LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

February 27, 2014
9:00 a.m.

CONVOCATION MATERIAL

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CONVOCATION AGENDA
February 27, 2014

Convocation Room – 9:00 a.m.

Treasurer's Remarks

Consent Agenda - Motion [Tab 1]
- **Confirmation of Draft Minutes of Convocation** – January 23, 2014
- **Motion** – Appointments to the Law Society Tribunal
- **Report of the Director of Professional Development and Competence** – Deemed Call Candidates
- **Inter-Jurisdictional Mobility Committee Report** – Amendments to the Territorial Mobility Agreement 2013
- **Audit and Finance Committee Report –** J. Shirley Denison Fund Application (in camera)

Treasurer's Advisory Group on Access to Justice (TAG) Working Group Report *(H. Goldblatt)* [Tab 2]

Tribunals Committee Report *(R. Anand)* [Tab 3]
- Implementation of the *Modernizing Regulation of the Legal Profession Act, 2013* (Bill 111)
- In Camera Item

For Information
- Pre-Proceeding Consent Resolution Process
- National Discipline Standards
- Tribunal Mission Statement
- Tribunals Office Quarterly Statistics
- Tribunal Adjudicator Evaluation Process

Professional Regulation Committee Report *(M. Mercer)* [Tab 4]
- Alternative Business Structures Working Group Report
- Report on the Pre-Proceeding Consent Resolution Process Pilot Project
- Federation of Law Societies of Canada National Discipline Standards Pilot Project

For Information
- 2013 Annual Report of the Complaints Resolution Commissioner
- Professional Regulation Division Quarterly Report

Paralegal Standing Committee Report *(C. Corsetti)* [Tab 5]
- Revisions to the *Paralegal Rules – Federation Model Code of Professional Conduct*
- Accreditation and Audit Framework for Paralegal Education Programs Proposal

For Information
- Revisions to the *Paralegal Guidelines – Federation Model Code of Professional Conduct*
- Progress Report on Paralegal Regulation
- Federation of Law Societies of Canada National Discipline Standards Pilot Project
- Professional Regulation Division Quarterly Report

Professional Development and Competence Committee Report *(J. Minor)* [Tab 6]
- Pathways Pilot Project – Related Amendments to By-Law 4

For Information
- Pathways Pilot Project – Evaluation Process Proposal
- Professional Development and Competence Director's Annual Report on Programs and Resources

Compensation Fund Committee *(P. Wardle)* [Tab 7]
- New Guidelines for Determination of Grants from the Compensation Fund

Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones Report *(H. Goldblatt)* [Tab 8]
- Human Rights Monitoring Group Requests for Intervention

For Information
- Parental Leave Assistance Program Update
- Report of the Activities of the Discrimination and Harassment Counsel
- Translation of Law Society Consultation Reports
- Public Education Equality and Rule of Law Series Calendar 2014

Audit and Finance Committee Report *(C. Bredt, C. Hartman)* [Tab 9]
- Information Systems Three Year Capital Budget Plan
- In Camera Item

For Information
- Other Committee Work
- In Camera Item

Treasurer's Remarks on Convocation's Process for Determining the Accreditation of Trinity Western University's Law School Program

Government Relations and Public Affairs Committee Report *(W. McDowell)* (in camera) [Tab 10]

Law Society Awards Committee Report (*Treasurer*) (in camera) [Tab 11]

Report of the LL.D. Advisory Committee (*Treasurer*) (in camera) [Tab 12]

Paralegal Award Selection Committee Report (*C. Corsetti*) (in camera) [Tab 13]

Compensation Committee *(C. Bredt)* (in camera) [Tab 14]

Lunch – Benchers' Dining Room

Tab 1

THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2014

MOVED BY: Malcolm Mercer

SECONDED BY: Susan Hare

THAT Convocation approve the consent agenda set out at Tab 1 of the Convocation Materials.

D R A F T

MINUTES OF CONVOCATION

Thursday, 23rd January, 2014
8:30 a.m.

PRESENT:

The Treasurer (Thomas G. Conway), Anand, Backhouse, Banack (by telephone), Boyd, Braithwaite, Bredt, Callaghan, Campion, Doyle, Dray, Earnshaw, Elliott, Epstein, Eustace, Evans, Falconer (by telephone), Furlong, Go, Goldblatt, Gottlieb, Haigh (by telephone), Hare, Hartman, Horvat, Hunter (by telephone), Krishna, Leiper, Lerner, MacKenzie, Manes (by telephone), Marmur (by telephone), McDowell, McGrath, Mercer, Minor, Murchie, Murray, Pawlitza, Porter, Potter, Pustina, Richardson (by telephone), Richer, Ross, Rothstein, Sandler, Scarfone, Schabas, Silverstein (by telephone), H. Strosberg (by telephone), Sullivan, Swaye, Symes, Wadden, Wardlaw and Wright.

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Secretary: James Varro

The Reporter was sworn.

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TREASURER'S REMARKS

The Treasurer addressed Convocation on the Trinity Western University Law School application and the Federation of Law Societies of Canada's reports respecting the application in the context of the Law Society's authority to determine admission to the legal profession in Ontario.

The Treasurer expressed condolences to the family of former bencher and Treasurer The Honourable Sydney L. Robins, O.Ont., Q.C., LSM, who passed away on January 10, 2014.

The Treasurer thanked Robert Lapper, Roy Thomas and the Communications staff for their work in contributing to the Treasurer's blog which received a 2013 Canadian Law Blog Award for one of the best new blogs.

The Treasurer announced that the Law Society is hosting the display of a bust of Sir John Alexander Macdonald, who was a member and bencher of the Law Society, as part of The Macdonald Project to mark the 199th anniversary of the birth of Sir John Alexander Macdonald.

The Treasurer reminded benchers that nominations for the Law Society Awards close on January 31, 2014.

The Treasurer announced that 26 candidates will be running in the Paralegal Bencher Election.

The Treasurer announced that Tab 5.2 in the Convocation Agenda is being deferred to the February 27, 2014 meeting of Convocation.

MOTION – CONSENT AGENDA

It was moved by Mr. Goldblatt, seconded by Ms. Doyle, that Convocation approve the consent agenda set out under Tab 1 of the Convocation Materials.

Carried

DRAFT MINUTES OF CONVOCATION – Tab 1.1

The draft minutes of Convocation of November 21, 2013 were confirmed.

MOTION – LAW SOCIETY ANNUAL GENERAL MEETING – Tab 1.2

THAT Convocation approve Wednesday, May 7, 2014 at 5:15 p.m. at Osgoode Hall, 130 Queen Street West, Toronto as the time and place of the 2014 Annual General Meeting, in accordance with Section 5 of By-Law 2 [Corporate Provisions].

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE – Tab 1.3

THAT the Report of the Director of Professional Development and Competence listing the names of the call to the bar candidates be adopted.

Carried

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REPORT OF THE TREASURER'S ADVISORY GROUP ON ACCESS TO JUSTICE WORKING GROUP

The Treasurer introduced the Report.

Proposal for a New Law Society Approach to Access to Justice

Mr. Goldblatt presented the Report for information, after which benchers spoke to various matters arising from the Report.

AUDIT & FINANCE COMMITTEE REPORT

Mr. Bredt presented the Report.

Re: Business Conduct Policy

It was moved by Mr. Bredt, seconded by Ms. Hartman, that Convocation approve the revised Business Conduct Policy for employees of the Law Society as set out in the report.

Carried

Re: Special Projects Fund Transfer

It was moved by Mr. Bredt, seconded by Ms. Hartman, that Convocation approve the transfer of $262,165 from the 2013 operating budget to the Special Projects Fund.

Carried

For Information

- LAWPRO Third Quarter Financial Statements for the Nine Months Ended September 30, 2013
- LibraryCo Inc. Third Quarter Financial Statements for the Nine Months Ended September 30, 2013
- Other Committee Work

PRIORITY PLANNING COMMITTEE REPORT

Mr. Bredt presented the Report.

Re: Revitalization of and Enhancements to the Law Society's Annual General Meeting

It was moved by Mr. Bredt, seconded by Ms. Minor, that Convocation:

a. approve changes to the structure and format of the Law Society's Annual General Meeting for 2014 and following years as follows:
    i. End motions at the Annual General Meeting;
    ii. Dedicate a portion of the meeting to a forum for dialogue between the Law Society and its licensee members;
b. direct that the Law Society explore other enhancements to the Annual General Meeting as discussed in this report.

Lost

ROLL-CALL VOTE

Anand	For	Lerner	Against
Backhouse	Against	MacKenzie	Against
Boyd	For	McGrath	For
Braithwaite	Against	Mercer	For
Bredt	For	Minor	For
Callaghan	For	Murchie	For
Campion	Against	Porter	For
Doyle	Against	Potter	Against
Earnshaw	For	Pustina	Against
Elliott	Against	Richer	Against
Epstein	For	Rothstein	Against
Evans	Against	Sandler	Against
Goldblatt	For	Scarfone	For
Haigh	For	Schabas	Against
Hare	Against	Silverstein	For
Hartman	For	Sullivan	Against
Horvat	For	Symes	Against
Krishna	Against	Wadden	Against

Vote: 17 For; 19 Against

PROFESSIONAL REGULATION COMMITTEE REPORT

Mr. Mercer presented the Report.

Re: Amendments to the *Rules of Professional Conduct*

It was moved by Mr. Mercer, seconded by Ms. Richer, that Convocation amend Rule 5.04 of the current *Rules of Professional Conduct* and Rule 6.3.1-1 of the *Rules of Professional Conduct* coming into force on October 1, 2014 as set out in the report.

Carried

PARALEGAL STANDING COMMITTEE REPORT

Ms. Corsetti presented the Report.

Re: Amendments to the *Paralegal Rules:* Gender Identity

It was moved by Ms. McGrath, seconded by Mr. Sandler, that Convocation approve the amendments to Rule 2.03 of the *Paralegal Rules of Conduct* as set out Tab 6.1.1 of the report.

Carried

For Information

- Pre-Proceeding Consent Resolution Conference Pilot Project
- Progress Report on Changes to the Licensing Process

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CONVOCATION ROSE AT 1:33 P.M.

THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2014

APPOINTMENTS TO THE LAW SOCIETY TRIBUNAL
Pursuant to Sections 49.20.2, 49.21, 49.22.1, 49.29 and 49.30.1 of the *Law Society Act*

MOVED BY: Malcolm Mercer

SECONDED BY: Susan Hare

CHAIR

THAT David A. Wright be appointed as the Chair of the Law Society Tribunal effective March 12, 2014 for a term ending September 3, 2017.

APPEAL DIVISION

Vice-Chair

THAT Mark Sandler be appointed as Vice-Chair of the Appeal Division of the Law Society Tribunal effective March 12, 2014 for a term ending May 28, 2015.

Members

THAT the following be appointed to the Appeal Division of the Law Society Tribunal effective March 12, 2014 for a term ending May 28, 2015:

Raj Anand
Marion Boyd
Christopher D. Bredt
Adriana Doyle
Seymour Epstein
Howard Goldblatt
Janet Leiper
Susan T. McGrath
Malcolm M. Mercer
W. A. Derry Millar
Janet E. Minor
Judith M. Potter
Linda R. Rothstein
Clayton Ruby
Roger D. Yachetti

That Cathy Corsetti and W. Paul Dray be appointed to the Appeal Division of the Law Society Tribunal effective March 12, 2014 for a term ending April 24, 2014.

HEARING DIVISION

Vice-Chair

THAT Linda R. Rothstein be appointed as Vice-Chair of the Hearing Division of the Law Society Tribunal effective March 12, 2014 for a term ending May 28, 2015.

Members

THAT the following be appointed to the Hearing Division of the Law Society Tribunal effective March 12, 2014 for a term ending May 28, 2015:

Raj Anand
Constance Backhouse
Larry Banack
Marion Boyd
Jack Braithwaite
Christopher D. Bredt
John A. Campion
Adriana Doyle
Ross F. Earnshaw
Seymour Epstein
Robert F. Evans
Julian N. Falconer
Patrick Furlong
Avvy Go
Alan D. Gold
Howard Goldblatt
John D. Ground
Jennifer A. Halajian
Susan M. Hare
Carol Hartman
Janet Leiper
Michael M. Lerner
M. Virginia MacLean
Dow Marmur
William C. McDowell
Susan T. McGrath
Malcolm M. Mercer
W. A. Derry Millar
Janet E. Minor
Barbara J. Murchie
Ross W. Murray
Judith M. Potter
Nicholas Pustina
Jack Rabinovitch
Janet Richardson
Susan Richer
Heather Joy Ross
Clayton Ruby
Mark Sandler
James A. Scarfone

Baljit Sikand
Catherine Strosberg
Harvey T.Strosberg
Gerald A. Swaye
Beth Symes
Robert Wadden
J. James Wardlaw
Bradley H. Wright
Roger D. Yachetti

THAT Robert J. Burd, Cathy Corsetti and W. Paul Dray be appointed to the Hearing Division of the Law Society Tribunal effective March 12, 2014 for a term ending April 24, 2014.

THAT the following be appointed to the Hearing Division of the Law Society Tribunal for a term of two years effective March 12, 2014:

Andrea Alexander
S. Margot Blight
Philippe M. Capelle
Marc D'Amours
Laura C. Donaldson
Lyle Kanee
Barbara A. Laskin
Roger Leclaire
Michelle M. Lomazzo
Jacques J. Ménard
Andrew Oliver
Susan E. Opler
Maurice A. Portelance
Frederika M. Rotter
Caroline Rowan
Errol M. Sue
Michelle Tamlin
Howard Ungerman
Sarah B. Walker
Ted Yao

Explanatory Note

Pursuant to the amendments to the *Law Society Act* as a result of the *Modernizing Regulation of the Legal Profession Act, 2013*, the terms of the chair, vice-chairs and members of the Hearing Panel and Appeal Panel expire on March 12, 2014. The appointments effective March 12, 2014 in this motion reflect the following:

1. The individuals listed include those who returned an application in response to the Chair's invitation to apply for appointment to the Hearing and Appeal Divisions.
2. The Chair's appointment is for a term that ends on the same date as the end of his original appointment effective September 3, 2013 for a four year term.
3. Lay benchers and lawyer benchers in any category (e.g. elected, life, *ex officio*) are appointed for a term ending on the date of the end of the term of the elected lawyer benchers in May 2015.
4. Elected paralegals/paralegal benchers are appointed for term ending on the date of the first regular Convocation following the Paralegal Bencher Election on March 31, 2014.
5. All other adjudicators are appointed for a two year term commencing March 12, 2014.

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

The Director of Professional Development and Competence reports as follows:

CALL TO THE BAR AND CERTIFICATE OF FITNESS

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

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

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on Thursday, February 27th, 2014

ALL OF WHICH is respectfully submitted

DATED this 27th day of February, 2014

CANDIDATES FOR CALL TO THE BAR
February 27, 2014

Transfer from another province (Mobility)

Danielle Bastarache
Eric Wesley David Boate
Kristin Alexis Green
Aimee Lyn Halfyard
Robert Gregory Hiseler
Katherine Anne Morison Marshall
Lee Haakon Chad Satveit

Transfer from another province (Quebec)

Jean-Philippe Herbert
Arielle Sarah Lavender
Yvette Virok

Licensing Process

L3

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 1.4

Report to Convocation
February 27, 2014

Inter-Jurisdictional Mobility Committee

Committee Members
Jacqueline Horvat (Chair)
William McDowell
Malcolm Mercer
Janet Minor
Joe Sullivan
Peter Wardle

Purpose of Report: Decision

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

DECISION

HOUSEKEEPING AMENDMENTS - TERRITORIAL MOBILITY AGREEMENT 2013

MOTION

1. That Convocation approve the amended Territorial Mobility Agreement, 2013 ("TMA 2013") in English and French set out at TAB 1.4.1: TMA 2013 Amended English and TAB 1.4.2: TMA 2013 Amended French.

Background

2. The National Mobility Agreement, 2013 ("NMA 2013"), which Convocation approved in February and June 2013, was signed by 10 provincial law societies during the Federation of Law Societies conference in St. John's, Newfoundland, in October 2013.

3. The three Territories did not sign the original National Mobility Agreement. In 2006 the Territorial Mobility Agreement ("TMA") was entered into for mobility between the Territories and the provinces. A revised TMA was entered into in 2011. To reflect the new provisions of the NMA 2013, with which the Territories agree, consequential amendments were made to the TMA ("TMA 2013"). Convocation approved these in November 2013.

4. It is now necessary to make certain housekeeping amendments to the TMA 2013 to correct minor errors in the originally approved document and to update the preamble in both the English and French versions as set out at **TAB 1.4.1: TMA 2013 Amended - English and TAB 1.4.2: TMA 2013 Amended - French.** The track changes versions of the documents are set out at **TAB 1.4.3: TMA 2013 Amended English track changes** and **TAB 1.4.4: TMA 2013 Amended French track changes**.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

TERRITORIAL MOBILITY AGREEMENT 2013

Territorial Mobility Agreement 2013

FEDERATION OF LAW SOCIETIES OF CANADA

April 2014

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement 2013 (“NMA 2013”) in facilitating permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this Agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this Agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,

- differences exist in the legislation, policies and programs pertaining to the signatories, including those differences between common law and civil law jurisdictions in Canada, and lawyers have a professional responsibility to ensure that they are competent with respect to any matter that they undertake, and

- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August, 2002, the Federation of Law Societies of Canada (the "Federation") approved the report of the National Mobility Task Force (“the Task Force”) for the implementation of full mobility rights for Canadian lawyers. This led to adoption of the National Mobility Agreement (“NMA”) by all provincial law societies other than the Chambre des notaires du Québec (“Chambre”).

Territorial Mobility Agreement 2013

The resolution adopted by the Federation in approving the report of the Task Force included an acknowledgement that "the unique circumstances of the law societies of Yukon, the Northwest Territories and Nunavut necessitate special considerations that could not be undertaken within the time frame prescribed in the Task Force's terms of reference, but should be undertaken in the future."

In 2006 all law societies other than the Chambre signed the Territorial Mobility Agreement ("TMA"). To recognize the unique circumstances of the territorial law societies, the agreement provided for reciprocal permanent mobility between the law societies of the provinces and the territories, without requiring the territorial law societies to participate in the temporary mobility provisions of the NMA. The original term of the TMA was five years. In 2011 the agreement was renewed without a termination date.

In March 2010, all Canadian law societies except the Chambre signed the Quebec Mobility Agreement ("QMA"), facilitating reciprocal mobility between Quebec and the common law jurisdictions. The mobility provisions set out in the QMA were extended to members of the Chambre in March 2012 with the signing by all law societies of the Addendum to the QMA.

The signatories to the NMA and the Chambre have now approved a revised agreement that extends the permanent mobility provisions of the NMA to mobility to and from the Barreau du Québec and incorporates the mobility provisions of the QMA and the Addendum to the QMA applicable to the Chambre. The "NMA 2013" was executed in October 2013.

This Agreement has been amended to ensure that references to the relevant clauses of the NMA 2013 are accurate.

The signatories to this Agreement who are not signatories to the NMA 2013 do not hereby subscribe to the provisions of the NMA 2013, except as expressly stated in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

"home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and **"home jurisdiction"** has a corresponding meaning;

"Inter-Jurisdictional Practice Protocol" means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

"lawyer" means a member of a signatory governing body;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"National Mobility Agreement 2013" or **"NMA 2013"** means the National Mobility Agreement 2013 of the Federation of Law Societies of Canada, as amended from time to time;

"permanent mobility provisions" means clauses 33 to 40, and 43 to 50 of the NMA 2013;

"practice of law" has the meaning with respect to each jurisdiction that applies in that jurisdiction;

"Registry" means the National Registry of Practising Lawyers established under clause 18 of the NMA 2013;

General

2. The signatory governing bodies will

(a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

(b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

(c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

(d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this Agreement alone,

(a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

(b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Permanent Mobility

6. The signatories that are signatories to the NMA 2013 agree to extend the application of the permanent mobility provisions of the NMA 2013 with respect to the territorial signatories to this Agreement.

7. The territorial signatories agree to adopt and be bound by the permanent mobility provisions of the NMA 2013.

8. A signatory that has adopted regulatory provisions giving effect to the permanent mobility requirements of the NMA 2013 is a reciprocating governing body for the purposes of permanent mobility under this Agreement, whether or not the signatory has adopted or given effect to any other provisions of the National Mobility Agreement.

Transition Provisions

9. This Agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

10. Provisions governing permanent mobility in effect at the time that a governing body becomes a signatory to this Agreement will continue in effect until this agreement is implemented.

Dispute Resolution

11. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Withdrawal

12. A signatory may cease to be bound by this Agreement by giving each other signatory written notice of at least one clear calendar year.

13. A signatory that gives notice under clause 12 will immediately notify its members in writing of the effective date of withdrawal.

Territorial Mobility Agreement 2013

SIGNED on the day of , 2013.

Law Society of British Columbia

Per: _____
Authorized Signatory

Law Society of Alberta

Per: _____
Authorized Signatory

Law Society of Saskatchewan

Per: _____
Authorized Signatory

Law Society of Manitoba

Per: _____
Authorized Signatory

Law Society of Upper Canada

Per: _____
Authorized Signatory

Barreau du Québec

Per: _____
Authorized Signatory

Chambre des notaires du Québec

Per: _____
Authorized Signatory

Law Society of New Brunswick

Per: _____
Authorized Signatory

Territorial Mobility Agreement 2013

Nova Scotia Barristers' Society

Per: _____
Authorized Signatory

Law Society of Prince Edward Island

Per: _____
Authorized Signatory

Law Society of Newfoundland and Labrador

Per: _____
Authorized Signatory

Law Society of Yukon

Per: _____
Authorized Signatory

Law Society of the Northwest Territories

Per: _____
Authorized Signatory

Law Society of Nunavut

Per: _____
Authorized Signatory

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

ACCORD DE LIBRE CIRCULATION TERRITORIALE 2013

Accord de libre circulation territoriale 2013

FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA

Avril 2014

Introduction

L'objectif de cet accord est d'élargir la portée de l'Accord de libre circulation nationale 2013 (« ALCN 2013 ») en facilitant la libre circulation permanente des avocats entre les juridictions canadiennes.

Bien que les signataires adhèrent volontairement à cet accord, ils s'attendent à ce que seuls les avocats membres des organismes signataires ayant mis en application des dispositions de réciprocité dans leur juridiction puissent profiter des dispositions du présent accord.

Les signataires reconnaissent que :

- il est de leur devoir, envers le public canadien et leurs membres, de réglementer l'exercice interjuridictionnel du droit afin de s'assurer que leurs membres exercent le droit avec compétente, conformément à l'éthique et à leurs responsabilités financières, en maintenant une assurance responsabilité professionnelle et une assurance en cas de détournement de fonds, dans toutes les juridictions du Canada;

- il existe des différences entre les lois, les politiques et les programmes des signataires, incluant les différences entre les juridictions de la common law et du droit civil au Canada, et les avocats ont l'obligation professionnelle de s'assurer qu'ils sont compétents dans tout dossier qu'ils entreprennent; et

- il est souhaitable de faciliter un régime de réglementation national pour l'exercice interjuridictionnel du droit afin de promouvoir des normes et des procédures uniformes, tout en reconnaissant le pouvoir exclusif de chaque signataire dans son propre champ de compétence législative.

Contexte

En août 2002, la Fédération des ordres professionnels de juristes du Canada (la « Fédération ») a approuvé le rapport du Groupe de travail sur la libre circulation nationale (le « Groupe de travail ») pour la mise en application des droits relatifs à la libre circulation des avocats canadiens. Cette mesure a mené à l'adoption de l'Accord de libre circulation nationale (« ALCN ») par tous les ordres professionnels de juristes des provinces autres que la Chambre des notaires du Québec (« Chambre »).

La résolution adoptée par la Fédération en approuvant le rapport du Groupe de travail reconnaissait que « les circonstances uniques des barreaux du Yukon, des Territoires du Nord-

Accord de libre circulation territoriale 2013

Ouest et du Nunavut requièrent un examen particulier qui ne pouvait se faire dans les délais prescrits en vertu du mandat du Groupe de travail, mais qui devait être entrepris ultérieurement ».

En 2006, tous les ordres professionnels de juristes autres que la Chambre ont signé l'Accord de libre circulation territoriale (« ALCT »). Afin de reconnaître les circonstances particulières des ordres professionnels de juristes des territoires, l'accord prévoyait la libre circulation permanente réciproque entre les ordres professionnels de juristes des provinces et des territoires sans exiger que les ordres professionnels de juristes territoriaux adhèrent aux dispositions de libre circulation temporaire de l'ALCN. La durée initiale de l'ALCT était de cinq ans. En 2011, l'accord a été reconduit sans date d'expiration.

En mars 2010, tous les ordres professionnels de juristes canadiens, à l'exception de la Chambre, ont signé l'Accord de libre circulation au Québec (« ALCQ ») qui facilite la libre circulation réciproque entre le Québec et les juridictions de la common law. Les dispositions de libre circulation énoncées dans l'ALCQ ont été rendues applicables aux membres de la Chambre en mars 2012 en raison de la signature de l'addenda à l'ALCQ par tous les ordres professionnels de juristes.

Les signataires de l'ALCN et la Chambre ont maintenant approuvé une version révisée de l'accord qui rend les dispositions de libre circulation permanente de l'ALCN applicables à la libre circulation vers et en provenance du Barreau du Québec et qui incorpore les dispositions de libre circulation prévues dans l'ALCQ et l'addenda à l'ALCQ applicable à la Chambre. L'ALCN 2013 a été signé en octobre 2013.

Le présent accord a été modifié de façon à s'assurer que toutes références aux clauses applicables de l'ALCN 2013 sont exactes.

Par les présentes, les signataires du présent accord qui ne sont pas des signataires de l'ALCN 2013 ne souscrivent pas aux dispositions de l'ALCN 2013, sauf les dispositions qui sont expressément énoncées dans le présent accord.

LES SIGNATAIRES CONVIENNENT DE CE QUI SUIT :

Définitions

1. Dans le présent accord, sauf indication contraire du contexte :

« accord de libre circulation nationale 2013 » ou **« ALCN 2013 »** désigne l'Accord de libre circulation nationale 2013 de la Fédération des ordres professionnels de juristes du Canada, avec les modifications pouvant y être apportées;

« assurance responsabilité » désigne l'assurance responsabilité professionnelle obligatoire en cas d'erreurs ou d'omissions exigée par un ordre professionnel;

« avocat » désigne un membre d'un ordre professionnel signataire;

« dispositions sur la libre circulation permanente » désigne les clauses 33 à 40, et 43 à 50 de l'ALCN 2013;

« exercice du droit » a la signification qui s'applique à chaque juridiction dans cette juridiction;

« ordre professionnel » désigne l'ordre professionnel de juristes, la *Law Society* ou la *Barristers' Society* d'une juridiction canadienne de la common law, ainsi que le Barreau du Québec;

« ordre professionnel d'origine » désigne un ordre professionnel de la profession juridique au Canada dont un avocat est membre, et **« juridiction d'origine »** a une signification correspondante;

« protocole sur l'exercice interjuridictionnel du droit » désigne le Protocole de 1994 sur l'exercice interjuridictionnel du droit de la Fédération des ordres professionnels de juristes du Canada, avec les modifications pouvant y être apportées;

« registre » désigne le Registre national des avocats en exercice établi en vertu de la clause 18 de l'ALCN 2013.

Général

2. Les ordres professionnels signataires :

(a) feront tous les efforts possibles pour obtenir des autorités législatives ou réglementaires les modifications aux lois ou aux règlements qui sont nécessaires ou recommandées pour mettre à exécution les dispositions du présent accord;

(b) modifieront leurs propres règles, règlements, politiques et programmes dans la mesure où ils le jugent nécessaire ou opportun pour mettre à exécution les dispositions du présent accord;

(c) respecteront l'esprit et l'objet du présent accord afin de faciliter la libre circulation des avocats canadiens dans l'intérêt public et s'efforceront de régler tout différend entre eux dans cet esprit et selon cet objet; et

(d) travailleront dans un esprit de coopération afin de régler tous les différends et toutes les ambiguïtés qui existent actuellement ou qui pourraient survenir plus tard, quant aux lois, aux politiques et aux programmes sur la libre circulation interjuridictionnelle.

3. Les ordres professionnels signataires adhéreront au présent accord et y seront liés en faisant signer toute copie de cet accord par une personne autorisée.

4. Un ordre professionnel signataire ne pourra, en raison seulement du présent accord :

(a) accorder à un avocat membre d'un autre ordre professionnel des droits d'exercice qui sont plus étendus que ceux accordés à l'avocat par son ordre professionnel d'origine; ou

(b) libérer un avocat des restrictions ou des limites imposées à son droit d'exercice, sauf dans les conditions qui s'appliquent à tous les membres de l'ordre professionnel signataire.

5. Les modifications apportées en vertu de la clause 2(b) entreront en vigueur dès leur adoption et s'appliqueront aux membres des ordres professionnels signataires qui ont adopté des dispositions de réciprocité.

Libre circulation permanente

6. Les signataires, qui sont des signataires de l'ALCN 2013, conviennent d'élargir l'application des dispositions sur la libre circulation permanente de l'ALCN 2013 en ce qui concerne les signataires des territoires du présent accord.

7. Les signataires des territoires conviennent d'adopter et d'être tenus aux dispositions sur la libre circulation permanente de l'ALCN 2013.

8. Un signataire, qui a adopté des dispositions réglementaires qui mettent en vigueur des exigences sur la libre circulation permanente de l'ALCN 2013, est un ordre professionnel de réciprocité pour l'application de la libre circulation permanente en vertu du présent accord, que le signataire ait ou non adopté ou mis en vigueur toute autre disposition de l'Accord de libre circulation nationale.

Dispositions de transition

9. Le présent accord est un accord multilatéral, applicable aux ordres professionnels qui l'ont signé, et ne requiert pas le consentement unanime des ordres professionnels canadiens.

10. Les dispositions régissant la libre circulation permanente, qui sont en vigueur au moment où un ordre professionnel signe le présent accord, demeureront en application jusqu'à la mise en application du présent accord.

Règlement des différends

11. Les ordres professionnels signataires adoptent et conviennent de mettre à exécution des dispositions du Protocole sur l'exercice interjuridictionnel du droit quant à l'arbitrage des différends, notamment la clause 14 et l'annexe 5 du Protocole.

Accord de libre circulation territoriale 2013

Retrait

12. Un signataire peut cesser d'être lié par le présent accord en donnant à chaque autre signataire un avis écrit d'au moins une année civile complète.

13. Un signataire qui donne un avis, en vertu de la clause 12, devra immédiatement aviser ses membres par écrit de la date d'entrée en vigueur du retrait.

Accord de libre circulation territoriale 2013

SIGNÉ ce • jour de • 2014.

Law Society of British Columbia

Par : _____
Signataire autorisé

Law Society of Alberta

Par : _____
Signataire autorisé

Law Society of Saskatchewan

Par : _____
Signataire autorisé

Law Society of Manitoba

Par : _____
Signataire autorisé

Barreau du Haut-Canada

Par : _____
Signataire autorisé

Barreau du Québec

Par : _____
Signataire autorisé

Chambre des notaires du Québec

Par : _____
Signataire autorisé

Barreau du Nouveau-Brunswick

Par : _____
Signataire autorisé

Accord de libre circulation territoriale 2013

Nova Scotia Barristers' Society

Par : _____
Signataire autorisé

Law Society of Prince Edward Island

Par : _____
Signataire autorisé

Law Society of Newfoundland and Labrador

Par : _____
Signataire autorisé

Law Society of Yukon

Par : _____
Signataire autorisé

Law Society of the Northwest Territories

Par : _____
Signataire autorisé

Law Society of Nunavut

Par : _____
Signataire autorisé

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

TERRITORIAL MOBILITY AGREEMENT 2013

Territorial Mobility Agreement 2013

FEDERATION OF LAW SOCIETIES OF CANADA

~~October , 2013~~ April 2014

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement 2013 (“NMA 2013”) in facilitating permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this Agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this Agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,

- differences exist in the legislation, policies and programs pertaining to the signatories, including those differences between common law and civil law jurisdictions in Canada, and lawyers have a professional responsibility to ensure that they are competent with respect to any matter that they undertake, and

- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August, 2002, the Federation of Law Societies of Canada (the "Federation") approved the report of the National Mobility Task Force (“the Task Force”) for the implementation of full mobility rights for Canadian lawyers. This led to adoption of the National Mobility Agreement (“NMA”) by all provincial law societies other than the Chambre des notaires du Québec (“Chambre”).

Territorial Mobility Agreement 2013

The resolution adopted by the Federation in approving the report of the Task Force included an acknowledgement that "the unique circumstances of the law societies of Yukon, the Northwest Territories and Nunavut necessitate special considerations that could not be undertaken within the time frame prescribed in the Task Force's terms of reference, but should be undertaken in the future."

In 2006 all law societies other than the Chambre signed the Territorial Mobility Agreement ("TMA"). To recognize the unique circumstances of the territorial law societies, the agreement provided for reciprocal permanent mobility between the law societies of the provinces and the territories, without requiring the territorial law societies to participate in the temporary mobility provisions of the NMA. The original term of the TMA was five years. In 2011 the agreement was renewed without a termination date.

In March 2010, all Canadian law societies except the Chambre signed the Quebec Mobility Agreement ("QMA"), facilitating reciprocal mobility between Quebec and the common law jurisdictions. The mobility provisions set out in the QMA were extended to members of the Chambre in March 2012 with the signing by all law societies of the Addendum to the QMA.

The signatories to the NMA and the Chambre have now approved a revised agreement that extends the permanent mobility provisions of the NMA to mobility to and from the Barreau du Québec and incorporates the mobility provisions of the QMA and the Addendum to the QMA applicable to the Chambre. The "NMA 2013" ~~will be~~was executed in October 2013.

This Agreement has been amended to ensure that references to the relevant clauses of the NMA 2013 are accurate.

The signatories to this Agreement who are not signatories to the NMA 2013 do not hereby subscribe to the provisions of the NMA 2013, except as expressly stated in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

"home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and **"home jurisdiction"** has a corresponding meaning;

"Inter-Jurisdictional Practice Protocol" means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

"lawyer" means a member of a signatory governing body;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"National Mobility Agreement 2013" or **"NMA 2013"** means the National Mobility Agreement 2013 of the Federation of Law Societies of Canada, as amended from time to time;

"permanent mobility provisions" means clauses 33 to 40, and 43 ~~and~~ to 50 of the NMA 2013;

"practice of law" has the meaning with respect to each jurisdiction that applies in that jurisdiction;

"Registry" means the National Registry of Practising Lawyers established under clause 18 of the NMA 2013;

General

2. The signatory governing bodies will

(a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

(b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

(c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

(d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this Agreement alone,

(a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

(b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Permanent Mobility

6. The signatories that are signatories to the NMA 2013 agree to extend the application of the permanent mobility provisions of the NMA 2013 with respect to the territorial signatories to this Agreement.

7. The territorial signatories agree to adopt and be bound by the permanent mobility provisions of the NMA 2013.

8. A signatory that has adopted regulatory provisions giving effect to the permanent mobility requirements of the NMA 2013 is a reciprocating governing body for the purposes of permanent mobility under this Agreement, whether or not the signatory has adopted or given effect to any other provisions of the National Mobility Agreement.

Transition Provisions

9. This Agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

10. Provisions governing permanent mobility in effect at the time that a governing body becomes a signatory to this Agreement will continue in effect until this agreement is implemented.

Dispute Resolution

11. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Withdrawal

12. A signatory may cease to be bound by this Agreement by giving each other signatory written notice of at least one clear calendar year.

13. A signatory that gives notice under clause 12 will immediately notify its members in writing of the effective date of withdrawal.

Territorial Mobility Agreement 2013

SIGNED on the day of , 2013.

Law Society of British Columbia

Per: _____
Authorized Signatory

Law Society of Alberta

Per: _____
Authorized Signatory

Law Society of Saskatchewan

Per: _____
Authorized Signatory

Law Society of Manitoba

Per: _____
Authorized Signatory

Law Society of Upper Canada

Per: _____
Authorized Signatory

Barreau du Québec

Per: _____
Authorized Signatory

Chambre des notaires du Québec

Per: _____
Authorized Signatory

Law Society of New Brunswick

Per: _____
Authorized Signatory

Territorial Mobility Agreement 2013

Nova Scotia Barristers' Society

Per: _____
Authorized Signatory

Law Society of Prince Edward Island

Per: _____
Authorized Signatory

Law Society of Newfoundland and Labrador

Per: _____
Authorized Signatory

Law Society of Yukon

Per: _____
Authorized Signatory

Law Society of the Northwest Territories

Per: _____
Authorized Signatory

Law Society of Nunavut

Per: _____
Authorized Signatory

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

ACCORD DE LIBRE CIRCULATION TERRITORIALE 2013

Accord de libre circulation territoriale 2013

FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA

~~Octobre 2013~~Avril 2014

Introduction

L'objectif de cet accord est d'élargir la portée de l'Accord de libre circulation nationale 2013 (« ALCN 2013 ») en facilitant la libre circulation permanente des avocats entre les juridictions canadiennes.

Bien que les signataires adhèrent volontairement à cet accord, ils s'attendent à ce que seuls les avocats membres des organismes signataires ayant mis en application des dispositions de réciprocité dans leur juridiction puissent profiter des dispositions du présent accord.

Les signataires reconnaissent que :

- il est de leur devoir, envers le public canadien et leurs membres, de réglementer l'exercice interjuridictionnel du droit afin de s'assurer que leurs membres exercent le droit avec compétente, conformément à l'éthique et à leurs responsabilités financières, en maintenant une assurance responsabilité professionnelle et une assurance en cas de détournement de fonds, dans toutes les juridictions du Canada;

- il existe des différences entre les lois, les politiques et les programmes des signataires, incluant les différences entre les juridictions de la common law et du droit civil au Canada, et les avocats ont l'obligation professionnelle de s'assurer qu'ils sont compétents dans tout dossier qu'ils entreprennent; et

- il est souhaitable de faciliter un régime de réglementation national pour l'exercice interjuridictionnel du droit afin de promouvoir des normes et des procédures uniformes, tout en reconnaissant le pouvoir exclusif de chaque signataire dans son propre champ de compétence législative.

Contexte

En août 2002, la Fédération des ordres professionnels de juristes du Canada (la « Fédération ») a approuvé le rapport du Groupe de travail sur la libre circulation nationale (le « Groupe de travail ») pour la mise en application des droits relatifs à la libre circulation des avocats canadiens. Cette mesure a mené à l'adoption de l'Accord de libre circulation nationale (« ALCN ») par tous les ordres professionnels de juristes des provinces autres que la Chambre des notaires du Québec (« Chambre »).

La résolution adoptée par la Fédération en approuvant le rapport du Groupe de travail reconnaissait que « les circonstances uniques des barreaux du Yukon, des Territoires du Nord-

Accord de libre circulation territoriale 2013

Ouest et du Nunavut requièrent un examen particulier qui ne pouvait se faire dans les délais prescrits en vertu du mandat du Groupe de travail, mais qui devait être entrepris ultérieurement ».

En 2006, tous les ordres professionnels de juristes autres que la Chambre ont signé l'Accord de libre circulation territoriale (« ALCT »). Afin de reconnaître les circonstances particulières des ordres professionnels de juristes des territoires, l'accord prévoyait la libre circulation permanente réciproque entre les ordres professionnels de juristes des provinces et des territoires sans exiger que les ordres professionnels de juristes territoriaux adhèrent aux dispositions de libre circulation temporaire de l'ALCN. La durée initiale de l'ALCT était de cinq ans. En 2011, l'accord a été reconduit sans date d'expiration.

En mars 2010, tous les ordres professionnels de juristes canadiens, à l'exception de la Chambre, ont signé l'Accord de libre circulation au Québec (« ALCQ ») qui facilite la libre circulation réciproque entre le Québec et les juridictions de la common law. Les dispositions de libre circulation énoncées dans l'ALCQ ont été rendues applicables aux membres de la Chambre en mars 2012 en raison de la signature de l'addenda à l'ALCQ par tous les ordres professionnels de juristes.

Les signataires de l'ALCN et la Chambre ont maintenant approuvé une version révisée de l'accord qui rend les dispositions de libre circulation permanente de l'ALCN applicables à la libre circulation vers et en provenance du Barreau du Québec et qui incorpore les dispositions de libre circulation prévues dans l'ALCQ et l'addenda à l'ALCQ applicable à la Chambre. L'ALCN 2013 ~~sera~~ a été signé en octobre 2013.

Le présent accord a été modifié de façon à s'assurer que toutes références aux clauses applicables de l'ALCN 2013 sont exactes.

