*

3. As a result of discussions at two meetings earlier this year at the Law Society, the Chair requested that the rules working group of the Committee consider amending the *Rules of Professional Conduct* ("the Rules") to include a duty to advise clients of their right to proceed with a matter in French. The two meetings were a dinner meeting hosted by the Treasurer entitled "Equity and Diversity: Miles to Go Before We Sleep" on March 21, 2001 and a forum entitled "Challenges and Opportunities for the French Bar in Ontario" on April 26, 2001. The initial suggestion was made by Nathalie Boutet of L'AJEFO at the Equity dinner.
4. The working group met to discuss the issue and proposed that a commentary as opposed to a rule would be the most appropriate vehicle. The working group's draft, reviewed by the Committee, is in the form of a new proposed commentary, within rule 1.03, as follows:

1.03 INTERPRETATION

Standards of the Legal Profession

1.03 (1) These rules shall be interpreted in a way that recognizes that

- (a) a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other members of the profession honourably and with integrity,
- (b) a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario,

Commentary

A lawyer should, where appropriate, advise a client who speaks French of the client's French language rights relating to the clients's matter, including where applicable

- (a) subsection 19 (1) of the *Constitution Act, 1982* on the use of French or English in any court established by Parliament,
- (b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused,
- (c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding, and
- (d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions.

(c) a lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations, and institutions,

(d) the rules are intended to express to the profession and to the public the high ethical ideals of the legal profession,

(e) the rules are intended to specify the bases on which lawyers may be disciplined, and

(f) rules of professional conduct cannot address every situation, and a lawyer should observe the rules in the spirit as well as in the letter.

General Principles

(2) In these rules, words importing the singular number include more than one person, party, or thing of the same kind and a word interpreted in the singular number has a corresponding meaning when used in the plural.

5. Prior to presenting the proposal to the Committee, the working group provided L'AJEFO, through Ms. Boutet, with the draft for its comments. The Committee received a letter from L'AJEFO's president, Peter Annis, dated June 6, 2001, attached at Appendix 1 in both English and French. In brief, the letter indicates complete support for the proposed commentary.

6. The letter also suggests additional language that would advise a lawyer not to influence a client to waive his or her linguistic rights when the reason for doing so is the lawyer's lack of linguistic competence to adequately serve the client's interest. While the Committee acknowledged this concern, the view was that rule 2.01 on competence addresses the lawyer's obligations in this respect¹, and that additional language need not appear in the proposed commentary.
7. The Committee is therefore requesting that Convocation amend the Rules by adding the above proposed commentary to rule 1.03. At the time this matter was considered at Committee, a quorum had been lost. However, the Committee defers to Convocation's general authority to make Rules (or amend Rules) found in the subsections 15(2) and (3) of By-Law 9 on Committees:

Rules of professional conduct

(2) Except when Convocation has established a committee other than a standing committee to prepare rules of professional conduct, subject to the approval of Convocation, the Professional Regulation Committee may prepare rules of professional conduct.

Authority of Convocation

(3) Despite subsection (2), Convocation may at any time adopt rules of professional conduct.

B. DECISION FOR CONVOCATION

8. Convocation is asked to amend the *Rules of Professional Conduct* by adding the commentary appearing in paragraph 4 above after clause 1.03(1)(b).

1

Subrule 2.01(1), clause (h) reads:

2.01 (1) In this rule

"competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

(h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,

The relevant part of the commentary following this rule reads:

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task..

ISSUES CONCERNING CONFIDENTIALITY IN THE OFFICE OF THE DISCRIMINATION AND
HARASSMENT COUNSEL

Joint Meeting of the Professional Regulation and Equity and Aboriginal Issues Committees

A. BACKGROUND

9. The Committee first reported this item on the confidentiality requirements of the office of the Discrimination and Harassment Counsel (DHC) to Convocation on January 25, 2001, on behalf of both the Committee and the Equity and Aboriginal Issues Committee. After some discussion on the merits of the report, Convocation decided that consideration of the report should be deferred until it had the opportunity to decide whether the DHC pilot project would become permanent.
10. A report, proposing a permanent DHC office, is being presented to Convocation by the Equity and Aboriginal Issues Committee this month. The report affirms the decision of the Committees reflected in the January 25 report, which, in brief, include proposals for
 - a. a by-law establishing the office of the DHC, providing for the appointment of the DHC by Convocation, specifying the duties of the DHC and requiring the DHC to maintain the secrecy of information obtained in the fulfilment of his or her duties, and
 - b. a rule of practice and procedure dealing with the admissibility in evidence in named Society proceedings of information obtained by the DHC in the fulfilment of his or her duties.
11. If Convocation decides to make the DHC office permanent, the Committees are requesting that Convocation decide on the issues discussed in the January 25 report, which appears in its entirety below, with respect to the new by-law and rule amendments.

B. INTRODUCTION

12. An issue was raised with the Committee last year through Charles Smith, the Law Society's Equity Advisor, about the need to address confidentiality of information in the office of the Discrimination and Harassment Counsel ("DHC").
13. The DHC was established by Convocation in 1998 through adoption of the Report of the ADR Systems Design Team.² The DHC is funded by the Law Society, and provides an arm's length service to individuals who have complaints about discrimination and harassment by lawyers. The service is promoted as a confidential service. Attached at Appendix 2 is a notice published in the *Ontario Reports* that describes the office and the services it provides.

2

See Appendix 3 for excerpts from the report dealing with the establishment of the DHC, which was described in terms of an ombudsman's office.

14. The current DHC, Mary Teresa Devlin, who attended the meeting, is a lawyer and is therefore bound by the obligations in the Society's *Rules of Professional Conduct* (the "Rules"), including the obligation to report to the Society misconduct on the part of another lawyer. The obligations in the reporting rule, rule 6.01(3)³, are modified somewhat for the office of the DHC by the last paragraph of commentary following the rule. That commentary reads:

The Society also recognizes that communications with the harassment and discrimination counsel appointed to assist in resolving complaints of discrimination or harassment against lawyers must generally remain confidential. Therefore, the harassment and discrimination counsel will not be called by the Society or by any investigative committee to testify at any conduct, capacity, or competence hearing without the consent of the person from whom the information was received. Notwithstanding the above, a lawyer serving as harassment and discrimination counsel has an ethical obligation to report to the Society upon learning that a lawyer is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice.

15. This commentary, based on commentary in the Rules adopted by Convocation in February 1998 dealing with lawyer counsellors for such organizations as OBAP and LINK, was added after consultation with the then Equity Committee and Charles Smith in the context of the review of the Rules. That review resulted in the adoption of new Rules in June 2000, effective November 2000. The new commentary addressed the issues of confidentiality in the office of the DHC with respect to Law Society discipline matters.
16. From the time the current DHC took office, there have been concerns about the duty to report and the tension between that obligation and the need to maintain confidentiality of the information received. Because of the close linkage between the Society's equity initiatives in the area of discrimination and harassment through the Equity and Aboriginal Issues Committee and the office of the DHC, a joint meeting of this committee and the Committee was held on December 7, 2000, following earlier discussions at the Committee, to address the issues of confidentiality.
17. The issues fall within three categories:
- a. Information received by the DHC as related to Law Society proceedings;
 - b. Information received by the DHC as related to external (to the Society) proceedings; and
 - c. The duty of the DHC as a lawyer to report misconduct on the part of another lawyer.

A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- (a) the misappropriation or misapplication of trust monies,
- (b) the abandonment of a law practice,
- (c) participation in serious criminal activity related to a lawyer's practice,
- (d) the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced, and
- (e) any other situation where a lawyer's clients are likely to be severely prejudiced.

18. The Committees had the benefit of research completed by Elliot Spears on the issues.

C. DISCUSSION OF THE ISSUES

The Need for Confidentiality in the Office of the DHC

19. In order for the DHC to fulfill his or her role, it is necessary that the DHC give an assurance of confidentiality to the users of the services. This is to encourage those who would otherwise not access the service or who choose not to complain to the Society about the conduct of a lawyer, for various reasons, to seek the DHC's advice and counsel on issues relating to discrimination and harassment.
20. The Society has recognized the importance of the DHC preserving secrecy with respect to information that comes to his or her knowledge in fulfilling the duties of the office. However, apart from the commentary in the Rules, there was some concern about how this could be accomplished in those circumstances where the information received by the DHC in the course of his or her duties may be sought, for example, by third parties.

21. The Committees examined the *Law Society Act* ("the Act") as a starting point. As the office is currently structured, unlike agents and representatives of the Society (among others), the DHC is not subject to the duty of confidentiality contained in the Act and is not protected from any requirement to give testimony or produce documents in "non-Society" proceedings.⁴ Although the DHC is an agent or representative of the Society to whom the duty of confidentiality and the protection provision apply, the DHC's information is not the kind of information in respect of which the duty of confidentiality described in the Act and the immunity provision apply. Specifically, the DHC does not obtain information as the result of any investigation under Part II of the Act, which must be commenced by the Secretary. In such cases, the Secretary initiates the information gathering with respect to the investigation. The Secretary does not do so with respect to the DHC. The DHC's duties expressly exclude the conduct of investigations.

Information Received by the DHC As Related to Law Society Proceedings

22. Subsection 49.12(2) makes it clear that even if the DHC were subject to the duty of confidentiality and could enjoy the benefit of the protection provision in the Act, without more, the duty of confidentiality and the protection provision would not ensure that information obtained by the DHC in the fulfilment of his or duties was "inadmissible" in Society proceedings.

4

The Act prohibits agents and representatives of the Society from disclosing information that comes to their knowledge as a result of an audit, investigation, review, search, seizure or proceeding under Part II of the Act. The Act also protects the agents and representatives from being required in non-Society proceedings to give testimony or produce documents with respect to information that they are prohibited from disclosing. The duty of confidentiality is subject to exceptions. The relevant subsections are 49.12(1) through (3), which state:

- (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.
- (2) Subsection (1) does not prohibit,
 - (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
 - (b) disclosure required in connection with a proceeding under this Act;
 - (c) disclosure of information that is a matter of public record;
 - (d) disclosure by a person to his or her counsel; or
 - (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.
- (3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1).

23. The Committees noted rules adopted by the Law Society of Alberta and the Law Society of British Columbia, both of which have offices similar to the DHC. These rules, the equivalent of our by-laws, have the effect of protecting against the use of information obtained by the counsel in those jurisdictions in proceedings at the respective law societies.⁵
24. The Committees determined that to protect information obtained by the DHC in fulfilment of his or her duties from being used in Society proceedings,
- a. a by-law should be made establishing the office of the DHC, providing for the appointment of the DHC by Convocation, specifying the duties of the DHC and requiring the DHC to maintain the secrecy of information obtained in the fulfilment of his or her duties⁶, and
 - b. a rule of practice and procedure should be made dealing with the admissibility in evidence in named Society proceedings of information obtained by the DHC in the fulfilment of his or her duties.⁷

5

British Columbia's Rule 4-33(4) reads:

In a proceedings under this Part of Part 2,

- (c) no one is permitted to give evidence about any discussion or other communication with the Ombudsperson in the capacity, and
- (d) no record can be admitted in evidence or disclosed under rule 4-025 or 4-26 if it was produced
 - (i) by or under the direction of the Ombudsperson in that capacity, or
 - (ii) by another person while receiving or seeking assistance from the Ombudsperson, unless the record would otherwise be admissible or subject to disclosure under rule 4-25 or 4-26.

Alberta's Rule 81.1(3) reads:

Communications made for the purpose of resolving disputes according to the Ombudsman's mandate are confidential. Neither the communications nor the information contained therein may be disclosed in any proceeding under Part 3 without the consent of the parties to the dispute.

⁶The Society's by-law-making authority in subsection 62(0.1), paragraph 1 of the Act would permit this as a matter "relating to the affairs of the Society".

⁷The Society's authority for making such a rule is found in clause 61.2(2)(e), read together with subsection 61.2(1). They state:

- 61.2 (1) Convocation may make rules of practice and procedure applicable to proceedings before the Hearing Panel and the Appeal Panel and to the making of orders under sections 46, 47, 48, 49 and 49.1.
- (2) Without limiting the generality of subsection (1), Convocation may make rules of practice and procedure,
- (e) governing the admissibility of evidence in proceedings, including the admissibility in evidence of documents and other information disclosed under this Act or under the regulations, by-laws or rules;

25. A draft by-law and rule appear at pages 19 and 22 respectively of this report.
26. The by-law deals specifically with the issue of confidentiality in section 6, and provides in subsection 6(2) that the by-law supersedes any requirement in the *Rules of Professional Conduct* that may require the DHC to disclose information to the Society as a matter of reporting misconduct. While this particular issue is the subject of discussion later in this report, as a drafting matter, the Committees determined that the by-law should reflect the proposal upon which the Committees agreed that there be no duty on the DHC to report misconduct.
27. The rule of practice and procedure relevant to the DHC is an amendment to current Rule 11 on evidence.⁸ The amendment provides that information obtained by the DHC in the course of his or her duties cannot be used and is inadmissible in a Law Society proceeding.
28. The Committees discussed the possibility of a member's challenge to the operation of the rule which a member may see as contrary to *Charter* rights, if the member believes that the DHC has information relevant to the matter before the Society.⁹

⁸ Rules of Evidence

- 11.01 (1) The rules of evidence applicable in civil proceedings apply in proceedings under the Act.
- (2) Notwithstanding subrule (1), with leave of the tribunal, an affidavit or statutory declaration of any person is admissible in evidence as proof, in the absence of evidence to the contrary, of the statements made therein.
- (3) An affidavit for use in a proceeding may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit but where, in the opinion of the tribunal, better evidence should be adduced through direct evidence of a witness, the tribunal may require the party to file or call such direct evidence and strike out the evidence filed.

Cross-Examination before Official Examiner

- 11.02 (1) A tribunal may order, on its own motion or on the motion of a party, that the cross-examination of the deponent of an affidavit or statutory declaration be conducted before an official examiner.
- (2) Where the cross-examination of the deponent of an affidavit or statutory declaration is conducted before an official examiner, it shall be conducted in a manner analogous to the procedure under the *Rules of Civil Procedure* and, where necessary, the parties may seek direction from the tribunal.

Documentary Evidence

- 11.03 In addition to providing a copy to the other party, any party tendering a document as evidence shall provide to the Clerk of the tribunal,
 - (a) four copies of each document where the hearing is before a three member Hearing Panel; or,
 - (b) two copies of each document where the hearing is before a one member Hearing Panel, the HMT, or the AMT.

⁹ Assuming that a Law Society proceeding involves a member's or student member's right to life, liberty or security of the person, an absolute bar against using or admitting into evidence information obtained by the DHC may not be considered to be in accord with the principles of fundamental justice.

29. The Committees were of the view that there was uncertainty around the issue, and determined that, notwithstanding the possibility of such evidentiary challenges, the rule should be adopted to protect the confidentiality of the DHC's information in Law Society proceedings.

Information Received by the DHC as Related to External (to the Society) Proceedings

30. As noted above, neither the duty of confidentiality, nor the immunity from giving testimony or producing documents, contained in the Act, applies to the DHC. Currently, information obtained by the DHC in the fulfilment of his or her duties is not protected by statute from being used in proceedings outside the Society. In such proceedings, the DHC would be required to rely on common law principles to prevent the disclosure or admissibility in evidence of the information.
31. The Committees considered that provision could be made in the by-law discussed above requiring the DHC to maintain the secrecy of information obtained by him or her in the fulfilment of his or her duties, and that that may assist the DHC to resist the disclosure of the information in non-Society proceedings.
32. The Committees, however, felt that the best protection that could be provided to the DHC would be to extend the duty of confidentiality and the protection from any requirement to give testimony or produce documents in the Act to the DHC. This would require an amendment to the Act. Such protection could not be achieved through a by-law as the only by-law making power that could be relied on to make such a by-law is limited in the scope of its application to the Society (i.e. the benchers, officers, employees, agents and other representatives of the Society and its members).
33. The Committees were mindful of the issues that surround amendments to the Act and at this stage simply wish to propose that if or when the Society decides to approach the Attorney General with respect to amendments to the Act for other reasons, this issue be included in the discussions. The Committees also recognized that if the information of the DHC were sought by a third party in proceedings that were a matter of federal jurisdiction (e.g. criminal proceedings), a provincial statute would not assist the DHC by way of protecting the information. However, the Committees did not think that these were reasons for not requesting an amendment to the Act, so that protection, as far as it would extend, could be provided to the DHC.
34. In the interests of doing all that can be done to protect the confidentiality of information obtained by the DHC, the Committees propose that this matter be referred to the Government and Public Affairs Committee for its consideration.

The Duty of the DHC as a Lawyer to Report Misconduct on the Part of Another Lawyer

35. As discussed above, commentary was added to the rule 6.01(3) to deal with information about a lawyer or lawyers that the DHC may receive in the course of his or her duties from an individual who has sought the services of the DHC.
36. The Committees recognized the importance of confidentiality as a key component of the DHC's office, central to its success and the purpose for which it was designed. The Committees had the benefit of input from the current DHC, Mary Teresa Devlin, on the issue. In responding to initial discussions on the issue, Ms. Devlin offered the following comments:

...an exemption [from disclosing information that comes to the DHC's knowledge as a result of the performance of DHC duties] is a critical component of the Program's success since a duty to report will have a "chilling effect" on callers and will effectively ruin the credibility of the Program".

37. Ms. Devlin advised the Committees that she works as the DHC on the premise that the service is completely confidential and that she need not report matters to the Society. She indicated that to date, this has not presented a problem for her.
38. The Committees discussed the issue of the duty to report at length. Views were expressed both in favour of and against requiring the DHC as a lawyer to observe the reporting requirement by which lawyers generally are bound. The Committees also discussed a modified reporting requirement. The Committees recognized that the issue only arises because the current DHC is a lawyer, and that a non-lawyer incumbent would not be faced with the same ethical dilemma.¹⁰
39. The Committees determined that there were four main options with respect to the reporting requirement:
- a. Include nothing in the Rules or the by-law with respect to a reporting requirement, in which case the DHC would be subject to the Rules in the same way as other lawyers;
 - b. Include an exemption for the DHC respecting reporting matters related to discrimination and harassment only;
 - c. Include a complete exemption from the reporting requirement, where the DHC would urge or encourage the complainant to contact the Society to file a complaint, or contact other appropriate authorities; or
 - d. Include a complete exemption from the reporting requirement, on the basis that the DHC's relationship with the complainant is akin to a solicitor and client relationship, where, if a matter is privileged, the lawyer is prevented from reporting a matter of misconduct to the Society, as reflected in rule 6.01(3).
40. The following points were raised in the discussion:
- with respect to the "carve out" for matters concerning discrimination and harassment in b. above, the problem with this approach is that it appears that conduct is graded, and that may send the wrong message to the public;
 - the office of the DHC may be affected in a negative way if the DHC was obliged to explain the reporting duties every time the DHC met or spoke with a complainant; in particular, the complainant may be confused and less likely to be completely frank in discussing matters with the DHC;
 - if there was no reporting requirement, and the DHC learned of ongoing misappropriation, for example, other members of the public could be severely disadvantaged by the misconduct of the lawyer; it may be possible to accommodate the non-disclosure of the source for defalcation issues, as the Society's audit teams could commence investigation immediately armed only with the name of the lawyer;

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The Committees noted, however, that if the DHC were a member of certain other professions, there would be a duty to report some matters to law enforcement authorities notwithstanding the confidentiality of the service.

- if the DHC is seen as connected with the Society, even though the office is arm's length from the Society, the Society may be exposed to liability; this may occur where a lawyer engages in a series of client sexual assaults, for example, that remain unreported, but a particular victim learns of the lawyer's past conduct with the other victims, and that the Society (as including the DHC) did nothing to address it;
 - the Society will risk destroying the essence of the office of the DHC if confidentiality is not guaranteed; it is in the interests of the public that the DHC maintain the confidentiality of information, so that the DHC can encourage those who access the service to take action with respect to the matter and provide options for dealing with the issues; without confidentiality, this will not happen.
41. After significant discussion on the issue, the Committees agreed that inasmuch as the Society should do all it can to protect the confidentiality of the information obtained by the DHC, the approach outlined in paragraph 39d. above should be adopted. The proposed by-law, as discussed in paragraph 26 above, accomplishes this through the language of section 6. Accordingly, it is proposed that the existing commentary to rule 6.01(3) dealing with the office of the DHC, being the last paragraph of the commentary under that rule, be deleted. That paragraph reads:

The Society also recognizes that communications with the harassment and discrimination counsel appointed to assist in resolving complaints of discrimination or harassment against lawyers must generally remain confidential. Therefore, the harassment and discrimination counsel will not be called by the Society or by any investigative committee to testify at any conduct, capacity, or competence hearing without the consent of the person from whom the information was received. Notwithstanding the above, a lawyer serving as harassment and discrimination counsel has an ethical obligation to report to the Society upon learning that a lawyer is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice.

D. SUMMARY OF THE COMMITTEES' PROPOSALS

42. The Committees propose that:
- a. A by-law should be made establishing the office of the DHC, providing for the appointment of the DHC by Convocation, specifying the duties of the DHC and requiring the DHC to maintain the secrecy of information obtained in the fulfilment of his or her duties. Draft By-Law 36 appears on page 19,
 - b. With respect to Law Society proceedings, a rule of practice and procedure should be made dealing with the admissibility in evidence in Society proceedings of information obtained by the DHC in the fulfilment of his or her duties. Draft rule 11.04(1) appears at page 22,
 - c. At the appropriate time, an amendment to the *Law Society Act* should be pursued to provide protection to information obtained by the DHC in the fulfilment of his or her duties from being used in proceedings outside the Society. At present, the matter should be referred to the Government and Public Affairs Committee for its consideration,
 - d. Amendments should be made to rule 6.01(3) of the *Rules of Professional Conduct* to delete the commentary dealing with the DHC's reporting requirements.