Par les présentes, les signataires du présent accord qui ne sont pas des signataires de l'ALCN 2013 ne souscrivent pas aux dispositions de l'ALCN 2013, sauf les dispositions qui sont expressément énoncées dans le présent accord.

LES SIGNATAIRES CONVIENNENT DE CE QUI SUIT :

Définitions

1. Dans le présent accord, sauf indication contraire du contexte :

« accord de libre circulation nationale 2013 » ou **« ALCN 2013 »** désigne l'Accord de libre circulation nationale 2013 de la Fédération des ordres professionnels de juristes du Canada, avec les modifications pouvant y être apportées;

« assurance responsabilité » désigne l'assurance responsabilité professionnelle obligatoire en cas d'erreurs ou d'omissions exigée par un ordre professionnel;

« avocat » désigne un membre d'un ordre professionnel signataire;

« dispositions sur la libre circulation permanente » désigne les clauses 33 à 40, et 43 ~~et~~ à 50 de l'ALCN 2013;

« exercice du droit » a la signification qui s'applique à chaque juridiction dans cette juridiction;

« ordre professionnel » désigne l'ordre professionnel de juristes, la *Law Society* ou la *Barristers' Society* d'une juridiction canadienne de la common law, ainsi que le Barreau du Québec;

« ordre professionnel d'origine » désigne un ordre professionnel de la profession juridique au Canada dont un avocat est membre, et **« juridiction d'origine »** a une signification correspondante;

« protocole sur l'exercice interjuridictionnel du droit » désigne le Protocole de 1994 sur l'exercice interjuridictionnel du droit de la Fédération des ordres professionnels de juristes du Canada, avec les modifications pouvant y être apportées;

« registre » désigne le Registre national des avocats en exercice établi en vertu de la clause 18 de l'ALCN 2013.

Général

2. Les ordres professionnels signataires :

(a) feront tous les efforts possibles pour obtenir des autorités législatives ou réglementaires les modifications aux lois ou aux règlements qui sont nécessaires ou recommandées pour mettre à exécution les dispositions du présent accord;

(b) modifieront leurs propres règles, règlements, politiques et programmes dans la mesure où ils le jugent nécessaire ou opportun pour mettre à exécution les dispositions du présent accord;

(c) respecteront l'esprit et l'objet du présent accord afin de faciliter la libre circulation des avocats canadiens dans l'intérêt public et s'efforceront de régler tout différend entre eux dans cet esprit et selon cet objet; et

(d) travailleront dans un esprit de coopération afin de régler tous les différends et toutes les ambiguïtés qui existent actuellement ou qui pourraient survenir plus tard, quant aux lois, aux politiques et aux programmes sur la libre circulation interjuridictionnelle.

3. Les ordres professionnels signataires adhéreront au présent accord et y seront liés en faisant signer toute copie de cet accord par une personne autorisée.

4. Un ordre professionnel signataire ne pourra, en raison seulement du présent accord :

(a) accorder à un avocat membre d'un autre ordre professionnel des droits d'exercice qui sont plus étendus que ceux accordés à l'avocat par son ordre professionnel d'origine; ou

(b) libérer un avocat des restrictions ou des limites imposées à son droit d'exercice, sauf dans les conditions qui s'appliquent à tous les membres de l'ordre professionnel signataire.

5. Les modifications apportées en vertu de la clause 2(b) entreront en vigueur dès leur adoption et s'appliqueront aux membres des ordres professionnels signataires qui ont adopté des dispositions de réciprocité.

Libre circulation permanente

6. Les signataires, qui sont des signataires de l'ALCN 2013, conviennent d'élargir l'application des dispositions sur la libre circulation permanente de l'ALCN 2013 en ce qui concerne les signataires des territoires du présent accord.

7. Les signataires des territoires conviennent d'adopter et d'être tenus aux dispositions sur la libre circulation permanente de l'ALCN 2013.

8. Un signataire, qui a adopté des dispositions réglementaires qui mettent en vigueur des exigences sur la libre circulation permanente de l'ALCN 2013, est un ordre professionnel de réciprocité pour l'application de la libre circulation permanente en vertu du présent accord, que le signataire ait ou non adopté ou mis en vigueur toute autre disposition de l'Accord de libre circulation nationale.

Dispositions de transition

9. Le présent accord est un accord multilatéral, applicable aux ordres professionnels qui l'ont signé, et ne requiert pas le consentement unanime des ordres professionnels canadiens.

10. Les dispositions régissant la libre circulation permanente, qui sont en vigueur au moment où un ordre professionnel signe le présent accord, demeureront en application jusqu'à la mise en application du présent accord.

Règlement des différends

11. Les ordres professionnels signataires adoptent et conviennent de mettre à exécution des dispositions du Protocole sur l'exercice interjuridictionnel du droit quant à l'arbitrage des différends, notamment la clause 14 et l'annexe 5 du Protocole.

Accord de libre circulation territoriale 2013

Retrait

12. Un signataire peut cesser d'être lié par le présent accord en donnant à chaque autre signataire un avis écrit d'au moins une année civile complète.

13. Un signataire qui donne un avis, en vertu de la clause 12, devra immédiatement aviser ses membres par écrit de la date d'entrée en vigueur du retrait.

Accord de libre circulation territoriale 2013

SIGNÉ ce • jour de • 2014.

Law Society of British Columbia

Par : _____
Signataire autorisé

Law Society of Alberta

Par : _____
Signataire autorisé

Law Society of Saskatchewan

Par : _____
Signataire autorisé

Law Society of Manitoba

Par : _____
Signataire autorisé

Barreau du Haut-Canada

Par : _____
Signataire autorisé

Barreau du Québec

Par : _____
Signataire autorisé

Chambre des notaires du Québec

Par : _____
Signataire autorisé

Barreau du Nouveau-Brunswick

Par : _____
Signataire autorisé

Accord de libre circulation territoriale 2013

Nova Scotia Barristers' Society

Par : _____
Signataire autorisé

Law Society of Prince Edward Island

Par : _____
Signataire autorisé

Law Society of Newfoundland and Labrador

Par : _____
Signataire autorisé

Law Society of Yukon

Par : _____
Signataire autorisé

Law Society of the Northwest Territories

Par : _____
Signataire autorisé

Law Society of Nunavut

Par : _____
Signataire autorisé

THIS SECTION CONTAINS

IN CAMERA MATERIAL

The Law Society of Upper Canada | Barreau du Haut-Canada

Tab 2

Report to Convocation
February 27, 2014

Report of the Treasurer's Advisory Group on Access to Justice Working Group

WORKING GROUP MEMBERS
Treasurer Thomas Conway (Chair)
Howard Goldblatt (Vice-Chair)
Chris Bredt
Marion Boyd
Cathy Corsetti
Adriana Doyle
Susan Hare
Michael Lerner
William McDowell
Janet Minor

Purpose of Report: For Decision

Prepared by Public Affairs

PROPOSAL FOR A NEW LAW SOCIETY APPROACH TO ACCESS TO JUSTICE

Motion

1. **That Convocation approve the creation of a framework to facilitate the reinforcement and integration of access to justice objectives, including intersecting equity principles, into the core business, functions and operational planning of the Law Society, the key components of which are as follows, and as further described in this report:**
    - **a. An internal focus on access to justice, including equity principles, as a strategic objective underpinning the Law Society's work, which will include:**
        - **i. aligning resources to enhance the Law Society's approach to developing access to justice objectives integrated across program areas; and**
        - **ii. strategically reviewing, reconsidering and, where appropriate, amending the Law Society's rules, regulations, policies and practices to foster change and innovation and achieve the Law Society's access to justice objectives.**
    - **b. An external focus through which the Law Society will facilitate a standing forum for collaboration on access to justice by:**
        - **i. reconstituting the Treasurer's Advisory Group on Access to Justice as a standing forum called The Action Group on Access to Justice; and**
        - **ii. providing administrative and other resources necessary to assist in convening and supporting the ongoing functioning of the standing forum.**
    - **c. The development of appropriate metrics to measure the effectiveness of steps and actions taken by the Law Society.**
    - **d. In addition to periodic updates, an evaluation and report to Convocation within three years on achievements, challenges and improvements pertaining to the development and implementation of the access to justice framework.**

INTRODUCTION

2. There are major access to justice gaps in this country. The National Action Committee on Access to Justice in Civil and Family Matters and others have highlighted:
    a. As many as one in three people will experience at least one legal problem in a given three year period. Few will have the resources to solve them.
    b. Members of poor and vulnerable groups are particularly prone to legal problems. They experience more legal problems than higher income earners and more secure groups.
    c. The problems people have often multiply; that is, having one kind of legal problem can often lead to other legal, social and health related problems.
    d. Legal problems have social and economic costs. Unresolved legal problems adversely affect people's lives and the public purse.

3. As the Honourable Frank Iacobucci noted in his recently released report on *First Nations Representation on Ontario Juries* **(Tab 2.1)** the justice system generally as applied to First Nations peoples, particularly in the North, is in crisis. He notes a set of broad and systemic issues at the heart of the current dysfunctional relationship between Ontario's justice system and Aboriginal peoples in this province.

4. The current justice system, which is inaccessible to so many, disproportionately impacts members of immigrant, Aboriginal and rural and northern populations, and other vulnerable groups. It is unable to respond adequately to the problem and is unsustainable.

5. In addition, the legal professions themselves are facing significant change as they endeavour to remain viable, competitive and relevant in the face of challenges presented by globalization, technology and changing client demands (see most recently the CBA's *Legal Futures Initiative*). Not least of the challenges facing the profession is access to justice and a perception that the legal profession is out of touch, not representative of the populations it serves, and itself creates barriers to low and middle income Ontarians accessing legal services and justice.

6. In the face of this growing understanding of the challenges, the legal professions are urged to redefine professionalism and ensure a strong focus on serving the public. In this context, the Law Society has an opportunity to profoundly influence change and respond, within the scope of its authority, to the challenges people are facing in accessing justice in this province.

7. This report from the Treasurer' Advisory Group on Access to Justice (TAG) Working Group proposes a framework for change that would see the Law Society lead and innovate on these important issues.

8. The proposals in this report have been revised since first presented to Convocation for information and discussion on January 23, 2014. The proposals have benefitted from significant input and advice from a range of committees, individual benchers, and Law Society advisory groups such as the Treasurer's Liaison Group, the Equity Advisory Group, and the Aboriginal Working Group. Discussions have also occurred with other stakeholder groups and associations and numerous written submissions have been received commenting on the proposals. In response to this significant input received, the proposals have been clarified, refined, and amended.

BACKGROUND

9. The Law Society has been engaged with issues pertaining to access to justice for years: from the work of the standing Committee on Access to Justice, to the regulation of paralegals introduced in 2007. In fact, the Law Society's mandate was enhanced with the legislative amendments introducing paralegal regulation to include a specific duty with regard to access to justice:

> **Principles to be applied by the Society**
> **4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> ...

> 2. The Society has a duty *to act so as to facilitate access to justice* for the people of Ontario. 2006, c. 21, Sched. C, s. 7.

10. Law societies across the country have been engaged in a number of diverse initiatives aimed at improving public access to legal services, ranging from those designed to prevent legal problems from arising, to those aimed at expanding knowledge and services for the self-represented, to those that increase access to legal assistance. There is growing recognition, however, of the limitations of these one-off, ad hoc approaches.

11. Despite significant individual and organizational efforts, including those of the law societies, the "crisis" only seems to be growing, highlighted perhaps most starkly by the numbers of self-represented litigants appearing in courts across the country. As a result, the attention being focussed on the need to address the imperative to provide more effective and meaningful access to justice in the last few years has been unprecedented.

12. The Law Society has responsibility for a broad range of regulatory activities, including standard setting, rule making, policy development and implementation, licensing, investigation and prosecution of complaints against lawyers and paralegals, adjudication of conduct, competence and capacity matters and imposition and monitoring of penalties. Across this range of activities there is significant scope to influence a cultural shift, foster innovation, and stimulate change that will better "facilitate access to justice for the people of Ontario."

13. In response to growing pressures and to further explore opportunities for the Law Society to enhance its role and provide leadership on these issues, the Treasurer identified access to justice as a priority during his term as Treasurer. In January 2013 he met with the Chairs of the Access to Justice, Government Relations, and Equity and Aboriginal Issues Committees. The Chairs were overwhelmingly supportive of seeking an enhanced role for the Law Society on these issues and agreed that focussed consultations within the profession and stakeholder groups would help to inform what that role should or could be.

14. Accordingly, the Treasurer's Advisory Group on Access to Justice (TAG) was established to seek information and advice from a broad cross-section of those involved in the justice sector: organizations whose core mandate involves addressing access to justice, lawyer and paralegal associations, representatives of groups promoting equity and diversity in the legal professions, courts and government representatives, and academics (list of the groups and organizations who have participated in TAG meetings attached as **Tab 2.2**).

15. Although established for a specific and limited purpose, TAG has already had the effect of facilitating a broader collaborative dialogue and galvanizing interest and energy. Posts to the Treasurer's Blog over the past year, as well as regular updates provided to Convocation and press coverage and attention, have helped to keep the profession informed about the Law Society's activities and evolving plans in regard to a new approach to access to justice issues.

TAG - What the Law Society Has Heard

16. Numerous meetings of TAG participants have occurred, both formally and informally, over the past year. Those dialogues culminated in a symposium in October 2013: *Creating a Climate for Change*. A group of key leaders and decision-makers dedicated to improving access to justice gathered for concrete and practical discussions about structures and mechanisms for implementing change, particularly as related to an enhanced role for the Law Society on these issues as it fulfils its legislative mandate.

17. Two background papers were prepared for the symposium: one to highlight key themes emerging from the many reports and recommendations of the last several years; and one to provide an overview of the scope of activities and organizations focused on improving access to justice in Ontario (*Access to Justice Themes: "Quotable Quotes,"* **Tab 2.3**; *Legal Organizations and Access to Justice Activities in Ontario,* **Tab 2.4**). The final report from the symposium summarizes the nature of input and ideas the Law Society received about an appropriate role (*Creating a Climate for Change: Report from the TAG Symposium, October 29, 2013,* **Tab 2.5**).

18. The core of the advice and input received through the TAG dialogues and symposium has been remarkably consistent and includes:
    a. Meaningful change will require changing the discourse – finding a common voice; engaging the public; creating a political climate for change.
    b. "Putting people first" requires an understanding that barriers to access to justice are both the cause and the effect of the disadvantages experienced today by various communities in Ontario society;
    c. In changing the discourse, the Law Society is well positioned to act as a catalyst/facilitator/educator:
        i. Providing a forum for dialogue and collaboration – bringing diverse actors together and enabling "those in charge" to work together;
        ii. Exploring and developing mechanisms to ensure broader public awareness: of the services available and how to access them; and of the importance of access to justice for all Ontarians more generally.
    d. Change – focussed, systemic and sustained - is necessary across the justice sector and across disciplinary boundaries; as an agent of change, the Law Society can lead and foster innovation within its own regulatory context by, for instance:
        i. addressing any regulatory impediments to, or creating inducements for, innovation generally in the delivery of legal services;
        ii. ensuring regulation of professional competence and conduct is appropriately balanced against the broader public interest in access to justice;
        iii. examining alternative structures that could better facilitate innovative approaches to the provision of legal services;
        iv. providing education and inducement for the professions to be better engaged on the issues and solutions;
        v. considering the scope of paralegal practice;
        vi. reaching out to diverse communities, particularly those where barriers to access to justice have been identified, and sharing and encouraging research on their needs and perspectives;
        vii. considering inducements for rural and other service delivery methods that would help address geographic barriers to access to justice.

19. Collaboration, and mechanisms to facilitate it, were central topics at every TAG meeting over the past year and were emphasized again at the TAG Symposium in October. Participants there strongly encouraged the Law Society to maintain the leadership it has shown in bringing diverse players together. There is now momentum and an expectation created that the Law Society will have an ongoing role in facilitating a collaborative dialogue in Ontario.

Other Initiatives that have Informed the Law Society's Approach

20. Many reports were reviewed and highlighted for the TAG Symposium. Three national reports released in 2013 were of particular significance in informing and shaping the TAG Working Group's proposal for a new Law Society approach to access to justice:

    a. *A Roadmap for Change*, Report of the National Action Committee on Access to Justice in Civil and Family Matters (October 2013) **(Tab 2.6**)
    b. *Reaching Equal Justice: an Invitation to Envision and Act*, Report of the Canadian Bar Association's Envisioning Equal Justice Initiative (November 2013) **(Tab 2.7)**
    c. *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, final report, Dr. Julie Macfarlane (May 2013) **(Tab 2.8)**.

21. Each of these reports (and their supporting background papers) has specific recommendations pertaining to law societies and professional regulation. The reports are consistent in the types of innovations they say law societies should be contemplating. As summarized by the Action Committee on Access to Civil and Family Justice in *A Roadmap for Change* (at page 14):

> "Specific innovations and improvements that should be considered and potentially developed include:
>
> - Limited scope retainers – "unbundling";
> - Alternative business and delivery models;
> - Increased opportunities for paralegal services;

- Increased legal information services by lawyers and qualified non-lawyers;
- Appropriate outsourcing of legal services;
- Summary advice and referrals;
- Alternative billing models;
- Legal expense insurance and broad-based legal care;
- Pro bono and low bono services;
- Creative partnerships and initiatives designed to encourage expanding access to legal services – particularly to low income clients;
- Programs to promote justice services to rural and remote communities as well as marginalized and equity seeking communities; and
- Programs that match unmet legal needs with unmet legal markets."

22. All of these reports also agree that access to justice is a multi-faceted issue that requires responses within and beyond the formal justice system. Most importantly, each report highlights the lack of leadership and collaboration on access to justice issues as being central to the reason that change and improvement continue to be such a challenge. The system's players are urged to change their focus:

> "Within our current constitutional, administrative and sectoral frameworks, much more collaboration and coordination is not only needed but achievable. We can and must improve collaboration and coordination not only across and within jurisdictions, but also across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.). We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well." (NAC, *A Roadmap for Change*, p. 7)

23. The importance of collaboration is highlighted in each report with specific recommendations for the creation of a collaborative forum, in one form or another, which brings together system players and its users and stimulates action for change.

24. Adopting a collaborative approach was also highlighted in the Law Society of Upper Canada, Legal Aid Ontario and Pro Bono Law Ontario's joint report *Listening to*

Ontarians (attached at **Tab 2.9**). It states "We believe that accessibility to the civil justice system would improve if organizations committed to access to justice committed to sharing information and working together" (at page 60).

25. Other significant Ontario reports have also highlighted the importance of collaboration; including the Karen Cohl and George Thomson report *Connecting across Language and Distance* and the report prepared by The Honourable Paul Rouleau and Paul Le Vay *Access to Justice in French.* Both reports recommend a coordinated approach for enhancing linguistic and rural access to legal information and services.

26. And, of course, the Honourable Frank Iacobucci's report on *First Nations Representation on Ontario Juries* (**Tab 2.1**) provides a stark and chilling reminder of the particular crisis Ontario's Aboriginal peoples face in accessing justice, and cannot be ignored. It too speaks of the need for systemic and cooperative action.

27. All of these reports have provided, in effect, a menu of innovations and changes that the Law Society, within it statutory mandate, must embrace, pursue and support. The challenge is to do so in an organized and strategic way, coordinated across program areas of the Law Society, and across partners within and beyond the justice sector who can contribute collectively to systemic and lasting changes.

The Key Role of Equity

28. The Law Society's ongoing involvement with equity issues through engagement with external groups, consultation with the professions, and reviewing and conducting related research, has also informed the Law Society's current approach to clarifying and defining its access to justice mandate.

29. In May 1997, the Law Society of Upper Canada unanimously adopted the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (the "*Bicentennial Report"*) which forms the foundation to the equity and diversity work of the Law Society.

The *Bicentennial Report* reviewed the status of women, and members of the Aboriginal, Francophone, racialized, disability, gay, lesbian, bisexual and transgender communities in the profession. The *Bicentennial Report* made sixteen recommendations that have since guided the Law Society as it promotes equality and diversity within the legal profession.

30. The adoption of the *Bicentennial Report* led to a series of systemic changes to promote equality and diversity within the legal profession and within the Law Society. The changes included the creation of an infrastructure to address these issues, including a standing committee of Convocation, advisory groups and the internal capacity. This in turn has led to the creation of programs such as: public education programs for members of the public and the profession; professional development programs for the profession; the adoption of significant policy initiatives such as the modification of the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* to address harassment and discrimination and the obligation of lawyers and paralegals to offer services in the French language; and significant research and policy development initiatives, such as the Challenges Faced by Racialized Licensees project and the consultations with the Aboriginal bar and lawyers with disabilities. The Aboriginal Bar Consultation Report provided numerous recommendations to support Aboriginal licensees that the Law Society has implemented or is pursuing including: networking, certified specialist designation in Aboriginal Law, and mentoring.

31. It is clear from research and consultations conducted to date that the concept of access to justice must include a consideration of Aboriginal, Francophone and equity-seeking communities. There is now ample evidence that these communities experience disproportionate barriers in the current justice system. At the same time, in the name of access to justice, the legal professions must be representative of the community they serve. As a result, the promotion of equity in the legal professions, and the enhancement of access to justice for Ontarians, must be viewed as complementary and interrelated challenges.

32. There will never be real access to justice without the involvement of legal professions that are inclusive, diverse and representative. Conversely, access to justice will not be attained

if members of Aboriginal, Francophone and equity-seeking communities continue to face barriers to access. Within the scope of its authority and mandate, the Law Society must therefore approach the interrelated dimensions of the equity and access to justice issues in a coordinated and simultaneous way.

A NEW LAW SOCIETY APPROACH TO ACCESS TO JUSTICE

33. It is apparent from all of the above that access to justice comprises a broad category of issues and responses that cannot all be addressed at once or by one entity. While not alone in shouldering the responsibility for promoting access to justice, it must be recognized that the Law Society does play and must play a central role in shaping and guiding the legal professions and in influencing change and innovation.

34. In order to be most effective, the Law Society needs a clear and new framework within which these issues and emerging recommendations must be considered. This framework would ensure that access to justice and related equity issues are considered in a strategic, systematic and sustained way, consistent with – and integrated into – the Law Society's core functions with regard to professional competence and professional conduct.

35. This is not a proposal to supplant those core functions but, rather, to supplement and enhance them, recognizing the growing public interest in and demand for improved access to justice. This is a proposal to break down siloed thinking and approaches, both internally and externally, to enable better integration of efforts and objectives which will "facilitate access to justice for the people of Ontario."

36. Creating a new framework with structural and resource supports within which these issues can be considered allows the Law Society to take the many reports and recommendations that already exist and begin to consider what they mean for the regulator and for system partners more broadly in working collaboratively to achieve meaningful and long lasting change.

37. The TAG Working Group proposes that the details of this new framework, including mechanisms for engagement with the users of the system and other stakeholders in order to identify priorities and processes for change, be developed over the next few months. With Convocation's approval, the details of the framework would be developed around two key components, one with an internal focus and one – a standing forum – focusing externally.

Key Component – Internal

38. The first key component of the proposed framework would require a critical, holistic and ongoing examination of the Law Society's own rules, regulations, policies and programs – both existing and proposed – to assess their effectiveness in meeting access to justice objectives. Where access to justice objectives have not already been identified, they should be considered. In identifying access to justice objectives, a particular emphasis should be placed on consideration of how those objectives would benefit those who can be among the most marginalized in society, including Aboriginal peoples, racialized communities, people with disabilities, and other equity-seeking groups.

39. This exercise would be informed to a great extent by the reports and recommendations that have emerged over the last year or so. The framework will ensure that those reports and recommendations are considered in a systematic and coordinated way across program areas. This will include a process and timeline to address, specifically and practically, proposals including those recommended by the Action Committee, Canadian Bar Association, and others such as,

    a. alternative business and delivery models;
    b. increased opportunities for paralegal services;
    c. increased legal information services by lawyers and qualified non-lawyers;
    d. regulation with respect to outsourcing of legal services;
    e. regulation with respect to the provision of summary advice and referrals.

40. In conjunction with the proposed external forum, the framework will also allow for further consideration of other issues and opportunities including those related to the following:

    a. alternative billing models;
    b. legal expense insurance and broad-based legal care;
    c. pro bono and low bono services;
    d. creative partnerships and initiatives designed to encourage expanding access to legal services – particularly to low income clients – including enhancements to legal aid;
    e. programs to promote justice services to rural and remote communities as well as marginalized and Aboriginal, Francophone and equity seeking communities; and
    f. programs that match unmet legal needs with unmet legal markets.

41. Operational changes already implemented by the Chief Executive Officer present an opportunity to align resources to the development and implementation of the proposed framework. The CEO has begun a reorganization of certain program areas to more efficiently and effectively deliver and support the Law Society's core functions. A new Division – Strategic Policy, Communications and Corporate Relations - has been created with a new Executive Director appointed as of February 3, 2014. This new Division will integrate issues management, access and equity, government and stakeholder relations, strategic communications, and Convocation and Committee support, into a new reporting and operating structure.

42. A core task of the new Division, with guidance from Convocation, will be to develop the details of the proposed framework necessary to fully integrate and implement a new approach to access to justice issues, including through identification of its guiding principles, objectives, work plans and outcomes/deliverables. Performance and outreach measures will be developed to ensure ongoing evaluation of the ability of the new Division to achieve its objectives.

43. The new Division will serve to ensure that a consistent and supported approach is taken across the organization in articulating and meeting access to justice objectives. The Division will position itself to provide expert advice and perspective on access to justice and related equity issues to support the core functions of the Law Society regarding professional competence and conduct. It will continue to liaise with members of Aboriginal, Francophone and equity partners to ensure various perspectives are appropriately considered. In addition, ongoing liaison will occur with the Canadian Bar Association, the Action Committee, and others to continue discussions with regard to the implementation of the recommendations they have made.

44. As more support, focus and structure is brought to the Law Society's approach to responding to access to justice issues and the recommendations emerging over the last year or so, there will be the ability to more nimbly and effectively respond to opportunities for dialogue and partnerships. The Law Society can be better positioned to develop informed, innovative and lasting change on a systemic basis.

45. As example, establishing this framework and integrating access to justice and equity issues into the Law Society's core business and operational planning will allow more strategic and coordinated responses between intersecting issues of access to justice and equity such as the challenges faced in obtaining access to justice in French, and by Aboriginal people and members of equity-seeking communities in accessing legal services. All of these issues have highlighted the need to be informed by the system users and to respond collaboratively with system partners. The framework proposed will better position the Law Society to do that in a more informed and coordinated way.

46. Within the new framework, the Law Society will engage with Aboriginal leadership and continue to liaise with the Aboriginal bar on access to justice issues, and will do so better equipped and informed about the role the Law Society has and the scope of its ability to respond to the challenges Aboriginal people face. A more structured framework and approach will enable more effective engagement ensuring that feedback provided to the Law Society can be appropriately considered and applied.

47. Similarly, as the Law Society responds to the *Access to Justice in French* report, or others, it can do so in a more coordinated, focused and effective way.

48. Committing to and fulfilling this component of the proposed framework also positions the Law Society to better support the second key component, an external forum. By integrating access to justice objectives into its core business and functions, the Law Society can lead by example and maintain the credibility needed to lead and support external partners.

Key Component – External – Standing Forum on Access to Justice

49. The second key component recommended by the TAG Working Group would see the Law Society provide the coordination and infrastructure support necessary to create and sustain a standing forum for collaboration on access to justice. This external forum will help to ensure that the Law Society's activities are complementary and supportive of the work of other key partners and, importantly, informed by users and service providers most familiar with their issue-specific challenges and opportunities. The Law Society recognizes that broad support of these partners and Ontarians generally is essential to achieving and sustaining meaningful change.

50. This type of cooperation and collaboration has been repeatedly identified as a necessary precursor to practical and long-lasting change. The lack of coordination and collaboration has been identified as a key "implementation gap" or impediment to moving forward with systemic change.

51. This proposal should be seen as a first step in realizing the structures that the Action Committee and Canadian Bar Association have recommended. No other body in Ontario has yet stepped forward to provide the infrastructure necessary to the collaborative forum all have recommended. The Law Society is uniquely positioned to do so and to convene meetings of a broad cross-section of system partners and beyond.

52. The TAG Working Group proposes that TAG be reconstituted to become "The Action Group on Access to Justice". The types of support proposed to be provided to The Action Group by the Law Society include:
    a. convening and facilitating meetings;
    b. relying on the Law Society's significant and positive government and stakeholder relations to build and sustain strategic partnerships necessary for success, and to influence change, as appropriate;
    c. providing administrative and related support in the coordination of meetings and tasks flowing therefrom; and
    d. assisting in the collection, analysis and dissemination of information.

53. Here again, the operational changes already underway present an opportunity to offer this support. The newly created Division would liaise with and provide the administrative and outreach support to the ongoing work of The Action Group. This is not anticipated to require new resources but would be accomplished largely through realignment and efficiencies found as the new Division reorganizes staff and functions.

54. The Action Group would seek to secure diverse participation ranging from key leaders in governments, courts, academia, and bar and paralegal associations, as well as representatives of Aboriginal, Francophone and equity partners, legal aid and clinics, and other legal and non-legal organizations and groups who play a role in providing access to justice in the province.

55. It is proposed that The Action Group's participants would together develop a shared vision and common agenda for change. The various studies, reports and recommendations of the last several years provide a solid foundation from which to quickly achieve that task. The Action Group would also benefit from continued liaison with and advice from members of the Canadian Bar Association's Reaching Equal Justice Initiative and members of the National Action Committee, including the Honourable Mr. Justice Thomas Cromwell, who

have themselves participated in TAG dialogues and provided such detailed and thoughtful advice and support to date.

56. Once developed, the common agenda could, in turn, lead to agreed-upon actions and strategies to be implemented in a complementary and cooperative way by The Action Group's participants. In this respect, it would be essential that The Action Group's participants be prepared to pursue the implementation of identified activities that are mutually reinforcing of one another and clearly linked back to the common agenda.

57. The Action Group could meet regularly as a whole and in topic-focused sub-groups. The Action group could also host an annual symposium to serve both as a mechanism to "report out" the work it has undertaken in the previous year, and to build and sustain interest and momentum around a common agenda for the following year.

58. Funding for actions and strategies agreed to by The Action Group's participants would come from the participants' usual funding sources. As The Action Group's participants cooperate and collaborate toward a common agenda and vision, there is opportunity to leverage funding much more effectively and efficiently. This approach will also allow the Law Society to move away from being perceived as a funder of access initiatives. Rather, the Law Society's contribution would be through its facilitative leadership and infrastructure support to The Action Group and through its own internal efforts to consider its policies and practices in light of access to justice objectives.

59. As stated, The Action Group would serve, at least initially, as the mechanism by which diverse partners are brought together, supported by the facilitation and infrastructure the Law Society is able to provide. The Law Society would maintain policy governance oversight of the functioning of The Action Group only to the extent of satisfying itself that its contribution of facilitation and infrastructure remains consistent with the Law Society's access to justice objectives more generally.

60. In addition to providing the infrastructure and facilitative support, the Law Society would participate in a substantive way as a member of The Action Group in developing the common agenda and translating The Action Group's identified priorities into action items for consideration in Law Society business and approaches. Possible action items would, of course, be considered through the Law Society's usual policy development and decision-making processes. Participation on The Action Group would contribute to the first key component of the proposed framework by further informing the Law Society on strategic priorities and actions it can take within its regulatory scope that will best support a more systemic reform effort.

Enhancements to the work of Law Society Committees to Support the Framework

61. A new integrated Law Society approach to access to justice presents an opportunity to rejuvenate the work of committees and build upon the solid foundations already established.

62. The framework proposed includes an ambitious goal of more fully integrating access to justice objectives across policy and program areas, by engaging in a holistic, systematic and ongoing examination of Law Society rules, regulations, policies and practices. At the outset at least, this will engage staff and benchers in a different and challenging dialogue and require considerable coordination and cooperation organizationally.

63. All committees will need to remain open to discussions of the overall access to justice and related equity agenda as the framework evolves. Committee members will be called upon to ensure its integration and success across policy and program areas, working closely with senior management and staff.

64. In recognition of the need on the part of the Law Society to approach the interrelated dimensions of the equity and access to justice issues in a coordinated and simultaneous way, there would also be value in closer cooperation between the Access to Justice Committee and the Equity and Aboriginal Issues Committee.

65. Greater coordination and cooperation between these two committees would help to ensure that equity principles inform the discussion of access to justice and that access to justice is taken into account in the formulation of equity policies and initiatives. This would allow for a sharing and integration of diverse expertise and perspectives that can be brought to bear on both equity and access issues in a focused, strategic and sustained way, enhancing the development and implementation of the new framework proposed.

66. Coordination and cooperation across all committees is expected to happen quite naturally and informally. Opportunities also exist within existing rules and operating principles that can facilitate cross-appointments, joint meetings, and other mechanisms to support the overall coordination and integration of the new framework.

67. The TAG Working Group is nonetheless mindful that more formal structures and mechanisms may be appropriate to achieving these overarching objectives of coordination and integration. There are also legitimate governance questions that have been raised by the TAG Working Group's proposals since first introduced to Convocation in January. In order to ensure that these issues and questions are appropriately considered, the TAG Working Group recommends that these issues be referred to the Governance Working Group for further consideration and consultation, as appropriate.

Financial Implications

68. The TAG Working Group has considered the potential costs of this proposal and has determined that it would be premature to provide cost figures. In large measure, policy and administrative support to reorganized Committees and The Action Group would be realized through efficiencies achieved in the operational realignment.

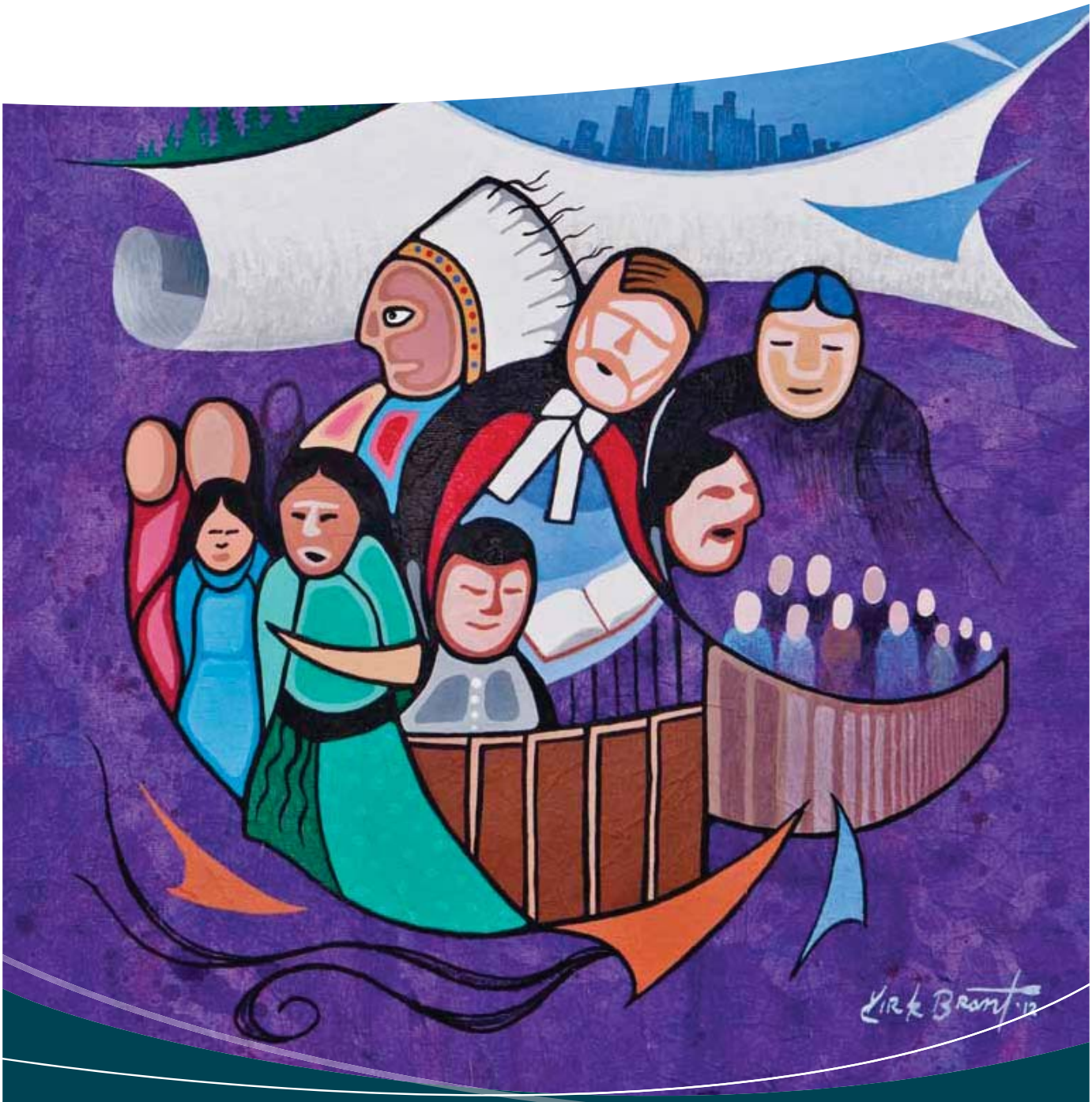
69. Operating budgets, particularly to support The Action Group forum, are unknown until The Action Group has been reconstituted and agreement reached with participants on how it will function. For 2014, operating expenses will be drawn from existing budgets; requests

for funding for 2015 and subsequent years will go through usual review and approval processes.

CONCLUSION

70. As the Honourable Mr. Justice Thomas Cromwell has said: access to justice is at a critical stage in this country; change is urgently needed. Because of its demonstrated ability to respond to change in the legal environment, including the integration of equity principles into its operations, the Law Society has a unique role to play in shaping the profession and fostering change within the scope of its regulatory authority.

71. It is time for the Law Society to adopt a more strategic and holistic approach to access to justice issues. The framework proposed provides a path to proceed forward in a focused and supported way. It is the next step in achieving a long-identified strategic priority of the Law Society and critical to better fulfilling its legislative mandate.



FIRST NATIONS REPRESENTATION ON ONTARIO JURIES

Report of the Independent Review Conducted by The Honourable Frank Iacobucci

February 2013

ART COURTESY OF KIRK BRANT, 2012

WWW.KIRKBRANT.COM

THIS REPORT IS DEDICATED
TO THE MEN, WOMEN, AND CHILDREN
OF FIRST NATIONS IN ONTARIO WHOSE
PERSEVERANCE AND COURAGE IN THE
FACE OF ADVERSITY AND CHALLENGES
CONTINUE TO BE AN INSPIRATION.

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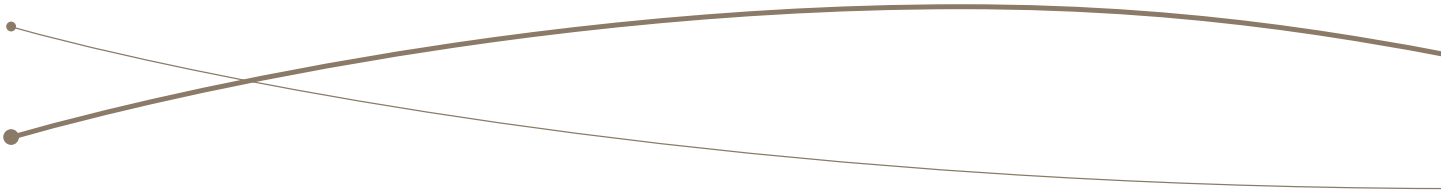

PART I
INTRODUCTION

A. PREFACE AND ACKNOWLEDGEMENTS

1. THIS REPORT DEALS WITH ONE OF THE MOST VENERABLE INSTITUTIONS IN HISTORY, THE JURY. MORE SPECIFICALLY IT DEALS WITH THE LACK OF REPRESENTATION OF FIRST NATIONS PEOPLES LIVING IN RESERVE COMMUNITIES ON JURIES IN ONTARIO.

2. As with most issues involving First Nations peoples, it is difficult to deal with one issue in a discrete manner without dealing with the influences of many other factors that impact on the specific issue in question. So it is with representation of First Nations peoples on Ontario juries. What appears at first blush to be a narrow assignment simply on jury representation as set forth in the Order-in-Council, triggers considerations and ramifications from numerous other factors that affect the principal question of my mandate as an Independent Reviewer of the subject. Why that broader inquiry into these important factors is necessary will be dealt with in this Report.

3. However, it should be stated at the outset that, although the Independent Review is not authorized by the Order-in-Council to be a detailed examination of, and recommendations for the reform of, the justice system of the province or for improvements in social and economic programs for First Nations, these matters not only lurk in the background but are also of great relevance. In short, to ignore this background is to jeopardize the chances of making any real progress on the issue of representation of First Nations peoples on juries.

4. As this Report will demonstrate, there is not only the problem of a lack of representation of First Nations peoples on juries that is of serious proportions, but it is also regrettably the fact that the justice system generally as applied to First Nations peoples, particularly in the North, is quite frankly in a crisis. If we continue the *status quo* we will aggravate what is already a serious situation, and any hope of true reconciliation between First Nations and Ontarians generally will vanish. Put more directly, the time for talk is over, what is desperately needed is action.

5. Doing nothing will be a profound shame especially when there has been a greater recognition throughout Canada of the tragic history of Aboriginal people, with many examples of mistreatment, lack of respect, unsound policies, and most importantly a lack of mutual trust between Aboriginal and Non-Aboriginal people. Indeed the setting up of this Independent Review is an example of the recognition of importance of that history by the Government of Ontario and I commend them for that.

6. But if this Report and its recommendations together with their implementation are put on the shelf, we as a society will all be the worse off and the momentum for progress will likely come to a halt. The consequences of this will be very serious.

7. This Independent Review and Report were largely made possible through the efforts of First Nations people, including Chiefs, Councillors, Elders, reserve residents, provincial territorial organizations and their leaders, and even some First Nations students. To all of them I express my sincere gratitude and appreciation for their involvement, sharing their experiences, offering opinions and suggestions, and for extending hospitality and courtesy to my colleagues and me. I cannot name you all, but I can say I am indebted to all of you for your help and commitment in the work of the Review.

8. I also wish to record my gratitude to specific groups and individuals for their invaluable help. These include Nishnawabe Aski Nation (former Deputy Grand Chief Terry Waboose and former Grand Chief Bentley Cheechoo), their counsel Julian Falconer, Julian Roy, Meaghan Daniel, all of whom played a central role in the launching of the Independent Review and organizing visits to reserves in the North which were most important in obtaining the views of First Nations members in different contexts and with different experiences. Also, I would like to thank the Union of Ontario Indians and their counsel Austin Acton, the Chiefs of Ontario, Aboriginal Legal Services of Toronto and their counsel Christa Big Canoe and Jonathan Rudin. My thanks also go to then Grand Chief Diane Kelly and her colleagues on the Treaty 3 Council of Chiefs. Thanks are also due to Irwin Elman, the Provincial Advocate for Children and

Youth. I would also like to thank Marlene Pierre, Sharon Smoke, Chris Moonias and Bruce Moonias, all of whom are family members of First Nation victims whose deaths were subject to a coroner's inquest, for sharing their grief with us and their submissions on coroners inquests and related matters.

9. We received considerable help and cooperation from officials at the Ministry of the Attorney General, Ontario Court Services, the Provincial Jury Centre, and judges of the Superior Court and Ontario Court of Justice and their officials. We have had the benefit of a paper describing experiences of jury role processes in other jurisdictions, prepared by former Attorney General Michael J. Bryant, who currently works as a consultant on Aboriginal issues.

10. For special recognition, I would like to acknowledge the former Attorney General Chris Bentley and current Attorney General John Gerretsen for their cooperation and support. I should also wish to thank especially Murray Segal, the former Deputy Attorney General of Ontario, for his instrumental role in setting up the Independent Review and collaborative effort to support the Review in every way. Thanks are also due to Acting Deputy Attorney General Mark Leach for his cooperation and help.

11. Finally, I should like to thank my team: John Terry, Counsel to the Independent Review, and Candice Metallic, Associate Counsel to the Review. No one could have better or more talented colleagues with whom to work than those two. They played an immensely important role in all phases of the Review and I thank them profoundly. I would also like to thank Nick Kennedy and Ryan Lax, who greatly helped us in the finalization of the Report.

12. Much time, effort and commitment has gone into the preparation of this Report by all those I have mentioned. I believe I express the sentiment of all concerned that improvements to the jury representation of First Nations peoples will be significantly advanced as a result of our collective efforts.

13. We also share a dream that the jury representation changes will spawn other needed improvements to the justice system and to the relationship between Ontario and First Nations peoples.

B. INTRODUCTION AND EXECUTIVE SUMMARY

1. INTRODUCTION

14. This Report will, I hope, be a wake-up call to all who are concerned with the administration of justice in Ontario. As I stated in the Preface above, it has become clear to me in carrying out this Independent Review that the justice system, as it relates to First Nations peoples, and particularly in Northern Ontario, is in crisis. Overrepresented in the prison population, First Nations peoples are significantly underrepresented, not just on juries, but among all those who work in the administration of justice in this province, whether as court officials, prosecutors, defence counsel, or judges. This issue is made more acute by the fact that Aboriginal peoples constitute the fastest-growing group within our population, with a median age that is significantly lower than the median age of the rest of the population.

15. The problem that is the specific focus of this Report – the underrepresentation of individuals living on reserves on Ontario's jury roll – is a symptom of this crisis. It is that narrow problem, and the concerns it raises about the fairness of our jury system, that have rightly prompted the Government of Ontario to arrange for this Independent Review to be carried out. But an examination of that problem leads inexorably to a set of broader and systemic issues that are at the heart of the current dysfunctional relationship between Ontario's justice system and Aboriginal peoples in this province. It is these broad problems that must be tackled if we are to make any significant progress in dealing with the underrepresentation of First Nations individuals on juries. And it is this systemic approach to the issues which has guided me in the conduct of my review and the formulation of my recommendations, as discussed below.

2. MY MANDATE AND WORK

16. I was appointed to carry out this Independent Review by Order-In-Council 1388/2011, dated August 11, 2011. The Order-in-Council, a copy of which is attached as Appendix A to this Report, directed me to make recommendations:

(a) to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and

(b) to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.

17. I commenced my work in Fall 2011 after assembling a small legal team to assist me. We began the Review by developing a process to gather information from all of those who have been involved in, or are affected by, the juries system in Ontario as it relates to the representation of First Nations peoples on the jury roll. After creating a website for the Independent Review, we set out to develop a process that would allow us to meet and receive submissions from interested First Nations leaders, communities and organizations, officials of the Ministry of Attorney General, Ministry of Health and Long-Term Care, the Provincial Advocate for Children and Youth, other service organizations and members of the judiciary who have presided over cases or motions relating to the issues under review.

18. Hearing from the First Nations leadership, people, and organizations as the first order of business was the best way, in my view, for me to understand and accurately define the systemic issues affecting First Nations peoples living in reserve communities as it relates to jury service. Given the vast diversity of First Nations and Treaty groups and organizations in the Province of Ontario, we determined that the engagement process must begin by introducing the Independent Review to First Nations and inviting them to participate in a manner they deemed appropriate. Accordingly, in November 2011, I sent a letter to all First Nations governments and First Nations and Treaty organizations in Ontario offering to meet with them, receive written submissions, or accommodate a combination of both. A copy of this correspondence is attached as Appendix D to this Report.

19. Between November 2011 and May 2012, I met with the leadership and people from 32 First Nations, mostly within their communities, and four First Nation organizations. This engagement included meetings with First Nations that are members of the Nishnawbe Aski Nation, the Union of Ontario Indians, Grand Council Treaty #3, as well as four First Nations that are unaffiliated with a tribal council or First Nations organization. The list of First Nations that I visited during this phase of the Review is attached as Appendix E to my Report. We also met with representatives of Aboriginal Legal Services of Toronto, who convened a Families Forum at which my team and I met with some family members of First Nations victims whose deaths were subject to a coroner's inquest. Overall, the cumulative meetings and discussions with every person involved helped shape my understanding of the systemic and procedural issues impacting the representation of First Nations peoples on the jury roll in Ontario.

20. Following the First Nations engagement process, I prepared a progress report and a discussion paper, attached as Appendix F to this Report, that I sent to all First Nations in Ontario, First Nation and Treaty organizations, and interested Aboriginal service providers, seeking their further input. The discussion paper set out the issues identified by First Nations during the engagement process and posed questions to solicit feedback on ways to address the challenges associated with the representation of First Nations peoples on juries.

21. Once I became familiar with the issues from the First Nations perspective, we met and had discussions with officials from the Ministry of the Attorney General, including the Court Services Division and the Provincial Jury Centre. We also met with some members of the judiciary who have presided over many cases involving First Nations offenders. Considering the large demographic of First Nations youth in Ontario, we also thought it useful to meet with the Provincial Advocate of Children and Youth in Ontario.

22. We received many written submissions as a result of the engagement process and the feedback requested through the discussion paper, including from, among others, Nishnawbe Aski Nation, the Union of Ontario Indians, the Chiefs of Ontario, Aboriginal Legal Services of Toronto, the Office of the Provincial Advocate for Children and Youth in Ontario, and Legal Aid Ontario.

23. Following receipt of written submissions in early July 2012, I prepared my Report based on all the information received through meetings and written submissions and further research and analysis carried out by my team and me. The Report was substantially completed by the end of August 2012 and provided to translators in early September 2012 for translation into French, Cree, Ojibway, Oji-Cree and Mohawk.

3. ISSUES IDENTIFIED DURING VISITS AND MEETINGS

24. My meetings with First Nations leaders, Elders, people, technicians and service providers from 32 communities during the engagement process played a crucial role in helping me understand the systemic and procedural issues affecting the representation of First Nations peoples on the jury roll in Ontario. During all these meetings, one point was resoundingly clear: substantive and systemic changes to the criminal justice system are necessary conditions for the participation of First Nations peoples on juries in Ontario.

25. Aside from the issues regarding the most effective manner to obtain names of First Nations reserve residents for the purposes of the jury roll, the fact is that many First Nations people are plainly reluctant to participate in the jury system. Many reasons exist for that reticence, and I heard them repeatedly throughout the engagement process.

26. First, First Nations leaders and people spoke about the conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution, and the values and laws that underpin the Canadian justice system. The objective of the traditional First Nations' approach to justice is to re-attain harmony, balance, and healing with respect to a particular offence, rather than seeking retribution and punishment. First Nations people observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.

27. Second, First Nations people often spoke of the systemic discrimination that either they or their families have experienced within the justice system in relation to criminal justice or child welfare. These experiences with the criminal justice system, along with historic limitations on the rights of First Nations people, have created negative perspectives and an inter-generational mistrust of the criminal justice system. Such perceptions, by implication, extend to participation in the jury process. First Nations people generally view the criminal justice system as working against them, rather than for them. It is an affront to them to participate in the delivery of this system of justice.

28. Third, First Nations people lack knowledge and awareness of the justice system generally, and the jury system in particular. It was understandably expressed that most First Nations individuals will refrain from participating in a process they know nothing about. Many First Nations people were unaware that the same jury roll was used to select juries for both trials and coroner's inquests. Therefore, most leaders identified the need for a focused and sustained education strategy for First Nations communities with respect to the role of juries in the justice system and the process by which jury rolls and jury panels are created, as well as the rights of individuals accused of offences and the rights of victims.

29. Fourth, First Nations leaders resoundingly and assertively expressed the desire to assume more control of community justice matters as an element of what they strongly believe is their inherent right to self-government, and at the very least be involved in developing solutions to the jury representation issue. Having been introduced to community-based restorative justice initiatives in previous years, First Nations experienced the benefits to their communities that came from the development of a culturally-appropriate

approach to justice. However, these programs were discontinued owing to funding cuts and will require financial resources and capacity to be resumed. First Nations leaders were unequivocal that re-introducing restorative justice programs would have multiple benefits at the community level. Such benefits include the delivery of justice in a culturally relevant manner, greater understanding of justice at the community level, increased community involvement in the implementation of justice and, finally, an opportunity to educate people about the justice system and their responsibility to become engaged on the juries when called upon to do so.

30. Fifth, the issue of local police services arose in many discussions throughout the engagement process. It became very clear that inadequate police services and associated funding contribute to negative perceptions of the criminal justice system. Many First Nations were very concerned about the limited and under-resourced police services and the lack of sufficient training for them. Some First Nations leaders expressed frustration regarding the lack of enforcement of First Nation by-laws.

31. A common theme expressed by First Nations leaders was concern for the protection of the privacy rights of their citizens with respect to the unauthorized disclosure of personal information for the purposes of compiling the jury roll. Confusion with respect to the obligations of First Nations governments in this regard appears to be related to different positions taken by Aboriginal Affairs and Northern Development (formerly Indian and Northern Affairs Canada) since 2001. The difficulty of creating and maintaining a single source list of individual residents that includes dates of birth and addresses on reserve is a real challenge because First Nations governments do not typically possess such a list. As an alternative, many First Nations leaders proposed that jury service ought to be voluntary and expressed a willingness to help facilitate such an approach. First Nations representatives also stated that the process to collect names for the purposes of the jury roll must be clear, tangible and consistent throughout all judicial districts in which First Nations are located.

32. First Nations peoples' willingness to participate in the jury process is also negatively affected by the content of the jury questionnaire. There are a number of features that First Nations people identified as discouraging them from responding. First, the statement of penalty of a fine or imprisonment for non-response within five days is viewed as coercive and inappropriately imposing jury duty through intimidation and threat, and the time frame of five days for response is thought to be unreasonable. Second, the requirement to declare Canadian citizenship prompts many to answer in the negative. However, it was expressed that if there were an option to declare First Nation citizenship or membership, many more First Nations people would respond positively, thereby increasing the number of eligible First Nations jurors. Third, the language requirement for juror eligibility, being English or French, is problematic for First Nations people whose primary language is their indigenous language. It was suggested that broadening the number of languages, along with the provision of translation services, would enhance First Nations responses to jury questionnaires and participation. It was suggested that an exemption be created for First Nations elected leadership, akin to the exemption for federal, provincial and municipal elected officials. Finally, it was explained that First Nations' lack of understanding of the jury selection process and role of juries served as a barrier to responding to jury questionnaires.

33. The engagement process also identified many practical barriers that exist with respect to the participation of First Nations peoples on juries, particularly in northern Ontario. These barriers include: the cost of transportation, where travel arrangements are not pre-arranged by the Court Services Division; inadequate allowances for accommodation and meals; the absence of child and elder care as eligible costs; and lack of income supplements. Further, community-based supports were viewed as a required service to assist with process logistics. Finally, the existence of criminal records and lack of knowledge and access to pardon procedures serves to exclude many potential First Nations jurors.

34. Many First Nations people, specifically those who unfortunately are, or have been, involved in coroner's inquests related to the death of a family member in state care, appreciate the importance of a coroner's jury that is representative of First Nations peoples and were interested in participating in coroner's inquests. They were anxious to see the resolution of this issue so the investigations into the deaths can proceed.

35. First Nations leaders unequivocally asserted that the way forward with respect to enhancing a relationship with the Ministry of the Attorney General in the context of the jury system, and all justice matters, is through a government-to-government relationship and a process that reflects such a relationship. First Nations seek greater control of the justice system as it applies to their people and view the re-integration of restorative justice programs as one measure to achieve this goal. The need for a collaborative approach to develop a proper jury roll process for First Nations peoples on reserve is viewed as a necessary step forward in a respectful relationship. Moreover, partnering with First Nations with respect to educational initiatives aimed at First Nations and government officials would contribute to improving the relationship.

36. Government officials with whom I spoke echoed the need for measures to substantially increase the participation of First Nations reserve residents on juries, in addition to obtaining reliable records required to prepare a representative jury roll. Court officials in the Kenora District, and more recently Thunder Bay, have undertaken various efforts to reach out to First Nations to obtain residence information and have undertaken programs to educate and inform First Nations communities about the jury system. However, we heard a consensus view among government officials that significant improvements are necessary. Using the data held by the Ontario Health Insurance Plan (OHIP) as one source list of names, addresses and dates of birth of reserve residents, coupled with information-sharing agreements or memoranda of understanding to protect the confidentiality of such information, is an approach worthy of further exploration and discussion with First Nations leadership. Moreover, educational efforts similar to the initiative undertaken by the Ministry of Attorney General and the Union of Ontario Indians and the Grand Council of Treaty #3 to conduct Jury Forums in 15 First Nations could be used as an ongoing measure to educate First Nations peoples on the subject of juries. Other creative approaches were suggested to minimize the burden on First Nations, such as the use of video conferencing technology for the jury selection process and Superior Court of Justice sittings in select First Nations communities.

4. WRITTEN SUBMISSIONS

37. In addition to certain written submissions I received during the engagement sessions, I also received helpful and detailed written submissions at the conclusion of the engagement process from six organizations: Nishnawbe Aski Nation, Union of Ontario Indians, Chiefs of Ontario, Aboriginal Legal Services of Toronto, the Office of the Provincial Advocate for Children and Youth, and Legal Aid Ontario. These organizations' submissions were consistent with the views I heard from First Nations people during the engagement process, emphasizing, among other things, the need to address jury roll reform in partnership with First Nations. As the Nishnawbe Aski Nation stated in its submissions, the underrepresentation of First Nations peoples on Ontario juries "is but one symptom of a larger problem of alienation and exclusion of First Nations people within the justice system."

38. The submissions offered many recommendations on ways in which the systemic and procedural issues related to the jury roll could be addressed. The matters addressed in the recommendations included, among other things: enhancement of community or restorative justice programs; improvements to the operation of the justice system in northern Ontario; uniform coordination and implementation of section 6(8) of the *Juries Act*; the involvement of First Nations peoples in compiling the jury roll; increased language supports with respect to juror questionnaires and translation services; increased juror remuneration and expense allocations; the recruitment of First Nations liaisons; revising the juror questionnaires; meaningful educational, outreach and training initiatives, especially for youth; measures to address inadequate police services in order to increase confidence in the justice system; and the need to take prompt and assertive steps to improve the relationship between First Nations and the Attorney General.

39. I am grateful for the thought and effort that these organizations demonstrated in providing me with these very comprehensive submissions and recommendations.

5. HISTORICAL, LEGAL AND COMPARATIVE RESEARCH

40. In addition to the engagement process and submissions described above, my team and I carried out research respecting various issues, including the history of juries and jury selection in Ontario, the requirement that a jury be representative, and the history and practice with respect to the representation of First Nations peoples on Ontario juries. Juries have served for generations as the cornerstone of our justice system, as well as a fundamental institution in the administration of justice in civilizations dating back to ancient times. Unfortunately, however, the jury system as it has developed and operated in Ontario, like Ontario's justice system in general, has not often been a friend to Aboriginal persons in Ontario. Indeed, criminal jury trials in Canada were used at times as a tool to punish what the British viewed as disloyal behavior on the part of Aboriginal people, and to persecute the customary practices of First Nations on the grounds that they constituted criminal behaviour.

41. Our research focused in particular on the application of, and case law respecting, the requirement in section 6(8) of the *Juries Act* for the sherriff "to obtain the names of inhabitants of the reserve from any record available."[1] It is clear to me as a result of this research and in particular the materials filed in conjunction with recent court cases respecting this matter that the current reliance by Court Services officials on obtaining the names from Band List information, though resulting from well-meaning efforts, is ad hoc and leads in many cases to out-of-date and otherwise unreliable information being used to compile the jury roll.

42. In accordance with paragraph 4 of the Order-in-Council, I also considered the law and practice in other jurisdictions to assess what lessons we can learn from them. Underrepresentation of Aboriginal peoples on juries is by no means exclusively an Ontarian or Canadian issue. Rather, this issue exists in various jurisdictions that rely on juries and that have sizeable Aboriginal populations, including other Canadian provinces, New Zealand, Australia and the United States. In reviewing law and practice in other jurisdictions, I had the benefit of a paper describing experiences of jury role processes in other jurisdictions prepared by former Attorney General Michael J. Bryant, who currently works as a consultant on Aboriginal issues.

43. I found this review of experience in other jurisdictions to be very helpful. It showed, among other things, that many other Canadian provincial governments rely on health insurance records as a source for compiling the jury roll. The review also revealed a number of practices in other jurisdictions that I have recommended be considered or studied for potential use in Ontario, including allowing individuals to volunteer for jury service as a supplemental source list (as is allowed in New York State), holding court hearings in remote communities, and drawing jurors from residents living reasonably close to where the hearing is held (as is done in the Northwest Territories and Alaska), and, when a jury summons or questionnaire is undeliverable or is not returned, sending another summons or questionnaire to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness (an approach adopted in some U.S. states to respond to underrepresentation of minorities on juries).

[1] *Juries Act*, R.S.O. 1990, c. J. 3, s. 6(8).

6. RECOMMENDATIONS

44. As a result of the engagement process, review of submissions, and research and analysis as described above, I make the following 17 major recommendations.

RECOMMENDATION 1: the Ministry of the Attorney General establish an Implementation Committee consisting of a substantial First Nations membership along with Government officials and individuals who could, because of their background or expertise, contribute significantly to the work of the Implementation Committee. This Committee would be responsible for the oversight of the implementation of the below recommendations and related matters. In view of the importance and urgency of the matter, I recommend that the Committee be established as soon as practically possible.

RECOMMENDATION 2: the Attorney General establish an Advisory Group to the Attorney General on matters affecting First Nations and the Justice System.

RECOMMENDATION 3: after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide cultural training for all government officials working in the justice system who have contact with First Nations peoples, including police, court workers, Crown prosecutors, prison guards and other related agencies.

RECOMMENDATION 4: the Ministry of the Attorney General carry out the following studies for eventual input by the Implementation Committee:

(a) a study on legal representation that would involve Legal Aid Ontario, particularly in the north, that would cover a variety of topics, including the adequacy of existing legal representation, the location and schedule of court sittings, and related matters.

(b) a study on First Nations policing issues, including the recognition of First Nations police forces through enabling legislation, the establishment of a regulatory body to oversee the operation of First Nations law enforcement programs, the creation of an independent review board to adjudicate policing complaints, and the development of mandatory cultural competency training for OPP officers; and

(c) a review of the Aboriginal Court Worker program and an examination of resources required to improve the program.

RECOMMENDATION 5: the Ministry of the Attorney General create an Assistant Deputy Attorney General (ADAG) position responsible for Aboriginal issues, including the implementation of this Report.

RECOMMENDATION 6: after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide broader and more comprehensive justice education programs for First Nations individuals, including:

(a) developing brochures in First Nations languages with plain wording which provide comprehensive information on the justice system, including information respecting the role played by criminal, civil, and coroner's juries;

(b) establishing First Nations liaison officers responsible for consulting with First Nations reserves on juries and on justice issues;

(c) commissioning the creation of video or other educational instruments, particularly in First Nations languages, that would be used to educate First Nations individuals as to the role played by the jury in the justice system and the importance of participating on the jury; and

(d) considering the feasibility of a program that would enlist students from Ontario law schools to participate in intensive summer education and legal assistance programs for First Nations representatives, dealing with the justice system generally and the jury system in particular, in consultation with Chiefs, and Court Services officials.

RECOMMENDATION 7: with respect to First Nations youth, in addition to having a youth member on the Implementation Committee, the Implementation Committee should request that the Provincial Advocate for Children and Youth facilitate a conference of representative youth members from First Nations reserves to focus on specific issues in the relationship between youth, juries, and the justice system, addressed in this report. The Provincial Advocate for Children and Youth should prepare a report on that conference; prior to submitting the report to the Implementation Committee the Provincial Advocate for Children and Youth should consult with PTOs and other First Nations associations.

RECOMMENDATION 8: the Ministry of the Attorney General, in consultation with the Implementation Committee, undertake a prompt and urgent review of the feasibility of, and mechanisms for, using the OHIP database to generate a database of First Nations individuals living on reserve for the purposes of compiling the jury roll.

RECOMMENDATION 9: in connection with this review, the Ministry of Attorney General and First Nations, in consultation with the Implementation Committee, consider all other potential sources for generating this database, including band residency information, Ministry of Transportation information and other records, and steps that might be taken to secure these records, such as a renewed memorandum of understanding between Ontario and the Federal government respecting band residency information or memorandums of understanding between Ontario and PTOs or First Nations, as appropriate.

RECOMMENDATION 10: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider amending the questionnaire sent to prospective jurors to:

(a) make the language as simple as possible;

(b) translate the questionnaire into First Nations languages as appropriate;

(c) remove the wording threatening a fine for non-compliance and replacing it with wording stating simply that Ontario law requires the recipient to complete and return the form because of the importance of the jury in ensuring fair trials under Ontario's justice system;

(d) on the premise that a First Nations member living on reserve in Ontario satisfies the Canadian citizenship requirement under s. 2(b) of the *Juries Act*, add an option for First Nations individual to identify themselves as First Nations members or citizens rather than Canadian citizens;

(e) enable First Nations elected officials, such as Chiefs and Councillors, as well as Elders, to be excluded from jury duty; and

(f) provide, through an amendment to the *Juries Act*, for a more realistic period than the current five days for the return of jury questionnaires.

RECOMMENDATION 11: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider implementing the practice from parts of the U.S., that when a jury summons or questionnaire is undeliverable or is not returned, another summons or questionnaire is sent out to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness.

RECOMMENDATION 12: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider a procedure whereby First Nations people on reserve could volunteer for jury service as a means of supplementing other jury source lists.

RECOMMENDATION 13: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider enabling First Nations people not fluent in English or French to serve on juries by providing translation services and by amending the jury questionnaire accordingly to reflect this change.

RECOMMENDATION 14: the Ministry of the Attorney General, in consultation with the Implementation Committee, adopt measures to respond to the problem of First Nations individuals with criminal records for minor offences being automatically excluded from jury duty by:

(a) amending the *Juries Act* provisions that exclude individuals who have been convicted of certain offences from inclusion on the jury roll, to make them consistent with the relevant *Criminal Code* provisions, which exclude a narrower group of individuals;

(b) encouraging and providing advice and support for First Nations individuals to apply for pardons to remove criminal records; and

(c) considering whether, after a certain period of time, an individual previously convicted of certain offences could become eligible again for jury service.

RECOMMENDATION 15: the Ministry of the Attorney General discuss with the Implementation Committee the advisability of recommending to the Attorney General of Canada an amendment to the *Criminal Code* that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries.

RECOMMENDATION 16: in view of the concerns I have heard and the fact that current jury compensation is not consistent with cost-of-living increases, I recommend that the Ministry of the Attorney General refer the issue of jury member compensation to the Implementation Committee for consideration and recommendation.

RECOMMENDATION 17: the Ministry of the Attorney General, in consultation with the Implementation Committee, institute a process that would allow for First Nations individuals to volunteer to be on the jury roll for the purposes of empanelling a jury for a coroner's inquest.

45. For a complete explanation of the recommendations, see paragraphs 347 to 386.

7. ACKNOWLEDGEMENT

46. The preparation of this Report would not have been possible without the participation and assistance of many First Nations people, including Chiefs, Councillors, Elders, members of reserves, provincial territorial organizations and their leaders, and even some First Nations students. I also benefitted greatly from the contributions of the lawyers who acted for various organizations and from government officials, all of whom were very fair and candid in their assessments of the shortcomings of current conditions.

47. It is my sincere hope that the trust that First Nations people have invested in this Independent Review process will be rewarded with prompt response and action by the Government of Ontario.

PART II
APPOINTMENT AND WORK OF THE INDEPENDENT REVIEW

A. MANDATE OF THE INDEPENDENT REVIEW

48. I WAS APPOINTED TO CARRY OUT THIS INDEPENDENT REVIEW BY ORDER-IN-COUNCIL 1388/2011, DATED AUGUST 11, 2011. THE ORDER-IN-COUNCIL, A COPY OF WHICH IS ATTACHED AS APPENDIX A TO THIS REPORT, DIRECTED ME TO MAKE RECOMMENDATIONS:

(a) to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and

(b) to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.

49. The Order-in-Council responds to the fundamental problem of lack of representation of members of Ontario's First Nations communities on Ontario's jury roll. As described in this Report, this problem appears not only to have been longstanding, but to have worsened over the past decade. It was brought to a head as a result of a series of cases that arose over the last several years, two of which have made their way to the Court of Appeal for Ontario.

50. The first of the recent set of cases involved the empanelment of juries in coroner's inquests into the deaths of individuals living in First Nations communities. At the commencement of the inquests into the deaths of Jacy Pierre and Reggie Bushie, the families of the deceased contacted the Office of the Coroner and the Attorney General to express their concern about the underrepresentation of First Nations peoples on the jury roll for the District of Thunder Bay. Their concern was prompted by the discovery made during the 2008 inquest into the deaths of Jamie Goodwin and Ricardo Wesley ("the Kashechewan Inquest") that the Kenora District jury rolls contained names of members of only 14 of the 49 First Nations represented by Nishnawbe Aski Nation (NAN) and that not a single member of the Kaschechewan First Nation was listed on the Kenora jury roll.[2]

51. Each family – and in the Bushie inquest, NAN – asked the presiding coroner to issue a summons to the Director of Court Operations so they could find out how the jury roll in the District of Thunder Bay was established. Both coroners refused to issue a summons. The Pierre family and NAN applied for judicial review of each coroner's decision and a stay of the inquests pending the hearing of their application. The court granted a stay of the Bushie inquest but refused to stay the Pierre inquest, which proceeded and was completed without the participation of the Pierre family. The Divisional Court dismissed the applications for judicial review. The Court of Appeal, in a decision reported as *Pierre v. McRae* (also referred to as *NAN v. Eden*), overturned this decision.[3] The Court of Appeal held that the families of Mr. Bushie and Mr. Pierre had adduced sufficient evidence to justify an inquiry into the representativeness of the jury rolls. The Court also ordered that the Director of Court Operations appear before both inquests to testify about the establishment of jury rolls in the Thunder Bay District. Following the Court of Appeal's decision, the coroner in the Bushie Inquest determined that the Thunder Bay District's jury roll was not representative, and ordered that the inquest be stayed until a representative jury roll is created.

52. The second set of proceedings arose out of appeals brought by First Nations defendants to set aside their criminal convictions on the basis that lack of representation of First Nations peoples on jury rolls had infringed their right to a representative jury. The defendant in *R. v. Kokopenace* learned of the Bushie inquest and the surrounding legal proceedings, and appealed his conviction on several grounds, including the unrepresentativeness of the jury roll for the Thunder Bay District.[4] The Court of Appeal dismissed all non-jury grounds of appeal, but adjourned the appeal to hear arguments about the jury composition

[2] *Pierre v. McRae*, 2011 ONCA 187 at para. 68.
[3] *Ibid.*
[4] *R. v. Kokopenace*, 2011 ONCA 536.

issue. The defendant in *R v. Spiers* appealed her conviction, and also pursued the jury composition issue.[5] These appeals were heard together by the Court of Appeal in May 2012, but at the time of writing the Court had not rendered its decision.

53. NAN is the political territorial organization representing the political, social and economic interests of 49 First Nations Reserve communities in Ontario. NAN's initiatives, aimed at addressing the issue of the underrepresentation of First Nations peoples on jury rolls, began following the Kaschechewan Inquest. NAN became involved in the Bushie Inquest on behalf of Mr. Bushie's family, and brought the appeals described above to the Divisional Court and the Court of Appeal. NAN also intervened in the *Kokopenace* and *Spiers* appeals. Through its participation in the coroners inquests, the subsequent legal challenges and political action, NAN has been instrumental in helping to focus public and judicial scrutiny on the issue of Aboriginal underrepresentation on Ontario jury rolls and in setting up this Independent Review.

54. The mandate set out in the Order-in-Council is both relatively narrow and broad. On the one hand, I have been asked to examine the specific issue of lack of representation of First Nations peoples on Ontario's jury roll, and my recommendations are focused on that issue. On the other hand, there is a recognition in the Order-in-Council of the need to strengthen "the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations" in relation to the jury representation issue. As the Attorney General stated in his factum filed in the *Kokopenace* and *Spiers* appeals, my mandate is to probe "the important systemic issues surrounding low participation of Aboriginal people on juries".[6] As described further in this Report, in investigating these systemic issues, it has become clear to me that the issue of underrepresentation of First Nations peoples on the jury roll in this province is merely a symptom of the broader disease ailing Ontario's justice system as it relates to First Nations peoples in Ontario. Consequently, while I appreciate that my mandate is first and foremost to address the issue of the lack of representation of First Nations community members on the jury roll, I have found that this issue cannot be realistically addressed without considering these broader systemic issues.

55. I should also note that the Order-in-Council expressly directs me not to address certain matters in carrying out my review, and consequently I have not done so. For example, paragraph 7 of the Order-in-Council states that I shall not report "on any individual cases that are, have been, or may be subject to a criminal investigation or proceeding, inquest or other legal proceeding". As a result, although my Report makes reference to the jurisprudence relating to these matters as part of the background and context for my recommendations, I do not report on or make recommendations with respect to any of these individual cases. In addition, as required by paragraph 8 of the Order-in-Council, I have taken care to perform my duties without making any findings of fact in relation to misconduct, or expressing any conclusions or recommendations regarding the civil or criminal liability of any person or organization, and without interfering in any investigation or criminal or other legal proceeding.

56. The heart of my mandate is addressed in paragraphs 5 and 6 of the Order-in-Council, which direct me, in the conduct of my review, to hold consultations with First Nations communities and to invite and receive submissions in writing from any First Nation, First Nations political territorial organization, First Nations organization, and member of a First Nation as well as from any interested party, including ministries of government. It is through this consultation process, described in detail in the next section of the Report, that I have gained the greatest understanding of the fundamental systemic problems that underlie the issues I have been directed to review.

[5] *R v. Spiers* (2007), 76 W.C.B. (2d) 55 (O.N.S.C.J.).

[6] The Independent Review was provided with these materials by counsel with the agreement of the court. See para. 5 of the respondent's factum in *R v. Kokopenance*.

B. WORK OF THE INDEPENDENT REVIEW

57. Shortly following the passage of Order-in-Council 1288/2011 on August 11, 2011, I began to assemble the legal team that would support my work for the Independent Review. John Terry, a partner with Torys LLP, was the first to join the team as lead counsel. In October, we recruited as associate counsel Candice Metallic, then a senior associate and now a partner with Maurice Law, Barristers and Solicitors. Together, my team and I began to develop a plan and engagement approach for the Independent Review.

58. We commenced the Independent Review with a process to gather information from all of those who have been involved in, or are affected by, the juries system in Ontario as it relates to the representation of First Nations peoples on the jury roll. After creating a website for the Independent Review, we set out to develop a process that would allow us to meet and receive submissions from interested First Nations leaders, communities and organizations, officials of the Ministry of Attorney General, Ministry of Health and Long-Term Care, the Provincial Advocate for Children and Youth, other service organizations, and members of the judiciary who have presided over cases or motions relating to the issues under review.

59. Hearing from the First Nations leadership, people and organizations as the first order of business was the best way, in my view, for me to understand and accurately define the systemic issues affecting First Nations peoples living in reserve communities as it relates to jury service. Given the vast diversity of First Nations and Treaty groups and organizations in the Province of Ontario, we determined that the engagement process must begin by introducing the Independent Review and inviting First Nations to participate in a manner they deemed appropriate. Accordingly, in November 2011, I sent a letter to all First Nations governments, and First Nations and Treaty organizations in Ontario, offering to meet with them, receive written submissions or accommodate a combination of both. A copy of this correspondence is attached as Appendix D to this Report.

60. Following the First Nations engagement process, described in more detail in Part IV, I prepared a Progress Report and a discussion paper that set out the issues identified by First Nations during the engagement process, and posed questions to solicit feedback on ways to address the challenges associated with the representation of First Nations peoples on juries. I prepared a summary progress report that was made available on our website, and a discussion paper that was sent to all First Nations in Ontario, First Nation and Treaty organizations, and interested Aboriginal service providers, seeking their further input. It is attached as Appendix F to this Report. The submissions we received are summarized in Part IV of this Report.

61. Once I became familiar with the issues from the First Nations perspective, we began to meet and have discussions with officials from the Ministry of the Attorney General, including the Court Services Division and the Provincial Jury Centre. We also met with some members of the judiciary who have presided over many cases involving First Nations offenders. Considering the large demographic of First Nations youth in Ontario, we also thought it useful to meet with the Provincial Advocate of Children and Youth in Ontario.

1. NISHNAWBE ASKI NATION

62. As described at paragraph 53 above, NAN had been intensely involved in legal and advocacy events leading up to the creation of the Independent Review. Accordingly, they were the first organization to submit a proposal for engagement, which we accepted. NAN proposed an engagement process similar to that adopted by Commissioner Mr. Justice Goudge in the Inquiry into Pediatric Forensic Pathology in Ontario. This approach entailed a preparatory meeting in each of the selected First Nations communities, followed by a meeting between community representatives, my team, and me. The preparatory team consisted of a NAN representative, former Grand Chief Bentley Cheechoo, and a translator, Jerry Sawanas, who provided advice and information required by each First Nation with which we met. NAN's legal team of two lawyers from the law firm Falconer Charney accompanied the NAN representatives to provide legal advice on the issues. The objectives of the preparatory meetings were to educate the leadership and community with

respect to the jury representation issue, to address any questions or concerns that may be raised, and to ensure that the community was sufficiently prepared for my visit. Following the preparatory meetings, a second visit was arranged whereby my legal team, NAN's preparatory team, and I attended the First Nations communities to discuss the issues.

63. As an important backdrop to the Independent Review, I want to acknowledge the seven young men from NAN First Nations who died while attending the Dennis Franklin Cromarty High School in Thunder Bay. In selecting the First Nations to be involved in the Independent Review engagement process, NAN respectfully and appropriately included the home First Nations of the young men who died in Thunder Bay, and also considered factors such as geographic location, size, and Tribal Council affiliation. Fifteen of NAN's 49 First Nations were identified by NAN to be visited during the Review. Owing to unanticipated events, such as inclement weather, deaths in the community, and other pressing matters that arose in First Nations communities, I was able to visit ten of the fifteen communities. The list of First Nations that I visited during this phase of the Review is attached as Appendix E to my Report. The outcomes of these sessions are summarized in Part IV of my Report.

2. UNION OF ONTARIO INDIANS

64. The Union of Ontario Indians, a political advocate for 39 Anishinabek First Nations in Ontario, submitted an engagement proposal and budget on behalf of its members, which we accepted. Having recently participated in a previous initiative funded by the Ministry of the Attorney General to conduct three discussion forums regarding juries in Anishinabek territory, the Union built upon this previous work and proposed to undertake five tasks for the Independent Review.

65. First, the Union assembled a steering committee that designed a process to engage their constituent First Nations in the Independent Review. Second, the Union prepared plain language backgrounders regarding the issue of the representation of First Nations peoples on juries for the purposes of dissemination in Anishinabek First Nations and institutions. Third, the Union commissioned external research reports to harness the knowledge, opinions, and suggestions of key organizations in the region. The authors of the independent research papers attended the engagement sessions to present their research and to contribute to fruitful discussions. These independent research reports are summarized in Part IV of this Report. Fourth, the Union originally planned to organize three consultation meetings at which First Nations individuals, leaders, and I were invited to attend to discuss the issue of the underrepresentation of First Nations peoples on juries. Of these three sessions, two were convened and one was cancelled. The summary of these sessions is found in Part IV of this Report. Finally, the Union prepared a Research Report and Submission that drew upon the outcomes of the Anishinabek engagement sessions as the basis for the Union's recommendations to me. The Union's submission is summarized in Part IV of this Report.

3. GRAND COUNCIL OF TREATY #3

66. The then Grand Chief of Treaty #3, Diane Kelly, and Chief Simon Fobister of Grassy Narrows First Nation met with me to discuss the issue of the representation of First Nations peoples on juries. After this meeting, the Grand Council of Treaty #3 submitted a proposal for a one-day meeting that was held at Wauzhushk Onigum First Nation, just outside Kenora. Eight Chiefs of Treaty #3 attended, along with technical advisors and Elders. The summary of this meeting appears in Part IV of this Report.

4. ABORIGINAL LEGAL SERVICES OF TORONTO

67. Aboriginal Legal Services of Toronto (ALST) submitted a two-part proposal, which we accepted. The first part involved the preparation of a comprehensive paper that addresses the jury representation issue and offers recommendations and solutions to the current problem of the underrepresentation of First Nations peoples on Ontario juries. ALST's comprehensive paper is summarized in Part IV of this Report. The second part of ALST's proposal involved convening a Families Forum at which my team and I met with some family members of First Nations victims whose deaths were subject to a coroner's inquest. The summary of this meeting is included in Part IV of this Report.

5. INDEPENDENT FIRST NATIONS

68. Finally, I received specific meeting requests from four First Nations that are unaffiliated with a tribal council or First Nation organization, which I gladly attended.

69. It is also important to note that we received submissions from various groups and individuals as outlined in Part IV.

70. I am most grateful to all of the First Nations and First Nation organizations that participated in the Independent Review. Their valuable assistance, generous contributions, and insightful perspectives have been of great benefit to me in writing my Report and developing the recommendations that, in my view, are required to enhance First Nations inclusion and participation on juries in Ontario. I am also equally grateful to the many judges, and court and government officials, who presented information, data, insights, and comments on the subject matter of the Review.