E. DECISION FOR CONVOCATION

43. Convocation is requested to:
- a. make By-Law 36 on the Discrimination and Harassment Counsel, as presented below or amended as Convocation deems appropriate;
 - b. make rule 11.04(1) of the Rules of Practice and Procedure, as presented below or amended as Convocation deems appropriate;
 - c. adopt the amendments to rule 6.01(3) of the *Rules of Professional Conduct* as described in paragraph 41, and
 - d. refer the issue of amendments to the *Law Society Act* to protect the confidentiality of information obtained by the DHC in proceedings external to the Society to the Government and Public Affairs Committee for consideration.
44. If Convocation approves the by-law and rule of practice and procedure, appropriate motions with respect to these items appear below, together with the text of the by-law and rule.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 22, 2001

MOVED BY

SECONDED BY

THAT, pursuant to the authority contained in paragraph 1 of subsection 62 (0.1) of the *Law Society Act*, By-Law 36 [Discrimination and Harassment Counsel] be made as follows:

BY-LAW 36

DISCRIMINATION AND HARASSMENT COUNSEL

Appointment

1. (1) Convocation shall appoint a person as Discrimination and Harassment Counsel in accordance with section 2.

Term of office

- (2) The Counsel shall be appointed for a term not exceeding three years and is eligible for reappointment

Appointment at pleasure

- (3) The Counsel holds office at the pleasure of Convocation.

No appointment without recommendation

2. (1) Convocation shall not appoint a person as Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.

Vacancy in office

- (2) When a vacancy exists in the office of Counsel, the committee shall conduct a search for candidates for appointment as Counsel in accordance with procedures and criteria established by the committee.

List of candidates

- (3) At the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Counsel, with brief supporting reasons.

Additional candidates

- (4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.

Recommendations considered in absence of public

- (5) Convocation shall consider the committee's recommendations in the absence of the public.

Application of s. 2

3. Section 2 does not apply if Convocation reappoints the Counsel under subsection 1 (2).

Function of Counsel

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

No authority to conduct investigation

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

Access to information

- (3) Except with the prior permission of the Secretary, the Counsel is not entitled to have any information in the records or within the knowledge of the Society respecting a member or student member.

Annual and semi-annual report to Committee

5. (1) The Counsel shall make a report to the committee,

- (a) not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year; and
- (b) not later than September 1 in each year, upon the affairs of the Counsel during the period January 1 to June 30 of that year.

Report to Convocation

(2) The committee shall submit each report received from the Counsel to Convocation on the first day following the deadline for the receipt of the report by the Committee on which Convocation has a regular meeting.

Confidentiality

6. (1) The Counsel shall not disclose,

- (a) any information that comes to his or her knowledge as a result of the performance of his or her duties under clause 4 (1) (a); or
- (b) any information that comes to his or her knowledge under subsection 4 (3) that a benchler, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.

Rules of Professional Conduct

(2) For greater certainty, clause (1) (a) prevails over the Society's Rules of Professional Conduct to the extent that the Rules require the Counsel to disclose to the Society the information mentioned in clause (1) (a).

Exceptions

- (3) Subsection (1) does not prohibit,
 - (a) disclosure required in connection with the administration of the Act, the regulations, the by-laws or the rules of practice and procedure;
 - (b) disclosure of information that is a matter of public record;
 - (d) disclosure by the Counsel to his or her counsel; or
 - (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE

MADE UNDER SECTION 61.2 OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 22, 2001

MOVED BY

SECONDED BY

THAT Rule 11 [Evidence] of the Rules of Practice and Procedure made under section 61.2 of the *Law Society Act* be amended by adding the following rule:

Certain information not admissible

11.04 (1) Notwithstanding subrule 11.01 (1), information obtained by the Discrimination and Harassment Counsel as a result of the performance of his or her duties under clause 4 (1) (a) of By-Law 36 shall not be used and is inadmissible in a proceeding before the tribunal.

II. INFORMATION

ETHICAL ISSUES RELATING TO LAWYERS AND RESIDENTIAL SCHOOL MATTERS

45. The Equity and Aboriginal Issues Committee requested the Committee's review of the need to address in the *Rules of Professional Conduct* circumstances in which lawyers may inappropriately
- solicit of victims of residential schools as clients, and
 - structure the related retainer agreements.
46. In April 2001, the Committee received material entitled "Residential School Issues" prepared by Margaret Froh, Aboriginal Issues Co-ordinator in the Equity Department which provided some background to the issue of residential schools and childhood institutional abuse cases. This material was supplemented by her memorandum presented to the Committee's June meeting.¹¹ The memorandum highlighted the issues and placed them in a broader context, relating them to the need to
- provide guidance to lawyers who deal with individuals who have suffered abuse in these cases
 - educate the Aboriginal community about the Law Society's role
 - address in an appropriate way issues of complaint that may arise with respect to lawyers involved in these cases.
47. The Committee agreed that it should work with the Equity and Aboriginal Issues Committee on a co-ordinated strategy to address these issues. The Committee was informed by Ms. Froh that research on the issue is currently being conducted by the Aboriginal lawyers advisory group, Rotiio'taties, would likely be available this fall. To that end, the Committee determined that as a starting point, it should explore means to provide guidance to the profession, for example, through guidelines on issues relevant to residential school litigation. The Committee, with the assistance of staff in the Equity and Policy and Legal Affairs Departments, will initiate work in this area over the summer and plans to arrange a joint meeting with the Equity and Aboriginal Issues Committee in the fall once information from Rotiio'taties is available.

AMENDMENTS TO THE GUIDELINES FOR SUSPENDED, RESIGNED OR DISBARRED MEMBERS AND MEMBERS WHO HAVE GIVEN AN UNDERTAKING NOT TO PRACTICE

¹¹This memorandum was also presented to the Equity and Aboriginal Issues Committee and appears in its report to June 2001 Convocation.

48. At the request of Senior Counsel - Discipline, Lesley Cameron, the Committee at its May and June meetings considered proposed amendments to the above Guidelines.
49. The amendments address a concern about certain words in the Guidelines that would permit a lawyer who, for example, is suspended pursuant to an order of the Hearing Panel to advise his or her clients only on the start date of the suspension that the clients should "take their files to a solicitor of their choice", in the words of the Guidelines. The concern arose out of a case recently concluded before a Hearing Panel. The Panel was concerned that the member's request for a lengthier than normal period of time between the order for suspension and the start date of the suspension was for the purpose of obtaining new clients and not to allow more time to wind down the practice.
50. The case illustrated a problem with the Guidelines which provide that clients must be advised to obtain another lawyer only when the suspension takes effect and not before. Absent an order from the panel or an undertaking, the Guidelines do not address the requirement for such disclosure to potential clients prior to any retainer of the member or to tell existing clients before the date of suspension.
51. The Committee agreed that the Guidelines should be amended to address these issues. The amendments require that lawyers, effective from the date of the *order* of suspension (not the start date of the suspension), advise clients of the need to take their files to another lawyer. Exceptions are provided where the member
 - obtains a stay of the order after appealing the finding of the Hearing Panel
 - will complete the matter for an existing client prior to the suspension date
 - will complete a matter for a new client prior to the suspension date.
52. The amended Guidelines appear at Appendix 4 The new language appears in a new section III on page 3 of the Guidelines.

**REPORT ON COMPLAINTS RESOLUTION (FORMERLY RESOLUTION AND COMPLIANCE),
INVESTIGATIONS AND DISCIPLINE FILE MANAGEMENT, CASELOADS AND OPERATIONS**

53. The Secretary, Richard Tinsley and James Yakimovich (Manager, Investigations) reported to the Committee on caseload management in the Complaints Resolution, Investigations, and Discipline Departments. The reports appear at Appendix 5. These reports are prepared monthly for review by the Committee as part of its monitoring function respecting file management. The Committee receives general information and statistics on file management and caseloads in the departments noted above.¹²
54. With respect to staffing changes, the chair made special mention of Janet Brooks and her excellent work for the Society since 1993, first as discipline counsel and then as senior regulatory counsel. Ms. Brooks will be leaving the Society at the end of June 2001. The Committee thanked Ms. Brooks for her sound judgment, skill and commitment to the Society's regulatory functions.

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The Chair of the Committee, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

APPENDIX 1
CORRESPONDENCE FROM PETER ANNIS, PRESIDENT, L'AJEFO

APPENDIX 2
NOTICE PUBLISHED IN THE *ONTARIO REPORTS* RESPECTING THE
OFFICE OF THE DISCRIMINATION AND HARASSMENT COUNSEL

APPENDIX 3
EXCERPT FROM THE REPORT OF THE ADR SYSTEMS DESIGN
TEAM, SEPTEMBER 1998 RESPECTING THE OFFICE OF THE
DISCRIMINATION AND HARASSMENT COUNSEL

APPENDIX 4
GUIDELINES FOR SUSPENDED, RESIGNED OR DISBARRED MEMBERS
AND MEMBERS WHO HAVE GIVEN AN UNDERTAKING NOT TO PRACTISE

Subsections (1)(a) of Section 50 and Section 50.1(1) of the *Law Society Act*, R.S.O. 1990, c. L.8 as amended provide as follows:

- 50 (1) Except where otherwise provided by law,
 55. no person, other than a member whose rights and privileges are not suspended,
 shall act as a barrister or solicitor or hold themselves out as or represent themselves to
 be a barrister or solicitor or practise as a barrister or solicitor;
- 50.1(1) Every person who contravenes section 50 is guilty of an offence and on conviction is liable
 to a fine of not more than \$10,000.

EFFECTIVE FROM THE DATE OF SUSPENSION, RESIGNATION, DISBARMENT OR UNDERTAKING NOT
TO PRACTISE:

I - YOU MAY:

- (a) See clients only for the limited purpose of assisting them in transferring their past or present legal
 work to another solicitor;
- (b) Collect accounts receivable;
- (c) Render accounts for work completed on or before the date of your suspension, resignation,
 disbarment or undertaking not to practise;

II - YOU SHALL NOT:

Carry on the practice or profession of a barrister and solicitor in any way, nor, represent or hold yourself out as a barrister and solicitor in any way. Except on the terms set out above, and without limiting the generality of the following, you shall not:

- (a) Accept any new clients;
- (b) Accept new legal work for existing clients;
- (c) Give legal advice to any client, other individual, corporation or other entity;
- (d) Subject to paragraph (f), continue, commence, carry on or defend any lawsuit or proceeding for any client, other individual, corporation or other entity with or without fee;
- (e) Subject to paragraph (f), appear in court for any purpose other than in your personal capacity to represent yourself as a party and/or as a witness;
- 6. Provide legal services to the public, unless acting as an agent where permitted by statute or by leave of the court or tribunal (e.g. including but not limited to Provincial Offences, Landlord and Tenant, Small Claims and Highway Traffic Act matters) on the specific condition that the principal has been advised, in writing, that you are not entitled to act and are not acting as a barrister and solicitor, that your representation will not afford them the protection of the Lawyers' Professional Indemnity Company in the event of your negligence or the protection of the Lawyers Fund for Client Compensation in the event of dishonesty or fraud and that your representation will not afford them the protection of solicitor-client privilege. In addition, any Court, administrative tribunal or other adjudicative body, as well as all other parties involved, must be informed that you are not entitled to act as a barrister and solicitor but are appearing as an agent.
- (g) Draft or revise legal documents of any type, and/or execute documents of any type which require or permit execution by a barrister and solicitor;
- (h) Notarize documents pursuant to the *Notaries Act*, R.S.O. 1990, c. N.6, or swear affidavits pursuant to the *Commissioners for taking Affidavits Act*, R.S.O. 1990, c. C.17;
- (i) Report to clients, other than to: 1) inform them that you are not practising law; and/or 2) deliver an account for services rendered prior to your suspension, resignation, disbarment or undertaking not to practise (for the preparation of client reporting letters see III (b) below);
- (j) Certify, or give any opinions on, title to property;
- (k) Subject to paragraph (f), draft and/or send a demand letter threatening or intimating that legal proceedings of any form will be taken on behalf of a third party, with or without fee;
- (l) Act as a solicitor for the estate of a deceased person or party under a "disability" as defined by the Rules of Civil Procedure;

- (m) Prepare wills or have anything to do with the administration, distribution or completion of estates, other than in your capacity as an estate trustee;
- (n) Give to another lawyer or receive on behalf of a client, other individual, corporation or other entity, any undertaking with respect to any legal matter;
- (o) Hold yourself out as a barrister and/or a solicitor;
- (p) Occupy or share office space with a barrister and solicitor in contravention of Rule 6.07;
- (q) Provide services to a barrister and solicitor, in relation to that individual's practice of law in contravention of Rule 6.07;
- (r) Act as an articling principal to a student-at-law in the Bar Admission Course or act as the supervising lawyer to a student-at-law in the Bar Admission Course;
- (s) Accept any referrals from the Lawyer Referral Service.

EFFECTIVE FROM THE DATE OF THE SOCIETY'S DECISION OR ORDER SUSPENDING YOU, PERMITTING OR ACCEPTING YOUR RESIGNATION OR DISBARRING YOU, OR REQUIRING OR ACCEPTING YOUR UNDERTAKING NOT TO PRACTISE, WHERE YOU HAVE NOT APPEALED AND OBTAINED A STAY OF THE DECISION OR ORDER:

III YOU MUST:...

- (a) Arrange immediately to inform all clients in active matters that they should take their files to a solicitor of their choice, unless such matters will be completed before the date you cease to practise. You may, in this capacity, suggest a referral to a particular solicitor. The ultimate choice of who is retained rests with the client and not with you;
- 2. Not accept any new client matters without informing the prospective clients of the decision or order and the fact of that you will cease to practise on a particular date, unless such matters will be completed before the date you cease to practise

EFFECTIVE FROM THE DATE OF SUSPENSION, RESIGNATION, DISBARMENT OR UNDERTAKING NOT TO PRACTISE:

IV YOU MUST:

Fulfil the requirements of all paragraphs below and confirm, in writing, to the Law Society, within 30 days of your suspension, resignation, disbarment or undertaking not to practise that you have done so.

1. Assign any and all outstanding reporting letters to another solicitor in good standing for completion. You may prepare a draft report for the solicitor of your choice, but that solicitor must review the file completely and send any reporting letter out to the client on his or her letterhead. You may make personal arrangements with the solicitor for his or her remuneration;
- (b) Employ another solicitor or agent to complete all undertakings given by and accepted by you prior to your suspension, cancellation or undertaking not to practise;
- (c) Return original wills and documents to clients or arrange to transfer this part of your practice to another solicitor, and inform your clients and the Law Society who has been given possession of their wills, documents and files;
- (d) Remove any sign from your door, building, premises, window, building directory or property designating it as a "law office" or designating you to be a "barrister", "solicitor", "lawyer", "Q.C.", "notary public" and/or "commissioner of oaths", in English or any other language. The above words must also be removed or crossed out from all stationery, letterhead, business cards, forms, stamps, accounts and any publications bearing your name;
- (e) If you were issued a Law Society Membership Photo ID Card, confirm that you have returned it to the Society forthwith, if you have not already done so;
- (f) Telephone/fax:
 - i) Either disconnect the lines or arrange for a voice message to advise callers that your law practice is closed until further notice and provide callers with the name and number of another lawyer to call for information regarding their files. Members under a definite suspension can leave a message advising when the office will reopen;
 - ii) Contact your telephone company and directory advertisers instructing them to remove from the next printing of the white and yellow pages of the telephone directory any words or abbreviations for "barrister", "solicitor", "lawyer", "Q.C.", "notary public" and/or "commissioner of oaths", in English or any other language, and to delete from Directory Assistance your law office listings and;
 - iii) Have your name deleted from the listing of lawyers under your law firm's name;
- (g) Trust Account(s):

Have all trust funds on deposit balanced to client liabilities as of the date of your suspension, resignation, disbarment or undertaking not to practise and turn funds over to:

 - (i) clients; or
 - (ii) succeeding solicitor, in trust, by direction of client; or
 - (iii) succeeding solicitor of your choice, in trust, if clients decline to claim or direct; and
 - (iv) close the account(s);
 - (v) forward a copy of your trust bank statements showing account closed particulars to the Law Society;
- (h) Finalize your accounting books and records to the latest of the date of your suspension, resignation, disbarment or undertaking not to practise and the closure of your trust account. Submit your annual filings within 90 days of your fiscal year-end, as required by the By-Laws.

22nd June, 2001

- (i) If a suspended member or a member subject to an undertaking not to practise, continue to file annually thereafter a Member's Annual Report;
- (j) Locate another member of the profession who will act as the articling principal to your current or incoming students-at-law and arrange for the orderly assignment or transfer of articles of the student-at-law under the direction of the Articling Director at the Law Society.

Enquiries regarding these guidelines and compliance should be directed to the Law Society of Upper Canada at telephone 416-947-3315.

June 8, 2001

APPENDIX 5
COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE
FILE MANAGEMENT AND CASELOAD INFORMATION
FOR THE MONTH ENDING MAY 2001

.....

Re: An Amendment to the Rules of Professional Conduct Respecting Advice on French Language Rights

It was moved by Mr. MacKenzie, seconded by Ms. Ross that the Rules of Professional Conduct be amended re: French Language Rights by adding the commentary appearing in paragraph 4 of the Report after clause 1.03(1)(b).

An amendment by Mr. Wright was accepted by the mover and seconder that the words "who speaks French" be deleted from the first paragraph.

The MacKenzie/Ross motion as amended was adopted.

"Commentary

A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable.

- (a) subsection 19 (1) of the *Constitution Act, 1982* on the use of French or English in any court established by Parliament,
- (b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused.
- (c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding, and
- (d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions."

Re: Confidentiality Issues Relating to the Office of the Discrimination and Harassment Counsel

Ms. Ross presented the item in the Report dealing with Confidentiality Issues relating to the Office of the Discrimination and Harassment Counsel.

It was moved by Mr. Crowe, seconded by Ms. Puccini that subsection 2 (1) of proposed By-law 36 (No appointment without recommendation) set out on page 19 of the Report be deleted.

Lost

An amendment by Mr. Wright was accepted that section 6 of proposed By-law 36 make reference to the Rule of Professional Conduct on justified disclosure with respect to imminent risk of death or bodily harm.

It was moved by Ms. Ross, seconded by Mr. MacKenzie and Ms. Potter that new By-law 36 be approved as amended and that Rule 11.04(1) of the Rules of Practice and Procedure be amended.

Carried

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) OF THE *LAW SOCIETY ACT*

THAT, pursuant to the authority contained in paragraph 1 of subsection 62 (0.1) of the *Law Society Act*, By-Law 36 [Discrimination and Harassment Counsel] be made as follows:

BY-LAW 36

DISCRIMINATION AND HARASSMENT COUNSEL

Appointment

1. (1) Convocation shall appoint a person as Discrimination and Harassment Counsel in accordance with section 2.

Term of office

- (2) The Counsel shall be appointed for a term not exceeding three years and is eligible for reappointment

Appointment at pleasure

- (3) The Counsel holds office at the pleasure of Convocation.

No appointment without recommendation

2. (1) Convocation shall not appoint a person as Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.

Vacancy in office

- (2) When a vacancy exists in the office of Counsel, the committee shall conduct a search for candidates for appointment as Counsel in accordance with procedures and criteria established by the committee.

List of candidates

(3) At the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Counsel, with brief supporting reasons.

Additional candidates

(4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.

Recommendations considered in absence of public

(5) Convocation shall consider the committee's recommendations in the absence of the public.

Application of s. 2

3. Section 2 does not apply if Convocation reappoints the Counsel under subsection 1 (2).

Function of Counsel

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

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

No authority to conduct investigation

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

Access to information

(3) Except with the prior permission of the Secretary, the Counsel is not entitled to have any information in the records or within the knowledge of the Society respecting a member or student member.

Annual and semi-annual report to Committee

5. (1) The Counsel shall make a report to the committee,

- (a) not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year; and
- (b) not later than September 1 in each year, upon the affairs of the Counsel during the period January 1 to June 30 of that year.

Report to Convocation

(2) The committee shall submit each report received from the Counsel to Convocation on the first day following the deadline for the receipt of the report by the Committee on which Convocation has a regular meeting.

Confidentiality

6. (1) The Counsel shall not disclose,
- (a) any information that comes to his or her knowledge as a result of the performance of his or her duties under clause 4 (1) (a); or
 - (b) any information that comes to his or her knowledge under subsection 4 (3) that a benchler, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.

Rules of Professional Conduct

- (2) For greater certainty, clause (1) (a) prevails over the Society's Rules of Professional Conduct to the extent that the Rules require the Counsel to disclose to the Society the information mentioned in clause (1) (a).

Exceptions

- (3) Subsection (1) does not prohibit,
- (a) disclosure required in connection with the administration of the Act, the regulations, the by-laws or the rules of practice and procedure;
 - (b) disclosure of information that is a matter of public record;
 - (d) disclosure by the Counsel to his or her counsel; or
 - (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

provision to make reference to the Rule of Professional Conduct on justified disclosure with respect to imminent risk of death or bodily harm

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE
MADE UNDER SECTION 61.2 OF THE *LAW SOCIETY ACT*

THAT Rule 11 [Evidence] of the Rules of Practice and Procedure made under section 61.2 of the *Law Society Act* be amended by adding the following rule:

Certain information not admissible

11.04 (1) Notwithstanding subrule 11.01 (1), information obtained by the Discrimination and Harassment Counsel as a result of the performance of his or her duties under clause 4 (1) (a) of By-Law 36 shall not be used and is inadmissible in a proceeding before the tribunal.