PART III

THE JURY SYSTEM AND FIRST NATIONS: PAST AND PRESENT

A. INTRODUCTION

71. JURIES HAVE SERVED FOR GENERATIONS AS THE CORNERSTONE OF OUR JUSTICE SYSTEM, AS WELL AS A FUNDAMENTAL INSTITUTION IN THE ADMINISTRATION OF JUSTICE IN CIVILIZATIONS DATING BACK TO ANCIENT TIMES. UNFORTUNATELY, HOWEVER, AS I DESCRIBE BELOW, IT IS CLEAR THAT THE JURY SYSTEM AS IT HAS DEVELOPED AND OPERATED IN ONTARIO, LIKE ONTARIO'S JUSTICE SYSTEM IN GENERAL, HAS NOT OFTEN BEEN A FRIEND TO ABORIGINAL PEOPLE IN ONTARIO.

72. In this part of the Report, I describe a brief history of juries in Ontario, the jury selection system as it currently operates in Ontario, the requirement that a jury be representative, the representation of First Nations peoples on Ontario juries, and the jury selection experience in other jurisdictions with significant Aboriginal populations.

B. BRIEF HISTORY OF JURIES IN ONTARIO

1. ROLE AND FUNCTIONS OF THE JURY

73. The jury as an institution has a long and distinguished history. References to jury-like bodies can be found in the history and mythology of early civilizations, including those of Egypt, Greece, and Scandinavia.[7] One of the earliest recorded jury-like bodies was established by the Greek King Solon around the end of the seventh century B.C.E. King Solon established two courts, which were presided over by a general assembly of Athenian citizens, called the *dikasteria*. Service on the *dikasteria* was open to any Athenian citizen aged 30 or over "who was not indebted to the state and whose civil rights had not been forfeited".[8] This body held the power of appeal over civil and criminal matters, and, in performing this function, determined questions of fact and law, and voted in secret. Its judgments were not subject to appeal. The Athenian jury was transplanted to Rome around 451 to 450 B.C.E., and there is evidence that Rome brought the jury system to the territories it conquered.[9]

74. The jury system as we know it in Ontario evolved in Britain. According to nineteenth century British historian, William Forsyth, trial by jury was unknown in the British Isles before the Norman Conquest in 1066 C.E.[10] Following the Norman Conquest, there are several recorded instances of individuals being gathered to conduct inquests and make determinations on questions of fact and law. For example, William the Conqueror summoned juries in each county to make determinations as to the "value and manner of holdings of all property within the country."[11] The jury that we know today emerged gradually under a series of kings following William, who empanelled juries to resolve disputes between the royal treasury and religious bodies over land ownership, and to determine guilt or innocence in criminal and civil matters.[12] The passage of the *Magna Carta* in 1215 by King John is credited by some as guaranteeing the right to trial by jury in Great Britain.[13] In 1275, trial by jury became mandatory in criminal proceedings

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7 See Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* (Cincinnati: W.H. Anderson Company, 1963), at chapter 1. Greek mythology speaks of the trial of Orestes, killer of his mother Clytemnestra (the wife of Agamemnon) as the "first jury trial of a mortal." In deciding Orestes' fate, the jury split with six votes cast for guilty and six votes for not guilty. However, the goddess Athena took pity on Orestes and cast her vote for an acquittal.

8 *Ibid*., at 2.

9 *Ibid*., at 3.

10 William Forsyth, *History of Trial by Jury*, (London: John Parker and Sons, 1852) at 54.

11 Moore, *supra* note 7 at 35.

12 *Ibid*., at 36-41.

13 *Ibid*., at 49-50. See also John Dawson, *A History of Lay Judges* (Harvard University Press: Cambridge Mass, 1960) at 289-290.

in Great Britain.[14] Many of the characteristics of modern juries emerged in the fifteenth and sixteenth centuries, including the right of the accused to challenge the composition of his or her jury panel, the use of juries to decide questions of fact (and not law), and the ability of juries to reach their own decision on the facts, rather than the decision demanded by the court.[15]

75. The last point is particularly relevant given the importance attributed today to the independence of the jury. Prior to the seventeenth century, jurors could be punished by the court for reaching the "wrong verdict" (doing so was considered perjury – lying to the court).[16] One of the most famous cases putting an end to this practice was the 1670 decision of *Bushell's Case*. In *Bushell's Case*, four jurors refused to convict two Quakers (a religious group) of "seditious preaching before an unlawful assembly."[17] At that time, any religious gathering outside of the Church of England was deemed unlawful, and that law was frequently used to repress the Quakers. The judge accepted the jurors' verdict of not guilty, but fined the jurors for reaching a verdict that was "contrary to the evidence and contrary to his instructions."[18] When the jurors refused to pay, they were imprisoned.[19] Lord Vaughn, a judge at the Court of Common Pleas, overturned this decision, and, in so doing, emphasized that "unless the jury can act independently of the judge, it cannot command public support."[20]

76. While we are separated by centuries from these foundational moments in the history of the jury, the developments in *Bushell's Case* and others are still reflected in the modern rationales for the jury system, which, as the Supreme Court of Canada has stated, are "as compelling today as they were centuries ago".[21] In its comprehensive 1980 examination of the jury system in Canada, the Law Reform Commission of Canada set out five major functions of the jury in modern criminal proceedings: (1) the jury is a fact-finder; (2) the jury acts as the conscience of the community in criminal proceedings; (3) the jury is the ultimate protection against oppressive laws and the oppressive enforcement of the law; (4) the jury is an educational institution; and (5) the jury helps to legitimize the criminal justice system.[22] These statements were adopted by the Supreme Court of Canada in *R. v. Sherratt*,[23] the Court's major decision on the importance of a representative jury, and, in my view, are directly applicable in considering the issues discussed in this Report.

77. Similar roles are played by the jury in a coroner's inquest. As discussed in more detail at paragraphs 85 to 89, the coroner system in Ontario was received with the rest of the common law from England in the mid-nineteenth century. Prior to a series of late-nineteenth century reforms in England, which took place well after the institution of the coroner was received in Ontario, coroner's inquests were responsible for indicting people for homicide and committing accused persons to trial.[24] After a series of reforms in England, the focus of the Office of the Coroner shifted to investigating causes of death, rather than committing accused persons to trial.[25] Similar changes followed in Ontario through a series of laws enacted during the nineteenth

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14 Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (The Lawbook Exchange, Ltd.: New Jersey, 2011) at 126.

15 Moore, *supra* note 7 at 68-69, 82, 89.

16 R.A. Hughes, "Role of a Jury in a Criminal Case," in Edson Haines, ed., *Special Lectures of the Law Society of Upper Canada 1959* (Toronto: The Law Society of Upper Canada, 1959) at 9.

17 Simon Stern, "Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case" (2001-2002) 111 Yale L.J. 1815 at 1822.

18 *Ibid*., at 1823.

19 *Ibid*.

20 *Ibid*.

21 *R. v. Sherratt*, [1991] 1 S.C.R. 509. [*Sherratt*].

22 Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980).

23 *Sherratt, supra* note 21 at para. 30.

24 Ontario Law Reform Commission, *Report on the Coroner System in Ontario*, by Chairman Allan Leal (Toronto: Queen's Printer, 1971) at 11. Christopher Granger, *Canadian Coroner Law: A Legal Study of Coroner and Medical Examiner Systems in Canada* (Toronto: The Carswell Company Ltd., 1984) at 35; where the author indicates that changes to the coroner's system in England occurred after the office was transplanted to Canada.

25 Granger, *Ibid*.

and twentieth centuries, and the use of coroner's inquests as a way of securing an indictment became obsolete.[26] Despite these changes, the jury remained "an essential component" of the modern inquest.[27] In performing its fact-finding role, the jury in a coroner's inquest, unlike in criminal or civil proceedings, does not make a finding of guilt or liability.[28] Rather, it is called upon to decide a series of questions related to the death and to make recommendations as to how such deaths may be prevented in the future.

78. Many of the early rationales for the jury continue to inform our use of the institution today, while at the same time, other, more modern, rationales have developed.[29] It is revealing that this institution, or others like it, has been used across human history in civilizations with little or no ties to one another, reflecting the broad appeal of an institution that enables members of the community to play a central role in the administration of justice.

79. However, in spite of the importance and longevity of the jury as an institution of justice, it is important to recall that, from the perspective of Aboriginal peoples in Canada, it has often been regarded as an instrument of injustice. Indeed, criminal jury trials in Canada were used at times as a tool to punish, what the British viewed as, disloyal behavior on the part of Aboriginal people, and to persecute the customary practices of First Nations on the grounds that they constituted criminal behaviour.

80. A notable example occurred in the aftermath of the 1885 Northwest Rebellion – an act of resistance and protest initiated by Métis and Cree leaders in Western Canada. Once the Rebellion came to an end, and charges were laid against the Aboriginal participants, juries, comprised of settlers who were incensed with the Métis and Cree for causing the Rebellion, tried and convicted a number of prominent leaders and their people of various criminal offences. The Métis leader, Louis Riel, was charged with high treason and convicted by a jury of six English and Scottish Protestants after only 30 minutes of deliberations. Riel was sentenced to death by hanging. Three Cree Chiefs – Chief Poundmaker, Chief Big Bear, and Chief One Arrow – along with eight other Cree men were tried for murder and found guilty by a jury of non-Aboriginal people after only 15 minutes of deliberations. Eight of the Cree men were sentenced to death by hanging and the three Chiefs were sentenced to three years in prison. Despite the Native casualties during the Rebellion, not one non-Native person was tried for the killing of Métis and Cree warriors. A priest wrote to the Archbishop criticizing the juries, "The jurymen are all Protestants, enemies of the Métis and the Indians, against whom they maintain bitter prejudices."[30]

81. During the engagement process for the Independent Review, I heard firsthand of the 1907 prosecution of two medicine men from the Sandy Lake First Nation in Northwestern Ontario for a customary act that was fundamentally incongruent with Canadian societal values of criminality. Jack and Joseph Fiddler were charged with the murder of a young woman who was possessed with what was known by the Anishinawbe as a "wendigo" or evil spirit that would bring harm and danger to the community. The two respected medicine men were asked by the family to perform this task and accordingly claimed to be acting in accordance with their customary roles and responsibilities. They were arrested by the Northwest Mounted Police, charged with murder and brought to Norway House in Manitoba, the location of a Hudson Bay Trading Post, for trial. Apparently, this was the first time the Fiddler brothers, who did not speak English, left their community and were brought into contact with non-Aboriginal people and the justice system. One brother, Jack Fiddler, took his own life before trial. Joseph Fiddler faced a completely foreign system without the aid of legal counsel. He was tried by a judge, who was a Commissioner of the Northwest Mounted Police involved in the original investigation, a lawyer from Winnipeg assigned to act as Crown Counsel, and a jury of six men from

[26] *Report on the Coroner System in Ontario, supra* note 24 at 25.
[27] *Ibid*., at 94.
[28] Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases*, by Chairman John McCamus (Ontario: Queen's Printer, 1994) at 92.
[29] *Sherratt, supra* note 21.
[30] Brian M. Brown, *Poundmaker, Big Bear, and the 1885 Rebellion* (1999), online: alittlehistory.com <http://www.alittlehistory.com/NativeRb.htm>.

Norway House. Joseph Fiddler was convicted of the crime and initially sentenced to death, which was later reduced to life in prison. Being an elderly and sick man, Joseph Fiddler died soon afterwards in custody.

82. According to historians who have examined this trial, it was intended to serve as a signal to other First Nations that "wendigo" killings were not tolerable and such behavior would be punished.[31] However, in so doing, it forever scarred the First Nations perception of the criminal justice system, particularly among members of the Sandy Lake First Nation, and contributes to their aversion to participate in it.

83. The relationship between the Canadian justice system and Canada's Aboriginal peoples continues to be troubled. A glaring example of these problems was revealed in the *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution*.[32] Although Donald Marshall, Jr., who was wrongfully convicted of murder and served 12 years in prison, did not elect to have a trial by jury, the utter failure of the criminal justice system as administered by the police, investigators, lawyers, Attorney General, and courts drew national attention to the issue of systemic discrimination in the justice system. The Royal Commission found that the miscarriage of justice in his case was directly attributable to the fact that Donald Marshall Jr. was a Mi'kmaq person. Given what I have heard while conducting the Independent Review, I unfortunately expect that a disturbing number of First Nations people in Ontario can relate to the circumstances endured by Donald Marshall, Jr.

84. I have mentioned the examples from Riel, Fiddler, and Marshall to illustrate the stains of mistreatment and injustice that to this day continue to influence the attitudes of First Nations people towards the Canadian justice system.

2. A BRIEF HISTORY OF THE JURY SYSTEM AND THE JURY SELECTION PROCESS IN ONTARIO

85. Juries have been used in criminal proceedings in Ontario since 1763, in civil proceedings since 1792, and in coroner's inquests since at least 1763. Prior to 1763, what is now Canada was, at least from the perspective of non-Aboriginal settlers and the European powers, a French colony governed by the law of France. During that period, trial by jury in criminal and civil proceedings does not appear to have been commonplace. Following the French defeat by the British in the Seven Years' War, France and Britain signed the *Treaty of Paris* in 1763, which ceded territory in Canada claimed by France to the British. That same year, King George III of England signed the *Royal Proclamation* of 1763.[33] The Royal Proclamation stipulated that private law in Canada – the law of contracts, family law, estates and successions, among other things – remained the French civil law, but English law was adopted for the administration of criminal justice.[34] As a result, the jury and the Office of the Coroner were introduced into Canadian criminal law.

86. In 1791, Upper Canada (now Ontario) was divided from Lower Canada (now Quebec) as a result of the *Constitutional Act*, 1791, and, in that year, Upper Canada received its own constitution.[35] These changes introduced the English jury system in its entirety to Upper Canada; juries in criminal proceedings were already commonplace, and they were introduced in civil proceedings by the 1792 *Act to Establish Trials by Jury*.[36] The language of this Act demonstrates the high regard in which the institution of the jury was held:

[31] Thomas Fiddler and James R. Stevens, *Killing the Shamen* (Manotick, ON: Penumbra Press, 1985) at 73.
[32] The Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations*, by Chief Justice T. Alexander Hickman (Halifax: McCurdy's Printing and Typesetting Limited, 1989).
[33] Graham Parker, "Trial by Jury in Canada" (1987) 8 Osgoode Hall L.J. 178 at 178.
[34] *Ibid*.
[35] *Ibid*., at 180.
[36] *Ibid*. See also *An Act to Establish Trials by Jury*, Upper Canada Statutes, 1792, c. 2.

> Whereas trial by jury has been long established and approved in our mother country, and is one of the chief benefits to be attained by a free constitution, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the province of Upper Canada, [...] all and every issue and issues of fact, which shall be joined in any action, real, personal, or mixed, and brought in any of his Majesty's courts of justice within the province aforesaid, shall be tried and determined by a unanimous verdict of twelve jurors, duly sworn for the trial of such issue or issues, which jurors shall be summoned and taken conformably to the law and custom of England.[37]

87. In line with these reforms, the Upper Canada Legislature established the Court of King's Bench (now the Superior Court) to hear criminal cases and certain civil cases, and other courts to hear the remainder of the civil cases.[38] Juries were used in all of these courts.[39] While they have since fallen out of use in all Canadian provinces, grand juries were also used to assess evidence adduced to determine whether a criminal indictment was appropriate.[40]

88. The Office of the Coroner was transplanted into Canada with the introduction of English criminal law.[41] It seems probable that early coroner's inquests employed juries, since this practice was common in England.[42] The first formal legislative enactment governing the Office of the Coroner in Upper Canada was the 1850 *Act to amend the Law respecting the office of the Coroner*.[43] The 1850 Act permitted the coroner to summon a jury for inquests into deaths by violent or negligent means and required that a jury be summoned for inquests into the deaths of individuals who died while in custody (this requirement remains the case today).[44] The law respecting coroner's inquests has since been modernized and the Office of the Coroner enhanced in various ways,[45] but the role of the jury (now a five-person jury) remains a fundamental part of every inquest.

89. The process for selecting jurors for trials was a highly contentious political issue in pre-Confederation Canada that first served as a catalyst for widespread reforms to the jury system, and subsequently contributed to the relative decline in the use of the jury. The *Act to Establish Trials by Jury* provided that "jurors shall be summoned and taken conformably to the law and custom of England". However, the selection process for comparatively densely populated late eighteenth and early nineteenth century England did not translate well to sparsely populated Upper Canada. In late eighteenth century England, constables were responsible for identifying men who met the requisite property requirements for jury service. Constables would post jurors lists on the local church door for three weeks, to allow people to identify any errors or omissions.[46] Subsequently, these lists were certified by a local justice and the names were transcribed into a jurors' book, from which prospective jurors were drawn. Since this process transferred poorly into Upper Canada, the legislature passed the *Act for the Regulation of Juries* in 1794, which provided that every year the clerk of the peace in each district would compose a list of prospective jurors (all male householders) and provide it to the sheriff.[47] From this list, the sheriff would select 36 to 48 names before a trial, from which 12 were randomly selected for jury service. Often, as discussed in the next section of this Report, the sheriff simply chose people living in the same neighborhood to reduce the costs associated with summoning jurors.

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[37] *An Act to Establish Trials by Jury, ibid*.

[38] R. Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada* (Toronto: Osgoode Society for Canadian Legal History, 2009) at 44.

[39] *Ibid*., at 45.

[40] *Ibid*.

[41] J.C.E. Wood, "Discovering the Ontario Inquest" (1967) 5 Osgoode Hall L.J. 243 at 246.

[42] See Christopher Granger, *Canadian Coroner Law: A Legal Study of Coroner and Medical Examiner Systems in Canada* (Toronto: The Carswell Company Ltd., 1984) at 15, 28.

[43] *Act to amend the Law respecting the office of the Coroner*, 1850, Upper Canada Statutes, c. 56.

[44] Ontario Law Reform Commission, *Report on the Law of Coroner*s by Chairman John McCamus (Ontario: Queen's Printer, 1995).

[45] See the current *Coroner's Act*, R.S.O. 1990, c. C.37, attached to this Report as Appendix C.

[46] R. Blake Brown, *supra* note 38 at 45.

[47] R. Blake Brown, *Ibid*. *An Act for the Regulation of Juries*, Upper Canada Statutes, 1794 c. 1.

90. This system generated considerable controversy, as critics expressed concern that sheriffs were abusing their position by packing juries to ensure specific outcomes in trials. Between 1800 and 1850, there were increasing calls to strip the sheriff of his power to appoint jury panels.[48] In the aftermath of the 1837 Rebellions, for example, there was widespread belief that government officials had packed juries to ensure the convictions of accused rebels. The drive towards reform culminated in 1850 with the passage of the *Upper Canada Jurors' Act of 1850*.[49] The 1850 Act introduced significant changes to the jury system, including a complex system for juror selection that involved a local "committee of selectors" in each township, which created lists of prospective jurors that were forwarded to the clerk of the peace, and subsequently to the sheriff for juror selection.[50] While the 1850 Act was effective in ending claims of packed juries, it significantly increased the costs of the jury system, which – as will be discussed in the next part of this section – was a major reason for the jury's decline in the nineteenth and twentieth centuries.

91. The increased costs of the jury system as a result of the 1850 Act, as well as general citizen dissatisfaction about the inconvenience of serving on juries, once again spurred reform efforts. A series of failed jury reform bills following the enactment of the 1850 Act eventually culminated in the passage in 1879 of *An Act to Amend the Jurors Act*.[51] This Act simplified juror eligibility by setting the minimum property requirements at $600 or more for people living in cities, and $400 or more for people living in towns and villages.[52] These property requirements were to remain in place until 1972. The proponents of this Act rejected using the voters' list as a basis for selecting possible jurors because, in their view, "there are many on the voters' list who would be anything but satisfactory jurymen."[53] The 1879 Act also simplified the process for juror selection in order to reduce costs.

3. DECLINE IN THE USE OF JURIES FROM THE NINETEENTH TO THE TWENTIETH CENTURY

92. The late-nineteenth century marked the beginning of a decline in the use of juries in Ontario. In addition to the reasons already discussed – high costs and inconvenience – one author attributes the decline to the entrenchment of responsible government.[54] Juries had served as a bulwark against oppressive laws and oppressive government. However, the establishment of democratically elected legislative assemblies in the provinces of Canada helped to assuage fears of tyrannical government and undermine this rationale for the use of juries

93. The decline in the use of juries was especially apparent in civil proceedings. Prior to the 1860s, in civil proceedings, trial by jury was the only form of trial recognized by the Courts of common law.[55] In 1868, the presumption that civil trials were to be tried by a jury was reversed after the Ontario legislature passed the *Law Reform Act of 1868*.[56] Following passage of that Act, civil actions were tried before a jury only when it was requested by one of the parties. Five years later, the Ontario legislature passed the 1873 *Act for the better administration of Justice in the Courts of Ontario*.[57] This Act required the permission of a judge for a jury to be called for all but a select number of civil causes of action, including libel and malicious prosecution. However, the parties could still choose to waive the jury for a trial involving one of those

[48] R. Blake Brown, *ibid* at 88.
[49] *Upper Canada Jurors' Act of 1850,* Upper Canada Statutes, 1850 c. 5.
[50] R. Blake Brown, *supra* note 38 at 135-138.
[51] *An Act to Amend the Jurors' Act*, S.O. 1879, c. 14.
[52] R. Blake Brown, *supra* note 38 at 144.
[53] *Ibid*., at 213.
[54] *Ibid*., at 217.
[55] The Honourable Mr. Justice Todd L. Archibald & Robert L. Gain, "The Breadth of Civil Jury Trials in Canada: Their History and Availability" in The Honourable Mr. Justice Todd L. Archibald & The Honourable Mr. Justice Randall Scott Echlin, *Annual Review of Civil Litigation*, 2007 edition, (Toronto: Thomson Canada Limited, 2007) 139 at 141.
[56] *Law Reform Act of 1868*, S.O. 1868, c. 6, s. 18(1).
[57] *Act for the better administration of Justice in the Courts of Ontario,* S.O. 1873, c. 8.

causes of action.[58] Since then, not only has the use of the jury declined, but there have also been calls for its abolition in civil proceedings. For instance, in 1968 the Ontario Royal Commission Inquiry into Civil Rights recommended that civil juries be abolished altogether except in defamation cases: "the conclusion we have come to is that the trial of civil cases by a jury is a procedure that has outlived its usefulness in Ontario."[59] However, when the Ontario Law Reform Commission examined this issue in 1994, it concluded that civil juries are appropriate in certain cases and therefore should remain available.[60]

94. Currently, civil juries are available in principle for all but a small range of actions, including actions for an injunction, equitable relief, or relief against a municipality.[61] Before proceeding to trial, the parties to a civil action can elect a trial by jury under the *Ontario Rules of Civil Procedure*.[62] In practice however, civil juries are rarely used outside of a narrow range of actions, including defamation.

95. The use of jury trials also declined in criminal proceedings, though not as precipitously as in civil proceedings. This decline was largely attributable to a series of laws passed by the Upper Canada Legislature and, following Confederation, by the Parliament of Canada. The Upper Canada Legislature enacted a law in 1834 which provided that certain types of offences, such as minor assaults and some crimes against the property of another, could be tried by a justice of the peace sitting without a jury.[63] In 1869, the newly constituted Parliament of Canada passed the *Speedy Trials Act*, which broadened the scope of offences that could be tried before a judge alone if the accused consented.[64] Parliament passed the first *Criminal Code* in 1892, which applied in all parts of the country. Under the *Criminal Code*, trial before a judge and jury was necessary for the most serious offences, including treason and murder.[65] However, certain other types of offences, such as assault or theft below a certain value, were triable by way of summary trial before a judge sitting alone if the accused so elected.[66] Similarly, young offenders could elect to be tried by a jury or a judge sitting alone.[67] The 1892 *Criminal Code* remains the basis for modern criminal law, and, consequently, many of the provisions it made for trial by jury remain (with some changes) today. In 1980, the Law Reform Commission of Canada recommended keeping the criminal jury, since "it performs a number of valuable functions in the criminal justice system", as I have discussed above.[68]

96. Currently, the rights of an accused to be tried by a jury are governed by the *Canadian Charter of Rights and Freedoms* and the *Criminal Code*. Under *Charter* section 11(f), any person charged with an offence has the right "except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment". As a result, at a minimum, those facing five or more years imprisonment are guaranteed the right to a trial by jury. The *Criminal Code* divides offences intro three types: indictable offences, summary conviction offences, and hybrid offences.[69] Indictable offences include "the most serious crimes", such as murder and treason.[70] As a general rule, these offences must be tried by a judge and jury

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58 *Ibid*., at c. 8, s. 16-17.

59 *Ontario Royal Commission Inquiry into Civil Rights* by Commissioner James Chalmers McRuer, Report No. 1, Vol. 2 (Toronto: Queen's Printer, 1968) at 859.

60 Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* by Chairman John McCamus, (Ontario: Queen's Printer, 1994) at 90.

61 *Courts of Justice Act*, R.S.O. 1990, c.43, s. 108.

62 *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, s. 47.01.

63 *An Act to provide for the summary punishment of Petty Trespasses, and other offences*, Upper Canada Statutes 1834, c. 4.

64 R. Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada*, (Toronto: Osgoode Society for Canadian Legal History, 2009) at 199. *An Act for more speedy trial, in certain cases, of persons charged with felonies and misdemeanors, in the Provinces of Ontario and Quebec*, S.C. 1869, c. 34.

65 Neil Vidmar, "The Canadian Criminal Jury: Searching for a Middle Ground" (1999) 62 Law and Contemporary Problems 141 at 146.

66 *Criminal Code*, S.C. 1894, c. 29, s. 783, 786.

67 *Ibid*., at c. 29, s. 818.

68 Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 2.

69 *Criminal Code*, *supra* note 66 at Part XIX – Indictable Offences, and Part XXVII – Summary Convictions.

70 See also *Criminal Code*, R.S.C., 1985, c. C-46, s. 469.

unless both the accused and the Attorney General consent to a trial before a judge alone.[71] Summary offences, such as impaired driving, carry maximum penalties of six months in prison and fines of up to $5000, and are tried before a judge alone.[72] There is no right to a jury for a summary conviction trial.[73] Finally, hybrid crimes, such as assault, fraud, and drug offences can be tried as indictments or summary offences, and the decision to proceed as one or the other is solely at the discretion of the Attorney General. If the Attorney General chooses to proceed by way of indictment, the accused can opt to be tried by a jury.[74]

97. The jury is still an important part of our criminal justice system. According to a 2011 Canadian Broadcasting Corporation news story, of the more than 600,000 criminal charges laid in Ontario between April 1, 2009 and March 31, 2010, 513 criminal indictments were disposed of by a judge and jury, as opposed to 340 by a judge sitting alone.[75] However, many of the issues affecting juries during the nineteenth century that I have briefly considered remain live issues today. For instance, the burden and inconvenience of serving on juries was recently highlighted in the same CBC story. In Ontario, jurors are paid nothing for the first ten days of a trial, $40 for everyday thereafter up to the fiftieth day of trial, and $100 a day thereafter. This lack of payment, among other difficulties, is contributing to an increase in the number of individuals who do not attend at court after being summoned.

C. THE JURY SELECTION SYSTEM AS IT CURRENTLY OPERATES IN ONTARIO

98. The machinery of the jury system in Ontario today is governed by the 1990 *Juries Act* (attached as Appendix B to the Report), which sets out the process for establishing jury rolls in the province's judicial districts.[76] Under that Act, the sheriff in each county and the Director of Assessment are responsible for compiling an annual jurors list, though in practice the sheriff's responsibilities have been delegated to the Provincial Jury Center (PJC) in London, Ontario and to local court officials.

99. During the spring of each year, we understand that the Court Services staff at each local Ontario Superior Court, in consultation with local judges, provide an estimate to the Provincial Jury Center of the number of jurors that will be required for all jury trials in the upcoming year. Once the required number has been determined, the Provincial Jury Centre informs the Municipal Property Assessment Corporation (MPAC) of the number of jurors that will be required. MPAC selects names at random from the list of municipal residents within each county and district, and forwards these names to a third party which is responsible for sending out jury questionnaires. As discussed at paragraph 41 of the Report, section 6(8) of the *Juries Act* requires the names of individuals living in First Nations communities to be acquired using any available record, since their names are not contained in MPAC record.

[71] *Ibid.*, *Criminal Code* at c. C-46, s. 473(1).
[72] *Ibid.*, c. C-46, s. 787.
[73] *Criminal Code*, *supra* note 66 at Part XXVII – Summary Convictions.
[74] *Ibid.*, at 147.
[75] Kazi Stastna, "Jury Duty: Unfair burden or civic obligation?" *CBC News* (8 November 2011) online: CBC News <http://www.cbc.ca/news/canada/story/2011/11/06/f-juries-analysis.html>.
[76] *Juries Act*, R.S.O. 1990, c. J. 3. *Juries Act*, R.R.O. 1990, Reg. 680. There seems to be confusion as to the delineation of jury districts, and the terminology used. Section 5(2) of the *Juries Act* addresses "territorial districts", while s. 10 of Regulation 680 under the *Juries Act* establishes two "jury areas," but does not identify the rest of the province's jury areas. It is regrettable that there is no publically available source of information identifying Ontario's jury districts or areas, or providing a map thereof. This lack of transparency seems to give rise to confusion, and warrants clarification.

100. Questionnaires are sent to all persons identified by MPAC, who after receiving a questionnaire must complete and return it within five days. The Ministry of Finance, acting as an agent of the Provincial Jury Centre, compiles the names of eligible jurors based on the responses in the questionnaires and forwards this information to the Provincial Jury Centre. Using this information, the Provincial Jury Centre compiles the jury rolls for the upcoming year for each county or district in the province.[77]

101. Jury panels for trials are randomly selected from the jury rolls compiled by the Provincial Jury Centre for each Superior Court when the need so arises. The panel is a group of people from which the *petit jury*, meaning the jury who sits on a trial, will be selected. Those selected for the jury panel are issued a summons requiring them to attend at the court where the trial will take place for jury selection. In criminal proceedings, both the Crown and the defence are given the opportunity under the *Criminal Code* to challenge prospective jurors, meaning that either side can ask that certain jurors be excused. Either side can challenge an unlimited number of prospective jurors "for cause", typically on the basis that the prospective juror will not be "indifferent between the Queen and the accused".[78] Depending on the type of crime being tried, both sides are also given between four and 20 "peremptory challenges", meaning that the prospective juror can be asked to stand aside without providing a reason.[79] Prospective jurors can also ask to stand aside on the basis of illness or that service will impose on them an undue hardship. When this process is complete, a group of 12 jurors will remain to serve on the *petit jury*. The parties to a civil proceeding select jurors in a similar manner, except only six jurors are chosen to serve on the *petit jury*.[80]

102. Juries for coroner's inquests are also selected from the jury roll prepared by the Provincial Jury Centre. When the coroner begins an inquest, he or she issues a warrant that requires the Provincial Jury Centre to provide a list of jurors living in the area where the death occurred. The Coroner's Constable then selects the names of people whom he or she believes to be "suitable to serve as jurors at an inquest" from that list and issues summonses requiring them to attend at the place of inquest.[81] As in the case of criminal or civil proceedings, prospective jurors may be dismissed if serving would cause undue hardship or if there is reason to believe that, because of bias, they may not be able to reach a verdict based on the evidence. From the group of prospective jurors, five are chosen to serve on the inquest.

103. Jury selection for coroner's inquests does not emphasize randomness in the same way as jury selection for civil or criminal trials. The role of a jury in a coroner's inquest is to make recommendations based on the evidence presented to them, not to make a finding of guilt or liability. In fact, coroner's juries are prohibited from making findings of legal responsibility. As a result, the imperative existing in criminal trials in particular that emphasizes trial fairness through a representative jury is not present in a coroner's inquest. Of course, the jury roll from which prospective jurors are drawn has to be representative; as I described in paragraph 51 above, the coroner suspended the Bushie Inquest after it was determined that the jury roll was not representative. However, often the members of a coroner's jury are selected from the area where the death took place, since people who reside in that area may be better able to make recommendations tailored to local needs and conditions.

[77] Affidavit of Shawn Joy, sworn on July 19, 2011, filed in *R. v. Kokopenace* at para. 5.
[78] *Criminal Code*, R.S.C., 1985, c. C-46, s. 638(1)(b).
[79] *Ibid*., at c. C-46, s. 634.
[80] *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, s. 108.
[81] *Coroners Act*, RSO 1990, c C.37, s. 33(2).

D. REQUIREMENT THAT A JURY BE REPRESENTATIVE

104. The requirement that a jury be representative is a bedrock principle governing the formation of the modern jury. As Madam Justice L'Heureux-Dube, writing for a majority of the Supreme Court of Canada in the 1991 *R. v. Sherratt* case, stated, the modern jury "was envisioned as a representative cross-section of society, honestly and fairly chosen".[82] My mandate as Independent Reviewer is not to determine whether the jury roll as it applies to First Nations communities is representative as a matter of law; that issue has been and continues to be dealt with before the courts and other bodies. But I believe it is important, nevertheless, for me to outline the background to and some of the case law respecting representativeness as part of the context for the recommendations in my Report.

1. HISTORY AND EVOLUTION OF THE PRINCIPLE OF A REPRESENTATIVE JURY

105. The principle that a jury must be representative of a fair cross-section of the community is a relatively recent one in North America. Historically, jury service in Ontario was limited to men who owned property. The property requirement for jury service was rooted in the history of the jury in the United Kingdom, which required, for example, during the sixteenth century that jurors own a freehold with a certain minimum value in the county where the crime took place.[83] The property requirements for jury service in Ontario were strict; only men owning houses or land with a minimum rateable value were called to serve on juries, likely resulting in the jury pool being limited to the wealthiest among an already narrow pool of eligible citizens. The 1877 *Jurors Act* provided, for example, that the jury roll would be established by compiling a list from the property assessment roll "commencing with the name of the person rated at the highest amount on such roll and proceeding successively towards the name of the person rated at the lowest amount, until the names of one half of the persons assessed upon such roll have been copied from the same".[84]

106. The already small pool of potential jurors in Ontario was further narrowed by the selection process. Often, the sheriff selected jurors from a single neighborhood to minimize the costs associated with summoning prospective jurors. Consequently, jury membership was decidedly unrepresentative. Juries were frequently composed of members of the upper class selected from the same neighborhood, who sat in judgment of those charged with criminal offences.

107. Minimum property requirements as a condition for jury eligibility remained the rule in Ontario until 1972. Following changes in 1972, eligibility for jury duty was determined by whether a person was listed on the most recent polling list registered under the *Municipal Elections Act*. A year later in 1973 this system for determining eligibility was changed, and all Canadians citizens aged eighteen to sixty-nine years became eligible to serve on a jury. That same year, the *Juries Act* was amended to require the sheriff to include the names of members of First Nation communities on the jury roll by obtaining those names "from any record available" – a provision now included in section 6(8) of the *Juries Act*, discussed in more detail in subsequent parts of the Report.[85]

108. The principle of a constitutional right to a representative jury emerged in United States jurisprudence long before it developed in Ontario or anywhere else in Canada. Historically, African-Americans were excluded from the jury source lists of many states, especially in the South. While in Canada the issue of jury representativeness was not dealt with extensively by the courts until the enactment of the *Charter*, the United States Supreme Court played an important role in that country in developing the safeguards guaranteeing a representative jury. The Sixth Amendment to the United States Constitution provides the right to be tried

[82] *R. v. Sherratt*, [1991] S.C.J. No. 21 at para. 31.
[83] Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* (Cincinnati: W.H. Anderson Company, 1963) at 68.
[84] *The Jurors Act*, R.S.O. 1877, c. 48, s. 6.
[85] *An Act to Amend the Jurors' Act*, R.S.O. 1973 c. 81, s. 5.

by "an impartial jury of the state and district wherein the crime shall have been committed".[86] This phrase has been interpreted by the Supreme Court as guaranteeing the right to a representative jury, and the Court has used it to strike down laws and practices that were aimed at excluding African-Americans from the jury pool.

109. The first Supreme Court decision addressing this issue was *Strauder v. West Virgina* (1880).[87] In *Strauder*, the accused, an African-American, was tried and convicted – by an all-white jury – of murdering his wife. At the time, West Virginia law prohibited African-Americans from serving on juries in the state. In its decision, the Supreme Court invalidated the West Virginia law on the basis that it violated the right of African-American defendants to the equal protection of the law.[88] The decision in *Strauder*, as two commentators have noted, "effectively (if indirectly) recognized the right of African-Americans to serve on juries."[89] However, it did not end the matter, and the extent to which African-Americans were excluded from juries varied across the country. Southern jurisdictions continued to exclude African-Americans from juries for decades to come; however, these practices were gradually eliminated through a series of important Supreme Court decisions, discussed below.

110. In 1935, the Supreme Court released two seminal decisions overturning the convictions of African-American men by different all-white juries in Alabama, where African-Americans were systematically excluded from jury service. These cases were heard concurrently and involved nine African-American men who were accused of raping two white women. These men were commonly referred to as the Scottsboro Boys. The first case, *Norris v. Alabama* (1935), set the precedent that excluding African-Americans from the jury source list violated the constitutional right of an African-American accused of a crime to the equal protection of the law.[90] In that case, one of the Scottsboro Boys had been convicted by an all-white jury. The conviction was appealed and was overturned by the United State Supreme Court. The Court held that the exclusion of African-Americans from the jury source list in Alabama implied to the Court that discrimination existed, and this exclusion provided a sufficient basis for overturning the conviction. The second case was *Patterson v. Alabama* (1935), where the Court followed its decision in Norris and set aside the convictions of two more of the Scottsboro Boys who had also been convicted by an all-white jury.[91]

111. Since these decisions, the United States Supreme Court has interpreted the Sixth Amendment in ways that have strengthened the right to a representative jury.[92] In *Thiel v. Southern Pac Co.* (1946) the Court interpreted this constitutional guarantee as requiring that the jury be "chosen from a representative cross-section of the community".[93] The Court has since developed two standards for testing the representativeness of juror lists: the equal protection standard and the fair cross-section standard. The equal protection standard forbids the exclusion of individuals from jury source lists on the basis of intentional discrimination, as well as any measures that are "susceptible to being used to exclude" groups of persons from the jury list.[94] The fair cross-section standard guarantees all those charged with an offence the right to a representative jury source list.[95] Moreover, in 1968 the Supreme Court decided in *Duncan v. Louisiana* that the Sixth Amendment, which the Court has found to protect (among other things) the right to a representative

86 U.S. Constitution. amend. VI.

87 *Strauder v. West Virginia* (1880), 100 U.S. 303.

88 David Kairys, Joseph Kadane and John Lehoczky, "Jury Representativeness: A Mandate for Multiple Source Lists" (1977) California L.R., Vol. 65, No. 4 at 780. Albert Alschuler and Andrew Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 The University of Chicago L.R. 867 at 893.

89 Albert Alschuler and Andrew Deiss, *Ibid*., at 894.

90 *Norris v. Alabama* (1935), 294 U.S. 587.

91 *Patterson v. Alabama* (1935), 294 U.S. 600.

92 Cynthia Williams, "Jury Source Representativeness and the Use of Voter Registration Lists" (1990) 65 New York University L.R. 591 at 591.

93 *Ibid*.

94 *Ibid*., at 596.

95 *Ibid*., at 598.

jury, applies to proceedings in state courts.[96] Finally, in *Batson v. Kentucky* (1986) the Supreme Court decided that peremptory challenges to prospective jurors (meaning challenges that allow the defence or the prosecution to ask that a prospective juror be excused without providing a reason) cannot be used to eliminate prospective jurors on the basis of race.[97]

112. Outright discrimination against African-Americans and other minorities was not the only means used to exclude them from jury source lists. In many states, prospective jurors were selected using a 'key man' system. The 'key man' was a prominent member of the community, such as a minister or a local banker, who was responsible for submitting lists of prospective jurors to the jury commissioner.[98] The commissioner would then compile a list of prospective jurors based on the names provided by the 'key man'.[99] However, the difficulties of ensuring a representative jury using the key man system are apparent; the selection of prospective jurors was subject to the beliefs and biases of the key men, who would often "draw upon their limited circle of acquaintances" in selecting potential jurors.[100]

113. It was widely acknowledged and recognized by Congress that the 'key man' system resulted in the underrepresentation of minorities on juries.[101] In response to the 'key man' system, and to create a fairer way to select people for federal jury source lists, the United States Congress in 1968 enacted the *United States Jury Selection and Service Act* (JSSA). The stated policy of the JSSA is that "all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community."[102] Under the JSSA, jurors for trials in federal courts are selected from voters lists, though the courts are given the discretion to supplement this source with others if it is determined that the voters list is unrepresentative. This legislation was an important step forward in promoting jury representativeness in the United States,. However, the JSSA applies only to the composition of jury source lists for federal courts, not state courts. The 'key man' system has not been declared unconstitutional, and it appears as though it is still used in some states to select the juries for trials before state courts.[103] Moreover, there is evidence that African-American underrepresentation on voters lists and the unavailability of residence lists from predominantly African-American districts means that African-Americans continue to be under-represented in federal jury trials.[104]

114. In Canada, as I noted above, the importance of a representative jury was not recognized as a constitutional principle until after the enactment of the *Charter* in 1982. However, in its 1980 working paper described at paragraph 76 above, the Law Reform Commission of Canada stated that "the functions assigned to the jury presuppose that jurors are selected at random from a fair cross-section of the community."[105] Consequently, "if a representative jury is to be empanelled, the categories of people who are disqualified from jury service must be kept at a minimum."[106] The Law Reform Commission recommended the following as the only reasonable disqualifications from jury service: not having Canadian citizenship, not having attained the age 18 years or over, not an ordinary resident in the judicial district, lack of fluency in the language of the accused, a mental or physical disability, conviction of a criminal offence, and certain occupational disqualifications.[107]

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[96] *Duncan v. Louisiana* (1968), 391 U.S. 145.
[97] *Batson v. Kentucky* (1986), 476 U.S. 79.
[98] Valerie Hans and Neil Vidmar, *Judging the Jury* (Perseus Publishing: United States, 1986) at 58.
[99] Hiroshi Fukurai, Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymandering, Language and Representativeness Quotas" (2001) 5 Texas Hispanic Journal of Law and Policy 7 at 19.
[100] *United States v. Green* (2005), 389 F. Supp. 2d 29 at para. 23.
[101] *Ibid*.
[102] *Ibid*.
[103] Coramae Richey Mann, *Unequal Justice: A Question of Color* (Indianapolis: Indian University Press, 1993) at 172.
[104] See Judge Nancy Gertner, "12 Angry Men (And Women) in Federal Court" (2007) 82 Chicago-Kent L.R. 613; *United States v. Green*, 389 F. Supp. 2d 29; Hiroshi Fukurai, Edgar W. Butler and Richard Krooth, "Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection" (1991) 22 Journal of Black Studies 196.
[105] Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 37.
[106] *Ibid*., at 40.
[107] *Ibid*., 40-43.

115. In its 1991 *R. v. Sherratt* decision, the Supreme Court of Canada recognized the requirement of a representative jury as a constitutional principle. In her reasons for the majority in that case, Madam Justice L'Heureux-Dube linked the principles of representativeness and impartiality to the s. 11(f) *Charter* right to be tried by a jury and the s. 11(d) *Charter* right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. As she stated,

> [T]he *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform many of the functions that make its existence desirable in the first place.[108]

116. In addition to protecting the rights of the accused, the representativeness of juries has broader implications for society's perception of the criminal justice system. Impartial and representative juries play an important function in maintaining public confidence in the legal system. The public is more likely to perceive trials, and by extension the legal system as a whole, as being fair if prospective jurors are representative of the wider community from which they are drawn. Conversely, the wholesale exclusion of particular groups from the jury pool risks undermining public acceptance of the fairness of the criminal justice system. A jury cannot act as the conscience of the community unless it is viewed favorably by the society that it serves.

2. ONTARIO CASE LAW ON REPRESENTATIVENESS

117. As I discussed above in Part II,A, the Independent Review arose in large part from a series of recent cases – *Pierre v. McRae* and the *Kokopenace* and *Spiers* appeals – dealing with the representativeness of jury rolls as they relate to members of First Nation communities. In this section, I briefly discuss some other Ontario cases that deal with the issue of representativeness. These cases have arisen in two different contexts: the preparation of jury rolls and the selection of individuals to serve on the jury.

(A) PREPARATION OF JURY ROLLS

118. In *R. v. Church of Scientology et al.* (1997), the Ontario Court of Appeal refused to find that limiting prospective jurors to Canadian citizens results in an unrepresentative jury.[109] In that case, the accused, who was a non-citizen convicted of various offences, sought to have a mistrial declared on the basis that the exclusion of non-citizens from jury rolls resulted in a jury that was unrepresentative. The trial judge agreed that the exclusion of non-citizens resulted in an unrepresentative jury roll, but the Court of Appeal overturned this decision. The Court acknowledged that a representative jury is important to ensure that certain viewpoints and beliefs are not systematically excluded from the jury pool. However, the Court found that non-citizens do not share any common characteristics that are relevant to the underlying reason for ensuring that jury rolls are representative.

119. Similarly, in *R v. Laws* (1998), the Ontario Court of Appeal found that the citizenship requirement for inclusion on the jury roll did not result in unrepresentative juries by precluding large numbers of black permanent residents who are not citizens from potential jury service.[110] The accused in this case was black and was charged with illegally smuggling individuals into Canada and the United States. He argued that a mistrial should be declared because the citizenship requirement for jury service resulted in large numbers of black permanent residents being excluded, raising the possibility that the jury roll was unrepresentative. The Court of Appeal disagreed; it found that the defendant could not establish that marginally increasing

[108] *R. v. Sherratt,* [1991] 1 S.C.R. 509 at para. 35.
[109] *R. v. Church of Scientology of Toronto*, 33 O.R. (3d) 65 (C.A.).
[110] *R. v . Laws* (1998), 41 O.R. (3d) 499 (C.A.).

the number of black people on jury rolls by eliminating the citizenship requirement for jury service would result in a material increase in the possibility of a black individual being selected to serve on the jury for a black person charged with an offence. However, this holding does not preclude the opposite finding in another case with substantially different demographics.

120. In *R. v. Nahdee* (1993), the Ontario Court of Justice declared a mistrial after it became clear that the sheriff of Lambton County had failed to make sufficient efforts to ensure that First Nations peoples were represented on jury rolls.[111] The defendant was charged with attempted murder, but subsequently sought a mistrial on the basis that the sheriff failed to secure the names of First Nations individuals for possible inclusion on jury rolls. The sheriff had contacted band leadership on First Nations reserves in his district in order to secure the names of the reserve's inhabitants for jury questionnaire mailing. However, the band leadership failed to reply to the sheriff's request, and the sheriff took no further actions to gather the names of reserve residents. The Court found that the sheriff failed in his duty under the *Juries Act* to actively seek out the names of First Nations individuals living on reserves for possible inclusion on the jury rolls. His failure to do so resulted in an unrepresentative jury roll, which warranted the finding of a mistrial.

121. In a 1994 follow-up trial involving the defendant from *R. v. Nahdee*,[112] the defendant was again convicted of attempted murder, but sought to have the conviction set aside on the basis that the jury roll was unrepresentative. The Ontario Court of Justice found that in 1994, the sheriff had made greater efforts to place the names of First Nations individuals in Lambton County on the jury roll by sending out and receiving responses from a larger number of jury questionnaires. As a result, the names of First Nations people living on reserves were inscribed on the jury roll, and there was a possibility that First Nations individuals would be chosen to serve on jury panels.

122. *R. v. Ransley* (1993) followed on the heels of the defendant's success in having a mistrial declared in *R. v. Nahdee*.[113] In Ransley, the defendant challenged the jury panel composed for his trial alleging that the jury roll was unrepresentative because the sheriff did not follow a specified procedure for adding First Nations individuals to the roll and also sent a disproportionately large number of questionnaires to the reserves in his jurisdiction because of the historically low response rates. The Ontario Court of Justice denied the defendant's challenge to the composition of the jury panel. The Court found that the process followed by the sheriff, while imperfect, represented a good faith attempt to secure the representation of First Nations peoples on the jury roll.

(B) SELECTION OF THE JURY PANEL

123. As already noted, the foundational case elevating the principle of a representative jury to a constitutional imperative was the Supreme Court's decision in *Sherratt*.[114] In that case, the accused sought to have all prospective jurors dismissed on the basis that they were not impartial as between the Crown and the accused. The accused was charged with murder, and considerable media coverage surrounded the search for the deceased's body ten months before the trial. The trial judge denied the defence's request. However, he instructed all prospective jurors that they could not serve on the jury if they had seen, heard, or read anything that might render them not impartial as between the Crown and the accused. The Supreme Court of Canada upheld the trial judge's decision but, as referred to in paragraph 115 above, made important statements about the constitutional requirement for juries to be impartial and representative.

[111] *R v. Nahdee*, [1994] 2 C.N.L.R. 158 (O.N.C.J.).
[112] *Ibid*.
[113] *R. v. Ransley*, [1993] O.J. No. 2828 (O.N.C.J.).
[114] *Sherratt*, *supra* note 108.

124. In *R. v. Bain* (1992), the Supreme Court of Canada found that section 634 of the *Criminal Code* was unconstitutional because it allowed the Crown to challenge, without cause, four times more jurors than the defence, as the Crown's ability to stand-aside 48 potential jurors far outstripped the defence's right to peremptorily challenge them.[115] The Court held that this could result in a jury that was perceived by society as partial towards the Crown, thereby tarring the entire trial with a taint of unfairness.

125. In *R. v. Smoke* (1983), the Ontario High Court of Justice found that the absence from the jury of First Nations individuals living on reserves in the jurisdiction where the crime took place did not constitute a violation of the defendant's *Charter* rights.[116] The defendant was charged with various counts of sexual assault, and all of the alleged offences took place on the reserve where he resided. He argued that he had a right to be tried on the reserve where he resided with a jury composed entirely of its residents. The Court disagreed; it found, that although there were no residents from reserves on the jury roll, First Nations individuals living off reserve were included. The Court found that First Nations individuals were as likely as non-First Nations individuals to be called to serve on a jury. The Court acknowledged that the presence of First Nations individuals living off reserve on the jury roll was different from having individuals who live on reserves on the jury roll; however, it did not believe that this distinction was serious enough to warrant providing the defendant with a remedy.

126. In *R. v. Butler* (1984), the British Columbia Court of Appeal found that a sheriff's policy of intentionally excluding members of First Nations from jury panels resulted in an unrepresentative jury that warranted granting the defendant a mistrial.[117] The Court noted that it is possible for a jury panel to contain no First Nations individuals. However, the "essential wrong" in this case was a deliberate policy on the part of the sheriff to exclude First Nations individuals altogether.[118]

127. In *Fiddler v. the Queen* (1994), the defendant was charged with sexual assault and, before the trial began, argued that he had a constitutional right to be tried by a jury of his cultural peers to be randomly selection from the district where he resided.[119] The then Ontario Court of Justice disagreed. While the Court recognized the importance of having people who share the defendant's cultural affinity on the jury rolls, it decided that the cultural affinity of the accused cannot predominate, since such a narrow approach ignores the perspective of the complainant and ignores entirely the interests of the public. Indeed, a jury composed solely of members of the accused's community would run counter to the value of maintaining a representative jury roll.

128. In *R. v. A.F.* (1993), the then Ontario Court of Justice found that holding a trial by jury outside of the defendant's community did not infringe his *Charter* rights.[120] The defendant, a resident of the Sandy Lake reserve, was accused of various sexual offences and elected a trial by jury. However, trials by jury were not available in Sandy Lake, and instead the trial was to be held in Kenora. The defendant argued that holding the trial in Kenora violated his *Charter* rights, since the jury would not be composed of members of his community. The Court disagreed; it wrote that for the purposes of jury selection, the notion of 'community' must be defined broadly if the jury is to satisfy its role as a democratic institution. A jury composed entirely of members of the defendant's family and kin would run counter to the broader definition of community. Moreover, the *Charter* does not provide a right to be tried in a particular location or to be tried exclusively by the members of a particular group.

[115] *R. v. Bain*, [1992] 1 S.C.R. 91.
[116] *R. v. Smoke*, [1983] O.J. No. 563, (H.C.J.)
[117] *R. v. Butler*, [1984] B.C.J. No. 1915 (B.C.C.A.).
[118] *Ibid*.
[119] *Fiddler v. the Queen* (1994), 22 C.R.R. (2d) 82 (O.N.C.J.).
[120] *R. v. A.F.*, [1994] O.J. No. 1392 (O.N.C.J.).

129. Finally, *R. v. Wareham (#2)* (2012) is, at the time of writing, the most recent judicial decision dealing with the issue of Aboriginal underrepresentation on jury rolls.[121] The defendant in *Wareham* was charged with second degree murder. His trial had originally been set for 2011, but following the Ontario Court of Appeal's decision in *Pierre v. McRae*, he successfully challenged his jury panel on the basis that it was not representative. In his 2012 trial, he once again attempted to challenge his jury panel on the basis that it was unrepresentative. The Superior Court denied his challenge. The Court found that, while the procedure in place for securing the representation of First Nations peoples on jury rolls was imperfect, good faith efforts were made to obtain the names of First Nations individuals living on reserve for inclusion on the jury roll. These efforts included contacting band chiefs and mailing jury questionnaires to large numbers of people living on reserve.

130. Certain general principles emerge from these cases. The principle of representativeness requires that jurors be selected at random from a pool whose composition is representative of Canadian society as a whole. In order to be representative, no group of Canadians can be systematically excluded. However, as I have stated above, no one has the right to have individuals from a particular group on their jury panel, or to be tried exclusively by members of a group to which they belong. Finally, illegality in the process for composing the jury, like the process for swearing in the jury, suffices to have a trial verdict set aside.

131. Having said all this with respect to the case law on representativeness, from a policy standpoint, I believe Ontario could enact procedures and approaches that go beyond the minimum legal standards that have been set by the jurisprudence, so long as what is proposed does not run afoul of the basic legal ingredients for having an impartial and representative jury.

E. THE REPRESENTATION OF FIRST NATIONS PEOPLES ON ONTARIO JURIES

1. INTRODUCTION

132. As the cases discussed above make clear, the issue of underrepresentation of members of First Nations communities on Ontario's jury roll is a serious and persistent problem. The statistics that have emerged from the court cases about underrepresentation of First Nations communities in the large northern judicial districts of Ontario are particularly troubling.

133. In the judicial district of Kenora, for example, which makes up about one-third of Ontario's land mass, it is estimated that approximately 30 to 36 per cent of the population live "on reserve" – in communities designated as reserves under the *Indian Act* or as "Indian Settlements" (non-reserve Crown land on which a community of Aboriginal persons resides more or less permanently)[122]. But, as described further below, these on-reserve residents typically make up less than ten percent of the Kenora jury roll. Similarly, in the judicial district of Thunder Bay, on-reserve residents in 2011 made up approximately five percent of the population but accounted for only 1.3 percent of the jury roll.[123]

134. My task in this Review is to provide recommendations as to how we can begin to deal with this problem, which – as I have emphasized – is deep and systemic. But to provide the proper context to my recommendations, it is important first to understand the steps that have already been taken by provincial officials to attempt to create a jury roll that is properly representative of the members of First Nations

[121] *R. v. Wareham (#2)*, [2012] O.J. No. 767 (S.C.J.).

[122] See paragraphs 53 to 55, and the tables of demographic data contained therein, of the Affidavit of Amber Khan (January 21, 2011) filed in *R. v. Kokopenace*.

[123] "Ruling by Dr. Eden on motion regarding jury selection," *Inquest concerning the death of Reggie Bushie*, (September 9, 2011) at para. 18.

communities. I do that in this section by describing the *Juries Act* obligation of court officials to include on-reserve residents on Ontario's jury roll, the record as to the steps court officials have taken to attempt to fulfill that obligation, and the results of those efforts to date.

2. *JURIES ACT* OBLIGATION TO INCLUDE ON-RESERVE RESIDENTS ON ONTARIO'S JURY ROLL

135. As described at paragraph 99 above, the *Juries Act* specifies that the primary source of data for creating Ontario's jury roll is the most recent municipal enumeration undertaken pursuant to the *Assessment Act*. But municipal enumeration does not capture residents of reserves designated under the *Indian Act*. The *Juries Act* therefore prescribes a separate process intended to provide for the proportionate inclusion of on-reserve residents in the jury roll. Section 6(8) of the *Juries Act* states:

> 6(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available.[124]

136. The sheriff's obligation "to obtain the names of inhabitants of the reserve from any record available" is in fact carried out by various provincial officials who have either been assigned the powers of the sheriff or who act on the instruction of the holder of such assigned powers.[125] Responsibility for fulfilling the obligations of section 6(8) is currently divided among:

(a) local judicial district or county court staff, who obtain the names of on-reserve inhabitants, select the individuals to receive questionnaires, and prepare and mail the questionnaires to on-reserve inhabitants;

(b) the Provincial Jury Centre, which receives and reviews the questionnaires returned and enters the eligible names in the jury roll; and

(c) the Director of Court Operations for the West Region, who carries out the sheriff's responsibility to certify each jury roll to be the proper roll prepared as the law directs.[126]

3. PRACTICE OF COURT OFFICIALS PRIOR TO 2001

137. The requirements currently found in section 6(8) of the *Juries Act* were first adopted in 1973, but it is not clear what records were relied on by Ontario officials at that time to fulfill those requirements. It appears that from at least the early 1990s on, Ontario officials began to rely substantially on lists maintained by Indian and Northern Affairs Canada (INAC) of persons with registered Indian status affiliated with each First Nation in Ontario.[127] These lists were obtained each year by the Provincial Jury Centre by way of a request to INAC under the federal *Access to Information Act* pursuant to a 1983 Ontario-Canada agreement allowing access to, and the use and disclosure of, personal information under the control of a federal government institution to Ontario for the purpose of administering or enforcing any law or carrying out a lawful investigation.[128] Once obtained, the lists were distributed to local court offices, where they were used to fulfill the requirements of section 6(8), if the local court staff were unable to obtain a list directly from a First Nation, which was often the case.

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[124] *Juries Act*, R.S.O. 1990, c. J. 3., s. 6(8).

[125] See section 73(2) of the *Courts of Justice Act*, R.S.O 1990, c. 43, as amended, which provides for any power or duty of the sheriff to be exercised or performed by a person to whom the power or duty has been assigned by the Deputy Attorney General or a person designated by the Deputy Attorney General.

[126] *Juries Act*, *supra* note 124 at s. 9. The Transcript of the cross-examination of Shaun Joy filed in *R. v. Kokopenace*, at 25-27.

[127] See paragraph 13 of the Affidavit of Sheila Bristo dated December 2, 2011, filed in *R. v. Kokopenace*

[128] *Access to Information Act*, R.S.C. 1985, c. A-1. Agreement between Canada and Ontario dated July 20, 1983, filed as Exhibit 25 to the transcript of the cross-examination of Shaun Joy filed in *R. v. Kokopenace*.

138. It appears that in the 1990s, provincial officials received more completed jury questionnaires from on-reserve residents than is the case today. In his 1994 decision in *R. v. Fiddler*, for example, Mr. Justice Stach stated that the return rate for on-reserve residents was approximately 33 percent, far higher than the return rates in the Kenora judicial district over the last several years, which have been less than ten percent.[129]

139. From at least the mid-1990s on, the Ministry of the Attorney General's Court Services Division circulated to its staff a directive respecting the performance of the sheriff's duties under section 6(8).[130] This directive was distributed annually by the Provincial Jury Centre to local court staff as part of an annual communications package sent out to prompt the commencement of the section 6(8) work. The directive instructed local court staff to:

(a) ascertain, check, and confirm the reserves located in the county or district for which they were responsible;

(b) attempt to obtain the band electoral list, or any other accurate list of residents, by writing letters, telephoning, or visiting the reserves in the area for which they were responsible;

(c) calculate the number of on-reserve questionnaires to be sent, using a prescribed formula;

(d) perform a random selection of the required number of names from "the best possible list", and prepare and mail the questionnaires to these persons; and

(e) provide interim and final reports to the Provincial Jury Centre at various points during this process.

140. That directive has now been replaced by instructions contained in a Jury Manual prepared by the Court Services Division, and is available to local court officials. Chapter 7 of the Jury Manual provides directions to local court officials as to how to comply with the requirements of section 6(8), restating and expanding on the instructions that had been provided in the directive.[131]

4. PRACTICE OF COURT OFFICIALS FROM 2001 ON

141. In 2001, INAC advised the Ministry of the Attorney General's Court Services Division that it was discontinuing its previous practice of providing lists to the Ministry. In its correspondence with the Ministry, INAC noted that federal privacy policies and practices regarding the release of this kind of personal information pursuant to the *Privacy Act* had changed since INAC initially began providing the lists.[132] INAC stated that "[d]ue to the sensitive nature and variability of the information under INAC's control, we have determined that this information cannot be released to you at this time."[133] INAC also noted in the letter that Ontario was the only province requesting this information from INAC for the purpose specified.[134]

142. Following 2001, Ontario officials continued to rely on the 2000 INAC lists, despite the fact that they began to become out-dated, as well as any other lists they were able to obtain by writing to or otherwise contacting individual First Nations communities. In the late 2000s, it appears that local court officials learned for the first time that the response rates from questionnaires mailed to the on-reserve population were very low. For example, the court official responsible for carrying out the sheriff's duties in the Kenora

[129] *R. v. Fiddler* (1994), 22 C.R.R. (2d) 82 at para. 101 (O.N.C.J.).

[130] The 1996 version of this directive, which was filed in *R. v. Kokopenace*, is a memorandum dated June 25, 1996 from the Director of the Program Development Branch of the Ministry of the Attorney General Court Services Division. According to the evidence filed in *Kokopenance*, I understand that versions of this directive were distributed annually.

[131] The Affidavit of Sheila Bristo (December 2, 2011), filed in *R. v. Kokopenace*, at para. 17.

[132] *Privacy Act*, R.S.C. 1985, c. P-21.

[133] Letter from Diane Leroux, Coordinator, Access to Information and Privacy, INAC to Liz Boyce, Court Administration Division, Ministry of the Attorney General of Ontario (September 24, 2001).

[134] *Ibid*.

judicial district learned in 2007 that the rate of eligible returns (i.e. the number of returned questionnaires from individuals eligible for the jury roll) for questionnaires sent to on-reserve residents in 2006 (for the 2007 jury roll) was 7.6 percent compared to a rate of 56 percent for off-reserve residents.[135]

143. Upon learning about these dismal rates of return, Kenora district court officials began taking additional steps to increase on-reserve resident representation. During the summer of 2007, Kenora court officials, including a court interpreter and Aboriginal liaison official for Ontario's north west region, travelled to 15 First Nations, meeting with community leaders, discussing issues relating to Aboriginal participation in the jury system and requesting updated Band Lists. In addition, Mr. Justice Stach directed that the number of questionnaires to be sent to the on-reserve population for the 2008 roll be increased substantially. Kenora court officials also took additional steps to encourage on-reserve resident participation in juries, including arranging for advance payment of travel, accommodation, and meals expenses and calling jury panels to appear on Tuesdays, rather than Monday, to enable potential jurors to travel to Kenora on Monday, rather than travel on Friday and stay the entire weekend waiting for the Monday appearance. Although the data maintained by the Provincial Jury Centre suggests that increasing the number of mailings to on-reserve communities has the effect of increasing the number of eligible on-reserve residents on the jury roll,[136] the response rates for eligible on-reserve questionnaires have remained very low – 5.7 percent for the 2008 jury roll,[137] 5.7 percent for 2009, 6.3 percent for 2010 and 6.3 per cent for 2011.[138]

144. There have been similar issues with underrepresentation of First Nations peoples on the Thunder Bay judicial district jury roll. In 2011, there were two separate findings that the jury roll for the Thunder Bay district was unrepresentative – both made following the Court of Appeal's ruling in *Pierre v. McRae*.

145. In the first case, *R. v. Wareham (#1)*, Madam Justice Pierce determined that the 2011 jury panel selection was not representative. The evidence she heard was that: court officials would send a fax and letter to each First Nations Chief requesting an updated band electoral list, followed by a telephone call; after further efforts to obtain the lists, Court Services Division would then wait to see which First Nations provided the information; only two of the 15 First Nations communities in the Thunder Bay judicial district agreed to provide the information; the lists relied on were generally old, some dating back to 2000; and court officials were not aware of the response rates from on-reserve individuals, discussed above at paragraph 142.

146. In the second case, a coroner's inquest into the death of Reggie Bushie, the Coroner Dr. Eden also held that the 2011 jury roll was not representative. He noted that residents of First Nations reserves represented five percent of the population in the Judicial District of Thunder Bay but accounted for only 1.3 percent of the jury roll – a result he described as a "serious deficiency".[139] On the basis of these results and a number of "deficiencies" he identified in the processes followed by local court officials, he concluded that the sheriff's duty of "diligence", set out in the *Nahdee* test, had not been met, and the 2011 jury roll was therefore not representative.[140]

147. In 2012, the *R. v. Wareham (#2)* case, discussed above at paragraph 129, came back before the court, and the accused once again challenged the representativeness of the jury roll – the 2012 roll this time. The court heard more evidence than had been heard in *R. v. Wareham (#1)*, including evidence with respect to additional efforts that had been made and procedures that had been changed to address the problems in

[135] Affidavit of Laura Loohuizen, filed in *R. v. Kokopenace* at paras. 82-83.

[136] For example, when the number of questionnaires sent to on-reserve residents was increased from 600 for compiling the 2008 jury roll to 810 for compiling the 2009 jury roll, the number of eligible on-reserve residents who replied and were able to be added to the jury roll increased from 34 to 64 persons. Correspondingly, when the number of questionnaires sent to on-reserve residents was decreased to 652 in 2010 and 684 in 2011, the number of eligible on-reserve residents added to the jury roll decreased to 41 and 43 persons respectively. See Exhibit C of the Affidavit of Shaun Joy (July 19, 2011) filed in *R. v. Kokopenace*.

[137] Affidavit of Laura Loohuizen, *supra* note 135 at paras. 103-104. See also: Exhibit 54, filed in *R. v. Kokopenace*.

[138] Exhibit C of the Affidavit of Shaun Joy (July 19, 2011) filed in *R. v. Kokopenace*.

[139] *Inquest concerning the death of Reggie Bushie; Ruling by Dr. Eden on motion regarding jury selection*, September 9, 2011, at para. 18.

[140] *Ibid*., at paras. 25-26.

the 2011 roll. Mr. Justice Platana concluded that, as a result of these additional efforts, the sheriff's office had satisfied the requirements of section 6(8) of the *Juries Act*, including that the sheriff exercise due diligence, resourcefulness, ingenuity and perhaps persuasion, rather than passively acquiescing to non-response or chronically ignored requests. As he stated:

> I do accept that, on the facts before me, the 2012 Thunder Bay jury roll was compiled in a manner that was representative of the community to the extent currently available. The facts are sufficient to establish that the sheriff did exercise diligence beyond what was done in the preparation of the 2011 and previous jury panels. Beyond the changes to the formal procedure, resourcefulness and ingenuity is demonstrated by the inclusion of a Native Court Worker to assist in obtaining information. Local elders were contacted for assistance. While *Bushie* describes the sheriff's duty as including "possibly persuasion", I also take into account the necessity for cultural sensitivity. When direct refusals to provide lists have been given by the band chiefs and councils, the leaders and decision-makers of their respective communities, and those offers to meet have not been accepted, I have no evidence before me to determine what other "persuasion" might be effective. Their attempts at including First Nations peoples living on-reserve demonstrate a reasonable effort to create a jury roll that is representative of the community.[141]

148. While these efforts were sufficient to satisfy Mr. Justice Platana that the sheriff's office had satisfied the requirements of section 6(8), the evidence of court officials in *R. v. Waerham (#2)* was that the response rate for eligible on-reserve questionnaires remained very low at 5.6 per cent.[142]

F. EXPERIENCE IN OTHER JURISDICTIONS

149. In accordance with paragraph 4 of the Order-in-Council, I have as part of my review considered the law and practice in other jurisdictions to assess what lessons we can learn from them. Underrepresentation of Aboriginal peoples on juries is by no means exclusively an Ontarian or Canadian issue. Rather, this issue exists in various jurisdictions that rely on juries and that have sizeable Aboriginal populations, including other Canadian provinces, New Zealand, Australia, and the United States. In this section, I discuss the ways individuals are selected for jury rolls in other Canadian provinces, as well as Australia, New Zealand and some American states, and how issues of underrepresentation are dealt with in those jurisdictions.

1. EXPERIENCE IN OTHER CANADIAN PROVINCES

150. The underrepresentation of individuals from First Nations communities on jury rolls is a serious concern in a number of provinces across Canada. As described below, the issue was dealt with in Manitoba's Aboriginal Justice Inquiry, and has also received recent attention from the British Columbia Government. In this section, I discuss the experiences of other provinces with respect to the issue of underrepresentation on jury rolls, as well as measures undertaken to remedy the problem. I will also briefly explain what source lists are used in other provinces to collect the names of prospective jurors.

(A) MANITOBA

151. Manitoba has had extensive experience with the issue of the underrepresentation of First Nations peoples on juries, and appears to be the only other province in Canada to have conducted a major review of this issue.

[141] *R. v. Wareham (#2)*, [2012] O.J. No. 767 at para. 54 (S.C.J.).
[142] *Ibid.*, at para. 23.

152. In April 1988, the Manitoba government created the Public Inquiry into the Administration of Justice and Aboriginal People in response to two incidents: a 17-year delay in bringing a 1971 murder on a First Nation reserve to trial, and the 1988 death of the executive director of a tribal council at the hands of a police officer, who was exonerated the next day. The Report of the Inquiry did not mince words; it opened by stating that "the justice system has failed Manitoba's Aboriginal people on a massive scale."[143] Because the scope of the Inquiry exceeds that of this Independent Review, I will discuss only those parts of the report that addresses the relationship between First Nations in the province and juries.

153. Historically, the jury roll in Manitoba was composed using voting lists. However, members of First Nations and Métis, were denied the vote in Manitoba between 1886 and 1952, and consequently were excluded from potential jury service. While First Nations individuals were granted the right to vote in 1952, their participation on juries did not improve significantly since First Nations officials, unlike mayors, were not required to submit the names of potential jurors to the County Court Judge. After 1971, First Nations officials were required to submit names drawn from their electoral lists.

154. In 1983, the province began using computerized records from the Manitoba Health Services Commission to compose jury lists. The Inquiry found that the use of provincial health records was a preferable source for choosing jurors, because it included First Nations individuals. The Inquiry stated that it was only after 1983 "that Aboriginal people began to be properly represented on the lists of potential jurors".[144] However, the Inquiry identified a number of logistical problems that remained and contributed to ongoing underrepresentation.

155. The Inquiry found that First Nations individuals were excluded at two stages of the jury composition process: the summoning of prospective jurors and the pre-trial jury-selection process. The Inquiry concluded that the summoning procedure works against Aboriginal people in a number of ways: summons are sent by mail, but individuals living on reserve often do not have access to regular mail service; individuals living on reserve are less likely to have telephone service at home, and therefore following up on a summons is difficult; and First Nations individuals living in urban centres are more likely to be renters, and therefore accurate records of their current addresses may not exist. Moreover, exemptions are often granted to First Nations individuals on the basis that the costs of travelling to the court and serving on the jury exceeds their means, and many First Nations individuals cannot speak English or French.[145] At the jury selection stage, the Inquiry found that "it is common practice for some Crown attorneys and defence counsel to exclude Aboriginal jurors through the use of stand-asides and peremptory challenges."[146] The examples they provide are compelling. In the Helen Betty Osborne case in The Pas, the jury had no Aboriginal members, in spite of the fact that it was in an area of Manitoba where Aboriginal people comprise over 50% of the population.[147] All six Aboriginal people called forward were the subjects of peremptory challenges from the defence. Similarly, on one day of the Thompson assizes, 35 of 41 Aboriginal people called to serve on three juries were rejected through peremptory challenges and stand-asides. "In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors, while the Crown rejected nine. Two jurors were rejected twice."[148]

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[143] Public Inquiry Into the Administration of Justice and Aboriginal People, *Report on Aboriginal Justice Inquiry of Manitoba*, Vol. 1 by A.C. Hamilton & C.M. Sinclair. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission <http://www.ajic.mb.ca/volumel/toc.html> at chapter 1.

[144] *Ibid*., at chapter 9.

[145] *Ibid*.

[146] *Ibid*.

[147] *Ibid*.

[148] *Ibid*.

156. The Law Reform Commission of Canada described the importance of peremptory challenges in the following manner:

> the peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.[149]

However, the Inquiry found that this power to exclude potential jurors for 'illogical or irrational' reasons has undesirable effects on the racial make-up of jury panels.[150]

157. To address the exclusion of First Nations individuals at the summons stage, the Inquiry recommended that where the sheriff grants an exemption from jury service (for instance on the basis that the person called cannot speak the language of the trial), that person must be replaced by someone from the same community. It also recommended that summonses be enforced, even where enough people have been found for the jury panel (given the lack of access to regular mail, First Nations individuals who do respond to a summons have often done so well after others with regular access to mail). With respect to the exclusion of First Nations individuals at the jury-selection stage, the Inquiry recommended that: peremptory challenges and stand-asides be eliminated altogether; that jurors be drawn from within 40 kilometers of the community where the trial is to be held; that in the event jurors need to be drawn from elsewhere, they should be selected from a community as similar as possible demographically and culturally to the community where the offence took place; and that the *Juries Act* should be amended to provide translation services for First Nations jurors who do not speak English or French but who are otherwise qualified to serve.[151]

158. It should be noted that, in response to the Supreme Court's decision in *R v. Bain*, Parliament in 1992 amended section 634 of the *Criminal Code* to eliminate the practice of stand-asides by the Crown, thereby remedying the asymmetry in power between the defence's right to peremptorily challenge and the Crown's right to stand-aside potential jurors.[152] Parliament replaced stand-asides with equal endowments of peremptory challenges for the Crown and the defence.[153] But this amendment does not change the underlying ability to discriminate in jury selection processes. Otherwise left unchecked, the amendment merely equalizes the discriminatory power inherent to peremptory challenges.

(B) BRITISH COLUMBIA

159. The British Columbia *Jury Act* gives the sheriff broad discretion in creating the jury roll for the province. Section 2 of the Act establishes the principle that "a person has the right and duty to serve as a juror unless disqualified or exempted under this Act", while section 8 states that "[h]aving regard for the principle in section 2, the sheriff may determine the procedures the sheriff considers appropriate for the selection of jurors."[154] In practice, the sheriff uses provincial voters' lists to select prospective jurors,[155] but there are concerns that the list does not properly capture individuals living in First Nations communities.

160. In 2011, following Ontario judicial decisions such as the Court of Appeal's decision in *Pierre v. McRae*, the British Columbia Civil Liberties Association (BCCLA) began an investigation of the practices followed

[149] Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 54.
[150] *Report on Aboriginal Justice Inquiry of Manitoba, supra* note 143 at chapter 9.
[151] *Ibid*.
[152] *R v. Bain*, [1992] 1 S.C.R. 91.
[153] *Criminal Code*, R.S.C., 1985, c. C-46, s.634 as am. by *An Act to Amend the Criminal Code*, S.C. 1992, c.41, s.2.
[154] *Jury Act*, R.S.B.C. 1996 Chapter 242, ss. 2 and 8.
[155] See *Jury Duty – Our Justice System Depends On It*, online: British Columbia Ministry of Justice <http://www.ag.gov.bc.ca/courts/jury_duty/index.htm>.

by the sheriff's office in British Columbia with respect to First Nations. In June 2011, the BCCLA wrote to British Columbia's Attorney General, stating that, as a result of its investigation, the BCCLA had become concerned that juries in British Columbia might suffer from similar underrepresentation of First Nations peoples on jury rolls. In its letter, the BCCLA stated that it did not appear the First Nations communities were being consistently included on the provincial voters list or directly contacted by Sheriffs' Offices.

161. British Columbia's Attorney General responded to the BCCLA letter in July 2011. In his response, he stated that in order to improve the sheriffs' database, a senior Court Services official had written to all Band leaders in the province requesting their lists of persons residing on reserves. He also stated that the database that British Columbia sheriffs obtain from Elections BC is significantly different from the database that Ontario sheriffs obtain from the municipal assessment rolls in that First Nations persons living on reserves are included to some degree in the British Columbia database. He acknowledged, however, that no one knew the extent to which First Nations individuals chose to be enumerated and the reason the Ministry was taking the extra step to write to First Nations was to ensure that "they were given an opportunity to be included in the database." [156]

(C) NORTHWEST TERRITORIES

162. With its vast size and low population density, the Northwest Territories faces particular challenges in holding jury trials. Jury trials became available in the Northwest Territories in 1955. However, between 1955 and 1968, Aboriginal individuals served on juries in only 27 of the 66 jury trials held in the Northwest Territories, despite forming an overwhelming majority of the Northwest Territories population.[157] Steps were taken during this period to improve the participation of Aboriginal peoples in the jury process. For instance, Mr. Justice Sissons, who was appointed to the Northwest Territories Territorial Court in 1955, committed the court to holding trials in the community where a crime took place and established a circuit court that travelled throughout the territory to hear criminal cases.[158]

163. In 1988, the Northwest Territories *Jury Act* was amended to permit jurors fluent in only one of the Territories' official languages to sit as a juror.[159] There are eleven official languages in the Northwest Territories: Chipewyan, Cree, South Slavey, North Slavey, Gwich'in, Inuvialukutin, Inuinnaqtun, Tlicho, Inuktitut, English, and French.[160] Consequently, under the amended section of the *Jury Act*, a First Nations individual living in the Northwest Territories who speaks only one or several First Nations languages can serve on a jury. To carry these reforms into effect, the Department of Justice in the Northwest Territories established an interpreter training program, consisting of an eight week course, with two weeks spent focusing on jury trials.[161] These interpreters play a number of roles during trials, including assisting the sheriff in assembling jury panels by explaining to people why they have been summoned, and translating evidence, arguments, and closing and opening statements.[162]

164. The jury roll in the Northwest Territories is composed by the sheriff, who obtains the names of residents in the Territories from the Director of Medical Insurance.[163] However, the regulations passed under the *Jury Act* permit the sheriff to use other source lists, including electoral and assessment rolls.[164] The jury list for

[156] Letter from Barry Penner, Q.C., Attorney General for British Columbia to Jason Gratl, British Columbia Civil Liberties Association (July 11, 2011) Re. First Nation Underrepresentation on Jury Rolls.
[157] Mark Israel, "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25 Law and Policy 37 at 42.
[158] Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) 13 Windsor Yearbook of Access to Justice 156 at 161.
[159] *Jury Act*, R.S.N.W.T. 1988 c. 5.
[160] *Official Languages of the Northwest Territories*, online: Northwest Territories Education, Culture and Employment <http://www.ece.gov.nt.ca/pdf_File/Official%20Language/024-Official%20Languages%20Map-web.pdf>.
[161] Christopher Gora, *supra* note 158 at 165-166.
[162] *Ibid*.
[163] *Jury Act, supra* note 159 at c.J-2, s. 8(2).
[164] *Jury Regulations,* NWT Reg (Nu) 034-99, s. 3(1).

each trial is "drawn from within thirty kilometers of the court," and consequently prospective jurors are nearly all from the same community as the accused.[165] The emphasis on involving the community in the criminal justice system was praised by the Manitoba Public Inquiry into the Administration of Justice, which stated:

> This solution is attractive to us, since it seeks to return to the community involved in a direct sense of involvement in, and control and understanding of, the justice system. [...] In aboriginal areas, those people would be able to understand the nuances that might apply to the relationship between victim and accused, or local factors that might escape the attention of non-aboriginal people.[166]

165. While there are significant differences between the Northwest Territories and Ontario, there are also certain similarities: the size and remoteness of the First Nations communities in Ontario's northern judicial districts; their perspectives on justice issues; and the fact that some First Nations individuals still speak only Aboriginal languages. As I discuss in my recommendations below, some of the approaches adopted in the Northwest Territories merit consideration in the Ontario context.

(D) ALBERTA

166. The Alberta *Jury Act* authorizes the sheriff in that province to obtain names for jury rolls using information from lists provided by the municipal property officer, including the list of electors, the assessment rolls, and any other public papers.[167] *The Jury Act* Regulation further specifies that jury selection may be made from any or all of: (a) lists of electors, assessment rolls and other public papers obtained from municipalities; (b) telephone directories; (c) Henderson's Directories for municipalities; and (d) any other source that the sheriff considers appropriate.[168]

167. There appear to have been some concerns expressed at various times as to whether the Alberta jury list is representative of First Nations peoples. In 1991, an Alberta task force examining the criminal justice system and Aboriginal peoples was told that Aboriginal persons were not being summonsed for jury duty. It recommended that Aboriginal peoples be included on jury lists.[169]

(E) OTHER PROVINCES THAT USE HEALTH INSURANCE RECORDS TO COMPILE THE JURY ROLL

168. As I described above in my discussion of the experience of Manitoba, it has, since 1983, relied on computerized records from the Manitoba Health Services Commission to compose jury lists, a practice that Manitoba's Public Inquiry into the Administration of Justice and Aboriginal People described as a preferable source for compiling the jury roll. Saskatchewan, Quebec, New Brunswick, Nova Scotia , Prince Edward Island, Newfoundland and Labrador (and the Northwest Territories, as mentioned above) have adopted this same approach.