NOTICE OF MOTION

Mr. Wright on behalf of the Chair of the Equity and Aboriginal Issues Committee gave notice of the following motion to be brought before Convocation on July 26th, 2001:

MOVED BY: Bradley Wright

SECONDED BY: Judith Potter and George Hunter

WHEREAS the Law Society of Upper Canada, the traditional name of the governing body of lawyers in Ontario, Canada, is committed to the principles of the independence and integrity of the bar and the judiciary, and to the principles of democracy, liberty, and responsibility, all in the public interest;

THEREFORE the Law Society of Upper Canada conveys to the Government of Zimbabwe the Society's deepest concerns and strongest condemnations of the attacks on those principles by the Government of Zimbabwe, specifically and without limitation the forced retirement of Chief Justice Anthony Gubbay and the intimidation of judges and officials in the administration of justice system. The Law Society of Upper Canada calls upon the Government of Zimbabwe to affirm and act upon an abiding commitment to the principles enunciated above, and thereby gain the respect of ourselves and the international community.

CONTINUATION OF THE PROFESSIONAL REGULATION COMMITTEE REPORT

Re: Confidentiality Issues Relating to the Office of the Discrimination and Harassment Counsel

It was moved by Mr. MacKenzie seconded by Ms. Ross that amendments to Rule 6.01(3) of the *Rules of Professional Conduct* as described in paragraph 41 of the Report be adopted.

Carried

Rule 6.01(3)

Duty to Report Misconduct

(3) A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- (a) the misappropriation or misapplication of trust monies,
- (b) the abandonment of a law practice,
- (c) participation in serious criminal activity related to a lawyer's practice,
- (d) the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced, and
- (e) any other situation where a lawyer's clients are likely to be severely prejudiced.

Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the Ontario Bar Assistance Program (OBAP), LINK, and other support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for OBAP and other support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

~~The Society also recognizes that communications with the harassment and discrimination counsel appointed to assist in resolving complaints of discrimination or harassment against lawyers must generally remain confidential. Therefore, the harassment and discrimination counsel will not be called by the Society or by any investigative committee to testify at any conduct, capacity, or competence hearing without the consent of the person from whom the information was received. Notwithstanding the above, a lawyer serving as harassment and discrimination counsel has an ethical obligation to report to the Society upon learning that a lawyer is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice.~~

It was moved by Mr. MacKenzie, seconded by Ms. Potter that referral of the issues of amendments to the *Law Society Act* to protect the confidentiality of information obtained by the DHC in proceedings external to the Society to the Government and Public Affairs Committee for consideration be adopted.

Carried

REPORT OF THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

Mr. Cass presented the Report of the Lawyers Fund for Client Compensation Committee for approval by Convocation.

Lawyers Fund for Client Compensation Committee
June 6, 2001

Report to Convocation

Purpose of Report: Policy - Decision Making
Information

Prepared by the Lawyers Fund for Client Compensation Department

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on June 6, 2001. Committee members in attendance were Clayton Ruby (Chair), Robert Aaron (Vice-Chair), Stephen Bindman, Ronald Cass Q.C., Abdul Chahbar, Gillian Diamond and Barbara Laskin. Also in attendance were Malcolm Heins (CEO), David McKillop (Secretary), Rima Berns-McGown, Maria Loukidelis, Paul McCormick, Lucy Rybka-Becker, Heather Werry, Eric Young and Benji.
2. The Committee is reporting on the following matters:

Policy - For Decision

- Amendment to Guideline 15 of the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation

Information

- Applying Guideline 12 of the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation to claims from Charities and Religious Organizations
- Litigation Update
- Communications Strategy for the Fund

SECTION A - POLICY - FOR DECISION

AMENDMENT TO GUIDELINE 15 IMPLEMENTATION OF THE INTER-JURISDICTIONAL PRACTICE PROTOCOL

Background

3. In February 1994 the Law Society became a signatory to the Federation of Law Societies of Canada's Inter-Jurisdictional Practice Protocol. The purpose of the Protocol is to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law. When implemented in a jurisdiction, the Protocol does away with "temporary or occasional membership" and permits a member of one Canadian law society to practice on an occasional basis in another Canadian jurisdiction without the necessity of obtaining a temporary call.

Issue

4. One of the requirements of the Protocol is that a member's home law society have a defalcation compensation program that extends to the member's legal services rendered in the host jurisdiction. In order to give effect to this requirement, the Committee advises that the *General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation* will require revision.

Current Guideline 15

5. The Committee considered Guideline 15 of the afore-mentioned guidelines which reads as follows:

In the case of a member who conducts a legal practice in a jurisdiction outside Ontario, no grant shall be paid out of the Fund when the funds or property of the claimant were received by or on behalf of the member in connection with a matter that originated in that jurisdiction or in connection with a trust of which the member was or is a trustee that originated outside Ontario.

Proposed Guideline 15

6. In order to bring Lawyers Fund policy in line with the Protocol, the Committee proposes that Guideline 15 be amended as follows (changes appear in italics):

In the case of a member who conducts a legal practice in a jurisdiction outside Ontario, *other than a practice within Canada that complies with the provisions of the Inter-Jurisdictional Practice Protocol*, no grant shall be paid out of the Fund when the funds or property of the claimant were received by or on behalf of the member in connection with a matter that originated in that jurisdiction or in connection with a trust of which the member was or is a trustee that originated outside Ontario.

7. Convocation approved the by-law to give the Protocol effect in Ontario on May 24, 2001. In addition to Ontario, the Protocol has now been implemented in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia. If adopted by Convocation, revised Guideline 15 would presently apply to Ontario members who occasionally practice in those provinces. As other provinces and territories adopt the Protocol, revised Guideline 15 will apply to those jurisdictions as well.
8. For 2000, the Fund purchased stop-loss reinsurance coverage from the Lawyers' Professional Indemnity Company. \$14 million of insurance coverage was purchased with an excess of \$6 million annual retention. Pursuant to LPIC Policy No. 2001-003, the Guidelines, which appear as a schedule to the policy, must be agreed to by the Insurer. The Committee advises that LPIC and its reinsurers have consented to the proposed amendment to Guideline 15.

Decision for Convocation

9. Convocation is requested to make the amendment to Guideline 15 of the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation as set out in paragraph 6 above. The Committee advises that if Convocation wishes to propose an amendment other than as set out at paragraph 6, it will be necessary to once again seek the approval of LPIC and its reinsurers before the amendment may be passed.
10. The Committee proposes that the amendment be effective July 1, 2001.

SECTION B - INFORMATION

POLICY ON CLAIMS TO THE FUND BY CHARITIES AND RELIGIOUS ORGANIZATIONS

11. As a result of grants paid on behalf of a particular member, the Chair requested that the Committee consider the issue of claims to the Fund by charities and religious organizations. In this particular matter, several estates were the victims of large scale misappropriations. In some of these cases, charities and religious organizations were major beneficiaries of these estates and the funds misappropriated by the solicitor would, in the normal course of events, have been paid to these beneficiaries.

12. Pursuant to Guideline 2 of the *General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation*, notwithstanding the absence of a direct solicitor and client relationship, estate beneficiaries are allowed to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim. As a result of this policy, several charities and religious organizations have qualified for \$100,000.00 grants from the Fund on account of the activities of this solicitor.
13. In 1999 the Fund was placed on notice of a potential claim from one of Canada's largest corporations. There was nothing in the guidelines to prevent such a claim from resulting in a grant. Guideline 12 only prevents grants being made to banks and similar institutions.

Guideline 12 of the General Guidelines for the Determination of Grants from the Fund

14. The Committee considered Guideline 12 which reads as follows:

"The financial circumstances of the person actually suffering the loss and the degree of hardship suffered by that person as a result of the loss are factors to be taken into account when determining any grant. No grant shall be made to a bank or other financial institution engaged in the business of lending money."

Traditionally this guideline, with the exception of the last sentence, has only been interpreted in such a way as to benefit claimants. For example, if a loss was particularly devastating to a claimant, they may be given the benefit of the doubt when it comes to deducting any interest payments received or considering factors such as risk and carelessness when determining the amount of any grant.

15. Arguably Guideline 12 could also be interpreted to say that those claimants of significant financial means have not suffered hardship as a result of their loss and therefore should not have access to the Fund. Prior to examination of this issue in 1999, the Fund had not been in the practice of examining a claimant's wealth to determine eligibility for a grant. Therefore, individuals, charities and religions of significant financial means have received grants from the Fund.
16. As a result of the 1999 corporate claimant issue, the Committee elected not to revise the wording of Guideline 12. Rather, it instructed staff, using the current wording, to use their discretion and bring to the Review Sub-Committee's attention both corporate and individual claimants who, due to their wealth, possibly should not have access or full access to the Fund. Utilizing this approach, corporate and individual claims are examined on an individual basis and it is up to the Review Sub-Committee to determine if the loss of funds will result in hardship to the claimant and, if not, whether a grant will be nonetheless considered in whole, in part, or at all.
17. The Committee considered the risks of initiating inquiries into the relative wealth of charities and religious organizations. While the Committee was concerned about accusations that the Fund was basing decisions on grant payments, or lack thereof, on the personal feelings of staff and benchers towards claimants of this type, it determined that if all claimants, be they individuals, corporations, estates, charities or religious organizations, were all examined in the same manner, the approach was proper and fair to all.

18. The Committee has again determined that an amendment to Guideline 12 is not necessary. Rather it is clarifying current practice that all claimants should be treated equally and therefore charities and religious organizations should be subject to the same scrutiny as is presently given to corporations and individuals. Therefore, staff will use their discretion and bring to the Review Sub-Committee's attention all eligible claimants who, due to their wealth, possibly should not have access or full access to the Fund. Utilizing this approach, such claims will be examined on an individual basis and it will be up to the Review Sub-Committee to determine if the loss of funds will result in hardship to the claimant and, if not, whether a grant will be nonetheless considered in whole, in part, or at all.