169. *Saskatchewan*. Saskatchewan's *Jury Act* empowers the Inspector of Legal Offices to requisition the register maintained for the *Saskatchewan Medical Care Insurance Act* as the source list for jury rolls in the province.[170] This practice appears to have been adopted as a result of a proposal initially made by the Law

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[165] Mark Israel, *supra* note 157 at 48.

[166] Cited in Mary Crnkovich and Lisa Addario, *Inuit Women and the Nunavut Justice System*, (Ottawa: Statistics Canada, Research and Statistics Division, 2000) at 7.

[167] *Jury Act*, RSA 2000, c J-3, s. 7.

[168] *Jury Act Regulation*, Alta Reg. 68/1983.

[169] *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta*, vol. 1 (Main Report) (Alberta: Justice and Solicitor General, March 1991) at 44-45 to 44-46. See also the comments in Mark Israel, *supra* note 157 at 41.

[170] *The Jury Act*, Statutes of Saskatchewan 1998, c. J-4.2, s. 7(1).

Reform Commission of Saskatchewan, which recommended in its report *Proposals for the Reform of the Jury Act*, after canvassing potential sources for the jury pool, that the best available source was the list of beneficiaries under the *Saskatchewan Hospitalization Act*.[171]

170. *Quebec*. The Quebec *Jurors Act* requires the sheriff to collect the names of prospective jurors from the electoral roll, but makes special provision for First Nations people living on-reserve. In particular, the Quebec Act permits the sheriff to gather the names of First Nations people living on-reserve using municipal valuation rolls, Band Lists drawn up in accordance with the *Indian Act*, and the population register of the *Ministère de la Santé et des Services sociaux*.[172]

171. *New Brunswick*. The New Brunswick *Jury Act* empowers the sheriff to collect names from lists of the following: beneficiaries under the *Medical Services Payment Act*, electors under the *Elections Act*, electors under the *Municipal Elections Act*, and registered owners of motor vehicles under the *Motor Vehicle Act*.

172. *Nova Scotia*. The Nova Scotia *Juries Act* empowers the sheriff to collect names for the jury roll from the province's Health and Wellness' Health Insurance list.[173] The issue of representation of First Nations peoples on juries has been given some attention in Nova Scotia. In 1994, the Law Reform Commission of Nova Scotia recommended that educational materials be made available in the Mi'kmaq language to foster greater interest in the jury system among members of that community.[174] The Commission also recommended that the province cease choosing jurors from the voters list and substitute a more comprehensive computerized list such as the medical service insurance list,[175] a recommendation that led to the adoption of that practice by the government. The Royal Commission on the Donald Marshall, Jr. Prosecution in 1989 also dealt with this issue, encouraging further study on the issue of proportional representation of minorities (including Mi'kmaq) on juries, in light of concerns about underrepresentation.[176]

173. *Prince Edward Island*. Under the Prince Edward Island *Jury Act*, the sheriff acquires names for the jury roll by requisitioning from time to time the names of residents in the province registered under the *Health Services Payment Act*.[177]

174. *Newfoundland and Labrador*. The Newfoundland and Labrador *Jury Act* allows the sheriff to refer to multiple source lists to create the jury roll. In particular, the sheriff can refer to the list of electors under the *Elections Act*, 1991, motor vehicle registration records under the *Highway Safety Traffic Act*, and the list of beneficiaries under the *Medical Care Insurance Act*, 1999.[178] Additionally, the regulations passed under that Act permit the sheriff to look to the licensed drivers database, the membership list of a francophone association, the telephone directory, and any other source considered appropriate by the sheriff.[179]

[171] Law Reform Commission of Saskatchewan, *Proposals for the Reform of the Jury Act*, (Saskatchewan: December 1979) at 18-20

[172] *Jurors Act*, RSQ, c J-2, s. 42.

[173] *Juries Regulations*, O.I.C. 2000-356 (June 29, 2000), N.S. Reg. 126/2000; *Juries Act*, SNS 1998, c 16.

[174] Law Reform Commission of Nova Scotia, *Final Report on Juries in Nova Scotia* (Nova Scotia: June 1994) online: <http://www.lawreform.ns.ca/Downloads/Jury_FIN.pdf> at 42.

[175] Law Reform Commission of Nova Scotia, *Juries in Nova Scotia* (Nova Scotia: June 1993) online <http://www.lawreform.ns.ca/Downloads/Jury_DIS.pdf> at 2-3, 5-6, 9-10, 21-24 and 26-28.

[176] *The Royal Commission on the Donald Marshall, Jr, Prosecution* (Halifax: McCurdy's Printing and Typesetting Limited, December, 1989) at 12.

[177] *Jury Act*, R.S.P.E.I. 1998, c. J-5.1, s. 8.

[178] *Jury Act*, 1991, S.N.L. 1991, c. 16, s. 14(1).

[179] *Prospective Jurors Alternate Sources Regulations,* NLR 88/99, s. 2.

2. EXPERIENCE IN OTHER COUNTRIES

(A) AUSTRALIA

175. Aboriginals have historically been underrepresented on juries throughout Australia. In a 1983 report on Aboriginal Customary Law, the Australian Law Reform Commission wrote:

> … the representation of Aborigines on juries has changed little in recent years. In those parts of Australia where Aborigines represent a sizeable proportion of the population, it is still rare for an Aborigine to sit on a jury.[180]

176. More recent publications and law reform commission reports indicate that, while efforts have been made to improve Aboriginal representation on juries in Australia, it remains a live issue in all six states across the country.

177. Each state exercises general legislative powers over matters of criminal law and procedure, including the process of jury trial.[181] At a general level, the process for composing the jury roll is similar in most states: the sheriff randomly selects names from electoral rolls for inclusion on jury rolls. However, the minutiae of the selection process differs across states, resulting in varying degrees of jury representativeness throughout the country.

178. The law reform commissions of three states – New South Wales, Queensland and Western Australia – have conducted extensive and recent examinations of the jury system. The reports of these commissions have included discussions respecting the underrepresentation of Aboriginals on jury rolls and made a number of findings and recommendations, which I mention below.

179. As in Canada, the value of a representative jury is recognized in Australia. As the Law Reform Commission of Western Australia stated in its 2009 report, "representation is generally considered to be the principal concept guiding juror selection."[182] According to the Commission, it is through its representativeness that the criminal justice system derives its legitimacy,[183] and a representative jury is "a body of persons representative of the wider community".[184] But the Commission also made clear that a jury does not have to be proportionately representative of the community at large; rather, it is enough that "all ethnic and social groups in the community should have the *opportunity* to be represented on juries (emphasis in original)."[185]

180. Unlike in the United States or Canada, voting is mandatory in Australia. Consequently, voting lists in that country are more likely than those in Canada or the United States to be comprehensive. There is no evidence that Aboriginals in Australia are registered to vote in lower proportions than those of the descendants of European settlers, since the voting registration system does not record race. However, the Queensland Law Reform Commission, in its 2011 report, suggested that Aboriginals may be underrepresented on that state's electoral roll because of low-levels of education and literacy, health and social conditions, and the general remoteness of indigenous communities and the transient nature of their inhabitants.[186] The Commission recommended that people be asked to register as Aboriginal when they register to vote in order to provide more information on this point.[187] The Commission also found that Aboriginals are more likely

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[180] Australian Law Reform Commission, *Aboriginal Customary Law Research Paper no. 13*. (Canberra: AGPS, 1983) at para. 590.
[181] Michael Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy" (1999) Law and Contemporary Problems 69 at 71.
[182] Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Discussion Paper, Project No. 99* (Perth, Western Australia: Quality Press, 2009) at 14.
[183] *Ibid*.
[184] Law Reform Commission of New South Wales, *Report 117 – Jury Selection* (Sydney: 2008) at 1.21.
[185] Law Reform Commission of Western Australia, *supra* note 182 at 14. Law Reform Commission of New South Wales, *Ibid*.
[186] Queensland Law Reform Commission, *A Review of Jury Selection, Report No. 68* (Queensland: QLRC, February 2011) at 75.
[187] *Ibid*., at xxii.

than non-Aboriginals to live outside of jury districts.[188] In addition, Aboriginals are more difficult to summon because they are more likely to lead transient lifestyles.[189]

181. Even if a summons is issued, a variety of factors mean that Aboriginals are more likely to be disqualified or will otherwise not become a part of the jury panel. For instance, in some states public transport is limited and prospective Aboriginal jurors may be unable to travel to the court for jury selection. Similarly, a lack of available accommodation near the court increases the likelihood that Aboriginals will be unable to serve on a jury. Aboriginals are also more likely to be disqualified on the basis of prior convictions, because, like Aboriginal persons in Canada, they are disproportionately overrepresented in the criminal justice system and in prison.[190] Moreover, they are also more likely to lack the necessary language skills to serve on a jury.[191]

182. The Australian law reform commissions have also identified various cultural factors that may explain Aboriginal underrepresentation. For example, the Law Reform Commission of Western Australia noted that Aboriginal jurors had expressed discomfort about being required to judge people they did not know.[192] Similarly, the Law Reform Commission of New South Wales notes that in the past Aboriginals have asked to be excused from jury service on the basis that sitting in judgment of another may harm their standing with their community.[193] At the jury panel selection stage, the commentator, Mark Israel, notes that there is evidence in New South Wales that some prosecutors have challenged the inclusion of Aboriginal jurors in cases where the defendant was also Aboriginal .[194]

183. Australian law reform commissions have proposed various measures to remedy Aboriginal underrepresentation on jury panels. To address the issue of underrepresentation as a result of prior convictions (given that Aboriginals represent a disproportionate percentage of the prison population in Australia), the Law Reform Commission of New South Wales recommended reducing the number of years that offenders are barred from jury service from ten years for all offences to two to five years, depending on the type of offence.[195] This recommendation was enacted into law by the New South Wales *Jury Amendment Act 2010*, which removed the uniform ten-year disqualification and replaced it with a graduated scheme for the exclusion of people on the basis of criminal history.[196] This proposal was also endorsed by the Queensland Law Reform Commission.[197] With respect to the issue of Aboriginals living outside of the jury district, the Queensland Law Reform Commission recommended that local governments review existing jury districts with a view to including Aboriginal communities, while the Law Commission of New South Wales proposed the adoption of a 'smart electoral roll' that would provide a more flexible tool for including individuals on the local court's jury roll.[198] Finally, the Queensland Law Reform Commission proposed a series of logistical measures aimed at improving Aboriginal underrepresentation, including: making transport arrangements to ensure that Aboriginals can attend court when summoned, making available accommodation near the court for people who cannot travel to the court each day of a trial, creating culturally appropriate educational programs to promote the importance of jury service, conducting more extensive research, and establishing a working group to ensure that any reforms are successful.[199]

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[188] Law Reform Commission of New South Wales, *supra* note 184 at 11.21, 11.69.
[189] Queensland Law Reform Commission, *supra* note 186 at 6.14.
[190] *Ibid*., at 6.57.
[191] Law Reform Commission of Western Australia, *supra* note 182 at 94.
[192] *Ibid*., at 47.
[193] Law Reform Commission of New South Wales, *supra* note 184 at 1.35.
[194] Mark Israel, "Ethnic Bias in Jury Selection in Australia and New Zealand" (1998) International Journal of Sociology 35 at 44.
[195] Law Reform Commission of New South Wales, *supra* note 184 at 3.19-3.23.
[196] Queensland Law Reform Commission, *supra* note 186 at 11.38.
[197] *Ibid*., at 6.148-6.150.
[198] *Ibid*., at 11.86, 11.18-11.19.
[199] *Ibid*., at 11.86.

184. However, the law reform commissions have rejected more radical suggestions for improving representativeness that have also been rejected by Canadian courts. For instance, the Law Reform Commission of New South Wales rejected the use of special panels composed largely (or entirely) of members of the racial or ethnic group of the accused owing to the practical difficulties associated with their establishment, among other things.[200] Similarly, the Law Reform Commission of Western Australia found that allowing a trial judge to order the inclusion of a person of the same race or ethnic group of the accused would not be appropriate, since it would interfere with the principle of random selection.[201] The Queensland Law Reform Commission rejected a similar proposal.[202]

(B) NEW ZEALAND

185. The New Zealand Law Commission conducted an extensive study of the use of criminal jury trials in that country in 2001 and found that the Mäori people in New Zealand, like First Nations in Canada, are underrepresented on juries and overrepresented as defendants in criminal proceedings.[203] The New Zealand Law Commission identified 'representativeness' as one of four necessary features of the jury system,[204] and they provided the following definition: "what is required [for a representative jury] is that all persons who are eligible to serve on juries, including those you are younger or older, or from ethnic minorities, do have an equal *opportunity* to serve (emphasis in original)."[205] In their report, the New Zealand Law Commission recommended a number of measures to make juries generally more representative, including: improving the representativeness of jury rolls (the source of jury lists) through outreach campaigns that encourage young people and minorities to become registered voters; extending judicial district boundaries; considering the question of representativeness in applications for a change of venue where the demographic composition of the jury roll in the venue where the crime is to be tried creates a likelihood of prejudice; and updating guidelines for excusing jurors to allow jurors to defer their service, rather than be excused from it altogether.[206]

186. As in Canada, the history of the introduction of a foreign legal system and the exclusion of the Mäori people from this system has created a sense of alienation. In the New Zealand Law Commission's consultations with Mäori people, many of the same concerns raised by members of First Nations communities in our discussions as part of this Independent Review were raised. As the Commission stated: "it was emphasized to us that many Mäori feel very strongly that juries are not representative of Mäori society, and this underrepresentation contributes to a general feeling of alienation from the criminal justice system."[207]

187. The Commission identified the three main reasons for the underrepresentation of Mäori on juries lists. First, jury lists in New Zealand are drawn from voters lists, but Mäori are far less likely than those of European ancestry to be registered voters. Second, once summoned to the court for jury selection, Mäori are more likely than other citizens to be excused or disqualified. Third, once chosen for the jury panel they are more likely to be challenged by the Crown or by the defence.[208] One study reported that several of the lawyers and judges interviewed believed that prosecutors "tended to weed out Mäori jurors because they were Mäori when there was a Mäori defendant".[209] Various authors have also suggested that Mäori have been excluded from juries because courthouses are predominantly located in the cities, while Mäori mostly live in rural areas, and Mäori are more mobile than other citizens and are therefore less likely to have a permanent address where a summons can be sent.[210]

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[200] Law Reform Commission of New South Wales, *supra* note 184 at 1.51-1.53.
[201] Law Reform Commission of Western Australia, *supra* note 182 at 47.
[202] Queensland Law Reform Commission, *supra* note 186 at 11.106-11.110.
[203] New Zealand Law Commission, *Juries in Criminal Trials, Report 69* (Wellington: NZLC, 2001) online: <http://www.lawcom.govt.nz/> at para. 165.
[204] The others being competence, independence and impartiality.
[205] New Zealand Law Commission, *supra* note 203 at para. 135.
[206] *Ibid.*, at paras. 136-156.
[207] *Ibid.*, at para. 165.
[208] *Ibid.*, at para. 166.
[209] Mark Israel, *supra* note 194 at 40.
[210] *Ibid.*, at 39.

188. The Commission's study considered two solutions to Mäori underrepresentation on juries: using source lists other than the electoral roll to select potential jurors, and ensuring that the proportion of Mäori selected for jury lists is the same as the proportion in the jury district's broader population. Ultimately, the Commission rejected both of these solutions.[211] Using source lists other than the electoral roll would be unduly cumbersome and expensive, and instead, greater efforts should be made to encourage more Mäori to register to vote. Tailoring the number of Mäori selected for jury lists to the number living in the jury district was similarly unacceptable since it would run counter to the principle of ensuring a representative jury. The Commission stated that "once an exception is made for one group there is no reason in principle why it should not be made for all other ethnic minorities and any other group."[212] In addition, the Commission found that practical difficulties such as securing adequate childcare during jury service imposed a particular burden on Mäori individuals, and that making childcare allowances available would help to remedy this problem.[213]

(C) UNITED STATES

189. There are fifty states in the United States, each with its own court system and jury selection process, as well as a federal court system with its own jury selection process. For this Report, I will deal only with two American states: Alaska because of its sizable Aboriginal population; and New York because of the particular steps it has taken to deal with the underrepresentation of minorities on its juries. At the federal court level, the *Jury Selection and Service Act* stipulates that names for the jury source list are to be drawn from voter registration lists, lists of actual voters, and other available sources where necessary.[214] Aboriginal people who retained their tribal membership were formally excluded from federal juries until 1924, when Congress declared them citizens.[215]

(i) Alaska

190. Alaska's Aboriginal population represents approximately 16 per cent of that state's overall population, but like many jurisdictions in Canada, the Aboriginal population is "overrepresented within Alaska prisons".[216] Much of Alaska's Aboriginal population lives in a series of about 200 small villages (referred to collectively as 'the Bush') outside of Alaska's main population centers of Juneau, Anchorage, and Fairbanks.[217] These cities are also home to the state's courts. Needless to say, the conditions and lifestyles in the Bush differ considerably from those in Alaska's major cities.

191. The standard practice in the state for holding trials prior to 1971 was to transport defendants to one of these cities for trial, and to select a jury from residents living within a fifteen mile radius of the trial site.[218] However, since the majority of the state's Aboriginal population lives in rural areas, this mode of selection often resulted in Aboriginals facing an all-white jury whose members were utterly unfamiliar with lifestyles and conditions in rural communities.[219]

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[211] New Zealand Law Commission, *supra* note 203 at paras. 168-174.
[212] *Ibid*., at para. 173.
[213] *Ibid*., at para. 496.
[214] Judge Nancy Gertner, "12 Angry Men (And Women) in Federal Court" (2007) 82 Chicago-Kent L.R. 613 at 617; *Jury Selection and Service Act of 1968*, 28 U.S.C. § 1861.
[215] Albert Alschuler and Andrew Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 The University of Chicago L.R. 867 at 884.
[216] Rachel King, "Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska" (1998) 77 *Oregon L.R.* 1 at 2.
[217] Jeff May, "Alvarado Revisited: A missing Element in Alaska's Quest for Provide Impartial Juries for Rural Alaskans" (2011) 28 Alaska L.R. 246 at 246.
[218] *Ibid*., at 247.
[219] *Ibid*., at 255.

192. Recognizing these and other difficulties that arise where Aboriginals are tried before a jury composed entirely of non-Aboriginals, the Alaska Supreme Court in *Alvarado v. State* declared the practice of drawing jurors from within a fifteen mile radius of the trial unconstitutional.[220] In particular, the Court found that this practice violated an accused's Sixth Amendment right to be tried by a jury drawn "from a pool representing a fair cross-section of the community".[221] In *Alvarado*, the defendant was accused of rape in the community of Chignik, Alaska. He was arrested in Chignik and transported approximately 463 miles to Anchorage for trial. The population of Chignik was at the time 95 percent Aboriginal, while only 3.5 percent of Anchorage's population was Aboriginal.[222] Pursuant to the rules governing the selection of juries in force at the time, the jury was drawn from within fifteen miles of the site of the trial, and consequently, not a single Aboriginal person appeared on Alvarado's jury panel, let alone the petit jury.[223] Alvarado was found guilty, but he successfully challenged the composition of his jury panel in an appeal before the Alaska Supreme Court by arguing that the jury selection process "precluded residents from Chignik and virtually all Native villages within the district, thus violating his constitutional right to an impartial jury".[224] In finding that the this policy for selecting jurors was unconstitutional, the Alaska Supreme Court wrote that substituting members of one community (in this case Chignik) with those from another (Anchorage) substantially impairs "the democratic ideal inherent in the notion of an impartial jury as an institution representing a fair cross section of the community".[225] Instead, the community that must be represented on the jury panel is the community where the crime is alleged to have taken place.

193. In response to the Alaska Supreme Court's decision in *Alvarado*, the state legislature adopted Alaska Criminal Procedure Rule 18.[226] Rule 18 introduces a number of steps to help increase Aboriginal representation on juries in Alaska. First, it increases the number of trials sites outside of the state's major urban centers and requires that jurors be called from within a fifty-mile radius of each trial site. Second, it gives the trial judge the discretion to limit the number of miles from the courthouse from which prospective jurors are chosen; however the accused is given a corresponding right to have jurors called from the entire fifty mile radius if the first jury pool "fails to fairly represent a cross-section of the community".[227] Third, the defendant is given the right to move, within ten days of entering a plea, for the trial to be relocated from the presumptive trial site to an alternative trial site within the venue district that is nearest to the site where the crime occurred.[228] Fourth, if the fifty mile radius rule is unlikely to result in a jury that is representative of a fair cross-section of society, the accused or the court can request a change in the jury selection area.[229] In practice, this latter rule may be carried out in three ways: the trial venue may be relocated to a community that is more representative; the court may draw prospective jurors from beyond the fifty mile radius; or the court may organize the trial in a community where no trial site exists but which is more representative.[230]

194. Although the implementation of Rule 18 has made important steps towards improving Aboriginal representation on juries in Alaska, several commentators have identified remaining difficulties. For instance, certain rural communities are excluded because they do not fall within the fifty mile radius. Moreover, Rule 18 imposes the onus on defendants to request a change of venue within ten days; however they are often ignorant of this right.[231]

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[220] *Alvarado v. State of Alaska*, 486 P.2d 891 (1971).

[221] Devon Knowles, "From Chicken to Chignik: The Seach for Jury Impartiality in Rural Alaska Native Communities" (2005) 37 *Columbia Human Rights L.R.* 235 at 249; *Alvarado v. State*, 486 P.2d 891 (1971).

[222] Jeff May, *supra* note 217 at 260.

[223] *Ibid*., at 261.

[224] *Ibid*.

[225] *Ibid*., at 262.

[226] "Rule 18. Venue: Place for Trial," *2011-2012 Alaska Rules of Criminal Procedure*, online: Alaska Court System <http://courts.alaska.gov/crpro.htm#18>.

[227] Devon Knowles, *supra* note 221 at 250.

[228] Jeff May, *supra* note 217 at 266.

[229] *Ibid*.

[230] *Ibid*.

[231] *Ibid*., at 249.

(ii) New York

195. New York uses a multiple source list approach to create its jury roll. The names of prospective jurors are drawn from the following five lists: registered voters, the holders of drivers' licenses or other identification issued by the Division of Motor Vehicles, state income tax filers, recipients of family assistance, and recipients of unemployment insurance.[232] The state updates these lists annually and has eliminated all automatic exemptions for jury service. At $40 per day, the state pays one of the highest juror *per diems* in the United States. New Yorkers can also volunteer for jury duty, and after jury questionnaires have been sent out, two-follow ups are immediately sent to non-responders.

196. New York has taken a number of steps in response to biases against minorities in the state's court system. In 1988, the Chief Judge of New York created the Judicial Commission on Minorities, which exists to this day, as a body to study this problem and make recommendations to improve minority interactions with the court system. In a five-volume report issued in 1991, the Commission concluded that minorities are significantly underrepresent*ed on many juries in the court system.*[233] The Commission found that all-white juries in New York were a regular occurrence and minorities charged with an offence were likely to face juries where their peers are not represented.[234] Moreover, the Commission's report noted that there was evidence of peremptory challenges being used to exclude minorities from jury panels in trials where the defendant is also a member of a minority group.[235]

197. To address these shortcomings, the Commission made a number of recommendations, including expanding the number of sources from which prospective jurors are selected for the jury source list. In addition, the Commission recommended that measures be put in place to allow jurors to be "on call" for a trial.[236] This recommendation, which has been implemented, means that persons may be on call for a one-day trial for several days, and if they are not called, but were available, their jury duty is considered complete.[237] The Commission's report also recommended strict judicial scrutiny over peremptory challenges to ensure that prospective minority jurors are not improperly excluded and that jury questionnaires record race in order to provide more information for further study.

198. As a result of the U.S. Supreme Court decision in *Batson v. Kentucky*, the U.S. has constitutional limits on the use of peremptory challenges, banning their use in a racially discriminatory manner.[238] Subsequent cases have expanded this prohibition, widening the group of persons subject to the rule to include the defence counsel and lawyers in civil cases, and widening the group of prohibitions to include challenges based on sex, while some lower courts have added religion to the list.[239]

199. New York State has developed a line of jurisprudence under the *Batson* rule that appears to be broader than the rest of the country's application of those precedents. In its 2008 decision in *People v. Luciano*, the New York Court of Appeals noted that courts should forbid peremptory challenges based on "race, gender, or any other status that implicates equal protection concerns".[240] In one recent case, people with a hunting license were found to satisfy this test, and a mistrial was declared because the defence counsel peremptorily challenged all potential jurors with a hunting license.[241]

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[232] Paula Hannaford-Agor, "Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded" (2011) 59 Drake L.R. 761 at 780-781.
[233] Report of the New York State Judicial Commission on Minorities, (1991) 19 Fordham Urban L.J. 181 at 242.
[234] *Ibid*., at 237.
[235] *Ibid*., at 238.
[236] *Ibid*., at 244.
[237] *General Information Questions and Answers*, online: New York State Unified Court System <http://www.nyjuror.gov/juryQandA.shtml>.
[238] *Batson v. Kentucky,* 476 U.S. 79 (1986).
[239] Michael C. Dorf, "Are Hunters a Constitutionally-Protected Group? A New York Judge Says Yes" *FindLaw* (9 September 2010), online: <http://writ.lp.findlaw.com/dorf/20100909.html>.
[240] *People v. Luciano*, 1 No. 78 (N.Y. 2008).
[241] Michael C. Dorf, *supra* note 239.

200. Finally, in New York State, it is possible to volunteer for jury duty. The list of volunteers is used to supplement the five source lists that counties use to compile their jury rolls. Judge Dwyer of the New York Rensselaer County Court has gone so far as to mail "coupons" to residents, urging individuals to volunteer their names for the master jury list by filling out the form and mailing it back. One thousand residents responded to this initiative in 1993, and several hundred to a similar initiative in 1984.[242] Accepting volunteers seems to be a useful way to supplement the master source list with names of residents who do not appear on the other lists used.

(iii) Sending Jury Roll Questionnaires to Areas with Significant Minority Populations

201. In 2006, following a 2005 study by U.S. District Judge Nancy Gertner, the U.S. Dictrict Court of Massachusetts revised its jury plan along the following lines: "a jury summons returned as undeliverable from any of the court's three geographic divisions will spur the court to send another summons to another resident in the same zip code."[243] Also, to keep lists more up to date and to try to negate the effects of a more transient renter population, the jury roll derived from postal addresses will be updated every six months.[244]

202. Based on this initiative, the U.S. District Court of Kansas amended its jury plan in 2007 to include a "supplemental draw" in which the response to an undeliverable summons will be sending of a new summons to someone in the same zip code.[245] This initiative not only includes undeliverable summonses, but also nonresponsive ones, an expansion on the Massachusetts initiative.

203. Currently, an ad hoc committee of Eastern Michigan judges, appointed by Chief Judge Gerald Rosen and co-chaired by Judge Victoria Roberts, is considering reforms to the jury selection system in the U.S. District Court of Eastern Michigan along similar lines of those of Massachusetts and Kansas, outlined above.[246]

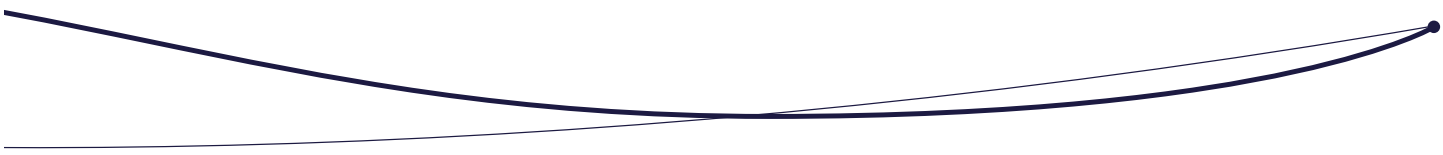
[242] Stephanie Domitrovich, "Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury" (1994), 33 Duquesne L.R. 39 at 97.

[243] "Courts Try to Maximize Jury Diversity" *The Third Branch* (July 2007), online: <http://www.uscourts.gov/News/TheThirdBranch/07-07-01/Courts_Try_to_Maximize_Jury_Diversity.aspx>

[244] *Ibid*.

[245] *Ibid*.

[246] "Why so few black jurors?" *The Detroit Free Press* (3 June 2012), online: <http://www.freep.com/article/20120603/OPINION01/206030445/Editorial-Why-so-few-black-jurors->.



PART IV
THE JURY SYSTEM AND FIRST NATIONS: THE FUTURE

(A) FIRST NATIONS PEOPLES' PERSPECTIVES ON THE JUSTICE SYSTEM CHILL THEIR DESIRE TO SERVE ON ONTARIO JURIES

209. In the opinion of First Nations representatives we met, the most significant systemic barrier to the participation of First Nations peoples in the jury system in Ontario is the negative role the criminal justice system has played in their lives, culture, values, and laws throughout history. This became very apparent in discussions with First Nations leaders, Elders, and others during the engagement sessions. They uniformly expressed the position that, until significant and substantive changes are made to the criminal justice system, the issue of jury participation will not improve.

(i) Cultural Barriers

210. One of the biggest challenges expressed by many First Nations leaders and people is with respect to the conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution, and the values and laws that underpin the Canadian justice system. The objective of the traditional First Nations' approach to justice is to re-attain harmony, balance, and healing with respect to a particular offence, rather than seeking retribution and punishment. First Nations observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.

211. Unfortunately, the criminal justice system represents deep-rooted pain and oppression for many First Nations peoples. The system is perceived not only as a tool to subjugate traditional approaches to conflict resolution in favour of assimilation into the mainstream society, but also as a mechanism by which a myriad of historical wrongs have been perpetrated upon First Nations. Today, First Nations peoples see themselves either as spectators to or victims of the justice system, whereas historically they were direct participants in the resolution of conflict within their own communities. To be asked to participate in Canada's justice system is seen by many First Nations people as contributing to their own oppression and, therefore, repugnant. These sentiments are not surprising, as many experts and authors have recognized the failure of the justice system for First Nations. For example, the Royal Commission on Aboriginal People observed:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada - First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.[247]

212. That being said, however, a number of the First Nations people with whom I met expressed a willingness and desire to work towards a reconciliatory model of justice that respects and incorporates First Nations traditional values and laws as a matter of self-governance within Canada's justice system. I will discuss this desire in more detail later in the Report.

213. Another core traditional First Nations value that often prevents many First Nations people from participating on juries for criminal trials relates to the cultural teaching that a person is not to sit in judgment of the actions of another or to direct a person's actions. Rather than judge an offence committed by an individual and determine his or her fate, the traditional Aboriginal justice process was aimed at restoring the offender and the victim to a place of harmony, peace, healing, and reconciliation. Because criminal trials require the jury to make a finding of guilt or innocence, which potentially affects a person's future in a negative way, many First Nations people feel unwilling to participate in that process. It is noteworthy

[247] Royal Commission on Aboriginal People, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: RCAP, 1996) at page 309.

that many First Nations people expressed an interest in participating in coroner's inquests, viewing the role of the coroner's jury, which does not make findings of guilt and which recommends changes to a system to prevent similar tragedies, as more aligned with their cultural understandings and ideologies.

(ii) Systemic Discrimination

214. First Nations people often spoke of the systemic discrimination that either they or their families have experienced within the justice system as it related to criminal justice or child welfare. Negative experiences of the criminal justice system, along with historic limitations on the rights of First Nations, have created negative perspectives and an intergenerational mistrust of the criminal justice system. Such perceptions, by implication, extend to participation in the jury process. First Nations people generally view the criminal justice system as working against them, rather than for them. It seems counterintuitive to them to participate in it.

215. I heard numerous tragic stories of First Nations individuals' experiences with the justice system at various levels, and what they clearly revealed were pervasive systemic problems with the way in which justice is delivered, and is seen to be delivered, to First Nations individuals. Many persons accused of crimes plead guilty to their offences, rather than electing trial, in order to have their charge resolved quickly but without appreciating the consequences of their decision. In fact, many First Nations individuals explained that they have never known a friend or family member who, when charged, proceeded to trial. Many of these accused persons believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members. A question was raised about whether the so-called *Gladue* reports were being properly prepared, or if they were even prepared at all for First Nations offenders. Also mentioned was the fact that provincial court judges attend remote First Nations communities only once every 60 to 90 days, resulting in long delays. Lastly, remands were mentioned in the context that they are a common occurrence and many cannot afford to travel to larger communities where the nearest Superior Court of Justice is located.

216. I also heard about the need for court workers in the communities to assist with the court process, and the absence of translation services afforded to First Nations people who do not speak English, leading to fundamental misunderstandings of the criminal justice process and, consequently, a guilty plea or a conviction. More disturbing were the anecdotes relayed to me regarding inhumane treatment afforded to First Nations people in jail. For example, I was told of a First Nations accused person being released from a Kenora jail without footwear or socks in the winter months. I was also told about the general ill-treatment and lack of dignity afforded to First Nations people in jail by the guards, and the lack of support and adequate probation services for offenders upon release from jail to facilitate their integration back into the community, which often contributes to re-offending.

217. Because my review was not a formal witness hearing inquiry, I did not ascertain the truth of these allegations. Quite frankly, that is not relevant. Even if they are only perceptions, they are instructive, because to First Nations people those perceptions inform their opinion about the justice system and that is the relevant and important consideration.

218. According to First Nations people with whom I spoke, there is a real fear that the passage of the *Safe Streets and Communities Act*, recently enacted legislation that among other things imposes mandatory minimum sentences, eliminates conditional sentences, and extends the time before which applications for pardon can be made, will perpetuate the systemic discrimination in the justice system and increase the rate of incarcerated First Nations people, many of whom would not otherwise be incarcerated, such as first time and non-violent offenders.[248] Many First Nations people believe this Act will reduce funding for crime prevention, police enforcement, and victim and rehabilitation programs – all core justice-related services that First Nations communities urgently need.

[248] *Safe Streets and Communities Act*, SC 2012, c. 1.

219. Justice challenges in northern First Nations communities are distinct and more drastic than appears to be the case in central and southern First Nations communities. The First Nations people I met in northern communities described a systemic lack of access to adequate legal services to defend charges, a deficiency that not only compromises their legal rights but also compounds their aversion to participate in the jury system. As mentioned above, the remote locations of First Nations require duty counsel and judges to fly into communities in varying frequency – typically every 60 to 90 days for one to two day periods – and limit access to their legal counsel. These circumstances pose challenges that compromise a First Nation accused's ability to properly defend himself or herself.

220. The lack of adequate infrastructure available to house court proceedings poses another challenge that compromises the delivery of justice in the North. It was explained that First Nations individuals in certain regions must attend court to address their charges in make-shift court rooms temporarily housed in arenas or dilapidated community halls. These venues do not provide adequate space for private interview rooms, and create an environment that lacks the decorum, respect, and formality ordinarily required for a court of law. It is understandable that First Nations people are reluctant to participate in the justice system, and particularly on juries, when their interactions with the system are anything but positive, respectful, or fair.

221. Since at least 1999, the Supreme Court of Canada has repeatedly recognized the urgency of measures required to address the crisis the criminal justice system presents to First Nations peoples. In *R. v. Gladue*, after recounting the numerous reports and studies on the Aboriginal justice issues, the Court stated:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.[249]

222. Most recently, the Supreme Court had an opportunity to assess the impact of its earlier decision in *Gladue*, and the hope for changes to the criminal justice system that would address systemic issues affecting First Nations peoples. This assessment was not positive:

> This cautious optimism has not been borne out. In fact, statistics indicate that the over-representation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent… From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent… As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they accounted for 17 percent of federal admissions in 2005… As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?"[250]

223. Despite this grim backdrop, I engaged in a number of positive discussions with First Nations leaders and community members regarding initiatives First Nations had taken to assert leadership over various aspects of the justice system in their respective communities. First Nations leaders in various communities recalled a time when the Province had funded a restorative justice program. As I understand it, this program allowed First Nations to develop a cultural approach to justice through the organization of justice committees that began to integrate First Nations principles into the delivery of justice. In particular, in Sandy Lake First Nation, I heard about the consultative role of Elders in the sentencing of First Nations offenders,

[249] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64.

[250] *R. v. Ipeelee*, 2012 SCC 13 at para. 62. Citations embedded in the quotation have been omitted.

originally developed through the restorative justice program. This practice has been admirably accepted by the local judiciary, and has continued, with Elders volunteering in the face of funding cuts to a program they deemed too important to end. I was advised that Elder advisors were also used in the Attawapiskat First Nation. These are the kind of steps that are helpful in moving towards the integration of First Nations principles and values into the justice system.

(iii) Education

224. First Nations people lack knowledge and awareness of the justice system generally, and the jury system, in particular. It was understandably expressed that most First Nations individuals will refrain from participating in a process about which they know nothing. Many First Nations people were unaware that the same jury roll was used to select juries for both trials and coroner's inquests. Therefore, most leaders identified the need for a focused and sustained education strategy for First Nations communities with respect to the role of juries in the justice system and the process by which jury rolls and jury panels are created, as well as the rights of individuals accused of offences and the rights of victims.

225. In 2010, the Ministry of the Attorney General, through the Court Services Division, partnered with the Grand Council of Treaty #3 to deliver "Community Jury Awareness Forums" to fifteen Treaty #3 First Nations located in the Kenora Judicial District. The forums focused on providing outreach and education regarding the jury process. The Grand Council of Treaty #3 expressed an interest in continuing to deliver these information forums and to work with the Ministry of the Attorney General to share information and develop jury lists to address the underrepresentation of First Nations peoples on the jury roll.

226. A similar partnership among the Ministry of the Attorney General, Court Services Division and the Union of Ontario Indians was created in 2009 and 2010. Together, they hosted three Jury Information Forums for the Anishinabek First Nations, which addressed the lack of First Nations candidates on the jury rolls, ways to improve relations, cooperation and trust between Anishinabek First Nations and the Ministry of the Attorney General and Court Services, and how to increase the representation of First Nations peoples in the justice system generally. These Jury Forums appear to have many educational benefits, and the First Nations partners expressed an interest in enhancing and continuing with the Jury Forums.

227. It was also mentioned by many people that government officials, Court Services staff, and police officers who work with First Nations ought to be educated with respect to the circumstances and issues that First Nations people face on a daily basis. In addition to cultural awareness training, it was suggested that all Court Services staff who are involved with ensuring First Nations peoples are represented on the jury roll ought to be trained to undertake their duties in the most effective way possible. It was thought that a better understanding of First Nations peoples would lead to better outcomes all around.

228. Further, education with respect to the justice system in general, and the jury system in particular, needs to take into account the relative youth of the First Nations population in Ontario. As of the 2006 Census, almost half of First Nations people in Ontario were below the age of 24, and almost 30 percent were 14 or younger. In comparison, just 18 percent of Ontarians were 14 or younger, and only approximately 32 percent of Ontarians were 24 or younger.[251] The median age for the First Nations population in Ontario is 27.9 years, whereas the median age for the province as a whole is 38.7 years.[252]

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[251] *Population by age groups, sex, and aboriginal identity groups*, online: Statistics Canada <http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=2&Data=Change&Sex=1&Abor=3&StartRec=1&Sort=2&Display=Page>. 2011 Census statistics are not yet available.

[252] *Aboriginal identity population by age groups, median age and sex*, online: Statistics Canada <http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=10&StartRec=1&Sort=2&Display=Page>.

(iv) Self-Government

229. First Nations leaders resoundingly and assertively expressed the desire to assume more control of community justice matters as an element of their inherent right to self-government, and, at the very least, to be involved in developing solutions to the jury representation issue. Having been introduced to community-based restorative justice initiatives in previous years, First Nations experienced the benefits to their communities that came from the development of a culturally appropriate approach to justice. However, these programs were discontinued owing to funding cuts, and therefore will require financial resources and capacity to be resumed. First Nations leaders were unequivocal that re-introducing restorative justice programs would have multiple benefits at the community level. Such benefits include the delivery of justice in a culturally relevant manner, greater understanding of justice at the community level, increased community involvement in the implementation of justice and, finally, an opportunity to educate people about the justice system and their responsibility to become engaged on the juries when called upon to do so.