LITIGATION UPDATE

Background

19. The Fund has paid claims on account of a Member totalling \$1.3 million. In one of those claims, Mr. & Mrs. C ("the Claimants"), who were closing the purchase of their new home in advance of the sale of their original home, arranged bridge financing from MCAP Mortgage Corporation (now Clarica Trust Company) in the amount of \$90,000.00. The Member acted for both parties through-out.
20. On closing the sale, the Member misappropriated that portion of the proceeds intended to repay the bridge loan. He also misappropriated an additional \$3,418.95 which belonged to the Claimants.
21. The Claimants lodged a claim with the Lawyers Fund for both amounts. Though the Fund did pay them a grant in the amount of \$3,418.95 in February of 1999, no grant was paid to them on account of the bridge loan as the Fund viewed that money as belonging to Clarica by virtue of an assignment/irrevocable direction to the Member as had been executed by the Claimants in Clarica's favour as part of the bridge loan agreement.
22. In November of 1999, Clarica sued the Claimants for the \$90,000.00 plus interest in the Ontario Superior Court of Justice on the basis of a promissory note which the Claimants had also provided to Clarica as part of the bridge loan agreement.
23. The Claimants again turned to the Fund as they did not have the financial resources to defend the lawsuit and because, if Clarica were to be successful in obtaining judgment against them, the Fund would likely have no basis to refuse them a grant. (*By letter dated 8 November 2000, counsel for Clarica wrote to the Fund seeking a grant for the funds misappropriated by the Member. That request was refused on the basis of General Guideline #13 in that Clarica is a financial institution engaged in the business of lending money*).
24. Upon being briefed on the matter, the Chair authorized the expenditure of up to \$25,000.00 on defence costs and instructed Committee authorization be sought to exceed that amount. The Fund subsequently retained the Claimants' counsel, Paul J. Sullivan, to carry on the defence of the action.

Motion for Summary Judgment

25. Following the exchange of pleadings, both parties brought motions for summary judgment which were heard by the Honourable Mr. Justice Day on 16 January 2001. By Order and Judgment delivered 12 April 2001, Mr. Justice Day dismissed Clarica's action and motion and ordered that Clarica pay the costs of both motions and the action to be assessed on a solicitor and client basis. In his Reasons, Mr. Justice Day found, by virtue of the irrevocable assignment the Claimants had executed in favour of Clarica, that the \$90,000.00 belonged to Clarica at the time it was misappropriated by the Member.

Appeal

26. Counsel for Clarica has now brought an appeal of Mr. Justice Day's decision.
27. Mr. Sullivan anticipates the appeal will be heard in approximately six months and will cost between \$5,000 and \$10,000.
28. The \$25,000.00 originally allotted by the Chair on account of defence costs has been exhausted. It is understood, however, that the Fund will be reimbursed for all or part of this expenditure to the extent costs are ultimately assessed and awarded to the Claimants should the appeal be successful. Our legal advice is that we are likely to succeed on appeal, as we did below.
29. The Committee authorized the retainer of Paul J. Sullivan to respond to Clarica's appeal and authorized a further expenditure of up to \$10,000.00 on account of legal fees and disbursements.

COMMUNICATIONS STRATEGY FOR THE FUND

Background

30. The Lawyers Fund levy represents 21% of the full annual fee paid by members to the Society. As such, the Fund is one of the Law Society's largest and most expensive programs. While no hard data exists, the perception is that the Fund enjoys widespread support amongst the profession and is a valuable asset in restoring confidence in the legal profession for those unfortunate enough to come into contact with some of its less than honest members.
31. While the Committee believes support for the Fund is high, this is no reason to "rest on our laurels" and assume it will always remain so. The profession should feel their significant contributions to this program are worthwhile. While a much more difficult goal, it would also be valuable for the profession to benefit by publicizing the good work the Fund does through the financial contributions of its members.
32. With these goals in mind, the Fund approached Eric Young Associates (E*Y*E) to make a presentation to the Committee. E*Y*E is a consulting firm that specializes in formulating communications strategies designed to engineer social change. The Committee Secretary and Lawyers Fund Manager, David McKillop, supplied E*Y*E with extensive background material on the Fund's prior attempts at public relations, how the Law Society currently communicates with its members and what other jurisdictions have done and are doing in this regard.

Presentation to Committee

33. Mr. Eric Young and Ms. Rima Berns-McGown of E*Y*E made a presentation to the Committee at its meeting held on June 6, 2001. The purpose of the presentation was to introduce Mr. Young and Ms. Berns-McGown to the Committee and to hear their initial thoughts on the issue of developing a communications strategy for the Fund.

34. Mr. Young began the presentation by asking the question should the activities of the Fund be publicized and if so, how? Mr. Young repeated the assertion that the Fund is an expensive program but at present is only communicating effectively to a small, discreet group of people - claimants to the Fund. Potential arguments against publicizing the Fund are that it is difficult to do without highlighting the bad conduct of some lawyers and may drive up demand for the Fund's resources. Arguments in favour include that offering the Fund is the right thing to do and that the profession should receive credit for this unique program.
35. While only offering his initial thoughts, Mr. Young felt it unlikely that the Fund could effectively and efficiently promote its activities to the public at large. Due to resource and management time constraints, Mr. Young feels more focussed efforts would yield positive results. These efforts should be focussed on the profession, government and community opinion leaders to reinforce the notion that the Law Society regulates the profession in the public interest, and to potential and actual claimants to the Fund who are its most important customers and the reason for its existence.
36. Mr. Young reported that most jurisdictions throughout the world are ambivalent about promoting and publicizing their Funds but one jurisdiction, New York state, is very proactive in this area and reports positive results.
37. Mr. Young cautioned that the Fund cannot drive the Law Society's overall communications strategy and this concern was echoed by the CEO and Manager of Public Affairs. The Law Society is currently developing its own communications strategy and ideally the Fund should form part of that strategy. In Mr. Young's opinion, the main message the Law Society should be conveying is that it regulates the legal profession in the public interest and the success of the Lawyers Fund is one of the easiest ways to reinforce that message.
38. The Committee thanked Mr. Young and Ms. Berns-McGown for their presentation and expressed its desire to view the final draft of a proposed communications strategy. The Committee asked staff to work with the Law Society's Public Affairs Department to ensure that any proposals do not conflict with the Law Society's overall communications plan.
39. A final proposal will be presented to the Committee at a later date at which time consideration may be given to undertaking some or all of E*Y*E's suggestions. The Committee will report further to Convocation at that time.

REFEREE REPORTS AND STAFF MEMORANDA

40. The Committee wishes to report that the Referee Reports and Staff Memoranda found in Appendix "A" (attached) have been approved by the Committee and grants in the amounts shown have been paid out or are in the process of being paid out.

APPENDIX "A"

GRANTS APPROVED BY THE REVIEW SUBCOMMITTEE AND BY THE LAWYERS FUND FOR CLIENT
COMPENSATION COMMITTEE
WEDNESDAY JUNE 6, 2001

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
C. Anthony Keith, Q.C.	Steven J. Carr (Disbarred - June 14, 2000)	1	\$8,000.00
	Larry G. Frolick (Permitted to Resign April 29, 1999)	1	\$15,950.00
	Paul D. Squires (Disbarred September 22, 1994)	3	\$65,916.68
Linda R. Rothstein	John Andriano (Disbarred October 27, 2000)	1	NIL
June A. Maresca	Lee Edward Fingold (Disbarred January 25, 1996)	11	\$287,101.55
Anil K. Kapoor	Morris C. Orzech (Permitted to Resign April 15, 1996)	6	\$493,681.00
Maryanne Cousins	Solicitor #61 (Administrative Suspension September 6, 2000 - Pending Discipline)	1	\$16,922.00
Patricia Cregg	Solicitor #61 (Administrative Suspension September 6, 2000 - Pending Discipline)	1	\$4,584.24

Sara Hickling	Stanley David Goldberg (Disbarred May 22, 1997)	4	\$90,750.00
	Larry G. Frolick (Permitted to Resign - April 29, 1999)	2	\$82,000.00
	R. Noel Bates (Disbarred May 22, 1997)	1	\$6,090.00
	John A. Sproule (Deceased August 19, 1994)	1	\$20,368.14
	Solicitor #63 (Administrative Suspension August 20, 1999 - Pending Discipline)	1	\$46,017.26
	Roland W. Paskar (Permitted to Resign - June 22, 2000)	1	\$2,500.00
	Solicitor #62 (Administrative Suspension September 6, 2000 - Pending Discipline)	1	\$37,329.50
	Paul D. Squires (Disbarred September 22, 1994)	14	\$174,982.50
	Michael De Cosimo (Disbarred March 25, 1999)	1	\$30,123.50
Maria Loukidelis	Michael De Cosimo (Disbarred March 25, 1999)	10	\$103,478.40

	John T., Comstock (Disbarred - May 16, 2000)	1	\$54,723.52
	Solicitor #5 (Suspended Non- Payment Filing Levy - December 1, 1995)	1	\$6,427.18
	David V. Freeman (Deceased March 7, 1996)	1	\$40,500.00
	Steven J. Carr (Disbarred June 14, 2000)	1	\$9,000.00
	Solicitor #41 (Suspended Non- Payment E&O Fees September 6, 2000)	2	\$134,300.00
	Solicitor #59 (Administrative Suspension July 23, 1999)	1	\$7,332.45
	Arnold Saul Handelman (Disbarred January 23, 1992)	1	\$60,000.00
	Richard R. Boraks (Discipline - 12 months Suspension Effective May 1, 1999)	1	\$20,000.00
Paul McCormick	Solicitor #47 (Undertaking Not to Practice - November 23, 1998)	2	\$24,000.00

	Solicitor #67 (Administrative Suspension September 6, 2000- Pending Discipline)	7	\$147,425.00
	John A. Zinszer (Disbarred March 2, 2000)	1	\$17,458.50
	David E. Nicholson (Disbarred November 23, 1995)	1	\$6,000.00
	Solicitor #69	1	\$40,000.00
	Rene St-Fort (Disbarred November 23, 1995)	1	\$21,140.14
	Solicitor #72	1	\$30,000.00
	Solicitor #73 (Administrative Suspension September 6, 2000)	1	\$59,711.10
	Nicholas Emil Hayek (Disbarred August 22, 2000)	1	\$10,500.00
Evan Shapiro	Solicitor #47 (Suspended E&O Filing Levy September 8, 1999)	5	\$387,000.00
	John Rothel (Disbarred June 27, 1996)	1	\$12,000.00
Heather Werry	William E. Duce (Disbarred April 29, 1999)	2	\$28,000.00

	Robert Charles Watt (Disbarred June 24, 1993)	1	\$8,210.41
	Solicitor #44 (Suspended Non- Payment Annual Fees - 6 September 2000)	1	\$8,224.20
	Lee Edward Fingold (Disbarred January 25, 1996)	1	\$6,000.00
	John Alexander Sproule (Deceased August 19, 1994)	1	\$26,000.00
	Murray John Haesler (Deceased June 25, 1994)	1	\$8,000.00
	Gerald Grupp (Disbarred April 22, 1993)	1	\$35,000.00
	Solicitor #57 (Suspended - Annual Fees and Filing - September 6, 2000)	1	\$25,516.50
	Mario Zammit (Permitted to Resign - March 24, 1994)	1	\$50,000.00
	Solicitor #61 (Administrative Suspension September 6, 2000 - Pending Discipline)	66	\$3,106,849.21
	Solicitor #29 (Suspended - September 6, 2000)	1	\$8,731.85
	G.W. Steven Harrington (Disbarred December 15, 2000)	1	\$13,908.00

	David Carson Bird (Disbarred September 27, 1990)	1	NIL
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Re: Amendment to Guideline 15 of the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation

It was moved by Ms. Laskin, seconded by Mr. Chahbar that effective July 1st, 2001 Guideline 15 of the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation be amended as follows:

“In the case of a member who conducts a legal practice in a jurisdiction outside Ontario, *other than a practice within Canada that complies with the provisions of the Inter-Jurisdictional Practice Protocol*, no grant shall be paid out of the Fund, when the funds or property of the claimant were received by or on behalf of the member in connection with a matter that originated in that jurisdiction or in connection with a trust of which the member was or is a trustee that originated outside Ontario.”