(v) Policing

230. The issue of local police services arose in many discussions throughout the engagement process. It became very clear that inadequate police services, and associated funding, contribute to negative perceptions of the criminal justice system. Many First Nations were very concerned about the limited and under-resourced police services and the lack of sufficient training for them. Some First Nations leaders expressed frustration regarding the lack of enforcement of First Nation by-laws.

(B) CURRENT PRACTICES FOR COLLECTION OF NAMES AND CONTACT INFORMATION OF FIRST NATIONS PEOPLE ON RESERVE ARE INADEQUATE

231. The majority of First Nations Chiefs and Councillors I spoke to throughout the engagement process were concerned about preserving the confidentiality of band membership lists. The leaders' prevailing concern relates to their obligation to protect the privacy of their citizens. Many took the position that they were obliged to obtain the consent of their citizens before they could disclose personal information such as names, dates of birth, and addresses. Moreover, many Chiefs felt strongly that education about the jury system was a pre-requisite to the disclosure of names. They also felt it was unfair to subject their people to what they regard as a completely foreign process.

232. Chiefs also expressed confusion relating to the position taken by Aboriginal Affairs and Northern Development Canada (AANDC) (formerly Indian and Northern Affairs Canada (INAC)) regarding the disclosure of membership lists. At one point in time, INAC was advising First Nations governments to refrain from disclosing any information taken from the Indian Registry System. Recently, AANDC appears to have changed its position, choosing instead to leave the decision to disclose Band Lists to the discretion of individual First Nations.

233. Some First Nations leaders indicated that the lists sought by Court Services officials would not provide the information they were seeking. The band membership lists that are typically requested by Court Services contain the names of all citizens of that First Nation, regardless of whether they live on or off the reserve. Typically, there is no indication of the location of residency for each member. In some instances, the Court Services Division has requested disclosure of the First Nation's "Electoral" or "Voters" list. I was advised that electoral lists also do not contain the addresses of First Nations citizens. Therefore, there is no list possessed by First Nations that contains the information required by the Court Services Division for the purposes of the jury roll. Specifically, we did not learn of a First Nation possessing a "Residency" list that contains the names and addresses of First Nation citizens resident on the reserve.

234. While a residency list would be ideal for the purposes of the Ontario jury roll, it may not be practical. First Nations have stated that they would have to devote time and resources to assemble such a list. They would require financial capacity to gather and maintain appropriate, accurate and current records, including addresses of all their citizens. Some First Nations I met expressed a willingness to do this if they received funding to do so.

235. Many other First Nations leaders and individuals suggested that the participation of First Nations peoples on juries should be voluntary, particularly considering the social and economic pressures already on their communities. They expressed the view that First Nations' administrators are best positioned to explore the interest and eligibility of citizens, and accordingly, could be tasked with maintaining a First Nations jury list. They were of the opinion that First Nations would support an option whereby they would enter into an agreement with Ontario to train First Nations administrators to create and maintain lists of names of willing First Nations people for the purposes of the jury roll. From this First Nations jury roll, it was suggested that the Provincial Jury Centre could then randomly draw the names required for the distribution of questionnaires. It was thought that such an approach would be appropriate to address the representation of First Nations' reserve residents on the jury roll. In addition, I received a very practical suggestion that a First Nations person be staffed in each judicial district to work with First Nations to obtain the information required for the purposes of the jury roll.

236. It has become obvious that the process to obtain the names and addresses of First Nations people on reserve must be clear and consistent throughout all judicial districts wherein First Nations communities are situated. As suggested by a participant in the engagement process, clear guidelines in this respect should be provided to all parties charged with the implementation of section 6(8) of the *Juries Act*.

(C) JURY QUESTIONNAIRES POSE PROBLEMS AND CONCERNS THAT DETER FIRST NATIONS RESPONSES

237. Many First Nations Chiefs, Councillors, and others raised issues regarding the substance of the jury questionnaire forms. First, the statement of penalty for non-response on the form provides "[i]f you fail to return the form without reasonable excuse within five (5) days of receiving it, or knowingly give false information on the form, you are committing an offence. If convicted of this offence, you may be fined up to $5000.00, or imprisoned up to six (6) months, or both." First Nations view both the penalty for non-response and the time limit for response as unreasonable, and more importantly, as imposing jury duty through intimidation and threat. It was often expressed that soliciting participation in the jury system by threat of fine and/or imprisonment had the reverse effect and was a strong disincentive to participate. Moreover, we are unaware of any case where an individual was fined or imprisoned or even charged with an offence for failing to respond to a jury questionnaire.

238. The second feature of the jury questionnaire to which First Nations people took considerable exception was the question regarding Canadian citizenship. While it is recognized that being a Canadian citizen is an eligibility requirement to serve as a juror, many First Nations believe very strongly, and are proud of the fact that, they are First Nations citizens. As a result, many First Nations persons who respond to the jury questionnaire answer in the negative, or would answer in the negative, to the Canadian citizenship question. This citizenship issue automatically disqualifies them from having their names entered on the jury roll. It was frequently suggested that if there were an alternative question asking if the respondent was a First Nation citizen or member, they would answer in the affirmative, and therefore not be disqualified from jury service.

239. Third, many First Nations leaders stated that Chiefs and Councillors ought to be included on the list of occupations that are exempted from jury service. It was stated that elected officials do not have the time or ability to be away from their communities and ought to be afforded the same exemption as other elected officials throughout Canada.

240. Fourth, I heard repeatedly that language poses a considerable obstacle. Requiring fluency in English or French as an eligibility requirement for jury service is problematic for many whose spoken language is their First Nation language. I spoke with many First Nations people who stated that if Ontario seeks their participation on juries, it ought to accommodate people who speak First Nations languages by equipping juries with translation services, if necessary. Moreover, the lack of translation of jury questionnaires and accompanying instructions pose challenges to First Nations people in completing the jury questionnaire forms.

241. Lastly, many First Nations participants in the engagement process expressed a lack of understanding of the jury selection process and role of juries, which in turn served as a barrier to responding to jury questionnaires. It was noted that confusion and misunderstandings often arise when a person is called for jury selection but not chosen for jury service, with no follow-up communication from the Court Services Division. It is likely that negative messages are passed to other people in the community, which potentially has an adverse impact on their future interest in responding to jury questionnaires.

(D) PRACTICAL BARRIERS TO JURY PARTICIPATION

242. In addition to all of the aforementioned obstacles, there exist some very real logistical barriers that First Nations peoples, particularly in northwestern Ontario, must overcome to participate on juries. Transportation from reserve communities to the urban centres is a significant challenge in a number of ways. Travel to urban centres often requires multiple modes of transportation that can take up to several days. The cost for airfare far exceeds what people can afford out-of-pocket. While the Court Services Division in the Kenora judicial district pre-arranges travel, accommodation and meal allowances for potential First Nations jurors, my understanding is that this service is not consistently offered in other judicial districts.

First Nations leaders expressed the opinion that all expenses related to the jury selection process or jury service must therefore be paid prior to travel to urban centres because of lack of resources and available credit.

243. First Nations people also noted that accommodations and meal allowances are not adequate. It was reported that hotels were substandard and meal stipends did not allow for healthy meal options. Concerns were also raised with respect to lack of translation services for people who travel to the urban centre where their dominant language is a First Nation language. Because the jury selection process and jury services require First Nations people to be away from their communities for several days, it was noted that childcare and Elder care expenses ought to be included as a necessary expense, or preferably, children and Elders ought to accompany the potential juror on an expense-paid basis. Moreover, for those potential jurors who are employed, First Nations people felt strongly that income supplements should be available. The First Nations people, with whom I spoke who had experienced jury service, expressed the need for community-based supports, such as assistance with process logistics, as well as services for psychological impacts that may arise following jury service.

244. Finally, First Nations people identified that the existence of criminal records, and lack of awareness of pardon procedures, present a significant bar to jury service. They explained that some First Nations people have old criminal records, many for minor offences, that excuse them from being eligible for jury service. However, owing to the lack of information and costs associated with pardon procedures, most do not expunge their criminal record, choosing to live with it instead.

(E) CORONER'S INQUESTS

245. The importance of coroner's inquests was emphasized by the families involved in coroner's inquests and by leaders and other people I met. Many First Nations people are dying while in state care, and a fear was expressed that the number of deaths will rise, simply by the excessive number of First Nations people in penal institutions and the child welfare system. It was explained to me that First Nations people understand, better than non-First Nations people, the systemic and historic issues that are engrained in the justice system, which often come into play in these tragedies. Therefore, ensuring the representation of First Nations peoples on coroner's juries is viewed to be integral to the proper resolution and prevention of future tragedies that involve First Nations peoples.

246. Aboriginal Legal Services of Toronto hosted a Families Forum – a gathering of family members who had been or were involved in coroner's inquests to examine the circumstances of a death while in state care. The main concerns expressed by the participants related to the composition of the juries and their lack of representativeness of any First Nations peoples, and the delays associated with the inquest. Families have been waiting for as many as five years to move forward with the inquests. Admittedly, much of this delay is associated with the lack of resolution of the issue of underrepresentation of First Nations peoples on coroner's juries. While this issue is being addressed in the courts, coroner's inquests are placed into abeyance, and the families are prevented from obtaining answers and the necessary closure in a timely manner.

247. Christa Big Canoe, Legal Advocacy Director at ALST, emphatically expressed this point: "The only thing these people ask for is fairness, not special treatment". That should be an attainable goal for everyone involved.

(F) RELATIONSHIP BETWEEN THE MINISTRY OF THE ATTORNEY GENERAL AND FIRST NATIONS WITH RESPECT TO THE JURY ROLL NEEDS TO BE IMPROVED

248. Every First Nation individual I met unequivocally asserted that the way forward with respect to enhancing a relationship with the Ministry of the Attorney General in the context of the jury system, and all justice matters, is through a government-to-government process. First Nations want to assume greater control of the justice system as it applies to their people and communities and rely upon their traditional approaches to justice as the preferred approach. First Nations recall the restorative justice programs that were initiated in a previous era and look to build upon those as a means to reclaim authority and responsibility over the delivery of justice to their people. They strongly believe that diverting First Nations people from the criminal justice system to a traditional system of healing and reconciliation will have many benefits that will ultimately trickle down to the jury roll process. Therefore, First Nations advocate for adequate funding to support community-based justice initiatives aimed at enhancing participation on juries in a culturally appropriate manner, and to return to the implementation of First Nations restorative justice initiatives.

249. First Nations view Ontario and Canada's investment in First Nations restorative justice programs as also benefitting the criminal justice system. Consistent with a restorative justice approach, First Nations people expressed the need for collaboration between the Ministry of the Attorney General and First Nations in developing a proper jury roll selection process. A family member who attended the Families Forum, discussed above, suggested a pragmatic step in this direction; the Attorney General should host a meeting with First Nations leadership to consider ways to implement section 6(8) of the *Juries Act*. Such a meeting would signal a positive step towards improving the relationship between the Attorney General and First Nations, particularly with respect to the jury system. On a broader level, it was also suggested that the Attorney General create a "Round Table" on Aboriginal People and Justice to design, develop, and implement an Aboriginal Justice system.

250. It became abundantly clear throughout the engagement process that education and awareness among First Nations people in relation to the jury system for both trials and coroner's inquests is a priority and would serve to improve the relationship. Increased education about the process for pardons and access to support services for First Nations are required. Likewise, First Nations are insistent that increased education, including cultural sensitivity training, is also required for Court Services and policing officials regarding First Nations culture, values, and traditions.

251. In the words of former Chief Jonathan Solomon Sr. of Kashechewan, "it is up to the Attorney General of Ontario to close the 'Knowing and Doing Gap'".

2. MEETINGS WITH GOVERNMENT OFFICIALS AND THE JUDICIARY

252. During the engagement process for the Independent Review, my legal team and I also met and spoke with officials from the Ministry of the Attorney General, Court Services Division, the Provincial Jury Centre, Ministry of Health and Long-Term Care, the Provincial Advocate for Children and Youth, and members of the judiciary who were involved in increasing the representation of First Nations peoples on the jury roll. We obtained helpful information regarding the role of the key actors in compiling the jury roll. We also heard a consensus view among government officials that improvements are necessary to substantially increase the participation of First Nations reserve residents on the jury roll.

253. Most of the information I learned from government officials and members of the judiciary about the compilation of the jury roll in Ontario and efforts to improve the representation of First Nations persons on the jury roll has already been described by me in Part III under the sections entitled the "Jury Selection Process as it Currently Operates in Ontario" and "First Nations Representation on Ontario Juries", and I will not repeat those descriptions here.

254. As discussed in those sections, at present, the manner in which potential First Nations jurors are identified is ad hoc and contingent upon the efforts made by court staff to connect with First Nations, and ultimately the decisions of First Nations to exercise their discretion to disclose a list of reserve residents. This ad hoc system has proven to be ineffective and results in a jury roll that is unrepresentative of all First Nations peoples on reserve. Accordingly, obtaining the names of First Nations residents on reserve in each judicial district in accordance with section 6(8) of the *Juries Act* in a consistent, reliable, and uniform manner is a core problem. Equally, if not even more important to achieving a representative jury roll is identifying effective ways to encourage the participation of First Nations peoples in the jury system once adequate lists or records are obtained that provide a reliable data source for First Nations reserve residents.

255. As I described above, until 2001, the Provincial Jury Centre obtained Band Lists from the Department of Indian Affairs and Northern Development through the Indian Registry System. It is the position of the federal Department that its decision to refrain from further disclosure of Band Lists following 2000 came at the request of First Nations, coupled with a review of the information-sharing agreement between Ontario and the Department of Indian Affairs and Northern Development with regard to the application of the new *Privacy Act*.[253] In 2007 and 2009, the Federal Department was advising First Nations against disclosing information from the Indian Registry System to third parties.[254] However, it is the Department's current position that each First Nation may exercise its discretion to disclose their Band Lists to Ontario for the purposes of the jury roll.[255]

256. I understand that the Court Services Division has considered, but not seriously pursued, the option of obtaining names of First Nations persons living on reserve from the Ministry of Health and Long-Term Care. Officials of the Ministry of the Attorney General with whom we spoke expressed the view that using the Ontario Health Insurance Plan (OHIP) database is not an ideal option for the collection of names of First Nations people on reserve for a number of reasons. First, gaining access to the OHIP database will require legislative and regulatory change and trigger a First Nations consultation process and, hence, be a lengthy pursuit. Second, the database does not contain a First Nations identifier and therefore may not be overly helpful in identifying persons living on reserve. Third, the reliability of the OHIP data base is somewhat compromised by the existence of a relatively large number of fraudulent cards.

257. However, our discussions with officials within the Ministry of Health and Long-Term Care suggested that the OHIP database could possibly be an important additional data source of names for the jury roll. While it was acknowledged that there is no First Nations indicator in the database, searches could yield success using the proper search criteria, such as postal codes and date range. Because the new OHIP cards must be renewed, cardholders are generally required to keep their cards and information current in order to access health services. However, it was acknowledged that the proper analysis and data polling must be undertaken to test the adequacy of the search results. With respect to disclosure of information for the purposes of the jury roll, the official with whom we spoke cautioned that the Ministry would also have to explore its legal obligations in this regard. In any event, the OHIP database, coupled potentially with information-sharing agreements or memorandum of understanding, is an avenue worthy of further exploration.

258. As described above, court officials in the Kenora District, and more recently Thunder Bay, have undertaken various efforts to reach out to First Nations to obtain residence information and have undertaken programs to educate and inform First Nations communities about the jury system. A recent example, as mentioned earlier, is the initiative of the Ministry of the Attorney General, Court Services Division in the Kenora Judicial District, the Grand Council of Treaty #3, and the Union of Ontario Indians to deliver Jury

[253] See Exhibit D to the Affidavit of Shawn Joy, sworn on July 19, 2011, filed in *R. v. Kokopenace*.

[254] See Exhibits 71 and 72 (Binder 6, Tabs 27, 28) to the Affidavit of Laura Loohuizen, sworn on July 18, 2011, filed in *R. v. Kokopenace*, *R. v. Spiers*, Court File No. C49961 / C48160.

[255] See paragraph 14, and Exhibit 2 of the Affidavit of Allan Tallman, sworn on September 30, 2011, filed in the *R. v. Kokopenace* and *R. v. Spiers*, Court File No. C49961 / C48160.

Information Forums in a total of 15 First Nations communities in 2010 and 2011. The reports that resulted from these Jury Forums contain useful recommendations for improvements. At the Red Rock First Nation, a community person was trained and hired to undertake a door-to-door campaign to educate people on the jury process. Beginning in 2008, jury questionnaires were produced in syllabics for First Nations people fluent only in their indigenous language. In addition, a First Nations court translator and liaison person was hired in the Kenora office to provide assistance to Court Services in its outreach efforts. It is precisely these types of initiatives, among others undertaken, that are critical to provide regular and on-going education, information, and encouragement to First Nations people on reserve with respect to jury service in the effort to create the annual jury roll.

259. I was also very interested to learn of the project undertaken in Thunder Bay to construct a new Court House with an Aboriginal Hearing Room that will be a symbolic and respectful centerpiece of the new Court House. I understand that the process to conceptualize, develop, and construct the Aboriginal Hearing room has involved First Nations people and Elders from the outset and that every First Nations protocol was honoured and followed. This is an important initiative that I would hope will provide a culturally appropriate space for First Nations people to participate in Ontario's justice system, and will go some way toward beginning to ameliorate some of the problems described above.

260. It was acknowledged by all with whom we met that the key to addressing the issue of representation of First Nations peoples on juries is significant collaboration and communication between First Nations leadership and the Ministry of the Attorney General. It was stressed that solutions must be sufficiently flexible to accommodate regional circumstances and distinctions, while providing certainty of process. For example, some suggested that alternatives to jury selection process should be explored, such as a video conferencing for jury selection. It was also proposed that consideration be given to trials conducted by the Superior Court of Justice in select First Nations communities, similar to the Provincial Courts. Finally, it was suggested that Superior Court judges could be provided with discretion to require a minimum quantum of First Nations jurors for criminal trials.

C. SUBMISSIONS

1. NAN SUBMISSIONS

261. NAN and its legal team were key participants in the community engagement process carried out as part of the Independent Review. Following the community dialogue sessions, NAN prepared submissions for my consideration, which are divided into six parts.

262. Part I is an introduction of NAN as a political organization and its role in the Independent Review, as previously described in this Report. In its general overview of the problem of the underrepresentation of First Nations peoples in Ontario's jury system, NAN quite rightly states that the issue "is but one symptom of a larger problem of alienation and exclusion of First Nations people within the justice system".[256] Addressing criminal justice in Northern Ontario has been a priority for NAN.

263. In Northern Ontario there are four judicial districts for which jury rolls are prepared: Kenora, Thunder Bay, Timmins, and Cochrane. Various First Nations associated with NAN are situated in each of these districts. NAN explains that of the 46 First Nations situated in the Kenora judicial district, 30 of them fall under NAN's organizational umbrella. Of these, I visited with the leadership and citizens of seven First Nations. In the Thunder Bay judicial district, four of the 15 First Nations are part of NAN. I also visited with First Nations in the Timmins and Cochrane judicial districts for a total of 10 First Nations associated with NAN.

[256] Nishnawabe Aski Nation, *First Nations and Juries Review, Systemic Submissions* (July 11, 2012) at page 1.

264. Part II of NAN's submissions describe the recent litigation in Ontario regarding the underrepresentation of First Nations peoples on the jury roll in Ontario. I have previously addressed these cases in Part II and Part III of this Report.

265. Part III of NAN's Submissions advocates for a "Charter-based approach to jury representativeness". The crux of NAN's proposal is that the approach to comply with section 6(8) of the *Juries Act* ought to focus on obtaining the proper number of First Nations peoples on the jury roll, rather than on ensuring court officials make "reasonable efforts", exercise due diligence, or possess good intentions to include on-reserve First Nations peoples on the jury roll. NAN submits that the results-based approach will require the Attorney General to address the broader systemic issues affecting First Nations peoples and the justice system, which are inextricably linked to the low response rate to jury questionnaires and ultimately the lack of representativeness of the jury roll. Moreover, such an approach in NAN's view will also foster the development of a respectful relationship between First Nations and the Attorney General.

266. NAN submits that First Nations' historic experiences with the Government's actions grounded in "good intentions" have resulted in catastrophic legal and policy developments that have contributed to the disadvantages faced by First Nations people. Therefore, the government's "good intentions" should be avoided in addressing the underrepresentation of First Nations peoples on Ontario juries. For example, they refer to the Indian Residential Schools policy, and early provisions of the *Indian Act*, which prohibited Indians from leaving reserves without the permission of the Indian Agent, prohibited Indians from hiring lawyers, and banished sacred ceremonies.

267. Part IV of NAN's submissions focuses on the practical and cultural barriers to participation on juries faced by First Nations peoples. NAN outlines eight barriers to the representation of First Nations peoples on Ontario juries, which are substantively similar to what we heard in the engagement sessions and are essentially aligned with what I have discussed in the previous section. Rather than being repetitive, I will provide a brief overview of the perspectives on these matters from NAN and the various people we met.

268. *Cultural barriers*. This first obstacle emerges from the conflict between First Nations' cultural values, traditional laws, and norms, and the Euro-Canadian principles and values that underlie the Canadian justice system. First Nations' cultural values and teachings prevent people who live by those values and teachings from judging the conduct and behavior of others, thereby instilling a strong sense of reticence to participate in juries for criminal trials. NAN quotes Chief Adam Fiddler from the Sandy Lake First Nation:

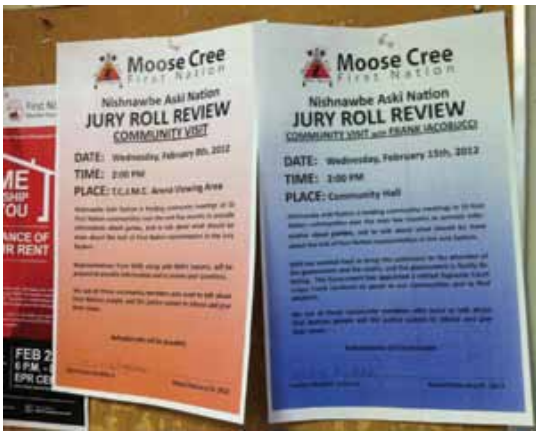
> One of the reasons our people don't want to be on the jury, it goes against our values. It also goes against the Bible. There are teachings from the Bible that we cannot judge others. Also it's part of our traditional values. We cannot judge somebody. We have our own traditional ways of dealing with issues… You cannot tell someone what to do, and you cannot judge them. To judge them is wrong. The idea of sitting on the jury and judge whether what they did is acceptable or not is wrong. There is a fear of that. That is one aspect of it… On the one hand, we are arguing to be part of the jury, but our fundamental belief system is that we don't want to be part of it. We struggle with it.[257]

269. However, it was observed that given the non-retributive nature of coroner's inquests and the potential effect of the juries' recommendations to change policies, First Nations people would not encounter the same cultural contradiction. Joe Meekis from the Keewaywin First Nation articulated succinctly:

> Coroners inquests are very important for us. We need to take part in those sessions. We have heard people talk about those cases. These cases affect our communities deeply; our kids who die in that river. I cannot express how important it is. We have to be included in those juries. That is very important.[258]

[257] *Ibid*., at page 30.
[258] *Ibid*.

270. NAN representatives observed that significant changes to the justice system and its relationship with First Nations could have a correlative impact on First Nations' views regarding participation on juries.



271. *Justice system is an alien system.* First Nations people do not view the Canadian justice system as a positive presence in their lives. They view it as a foreign system of imposition that has subjugated traditional and more peaceful and culturally driven approaches to resolving conflict. First Nations view themselves as objects of the criminal justice system rather than meaningful partners and participants in it. Chief Eno Anderson of Kassibonika Lake First Nation was eloquent in his vision for a justice system that reflects First Nations' cultural norms:

> Until they incorporate our principles, our understanding, our values, we won't accept it… It will feel foreign. Like a stranger coming into our community. Until we have a structure that we are part of. If we are part of it, we will support it… We want a justice system that can resolve problems, not a justice system that takes away our people.[259]

272. *Mistrust of police/authorities*. Consistently negative experiences encountered by First Nations people with respect to the police and other authorities compound their negative perceptions of the criminal justice system. This experience has a direct correlation to the lack of interest in participating in the jury system, as described by Chief Roger Wesley of Constance Lake First Nation:

> That's what has to change – we have to have a fair opportunity. Fair. Fair justice would be something new to this province, because it doesn't exist for First Nations people… Take note, the system is fundamentally flawed for these people. As a leader of this community, it's tough to see young men and women being put through the process and never feeling like they had a chance.[260]

273. The level of mistrust is exacerbated by the directive language used in the jury forms, which is perceived as a threat of jail or fines for failure to respond to a jury questionnaire. Joe Meekis of the Keewaywin First Nation summed up a constant theme of the engagement sessions: "[w]hy stretch out your hand if you are going to hit the guy? Not a good way to ask for help."[261]

274. *"Conveyor belt" for guilty pleas*. First Nations participants from community to community repeatedly identified numerous systemic and serious problems with the way in which justice is delivered in Northern Ontario, which more often than not result in guilty pleas, as described in Part IV, Section A of this Report. One citizen from Mattagami First Nation stated, "[n]ot once has [friends or family] made it to trial. They always plead guilty. Guilty, Guilty, Guilty."[262]

275. There is a real perception that the justice system simply does not care about First Nations peoples and the reciprocal effect is that First Nations people refuse to participate in any aspect of the justice system. Chief Connie Gray MacKay of the Mishkeegogamang First Nation provided a powerful, yet disturbing, depiction of a typical day in court in Pickle Lake:

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[259] *Ibid*., at 31-32.
[260] *Ibid*., at 32.
[261] Ibid., at 33.
[262] *Ibid*., at 35.

> Any client who wants to talk to their lawyer, it happens in the kitchen. The judge changes in the library. The lawyers don't have a room they can interview people in, if the kitchen is full and the bar is full, so there is no privacy, no confidentiality. There is a makeshift wall inside the courtroom, so you can have a meeting there, or you are meeting alongside of the walls. It's a whole shaming process, there is no privacy for anyone… Something has to change, it's no longer acceptable.[263]

276. These experiences undermine respect for the judicial process and are counterproductive to enhancing jury participation.

277. *Practical obstacles to jury participation in remote communities.* The geographical and socio-economic realities of First Nations in the North give rise to significant challenges to jury participation. As discussed in Part IV, Section B of this Report, NAN maintains that these logistical and funding matters must be addressed to encourage First Nations people to participate on juries.

278. *Lack of education concerning the jury system.* Many participants in the engagement sessions were profoundly unfamiliar with the justice system in general, and the jury system in particular. Based on the accounts from First Nations people, it was equally clear that the justice system and its actors require substantial education about First Nations peoples. Following our meeting, the Kassabonika Lake First Nation provided written submissions that summarized this issue succinctly:

> People are reluctant to serve [on juries] when they do not understand or trust the system… Just as there is a need for the justice system to be better informed and educated, there is a need for community education and awareness about the justice system. Elements such as the role and relationships of jurors need to be taught and understood. Information should be translated into the aboriginal language of the community; including jury notices.[264]

279. *Criminal records disqualify many First Nations people from participating in juries.* First Nations peoples' prior convictions represent a substantial barrier to the participation on Ontario juries; a barrier which will only increase with recent amendments to the *Criminal Code* that make it more difficult to obtain pardons to absolve a person's criminal record.

280. *Lack of respect for First Nations leadership.* The manner in which some court officials attempt to obtain band or electoral lists from First Nations is perceived as inappropriate and lacking a respectful protocol that is owed to elected First Nations leadership. An anecdote was provided of a situation in which a court official sought to obtain names from an administrative assistant after a Chief refused to disclose a list. Most, if not all, of the First Nations leaders spoke of their duty to respect and protect the privacy rights of the people they represent.

281. Part V of NAN's Systemic Submissions address the role of the Nishnawbe Aski Legal Services Corporation (NALSC) in the delivery of justice in Northern Ontario. NALSC was created in 1990 as a result of collaboration between NAN and Legal Aid Ontario to address justice issues in the North. It delivers the Legal Aid Plan in Treaty 9 and Treaty 5 territories, provides public legal education, and carries out law reform initiatives, such as restorative justice programs, in the areas of criminal and child welfare law. Its programs are funded by an array of public funders.

282. NAN acknowledges serious limitations associated with NALSC's program delivery, in that it is unable to offer the full scope of services to all NAN communities owing to funding constraints. NAN proposes that if the restorative justice programs were properly resourced, NALSC would be better positioned to meet its objective of diverting a majority of criminal matters to restorative justice, enabling First Nations

[263] *Ibid.*, at 35.
[264] *Ibid.*, at 36.

to move towards a culturally specific justice model. NAN also proposes that adequate funding be provided for NALSC's public education mandate to help First Nations people in NAN communities understand the justice system and the role of juries therein, and to provide the support necessary to assist potential First Nation jurors in their participation.

283. In Part VI of its Systemic Submissions, NAN sets out broad areas on which, in its view, the Report of the Independent Review ought to focus its recommendations.

284. *Implementation: combating skepticism of the review process.* NAN proposes that the Report recommend the creation of an implementation process that identifies the institution or department that would carry the responsibility for implementing a particular recommendation, with measureable benchmarks within a reasonable time frame. As well, NAN proposes that a reporting mechanism be included in the recommendations to update First Nations, the public, and the courts.

285. *Ownership: enhancement of restorative justice programs.* NAN states that the way forward to reconcile competing worldviews regarding justice is to foster long-term participation of First Nations peoples in, and ownership of, the justice system. NAN proposes that this reconciliation can be achieved by creating partnerships within First Nations on self-governance and justice, and making necessary room for legal plurality and the existence of dual justice systems. The existing approach in Sandy Lake First Nation and Attiwapiskat First Nation of enabling Elders to sit with the provincial court judge has proved beneficial, despite the withdrawal of funding to support this activity.

286. *Reparations: improvements to the justice system.* NAN proposes that the government make significant investments to improve the operation of the justice system in northwest Ontario. Discussions with First Nations have exposed a system that fails at its most rudimentary level and has lost the confidence, trust and respect of First Nations people generally. NAN argues that unless the overall justice system is addressed, there is no prospect for redressing the under-representation of First Nations peoples on juries. Therefore, it urges the Independent Review to highlight the most pressing issues and propose recommendations for a process to address the basic failings of the system. NAN outlines some of these key needs:

- increased frequency of court sittings, and, in consultation with First Nations leadership, explore the feasibility of holding jury trials in remote communities;
- appropriate infrastructure for court hearings;
- adequate legal representation and a review of the Legal Aid system in the North;
- properly trained language interpreters; and
- adequate funding for the accused and their witnesses to properly access the justice system.

287. *Relationships: the creation of provincial-level infrastructure to manage the inclusion of First Nations people on the jury roll.* NAN proposes the development of infrastructure to manage a comprehensive province-wide process to include on-reserve First Nations residents on the jury roll. Such an approach will promote the implementation of section 6(8) of the *Juries Act* in a systematic and consistent manner throughout Ontario. NAN proposes that the elements of this process should include:

- affixing accountability for the implementation of section 6(8) with the Assistant Deputy Minister of the Attorney General, rather than local court officials, to ensure the appropriate expertise is used, adequate resources are committed and reporting is mandated;
- developing solutions through partnerships created that respect a government-to-government relationship; and
- collecting, analyzing, and monitoring the statistics of jury questionnaires and implementing remedial measures, as necessary.

288. *Involvement: First Nations participations in juror enumeration.* NAN recommends that First Nations governments be given the opportunity to become directly involved in juror enumeration. NAN argues that this approach would enhance the eligible return rate of questionnaires sent to First Nations and, therefore, actual representation of First Nations peoples on the jury roll. The solution to enhancing actual representation does not lie in increasing the number of jury questionnaires sent to First Nations people, but rather in outreach and self-selection of those individuals who have the ability, willingness, and capacity to serve as jurors. NAN argues that as long as a sufficient number of suitable candidates are enumerated, the fundamental principle of randomness would not be offended. NAN states that the subsequent safeguards of the out-of-court and in-court jury selection process would preempt any legal challenges of impartiality of the jury. Finally, NAN submits that any approach to enumeration should respect principles of autonomy; involving First Nations in an enumeration process must be consensual and participation of individual jurors should be voluntary

289. *Support: ensuring the participation of First Nations peoples on juries.* During the engagement process, meeting First Nations people who served on a jury was not common. However, there were a number of individuals who received jury questionnaires. Of these people, most expressed confusion, concerns respecting the content of the forms, and fear regarding penalties for not responding. As a result of this feedback, NAN proposes five measures that are aimed at providing the necessary support to garner participation of First Nations peoples on juries.

- Public legal education should be carried out for First Nations people regarding the jury system and the role of jurors. It should be developed in consultation with First Nations governments and organizations. Likewise, an education initiative is required for officials of the Court Services Division regarding First Nations peoples and cultural and political protocols to reduce alienating interactions.
- Contact policies and practices should be renewed to transform the manner in which court officials initiate contact with First Nations with a view to soliciting voluntary participation, rather than coerced participation. Additional support resources in the form of a contact person within the Court Services Division would assist in clarifying questions regarding the process.
- Travel and income supports ought to be enhanced to alleviate the hardship of traveling. Such supports could take the form of increased financial resources or implementing video conferencing or other similar technology to reduce travel for the jury selection process. Where travel is required, a designated person from the local Court Services Division office should make all the necessary arrangements for travel. Enhanced income supports are required for matters such as childcare and Elder care responsibilities.
- Interpretation services for First Nations jurors would enhance the potential for participation. NAN also suggests amending the *Juries Act* to include a First Nations language as a qualifying criterion to jury eligibility, which would be aligned with the official languages recognized by the *Official Languages Act*.
- Exclusions based on criminal record could be addressed through an amendment to the *Juries Act* that aligns prohibited criminal offences with specific offences contained in the *Criminal Code*.

2. UNION OF ONTARIO INDIANS SUBMISSIONS

290. The Union of the Ontario Indians is an advocate for 39 Anishinabek First Nations in Ontario with an approximate population of 55,000 First Nations persons. The Union was incorporated by the Anishinabek Nation in 1949 and is comprised of four regional areas represented by respective Regional Chiefs.

291. We received three main groups of submissions from the Union. First, the Union provided a comprehensive set of submissions following the engagement process addressing nine areas that require improvements and advance recommendations in this regard. Second, the Union provided us with its report entitled “Juries

are a Circle of Justice",[265] which it prepared following the Jury Information Forums conducted in 2009, which I described above at paragraph 226 of the Report. Third, the Union commissioned three independent papers that address the issue of the representation of First Nations peoples on Ontario juries. I briefly discuss each of these submissions below.

(A) SUBMISSIONS FOLLOWING ENGAGEMENT PROCESS

292. The Union in its submissions identifies three prevailing messages that arose from the engagement process. First, Anishinabek First Nations are generally apathetic about becoming involved in the jury system because it is a part of a larger justice system that is perceived as foreign, unfair, and devoid of Anishinabek values and interests. Second, Anishinabek First Nations prefer to develop and implement their own justice-related institutions as a means to reduce the number of people in jail, which will in turn increase confidence in the justice system. Examples of these institutions include the police, diversion and restorative justice programs, court workers, and courts. Third, in order to encourage the participation of First Nations peoples on juries, Ontario should take steps to improve the justice system, including increasing cultural competency in the courts and providing more public education to First Nations communities on the role of juries and the associated processes.

293. *First Nations justice projects.* The Union reports that its First Nations members view the development of community justice projects as a partnership between First Nations and the justice system. In addition to diverting First Nations individuals from penal institutions and promoting healing and recovery, these projects have a positive impact on First Nations because they enable them to rebuild jurisdiction over their own affairs. On the broader scale, community justice projects reduce fear, confusion, and distaste that First Nations currently have for the justice system. Therefore, this recommendation has twin benefits of improving the relationship of First Nations and the justice system, while empowering the communities to address justice issues that affect them.

294. The Union recommends that Ontario provide additional funding and support for community justice programs and related work.[266]

295. *Policing.* The Union reports that First Nations police programs positively contribute to First Nations' relationship with law enforcement. However, currently First Nations policing is a discretionary program, not secured by enabling legislation, so its existence and funding are vulnerable to elimination. The Union recommends that Ontario and Canada work collaboratively to develop First Nations Policing legislation, or preferably, fund First Nations to develop their own policing laws.

296. The Union submits that certain tangible measures should be taken to improve First Nations police services and enhance public confidence in their delivery. First, it suggests that a regulatory body be established to oversee the operation of First Nations law enforcement programs. Second, because there is currently no mechanism to review inappropriate conduct, the Union proposes the creation of an independent review board to adjudicate complaints. The Union suggests that the Office of the Independent Police Review Director could be involved in this initiative. Finally, it recommends that OPP officers receive mandatory cultural competency training, including in the areas of First Nations' rights, laws, and by-law enforcement.

297. *Health*. The Union's Women's Council hold strong beliefs that the overrepresentation of First Nations peoples in Ontario jails is largely attributable to health issues generated over the years by the historic injustices endured by First Nations peoples. They propose that health supports be available both inside and outside of penal institutions to those offenders who require it. Specifically, the Union recommends that Ontario increase funding to First Nations administrations for programs and services to address physical

[265] Union of Ontario Indians, *Juries are a Circle of Justice – Report on the Ontario Jury Information Forums Conducted Within the Anishinabek Nation, November 2009 to February 2010* (Spring 2010).

[266] Union of Ontario Indians, *Submissions on Behalf of the Anishinabek Nation to the Iacobucci Review*, at page 5.

and mental health issues. It also recommends that provincial penal institutions increase rehabilitation services available to offenders while in custody and during the parole process, and suggests that these services be monitored by a civilian oversight committee.

298. *Education*. The Union states that informing and educating First Nations people on justice matters generally, and the jury system specifically, will dispel many misunderstandings and encourage First Nations people to participate in the jury process. The Union recommends that educational efforts be creatively designed and implemented in collaboration with tribal councils, Provincial Treaty Organizations or other regional organizations. To specifically target youth, the Union proposes that Ontario and Canada develop a school curriculum regarding the justice system, including the jury process as it relates to First Nations peoples living on reserves.

299. The Union also emphasizes the importance of clarifying the privacy issues concerning disclosure of electoral lists or other information regarding band membership, and sharing this information with First Nations leadership.

300. *Racism and special circumstances*. Many First Nations individuals believe that racist misconceptions and assumptions permeate the justice system – from policing to courts to the penal institutions. As one measure to address these issues, the Union recommends the implementation of mandatory cultural competency training for police, court workers, Crown prosecutors, prison guards and employees, the Office of the Children's Lawyer, and Children's Aid Society workers. The Union also recommends that consideration be given to incorporating into the criminal justice system the opportunity for a First Nations accused to raise special circumstances – as currently provided during sentencing in accordance with the Supreme Court of Canada's *Gladue* decision – prior to sentencing and as early as his or her first court appearance.

301. *Juries*. To instill greater confidence in the justice system and increase the willingness of First Nations people to participate on juries, the Union proposes that Ontario make concerted efforts to increase the number of First Nations judges appointed to the bench, especially to appellate courts. The Union also recommends that the Attorney General investigate alternatives to the current system that allows potential jurors to be removed by a challenge for cause, challenges which may be sometimes motivated by racist intent.

302. *Travel and expenses.* The socio-economic conditions of most First Nations reserves, the great distance between reserves and courts locations, and the in-court jury selection process are serious disincentives and barriers to jury participation, particularly for a lengthy jury trial. To alleviate some of these obstacles, the Union recommends a drastic increase in the compensation rates for jurors, including those who are required to appear for selection but are excused. Concurrently, the Union proposes that the Attorney General explore options to convene court proceedings on First Nations reserves, where possible.

303. *Options for improving and updating jury rolls*. Although some First Nations people appreciate their civic duty to serve on juries, encouraging Chiefs and Councils to share information with Court Services is the challenge. In recommending a variety of options, the Union stresses that a "one size fits all" approach is not an appropriate way to obtain lists from First Nations. The Union recommends the consideration of an "opt in" process whereby individual First Nations people would volunteer to serve. The Union also suggests including an ongoing plebiscite on the electoral ballots cast by individual voters that poses a question as to whether the community agrees to share their membership or residency list. Finally, the Union again suggests that juror compensation be increased to serve as an economic inducement to an otherwise impoverished demographic.

304. *Coroner's inquests.* The fact that a jury for a coroner's inquest is selected from the same jury roll as juries for criminal trials is something that is unknown to most people who participated in the engagement process. This type of information could motivate First Nations leadership to disclose Band Lists and to work with Court Services to ensure that coroner's inquests into First Nations deaths are convened in a timely manner. An assertive educational campaign would serve to inform First Nations leadership of the benefits of disclosing lists for the preparation of the jury roll. The nature of a coroner's inquest is also a motivating factor for potential First Nations jurors, who would see it as an opportunity to take part in making recommendations for change.