Carried

MATTERS NOT REACHED

Admissions Committee Report

Admissions Committee
June 22, 2001

Report to Convocation

Purpose of Report: Decision Making

Prepared by the Policy Secretariat

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TERMS OF REFERENCE/COMMITTEE PROCESS

3. The Admissions Committee ("the Committee") met on June 7th, 2001. Committee members in attendance were Derry Millar (Chair), Edward Ducharme (Vice-Chair), Tom Carey, Gillian Diamond, Pamela Divinsky, Dean Peter Hogg, George Hunter, Sanda Rodgers and Stephanie Willson. Staff in attendance were Julia Bass, Bob Bernhardt, Ian Lebane, Susan Lieberman, Charles Smith, Elliot Spears and Roman Woloszczuk.
4. The Committee is reporting on the following matters:

Policy - For Decision

1) Reciprocal Mobility Arrangement with Quebec
2) Dates of Call to the Bar, 2003 onwards

POLICY - FOR DECISION

RECIPROCAL MOBILITY ARRANGEMENT WITH QUEBEC

Issue

5. The *Barreau du Québec* has requested that the Law Society of Upper Canada establish a mechanism to permit Quebec lawyers to practice federal and Quebec law in Ontario, creating reciprocity with the recent actions of the Barreau to permit two Ontario lawyers to practice federal and Ontario law in Quebec.

Background

6. A large Toronto law firm approached the *Barreau* last year in connection with the planned opening of their Montreal office, with a view to enabling two of their Toronto partners to practice in Montreal. It was understood that this practice would be limited to federal law and the law of provinces where the two partners are already entitled to practice. Any Quebec matters are to be handled exclusively by Quebec lawyers.
7. On January 18th, the *Barreau* passed a resolution granting the two lawyers conditional one-year permission to apply for membership, subject to the usual requirements with regard to French-Language proficiency, payment of fees, etc. This is regarded as a pilot project. (The resolution and an unofficial translation thereof is attached at Appendix 1.)
8. Officials of the *Barreau* have now approached the Law Society to support a request that this arrangement be made reciprocal, so that the firm's Quebec lawyers, and other lawyers in this position, can apply to the Law Society for membership with similarly limited rights and privileges. (Correspondence attached at Appendix 2).
9. Under current policy, the Law Society does not impose restrictions on the rights and responsibilities of members; lawyers are either members or not. This procedure would also differ from current transfer arrangements as no transfer examinations would be required.
10. On May 24th, Convocation passed By-law 33 on the occasional practice of law by lawyers from another province, under the Protocol on the Interjurisdictional Practice of Law. However, the Quebec proposal differs from the occasional practice scheme in a number of respects: it concerns full-time, possibly permanent legal practice, and contemplates that the lawyers involved would form a new category of membership and would pay the normal membership fees.

The Committee's Deliberations

11. Although not arising from the terms of the Interjurisdictional Protocol, the proposal is in keeping with the spirit of the Protocol. It would be to the advantage of members of the Law Society to be able to apply to work in Quebec, and any Quebec lawyers using this provision would not be practising Ontario law, avoiding the problem of unfamiliarity with the law of the jurisdiction.
12. If the Law Society establishes reciprocity with Quebec in this fashion, it would logically imply that this sort of arrangement would be available to other provinces requesting it.
13. The form of membership under consideration could be regarded as analogous to a limited licence, a concept that the Law Society has generally rejected.
14. However, it can also be argued that a special form of membership for out of province lawyers is logically distinct from a limitation on the licence of an Ontario member.
15. Implementation of the proposal would require the resolution of a number of issues having to do with the status of the 'non-Ontario' members, e.g. right to vote for or stand as benchers, insurance treatment etc.

16. The Law Society also recognises a category of 'Foreign Legal Consultants' who are permitted to advise on the law of their home jurisdiction while working in Ontario, although this arrangement has not been formalised in a by-law.
17. The Federation of Law Societies of Canada will be holding a workshop on mobility at their meeting in Saskatoon this August.
18. The Committee's view is that the issue of greater mobility for lawyers is of increasing importance and should be considered in a co-ordinated fashion rather than as a series of *ad hoc* proposals.

Recommendation to Convocation

19. The Committee recommends that Convocation authorise the Admissions Committee to define the terms of reference for a Task Force on Mobility Issues, including a proposed schedule and budget, to place before Convocation in the fall.

DATES OF CALL TO THE BAR FOR 2003 ONWARDS

Issue

20. The new model of the Bar Admission Course introduced greater scheduling flexibility for students and a shorter time between graduation from law school and call to the bar. These features required a re-examination of the dates of the ceremonial calls to the bar, which was considered by the Committee and Convocation in March. Convocation accepted the Committee's recommendation that the year 2002 be treated as a transitional year, with one call to the bar in September, and requested that the issue of call dates in subsequent years be brought back after further consideration.
21. Still to be decided is whether, in years after 2002, there should be one or two ceremonial calls to the bar, and in which months.

Background

22. One of the major goals in the development of the new Bar Admission Course was to reduce the time between graduation from law school and call to the bar. Since 1992, the major ceremonial calls to the bar have been in February, approximately 22 months after completion of the LL.B.
23. Under the previous model of the Bar Admission Course the majority of students began the Bar Admission Course in May or June immediately following completion of third year law school and completed the course, including articling, in December of the following year.
24. Scheduling the calls in February was introduced in response to the competing pressures of making the call as early as possible, while still providing adequate administrative time to,
 - a. communicate examination results to students;
 - b. provide a set of supplemental examinations for those who failed;
 - c. mark the supplemental examinations; and
 - d. process the successful students for inclusion in the call.

25. The production of the call ceremonies is a major event requiring substantial organization and planning.
26. In the new Bar Admission Course, students may choose the order in which they complete the different phases. Depending upon the option they choose, students may be finished the course and eligible for call to the bar by either the end of June (those who do the teaching phases back-to-back followed by articling) or the end of August (those who sandwich articling between the two teaching phases), in the year following their completion of law school.
27. Although there are calls to the bar in any month in which Convocation sits, (which will continue under the new Course) this report addresses the major ceremonial calls, which accommodate the majority of students.

Discussion

28. There has always been pressure on the Law Society to call students to the bar as quickly as possible to allow them to begin practising law and earning an income. There has also been, over the last ten years at least, significant pressure on the Law Society to permit students who have failed examinations during the teaching term to write supplemental examinations as soon as possible so that successful completion will allow them to be called to the bar at the large ceremonial call with the rest of their class.
29. The proportion of students choosing the 'back to back' model of the BAC has been much higher than expected, about 75%. This has raised the question of whether the choice of scheduling should be eliminated. The Department of Education recommends that the choice be retained on the grounds that it is an important advantage to the 25% of students who choose it.

Starting in 2003, should there be a single major ceremonial call or should there be two?

a) Two Calls

30. Scheduling two calls reduces the potential waiting period for call to the bar. The first call could be held in July or August (for those students who complete the Course by the end of June). The second set could be held in September or October (for those students who complete the Course by the end of August).
31. This option would provide the advantage that all students would be called to the bar within a relatively similar time frame following completion of the Course, rather than those finishing in June having to wait until October to be called. As a result they will be able to start their careers as lawyers earlier, and will have potential for increased earnings.
32. A potential disadvantage of this approach is the perceived differentiation of lawyers by their month of call. The Bar Admission Course Reform Task Force cautioned against the creation of separate call months, where students who choose the schedule that results in a earlier call are perceived to be of greater worth than their classmates.
33. Scheduling ceremonial calls to the bar in the summer months may be a challenge in terms of obtaining the necessary quorum of benchers, particularly given the practice of holding calls in three different locations.

34. Multiple call dates in London and Ottawa would lead to increased costs. (Approximately \$25,000 each.) In Toronto, if the students were relatively evenly divided between calls, it may not lead to a substantially increased cost if the centre (currently Roy Thompson Hall) was only required for one day in each of August and October.
35. However, given the strong preference for the back to back model, most students would probably choose the summer call, in fact the availability of an earlier call would probably increase even further the number of student choosing that option.
36. Administratively, the calls draw heavily on the resources of the Registrar's office. A July or August call would occur at a time when the Course is in session. Increased staffing would likely be required for at least some period leading up to the calls.
 - b) One Call
37. There could be one major ceremonial call in either late September or end of October.
38. If most students are called at the same time, it eliminates the concern, raised above, of the perceptions about those called earlier being worthier than others.
39. Another advantage of this approach is that for all of the students it would provide a two month period in which they were not attending the Bar Admission Course or articling at some point between their LL.B. graduation and their call. Although some students would continue working some might use the opportunity for some "down-time" before their call. (Some students have expressed a desire that they be left with time in which they can take an extended vacation/sabbatical, or pursue an outside interest. Although they should arguably be able to negotiate this period with their law firms, they feel their bargaining position is weak, and have expressed a wish for the Law Society's support.)
40. The clear disadvantage of one call in September or October is that some students will have a much longer wait for their call. Many students plan to open up practices on their own, and for them an earlier call is more important than a longer break.

The Committee's Deliberations

41. The Committee's view was that the priority concern behind the shortening of the articling term and the redesign of the BAC was to enable students to be called to the bar earlier. It therefore seems inconsistent to require students to wait for most of the summer for their call.
42. On the other hand, the committee recognised the possible difficulty that could arise with obtaining a quorum of benchers during the summer months.
43. It was felt that the interests of students in the earliest possible call date should prevail over the logistical difficulties of scheduling.

Recommendation

44. The Committee recommends two call dates, a major ceremonial call in July (in Toronto, London and Ottawa) and one in the fall to be scheduled as numbers warrant.

Request to Convocation

45. With the assistance of this report, Convocation is requested to decide that there should be two call dates for students graduating in 2003 and after, one in July and one in the fall to be scheduled as the numbers warrant.

INFORMATION ITEMS

ABORIGINAL STUDENTS IN THE BAC

46. A Report from the Education Department, prepared in conjunction with the Equity Initiatives Department, on the statistics on Aboriginal students in the BAC is attached at Appendix 3.

ENFORCEMENT OF STUDENT RECRUITMENT PROCEDURES

Issue

47. The Law Society has for a number of years regulated the process by which both articling students and, more recently, summer students are recruited, these procedures being particularly relevant to the highly competitive market of the larger Toronto firms. However, surveys of law schools, law firms and particularly, students have shown a significant degree of dissatisfaction with the level of observance of the procedures. One of the problems is that students are understandably reluctant to complain on the record. If the procedures are not reasonably enforceable, it raises the question of whether the Law Society should cease to regulate this area.

Background

48. The Law Society first started regulating articling student recruitment in 1980. The central feature of the procedures developed was an agreed-upon set of dates before which job offers would not be made. This was intended to give students the best opportunity to consider, and be considered for, articling positions.
49. As the recruitment of summer students for the summer after second year law school and, most recently after first year, has become more common, similar procedures were adopted to regulate these processes also.
50. The Law Society's jurisdiction to regulate the employment of law students derives from section 62 of the *Law Society Act*. Paragraph 62 (0.1) 19 reads as follows:
 'Convocation may make by-laws,
 19. Defining and governing the employment of student members while under articles and the employment of other law students.'
51. Although the Law Society has not exercised this jurisdiction by passing a by-law, the Society's Rules of Professional Conduct include the following:
 " Sub-rule 5.02(1). A lawyer shall observe the procedures of the Society about the recruitment of articling students and the engagement of summer students."
52. While it appears that most firms follow the procedures, there are persistent complaints, sometimes of a vague nature, that some firms are 'jumping the gun' on dates or otherwise failing to follow the rules.

53. In recent surveys¹³, 23% of student respondents stated that, in their experience, law firms were not abiding by the Summer Recruitment Procedures and 16% of student respondents commented on their awareness of violations of the Articling Recruitment Procedures. In separate communications, several law firms and career development officers ('CDOs') also alleged violations by firms.
54. Typically, alleged procedural violations have involved early telephone calls on Call Day, early offers, pressure from firms for students to reveal their match rankings, pressures on students to commit to job offers before the designated date, and generally testing the spirit of the Procedures, such as holding an "Open House" on a date that has the effect of turning the open house into a targeted, and thus restricted, recruitment activity. Complaints are often made anonymously, or second hand, because the original complainant is afraid of repercussions.
55. Enforcement of the procedures may be complicated by the fact that while complaints generally concern a firm, the Law Society's only disciplinary powers are over individual members. However, in most law firms it is possible to identify a member of the Law Society involved with the process.
56. A further complication is the participation in the recruitment process of US law firms. The Law Society's jurisdiction is limited to the regulation of its members.
57. Anecdotally, it appears that there have not ever been any serious sanctions for violations of sub-rule 5.02(1). At the most, a letter may have been sent or a phone call made concerning such violations.
58. In recent surveys, representatives of all groups (students, CDOs and firms) expressed frustration that violations of the Procedures have not been dealt with strictly.

The Committee's Deliberations

59. While it may be unrealistic to achieve 100% compliance, there are probably a number of steps which could be taken to improve observance of the procedures, such as better communication with the major firms about the problem and the Law Society's concerns.
60. While the Law Society lacks the jurisdiction to regulate the US firms, it may be possible for the Law Schools to enter into agreements with them whereby they would observe Law Society procedures voluntarily in return for facilitating recruitment activities on campus.

The Committee's Decision

61. The Committee requested the Committee Chair to write to all the large firms which hire a significant number of students to inform them of the perceived problem and to request their assistance in achieving better observance of the procedures. In addition, the Committee chair was requested to telephone the managing partner of those firms which have been alleged to have breached the agreed procedures to ask whether they are aware of any problems in the recruitment process.

APPENDIX 3

Re: Aboriginal Students in the BAC - Supports and Successes

1. The following report indicates a dramatic improvement in the success rate of self-identified Aboriginal students in the BAC, and it discusses some of the support services that have made this possible.

STATISTICS FOR ABORIGINAL STUDENTS IN THE BAC:

41st BAC (Fall of 1999)

2. As of February 2000, of the 18 self-identified Aboriginal students who were enrolled in the 41st BAC, 3 had withdrawn and 9 of the remaining 15 successfully completed Phase Three. Thus 50% of the initial 18 successfully completed.

42nd BAC (Fall of 2000)

3. As of May, 2001 of the 19 self-identified Aboriginal students who were enrolled in the 42nd BAC, none had withdrawn and 16 successfully completed Phase Three. Thus 84% of the initial 19 successfully completed. In addition, two of the other three students are within one course of successful completion.
4. It is important to note three things in relation to these statistics:
 - a. This improvement in performance has occurred during two years in which general success rates have remained relatively stable and the standards have remained high. (Approximately 30% of the students fail at least one exam, but after the supplementals about 95% of the students are successful in completing the requirements.)
 - b. The support programs that are identified in the following text are virtually all available to students who are having difficulty, regardless of the communities to which they identify.
 - c. The statistics do not indicate that systemic problems for Aboriginal Peoples, or for students from other communities under represented in the profession, have been solved. Many of the students who passed did so with little margin to spare, and there is still an over representation of students from these communities in the collection of students who are not successful.

BAC Supports

5. Aboriginal students of the 42nd BAC accessed various supports through the Aboriginal Issues Coordinator, the Student Success Centres, and BAC administrators. These supports to Aboriginal students were implemented further to discussions with Rotiio' tatie (then Roti io' ta'-kier) in the spring of 2000, and included an *orientation program, *tutoring, and *exam review sessions. Aboriginal students also benefited from a *shorter turn around on making students' marks available thanks to in-house marking, as well as an *appeal process for students who failed exams (programs with an asterisk are available to all students).

6. With the addition of the Aboriginal Issues Coordinator position in May 2000, the Law Society also offered Aboriginal BAC students an *Elders Program (Toronto), informal counselling, *financial assistance program, *assistance in résumé writing/job searches/setting up a practice, assistance in accessing housing and other services, *assistance in obtaining accommodations in the BAC, and opportunities to network with Aboriginal lawyers and other members of the Bar through organized lunches or dinners in Toronto and Ottawa (programs with an asterisk are available to all students).
7. Most of the 19 self-identified Aboriginal students of the 42nd BAC accessed supports of some kind.

Orientation Program: Five Aboriginal students completed the orientation program and offered positive feedback on the program.

Tutoring and Exam Review: Nine Aboriginal students accessed tutoring and the feedback was very good. Ten Aboriginal students attended one or more exam review sessions, with many of those ten participating on a regular basis. The feedback on exam review sessions was also generally very good.

Elders Program: Seven Aboriginal students in Toronto participated in the Elders Program. The feedback from those students who accessed the Elders Program was excellent.

Financial Support: Nine Aboriginal students accessed financial assistance through the Equity & Diversity Bursary Program. Several of these students cited the financial assistance as the most significant support to their success in the BAC. Many of these students were parents, some single parents, with many other commitments outside of the BAC and in difficult financial circumstances.

Skills Development: Eight Aboriginal students accessed assistance in résumé writing, job searches, or in setting up a practise.

Housing: One Aboriginal student who had relocated from Northern Ontario to a BAC site had required assistance in obtaining housing and other essential services.

Accommodations for Disability, etc.: Two Aboriginal students sought assistance from the Aboriginal Issues Coordinator and the Student Success Centres in seeking accommodations for the BAC.

Appeals Process: Twelve exams grades were appealed by Aboriginal students, several of those successful appeals resulted in a pass for students.

Further Development of Supports

8. There are ten self-identified Aboriginal students in the 44th BAC (Skills Phase, May 2001). The location of these Aboriginal students are as follows: 3 in Ottawa, 3 in Toronto, 2 in Windsor, 1 in Kingston and 1 in London.
9. All supports mentioned above will be available to current students with the exception of the Equity & Diversity Bursary - which has been replaced by the Repayable Allowance Program, and the orientation period which was not offered due to the immediate start of the BAC following completion of law school. The orientation program will be offered to those Aboriginal students of the 43rd BAC (Phase III, September 2001).

10. In addition to offering a weekly Elders Program / discussion groups with Aboriginal lawyers in Toronto, we will be organizing a monthly lunch program for Ottawa BAC students with Elders and Aboriginal lawyers in the Ottawa area. We will also work with students in Windsor, London and Kingston to ensure that they, as well as Aboriginal members of the profession in those communities, access supports wherever possible.
11. Formalized mentoring relationships between members of Rotiio' taties and other Aboriginal lawyers with BAC students are being developed pursuant to the Law Society's Equity & Diversity Mentorship Program.
12. We will create an Aboriginal students list serve using the Bar-EX email system. This will ensure Aboriginal students who are interested in being connected with their peers across Ontario have the opportunity to do so, sharing their experiences and networking with other Aboriginal students.
13. We will be working with Aboriginal students at their BAC sites to ensure that they maintain access to a support network in their study centre. This is particularly important given the fact that students now have the opportunity to study in the same site where they attend law school, which will likely result in smaller groups of Aboriginal students at each BAC site. We hope that ensuring access to the Aboriginal Issues Coordinator, other Aboriginal law students, Aboriginal lawyers, and supports in the local communities will further minimize feelings of isolation for Aboriginal students in the BAC.

Conclusion

14. The creation of the Aboriginal Issues Coordinator position and the further development of supports to Aboriginal students in the BAC has had a significant impact on the success of Aboriginal students, as reflected in the success of Aboriginal students in the 42nd BAC (fall of 2000). We continue to work with Rotiio' taties and the broader Aboriginal community for feedback and support in the initiatives we undertake with Aboriginal BAC students. Positive responses to the various supports offered, and the evidenced successes of Aboriginal students in the 42nd BAC suggest continuing success of Aboriginal students as we further enhance the broadening base of culturally appropriate supports to Aboriginal students in the BAC. Moreover, several of the supports developed originally for Aboriginal students have been made available for students in general, and this has had a positive impact on the success rates for these students as well.

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

- (1) Copy of Resolution of the Executive Committee of the Barreau du Quebec.

(Appendix 1)

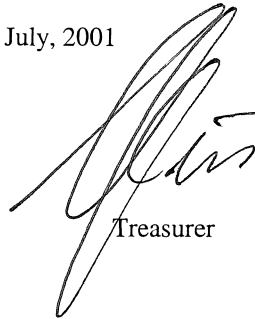
- (2) Copy of a Letter from Ronald Montcalm, c.r., le batonnier du Quebec, to Robert Armstrong, Treasurer, and letter from Me Pierre Gauthier, Executive Director of the Barreau du Quebec to Malcolm Heins, CEO

(Appendix 2)

Motion - Appointment to Family Rules Committee

CONVOCATION ROSE AT 4:00 P.M.

Confirmed in Convocation this 26th day of July, 2001



Treasurer