305. The Union recommends that Ontario educate First Nations Chiefs and Councils regarding the importance of jury rolls generally, and the representation of First Nations peoples on coroner's inquests specifically. It suggests that Ontario partner with tribal councils and PTOs in their education efforts to maximize effectiveness. It also suggests that Ontario consider separating jury rolls for criminal trials and coroner's inquests to ensure the participation of First Nations peoples in the latter.

(B) SUBMISSIONS FOLLOWING JURY INFORMATION FORUMS -- "JURIES ARE A CIRCLE OF JUSTICE"

306. As previously explained, the Union partnered with the Ministry of the Attorney General in 2009 to deliver Jury Information Forums to the First Nations associated with the Union. Following those Forums, the Union prepared a report that contained the following recommendations.

Ways to increase the number of First Nations jurors

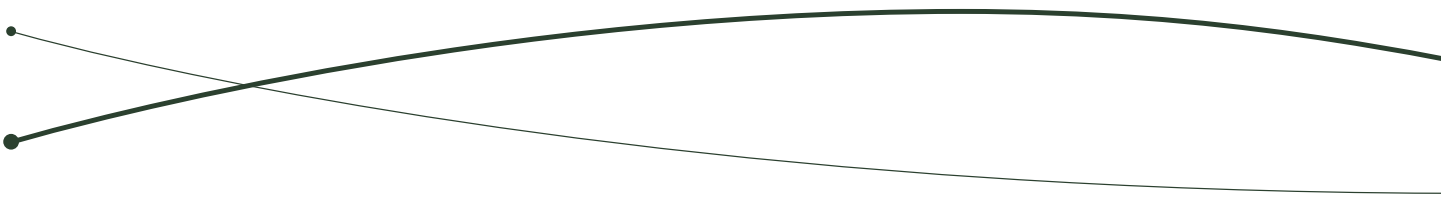
- For the purposes of the jury roll, the Anishinabek Nation and Ministry of Attorney General should negotiate an agreement to develop a process to obtain Band Lists and establish protocols for the use, protection and storage of the information.
- Organize Jury Information Forums in all 40 Anishinabek First Nations.
- The Ministry and the Anishinabek Nation should work collaboratively to develop a promotional strategy for dissemination of information regarding the jury process.
- Create the position of Anishinabek Nation Sheriff, or a similar role, who would liaise with First Nations and compile the jury roll.
- Develop a distinct process for the selection of First Nations jurors within which First Nations would be charged with selecting potential jurors for the jury roll.

Procedural Recommendations

- Develop a jury summons form specific to Anishinabek First Nations and produce it in the First Nations languages of Odawa, Ojibway, Delaware, Pottawatomi, Chippewa, Algonquin and Mississauga.
- Provide translation services in the First Nations languages.
- Remove the references to penalties for non-response on the jury form.
- Provide an option to identify First Nations citizenship on the jury form.
- Remove the requirement for Anishinabek jurors to swear an oath on the Bible or take an oath to be a juror.
- Provide nominal remuneration for jury duty.
- Provide for travel expenses for all potential jurors who are required to attend the selection process, regardless of whether they are selected for duty or reside within a certain radius of the courthouse.
- Provide culturally appropriate aftercare treatment for jurors who require it.

Ontario Justice System

- Provide information and assistance to those First Nations citizens who want to obtain a pardon for past criminal offences.



- Appoint a liaison person to work with Anishinabek First Nations to provide information about the Ontario justice system and to provide support for jury summons forms and related documentation.
- Enhance funding for the Aboriginal Court Worker program and First Nations justice workers to support offenders.

(C) INDEPENDENT PAPERS COMMISSIONED BY THE UNION

307. *Paper by Elder Ernie Sandy*. In his paper, "Recommendations from First Nation Citizens in Ontario Justice System", Elder Ernie Sandy interviewed many First Nations people and made recommendations based on what he learned.[267] The views he heard reflected the recurring theme that First Nations people were uninterested in serving on juries because their experiences and perceptions of the justice system were pugnacious, negative, colonial and contrary to their core cultural beliefs. That being said, he stated that some expressed curiosity towards the jury system. Mr. Sandy made the following recommendations.

Education and Outreach

- Develop outreach programs regarding the jury selection process to be delivered in First Nations communities by First Nations justice workers. The focus of these programs should be to educate First Nations citizens about the importance in serving on a jury and could be promoted with the use of a slogan. For example, "You can make a difference in someone's life as a jury member".
- Develop a comprehensive "First Nation culture and historical awareness" sensitivity program delivered, with the assistance of Elders and guest speakers, to key personnel and justice lawyers who work closely with First Nations citizens.
- The Attorney General's office should host a conference on the jury system that is aligned with the timing for major political gatherings in the province.
- Produce a video that explains the jury system in a First Nations context and emphasizes the importance of participation, to be used as an education tool in schools and for the purposes of informing First Nations people generally.
- Encourage "kitchen table" dialogue between court workers, leadership, and First Nations community members with an emphasis that no formal education is required to sit on a jury.
- Create a juror orientation program to prepare individuals for the jury selection process.

Accessibility

- Encourage First Nations citizens to actively pursue their right to sit on a jury, even if excluded through the selection process.

Eligibility

- Request a list of the names of eligible First Nations individuals from the federal department of Aboriginal Affairs and Northern Development.

Relationship Building

- Establish a First Nations citizen advisory body within the Attorney General's office. Through this process, mutual admiration of each other's professional, cultural and personal qualities can be fostered.

[267] Ernie Sandy (Traditional Teacher, Elder), *First Nation Citizens in Ontario Justice System* March 23, 2012.

308. *Paper by Elder Mike Esquega Sr. (Northern Superior Regional Elder).* The central message of Mr. Esquega's submission is that improvements to the justice system for Anishinabek citizens may increase their willingness to participate in the jury system.[268]

309. Mr. Esquega recommends that Ontario develop and implement an action plan to acknowledge, support and provide accommodations for First Nations people to participate in the jury process. This plan should include the following elements:

- a process to educate and consult with First Nations individuals when they are subpoenaed to the jury selection process;
- the use of ceremony in the court process, including jury selection;
- consideration of a minimum mandatory number of First Nations citizens (or a full panel);
- a support system for those attending the selection processes;
- oversight of the selection process to ensure its fairness; and
- provisions to respond to financial and cultural concerns, such as considering holding court in the community of an accused person or a neighbouring First Nation.

310. Mr. Esquega also recommends that Ontario enter into a Protocol Agreement with First Nations to ensure that continuous and meaningful consultations occur with First Nations with respect to changes to the justice system, and that an educational campaign be implemented. He recommends that the consultations to be held with Chiefs and Councils, as well as with citizens, through forums provided by the Union of Ontario Indians and other organizations, and that the consultations should include women, youth, and elders, and produce a discussions paper for review by the First Nations and government officials.

311. *Paper by Karen Restoule.* For her paper "Recommendations from Jury Roll Selection – Problems or Symptom?", Ms. Restoule interviewed individuals from 15 First Nations regarding the criminal justice system and the jury process.[269] The dominant theme of these interviews is consistent with what I heard throughout the engagement process – that there is a profound mistrust of, and alienation from, a criminal justice system that is perceived to be contrary to Anishinabek original jurisdiction over justice matters and devoid of Anishinabek legal principles or cultural values.

312. Ms. Restoule proposes that existing Community Justice Programs delivered by First Nations organizations in a culturally appropriate manner in 23 First Nations communities should be expanded to other areas of the justice system, including criminal trials for summary, hybrid, and indictable offences, as well as coroner's inquests. She also proposes the creation of a model of justice based upon the American Tribal Courts as a process of reconciliation for the application of common law and Anishinabek Nation legal principles. Alternatively, Ms. Restoule suggests incorporating Indigenous legal principles into the criminal justice system as a means to encourage the participation of First Nations peoples on juries.

313. Ms. Restoule's recommendations specific to the jury system include:

[268] Mike Esquega Sr. (Northern Superior Regional Elder), *Anishinabek Jury Selection Process*, 2012
[269] Karen R. Restoule, *Jury Roll Selection – Problems or Symptom?*, March 23, 2012.

First Nations Legal Principles

- traditional legal principles of the Anishinabek Nation should be incorporated within the jury system, and the justice system as a whole, particularly when Anishinabek citizens are involved.
- a feast and/or relevant ceremonies should be held when any citizen of the Anishinabek Nation is involved in criminal or civil trials, whether as an accused or a victim.

Partnership with First Nations

- Anishinabek Nation leadership should be included in the development and implementation of any recommendations regarding the jury roll selection process and/or justice system stemming from this Independent Review.
- Elders should be included in any legal process involving a citizen of the Anishinabek Nation.
- Elders should be consulted regarding their role and level of participation within criminal or civil trials and coroner's inquests.
- an ongoing relationship should be maintained between the Ministry of the Attorney General and the Anishinabek Nation.
- meetings and ceremonies should be held every year to reaffirm commitments between the Ministry of the Attorney General and the Anishinabek Nation, allowing for amendments to be made to the processes and trust to be built over time.

Resources

- adequate resources should be provided to citizens of the Anishinabek Nation attending jury duty. Further, criminal or civil trials and coroner's inquests should be hosted within Anishinabek Nation territory to reduce costs substantially.
- adequate resources should be provided to accommodate the families of the individuals attending jury duty.
- resources should be provided to implement the recommendations stemming from this Independent Review.

Education

- training should be provided for all individuals working within the justice system, including the judiciary, legal, and administrative staff, and such initiatives should be developed and delivered in partnership with the Anishinabek Nation.
- there should be public legal education initiatives targeted towards First Nations peoples and youth that seek to create awareness of the role of juries. These initiatives should be developed and delivered in partnership with the Anishinabek Nation and local school boards. The distinctions between a criminal or civil jury versus an inquest jury should be emphasized in the materials.

Accessibility

- where possible, criminal or civil trials and coroner's inquests should be held within the First Nation of the accused or victim, or within the Anishinabek Nation territory.
- where it is not possible to host the legal process within the Anishinabek Nation territory, the process should be made available to the First Nations involved via videoconferencing and resources for necessary equipment should be provided to First Nations of the Anishinabek Nation.

Language

- translation and interpretation services should be made available to all First Nations individuals selected to participate on a jury, as well as the families affected by the trial or inquest, including instances where video-conferencing is employed.

Eligibility

- the Canada and Ontario citizenship criteria for jury roll selection should be reconsidered. Many First Nations individuals do not identify as citizens of these jurisdictions.
- the criteria of having no prior criminal record should be reconsidered.
- the eligibility requirements for serving on a criminal or civil jury should differ from those for a coroner's inquest.

Outreach Strategy

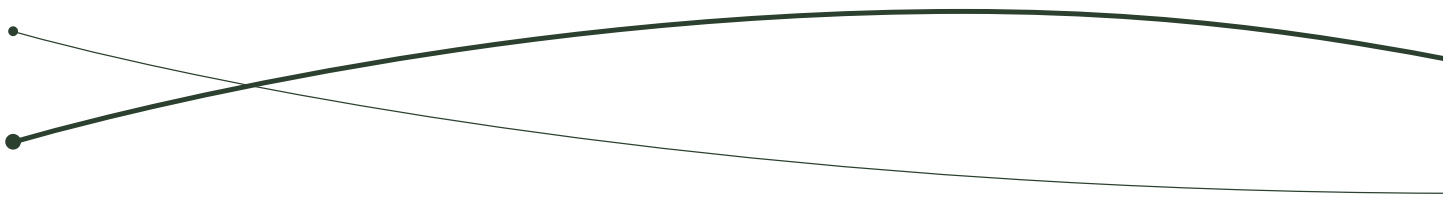
- an outreach strategy should be developed and delivered in partnership with the Anishinabek Nation, in order to ensure that materials are culturally appropriate.
- there should be an outreach strategy specifically geared towards engaging First Nations youth. It is important to ensure this strategy is "catchy."

3. CHIEFS OF ONTARIO SUBMISSIONS

314. In a letter dated June 4, 2012, former Ontario Regional Chief Angus Toulouse submitted his thoughts and recommendations for changes to the current process for the assembly of the jury roll in Ontario, as it relates to First Nations peoples. Former Chief Toulouse recognized the importance of the Independent Review and pledged his full support.

315. The primary theme of the submissions of the Chiefs of Ontario, like that of others who have participated in this process, is that the encouragement of participation of First Nations peoples in the court system must be accompanied by the broader objective of eradicating systemic discrimination in the justice system. The Chiefs of Ontario cite several examples that they view as symptomatic of the ways in which the Canadian justice system is currently failing First Nations peoples through the subversion of First Nations legal traditions and customs and the failure to reconcile the Canadian legal system with First Nation legal principles and traditions.

316. The Chiefs view Canadian child welfare law as incongruous with the First Nations concept of the family unit, as it causes the relocation of many First Nations children. They raise the issue of inadequate attention given to the preparation of *Gladue* reports (pre-sentence reports) by probation officers. The Chiefs state that, rather than provide the proper context to determine an appropriate sentence, probation officers often perform a disservice to First Nations offenders because their reports are written with a Eurocentric bias. They also describe how traditional healing circles have essentially become sentencing circles that impose conventional criminal procedures and sentences, contrary to the healing attributes that First Nations seek. They describe the use of crimogenic risk assessments that are designed to assess the risks of reoffending, asserting that these reports are often used by the Crown in criminal proceedings as a tool to establish that First Nations offenders are at a high risk of re-offending. The Chiefs of Ontario argue that these reports create a bias against First Nations offenders by failing to consider the specific cultural context of the offender's background.



317. The Chiefs of Ontario address the issue of the collection of names and addresses of on-reserve residents for the purposes of jury questionnaires. With respect to the option of drawing upon Ontario Health Insurance Program information as a source of names and addresses for on-reserve First Nations peoples, the Chiefs of Ontario argue that this data source, if used alone, would not capture all on-reserve First Nations peoples, as they note that many First Nations peoples in remote communities do not have health cards. In any event, they observe that simply identifying the ideal data source will not necessarily result in a higher response rate to jury questionnaires due to the broader systemic issues that have engendered a deep mistrust by First Nations peoples of the justice system.

318. The Chiefs of Ontario recommend that the Attorney General's office include designated First Nations officials to address First Nation issues and intergovernmental relations. These positions, appointed to serve each treaty region or judicial district, could be mandated to collect information from the First Nations within the delineated regions and to maintain relationships with First Nations on justice matters and judicial services.

319. The Chiefs of Ontario advance four specific recommendations with respect to the jury forms:

- Citizen v. First Nations: It is recommended that the jury forms include a question relating to a person's citizenship of a First Nation. It was explained that some First Nations do not relate to Canadian citizenship and often do not possess evidence of such.
- encourage First Nations members to complete and submit forms: It is recommended that both the Province of Ontario and the Federal Government work collaboratively with First Nations Governments, regional organizations or tribal councils to fund and provide an educational program that targets youth, designed to inform them of their legal and civil rights and duties within the Canadian constitutional and common law framework.
- exemption from jury service: It is recommended that Elders be exempted from jury service so that their traditional role and cultural integrity in the community is preserved.
- translation services: Increased and adequate translation services could help to encourage First Nations peoples to participate as potential jurors.

320. The Chiefs of Ontario maintain that the paramount factor for increasing the participation of First Nations peoples in the jury system is the recognition and accommodation of First Nations legal traditions and cultural differences. In addition, they identify two practical barriers to the participation of First Nations peoples on juries that require particular attention: the payment of transportation, accommodations and meals by the Ministry of the Attorney General; and the provision of support services to enable First Nations individuals to complete jury forms, attend at a trial or coroner's inquest, and deal with post-jury duty psychological effects.

321. The Chiefs of Ontario conclude their comments by reinforcing the need for a respectful government-to-government relationship between First Nations and the Government of Ontario as a means to address the systemic issues plaguing the criminal justice system.

4. ABORIGINAL LEGAL SERVICES OF TORONTO SUBMISSIONS

322. Aboriginal Legal Services of Toronto (ALST) is a multi-service legal agency that has served Toronto's Aboriginal community for over 21 years. This organization has gained substantial experience through the representation of Aboriginal clients in coroner's inquests, inquiries, criminal litigation, and advocacy to ensure Aboriginal clients receive equitable treatment in and access to the justice system. In particular, ALST has been actively involved in litigation that has considered and is considering the issue of the representation of First Nations peoples on juries.

323. ALST frames the issue of jury representativeness as one of fundamental justice, which they assert is being breached by the lack of representation of First Nations peoples on the jury roll. As a general proposition, ALST is of the view that the issue of jury representation arises from the failure to fulfill the obligations demanded by section 6(8) of the *Juries Act*. They note that there is no consistent source list from which to draw on-reserve First Nations names, nor have sufficient efforts been made to ensure the jury roll is properly representative of First Nations peoples.

324. ALST asserts that First Nations people who reside on a reserve have the right to be considered for jury duty and that a properly representative jury is particularly important for Aboriginal accused persons in the criminal justice system. They note that systemic discrimination against Aboriginal people in the criminal justice system has been most recently affirmed by Canada's highest court in *R. v. Ipeelee*[270] and that an accused person being tried by a jury that is drawn from an unrepresentative jury roll potentially faces discrimination under section 15 of the *Charter*.

325. ALST addresses the connection between the historic exclusion of Aboriginal people from the Canadian justice system and the underrepresentation of on-reserve First Nations peoples on the jury roll. It notes the correlation between the overrepresentation of Aboriginal people in the penal systems and their exclusion from participation in the Canadian justice system, arguing that the latter is a factor that contributes to the excessive imprisonment of Aboriginal peoples.

326. ALST also addresses the connection between the coroner's process and the jury roll issue. Because the number of Aboriginal peoples in the penal system is unrelenting, thereby increasing the probability of deaths that will occur while in custody, coroner's inquests are of growing importance. Ensuring that inquest juries represent the Aboriginal population is integral to remedying the circumstances by which such deaths occur through a proper understanding of the historic, cultural, and contemporary contexts.

327. Following its review of recent litigation respecting the issues of representation of First Nations peoples on juries, ALST states that using Band Lists is not the most effective manner in which to ensure that First Nations peoples are represented on the jury roll in Ontario. They take this position for a number of reasons. First, ALST draws the distinction between those First Nations that control and administer their own membership lists and those First Nations that have chosen to leave their membership lists to be maintained by Aboriginal Affairs and Northern Development Canada (AANDC). Of those First Nations that have regained control of their membership lists, they will have to consider the privacy interests of their members in deciding upon disclosure, just as AANDC must consider privacy issues. Those First Nations that have left their lists with AANDC rely on the federal Department to address this matter. Finally, ALST argues that band members ought to be involved in the decision-making that will, in effect, determine whether band members will participate in the jury system.

328. ALST questions the lack of consistency with respect to Ontario's efforts to comply with section 6(8) of the *Juries Act*. ALST contends that Ontario failed to assess the impact of the Supreme Court of Canada's decision in *Corbiere v. Canada*, preventing Court Services personnel from appreciating that the lists they relied upon likely contained names, without distinction, of First Nation citizens who reside off the reserve. Referring to the evidence of actions taken by local Court Services officials in the Thunder Bay and Kenora judicial districts to comply with section 6(8), ALST submits that the exercise of local authority and discretion within Court Services is not the appropriate means to address the representation of First Nations peoples on the jury roll.

329. In looking forward at ways to remedy the current problems of lack of representation of First Nations peoples on Ontario juries, ALST recommends Ontario follow the Manitoba model, under which, as I noted at paragraph 154, names of all Manitoba jurors are selected by data drawn from the provincial health

[270] *R. v. Ipeelee*, 2012 SCC 13.

registry. ALST notes that the Manitoba Justice Inquiry, to which I have also referred to at paragraph 154, found that this approach adequately addressed the representation issue, with the exception of Winnipeg, though no explanation for this exception was given.[271]

330. ALST makes a number of recommendations, categorizing them as either long term or interim activities. The recommendations are as follows:

(i) Long term Recommendations

General

- creation of a map that depicts judicial districts and the First Nations communities situated within them.
- clear and concise directives to regional Court Services offices in relation to:
  - » standards of communication and outreach to First Nations communities and peoples;
  - » recruiting First Nations staff in regions where there is a high percentage of First Nations population;
  - » human resource policy on hiring, retaining and promoting First Nations employees within the Court Services Division; and
  - » a policy that prioritizes the representation of First Nations peoples on the jury roll within the Court Services Division and Coroner's Office.
- mandatory training for Sheriffs to familiarize them with the composition, political and cultural attributes of the First Nations in their respective judicial districts.

Training

- aboriginal cultural competency training for Court Services staff, Coroners and their counsel that includes general information about each First Nation, history of exclusion, overrepresentation and incarceration, inquest issues, cultural and lived experiences:
  - » developed by or with First Nations
  - » adequately funded
  - » sustainable and transferrable; and
  - » regularly updated.
- communications training for staff of the Court Services Division and Crown lawyers.

Relationships

- strategic outreach to First Nations leadership, tribal councils, political and territorial organizations, Aboriginal service agencies and women's groups.

[271] Public Inquiry Into the Administration of Justice and Aboriginal People, *Report on Aboriginal Justice Inquiry of Manitoba*, Vol. 1 by A.C. Hamilton & C.M. Sinclair. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission <http://www.ajic.mb.ca/volumel/toc.html> at chapter 19.

Coroner's Services

- outreach to First Nations governments and communities to explain the importance of representation on inquest juries.
- regional and investigative coroners should meet with First Nations governments and political organizations regarding juries.

Legislative Changes

- research approaches from other jurisdictions that address First Nations access to justice and inclusion on the jury roll, the results of which should guide legislative change.
- create an equal system for all jurors.
- as an alternative to legislative change, Ontario should seek to enter into a Memorandum of Understanding with Aboriginal Affairs and Northern Development for the provision of annual lists from the Indian Registration system of First Nations reserve residents.

Outreach

- an implementation committee should be created that includes First Nations governments and agencies from each judicial district that contains First Nations reserves.
- a public awareness campaign should be designed in consultation with First Nations peoples directed at the general public and legal professionals.
- Ontario should sponsor a Continuing Professional Development course certified by the Law Society of Upper Canada that addresses the representation issue.

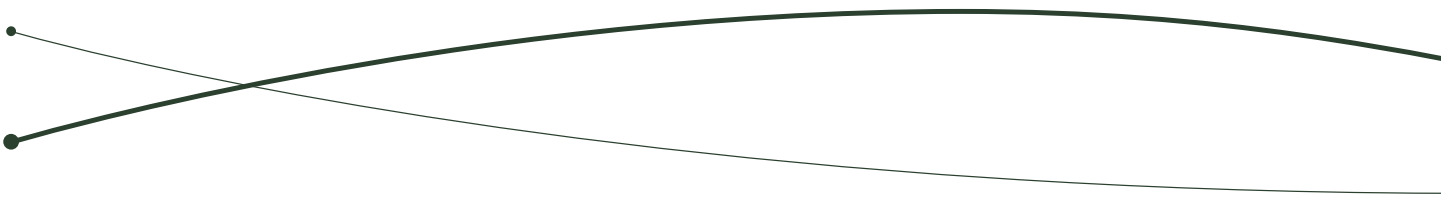
(ii) Interim Recommendations

Court Services Division and Sheriffs

- training should be provided to all Sheriffs and court staff that are involved in implementing section 6(8) of the *Juries Act*. Training should incorporate a historical overview, information on First Nations governance systems, the impact of the *Indian Act* on Band Lists and voters lists, and cultural competency and communication training appropriate for dealing with First Nations peoples.
- changes should be made to the jury manual to set out a specific protocol regarding engagement with First Nations for the implementation of section 6(8).
- Court Services staff should make efforts to build relationships with First Nations communities, tribal councils and political and territorial organizations as part of a robust communication and outreach strategy.

Inquest Recommendations

- In the case of an unrepresentative jury roll, the Coroner should make direct efforts to communicate with the victim's family to explore whether they want to proceed in any event of the existing jury roll, rather than unnecessarily delaying the inquest.
- The Coroner should explore what steps can be taken to implement a representative jury on a case-by-case basis, similar to what the Court of Appeal recommended in *Pierre v. McRae,* which was to order the sheriff to produce a list of jurors from a proper jury roll.



5. SUBMISSIONS OF THE OFFICE OF THE PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH

331. The Provincial Advocate for Children and Youth made submissions respecting a role for First Nations youth in the jury education process. The Provincial Advocate is an independent officer appointed by the Legislative Assembly of Ontario. His mandate is to "provide an independent voice for children and youth and partner with them to bring issues forward; encourage communication and understanding between children and families and those who provide them with services and; educate children, youth and their caregivers about the rights of children and youth." As part of his mandate, the Provincial Advocate works for the rights and interests of First Nations children and youth.

332. By way of context, the Provincial Advocate notes that First Nations peoples currently represent 16.7 percent to 19.7 percent of the prison population in Canada, while they represent only four percent of the overall Canadian population. According to the Provincial Advocate, these statistics are likely to worsen over the coming decade, and Ontario already has the third highest incarceration rate in Canada. It is the view of the Provincial Advocate that Aboriginal youth are almost eight times more likely to be in custody compared to their non-Aboriginal peers.

333. The socio-economic challenges faced by Aboriginal youth create a dire picture that begs for transformative changes to the justice system if First Nations peoples are to participate in the jury process. The Provincial Advocate explains that gang involvement, high rates of suicide, contact with the youth justice system, unemployment and underemployment, lack of education, history of physical and sexual abuse, and over-policing are matters that in one way or another burden the life of an Aboriginal youth. Accordingly, it is imperative that First Nations youth be involved in creating solutions to the jury system to counter the overrepresentation of First Nations peoples in the justice system and to lend their experience to address prevention approaches and alter perceptions that bar willingness to participate on juries.

334. In preparing his submissions, the Provincial Advocate's office recruited a group of First Nations youth with whom it had previously worked to seek their perspectives and opinions regarding potential reforms aimed at inclusion of youth in the jury process. The Provincial Advocate's office expressed a commitment to move forward with its recommendations that focus on educational processes to address the systemic barriers to First Nations youth and their communities insofar as participation on juries is concerned.

335. The Provincial Advocate identifies an initial challenge in working with First Nations youth in a reform process that he describes as needing to overcome a "confidence deficit". Many First Nations youth have come to feel apathetic towards the "system" because the government has failed to provide the most basic of services, like clean water, health care, food security or safe housing. Coupled with the historical wrongs committed by government in relation to First Nations' culture, language, loss of land, racism, discrimination and other injustices, many First Nations youth feel disempowered to effect any sort of change.

336. Also contributing to the confidence deficit is the pattern of exclusion of First Nations youth from decision-making regarding matters that affect their lives. Such exclusion serves to undermine their confidence in their own ability to make sound decisions. The confidence deficit effectively impedes motivation on the part of First Nations youth to become involved in reformative change. However, according to the Provincial Advocate, with the necessary supports, this challenge is manageable.

337. The Provincial Advocate suggests a number of ways to empower First Nations youth to willingly participate in changing the system to better serve their rights and interests. First, youth must come to understand and appreciate that they possess certain definable rights by virtue of being First Nations citizens, as well as citizens of Ontario and Canada. The Provincial Advocate's office states that given its role in rights education, it is well-positioned to act as a resource for First Nations youth as they advocate for change in Ontario's Justice System.

338. The Provincial Advocate advances the concept of civic engagement as an effective framework to explain an individual's obligation to the jury process. Educating First Nations youth about how they can contribute to their community in a meaningful way by applying their lived experiences can be an effective way to instill motivation for active community engagement. The community is strengthened by maximizing the number of youth that are taught the importance of civic engagement, in the context of First Nations' cultural values and norms. Once seen in that context, First Nations youth can then apply this concept to the broader community and, in particular, the jury process.

339. The Provincial Advocate stresses the importance of the *Gladue*[272] case and the principles espoused therein as a tool to entice young people to become active in the reform process. Ensuring that the *Gladue* principles are properly applied to Aboriginal offenders is a way in which First Nations youth can positively exercise their civic engagement. Moreover, sentencing options available through the application of the *Gladue* principles present an opportunity for young people to learn about their First Nation's traditional laws, values, and approaches to the restoration of harmony and justice and how that can be applied in a daily setting. Being involved in a community's restorative justice process can be an invaluable teaching tool that demonstrates the resolution of conflict and the return to harmony. This is a positive exercise of the justice system. The Provincial Advocate asserts that any systemic reform of the justice system must be based upon the *Gladue* principles. Reforms must be focused on remedying the overrepresentation of First Nations peoples in prisons and the circumstances by which the lives of First Nations peoples are the subject of coroner's inquests.

340. As a first step, the Provincial Advocate recommends initiating a discussion that brings together First Nations youth to strategize on the development and delivery of jury education workshops. He further recommends that a strong mentorship relationship be fostered between Justice officials and First Nations youth to reinforce the commitment to move towards systemic change.

341. Specific recommendations proposed by the Provincial Advocate include:

- First Nations young people be brought together so that they can share their knowledge, questions and concerns about Ontario's justice system and be educated regarding the role of the jury process in improving the conditions that influence the delivery of justice to First Nations peoples.
- the Provincial Advocate's Office work in partnership with First Nations youth, communities and leadership to develop recommendations that are specific to what is needed to create a justice system that is fair and just in their eyes and anchored in their rights under the United Nations Convention on the Rights of the Child.
- First Nations young people be provided with the opportunity to work with their Elders, the Provincial Advocate's office and the justice system to create a mentorship model that encourages the participation of youth in the jury process.
- young people be provided with an opportunity to work with the Provincial Advocate's office to develop educational activities, and participate in a process to help develop a systemic policy framework to transform the jury process. Early education is a key strategy to ensure that young First Nations people are informed of how jury service can contribute to delivering justice for First Nations people.
- a review of the current jury recruitment and selection process be conducted to identify the barriers for First Nations young people and adults and changes that are necessary to promote involvement in jury service that is aligned with a cultural approach to civic engagement.

[272] *R. v. Gladue*, [1999] 1 S.C.R. 688.

step of beginning – rather than ending – my recommendations with the section on Implementation, which includes recommendations for establishing bodies that will be instrumental in turning the words on the page in my Report into action.

348. Second, it is obvious that all the recommendations listed below cannot be implemented at the same time. It is also abundantly clear that resolving the issues on jury representation is going to take time. There is no magic bullet that can provide an instantaneous solution. Consequently, the implementation of various recommendations will need to be prioritized, and milestones and targets scheduled. This is part of the work I anticipate will be carried out by the Implementation Committee and its support staff, which I describe in the section on Implementation of Recommendations that follows.

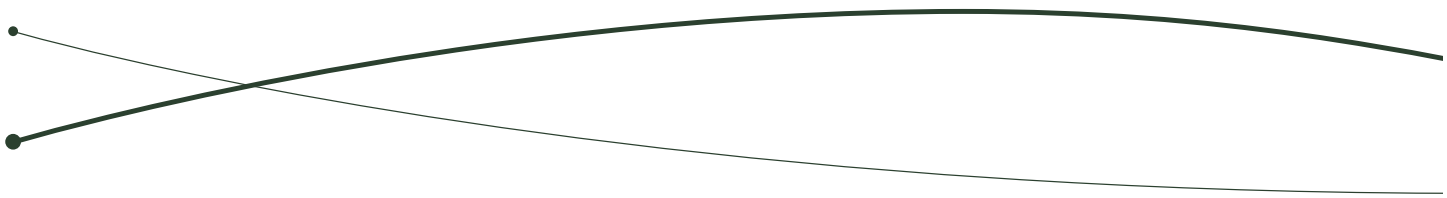
349. Third, in making recommendations, it is virtually impossible for me to calculate or estimate the financial costs of the recommendations. The Independent Review team has neither the capacity nor expertise to perform those tasks. However, the terms of the mandate as stated in the Order-in-Council call for me to take the financial situation into account in putting forth recommendations.

350. I believe that the best way to comply with the terms of reference, and to make recommendations for the improvement in the representation of on-reserve First Nations peoples on juries, while being respectful of Ontario's financial condition, is the following approach. I have made recommendations that I believe should be made based on what I have heard or observed to improve the jury representation situation. If, on further analysis, these prove to be financially difficult, I would suggest that consideration be given to modify the recommendation in a way that reduces costs while not changing the substance of the recommendation. Alternatively that particular recommendation might be deferred since, as mentioned, every recommendation practically cannot be implemented at the same time. However, these are examples of matters to be left to the Implementation Committee, as discussed below.

351. I realize that many of my recommendations will involve costs, but I would like to say that as much as I can, I have taken financial considerations into account in making the recommendations. With that said, when principles of justice and fairness for thousands of people are involved, the financial aspects of the matter should not trump those fundamental principles in any material way. Moreover, the costs of doing nothing will likely be more than the costs of implementing these recommendations, when one considers the expenses involved by the present approach. This is apart from the greater potential for loss of liberty and increased distress for First Nations peoples and a further deterioration in the relations between the Ministry and First Nations.

352. Fourth, it became apparent almost immediately from the start of the Independent Review that the problems with improving the representation of First Nations peoples on juries are inextricably connected with problems arising from the justice system's treatment of members of First Nations generally. This is an undeniable fact. I realize that my review is not about reforming the justice system of Ontario, but I would be derelict in my duty as the Independent Reviewer to avoid any discussion of the need to address serious issues that arise from how the justice system impacts the question of jury representation. Accordingly, I feel compelled to put forth recommendations which deal with these broader issues. Some of these issues relating to the justice system may be ones for longer term responses, but they are not to be ignored if progress and improvement are to be achieved.

353. Fifth, in listing my recommendations, I do not wish to imply that they are complete in every way, as they may require some fine tuning at the implementation stage, or more substantially, further analysis or study or consultation with First Nations. In addition, I greatly benefitted from the myriad of recommendations from various groups and individuals that have been summarized above. I have done so because the Implementation Committee may well wish to consider some of them as the Committee deems appropriate.



354. Finally, and most importantly, while I believe all of the recommendations below are desirable and would go a long way to enhancing the representation of First Nations peoples on juries, something even more fundamental is required.

355. In my experience dealing with Aboriginal issues as a lawyer (in both public and private practice) and judge, too often I have seen evidence or examples of mistrust and disrespect between Aboriginal and non-Aboriginal Canadians, whether the latter are government or private institutions or individuals. Although the evils of racism and discrimination have diminished over time, much more is needed to foster a relationship of harmony and enlightened co-existence between Aboriginals and non-Aboriginals. Without building a foundation of mutual respect and mutual trust for each other, the recommendations below will achieve nothing. And that respect and trust has to be earned not proclaimed. Concrete proposals and mutual effort are required.

356. To my mind, the model relationship between the two groups should be partners rather than what history reveals as adversaries. First Nations do have governments, and this Independent Review has reinforced my belief in the importance of emphasizing a government-to-government relationship that incorporates an underlying respect for cultural, traditional, and historical values that are different. It is this government-to-government relationship that must underlie the relationship between Ontario and First Nations going forward in dealing with justice and jury representation issues. To recognize this, I have recommended the models of the Implementation Committee and the Advisory Group to the Attorney-General as outlined below.

2. IMPLEMENTATION OF RECOMMENDATIONS — ESTABLISHING AN IMPLEMENTATION COMMITTEE AND MINISTER'S ADVISORY GROUP

357. As noted in the introduction above, I have decided to begin my recommendations with this section on implementation. I do so in order to emphasize the fundamental importance of the government moving quickly to create – in partnership with First Nations in Ontario – bodies that can effectively begin the work of responding not just to the problem of underrepresentation of First Nations individuals on juries, but to the broader systemic challenges that have been identified in the course of the Independent Review.

358. As frequently mentioned, cynicism and mistrust of jury participation along with similar concerns about the justice system are widespread within First Nations communities. That cynicism includes doubts among First Nations that much will ever come out of this Independent Review. The Order-in-Council, to some extent, recognizes implicitly this state of affairs. In addition to calling for recommendations to enhance the representation of on-reserve First Nations peoples on juries, it calls for recommendations "to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue".

359. To meet the implementation part of my mandate, I have two major recommendations to put forward: the establishment of an Implementation Committee with government and First Nations members and the setting up of an Advisory Group to the Attorney General on matters affecting First Nations and the Justice System.

(A) IMPLEMENTATION COMMITTEE

360. RECOMMENDATION 1: I recommend that the Ministry of the Attorney General establish an Implementation Committee consisting of a substantial First Nations membership along with Government officials and individuals who could, because of their background or expertise, contribute significantly to the work of the Implementation Committee. This Committee would be responsible for the oversight of the implementation of the below recommendations and related matters. In view of the importance and urgency of the matter, I recommend that the Committee be established as soon as practically possible.

361. Having First Nations membership that is substantial and not mere tokenism would underscore the seriousness of the Ministry of the Attorney General to improving the relationship between the Ministry and First Nations and increase the chances of greater acceptance within the First Nations. An example of someone with a unique background or expertise that should be represented on the Committee is an individual who could be a First Nations youth representative. Such a representative would be valuable because of the serious issues facing First Nations youth and the importance of the perspective that a youth representative on the Committee could bring to it, given the dramatic demographic increase of youth referred to in paragraph 228.

362. I do not wish to specify the exact number of people who would serve on the Committee except to say it should be large enough to include individuals who can contribute from their experience and qualifications to the work of the Committee, yet small enough to avoid difficulty in scheduling meetings and conducting its business. It may be that approximately seven to nine members is the appropriate range.

363. The Committee will need to have a support group, which should not be large in number, and could involve secondments from existing Ministry of the Attorney General staff and others as appropriate.

364. The Committee would be appointed by the Attorney General for a three year term with the possibility of a renewal for an additional term. A small secretariat would need to be assembled with the appointment of an Executive Director who could come from the public service.

365. The Committee members would be paid pursuant to provincial practice for boards of directors for independent Crown agencies. The budgets and expenses for the Committee's work would be subject to approval pursuant to Management Board guidelines and established Government of Ontario procedures.

366. The Implementation Committee would be responsible for such things as:

(a) developing a timetable for implementing the recommendations with milestones to achieve measurable targets as appropriate;

(b) establishing protocols for meetings, decision making, and related matters;

(c) issuing annual reports to the Attorney General on progress made in the implementation of recommendations and changes that are deemed important by the Committee to make;

(d) ensuring there is a proper liaison with the Deputy Attorney General and other officials of the Ministry to achieve a cooperative and collaborative working relationship;

(e) developing and transmitting recommendations of the Committee for implementation to the Deputy Attorney General for approval; and

(f) receiving periodic reports from Ministry officials on implementation of recommendations and related matters.

(B) ADVISORY GROUP TO THE ATTORNEY GENERAL ON FIRST NATIONS PEOPLES AND THE JUSTICE SYSTEM

367. RECOMMENDATION 2: To address paragraph 1(b) of the Order in Council 1288/2011 on August 11, 2011 establishing my mandate, I recommend that the Attorney General establish an Advisory Group to the Attorney General on matters affecting First Nations peoples and the Justice System. Creating this Group would not only underscore the commitment of the Ministry to improve their relationship with First Nations on jury issues but also on justice system concerns that are related to the participation of First Nations peoples on juries.

368. As I have already mentioned, I believe that relations between the justice system and First Nations have reached the crisis stage. As one senior Ontario government official told us: "justice has not been a friend to First Nations". This situation has been arrived at over many years of neglect, and a response is required on many fronts, including a top down approach for the Attorney General to seek the candid advice and wisdom of those directly affected, namely First Nations. In my view, this would be welcomed by the First Nations leaders and people with one major proviso: the Advisory Group should not be window dressing but be an effective mechanism for the Attorney General to receive valuable input from First Nations to begin a real pathway to improve elements of the justice system that for too long have been ignored as far as First Nations peoples are concerned.

369. The Group could be asked to meet periodically but at least twice a year as decided by the Attorney General. I would leave other details for the Group, such as membership, to the determination by the Attorney General since it would be presumptuous of me to go any further. In a similar vein, I do not wish to prescribe the agenda items for such a group. We heard much from First Nations people about the importance of restorative justice in the justice system. Accordingly, that could be a point for discussion by the Advisory Group.

370. The recommendations to set up an Implementation Committee and an Advisory Group to the Attorney General will not by that alone solve all the concerns that have been outlined in this Report, but it will signal an important and much needed change in the commitment of Ministry officials to improve the situation facing First Nations. The effective working of the Implementation Committee and Advisory Group will go beyond the signaling stage of a changed commitment, but could well lead to an improved relationship between First Nations and the Ministry of the Attorney General, and even better still to positive and meaningful improvements for First Nations peoples.

3. RECOMMENDATIONS RESPECTING SYSTEMATIC CONCERNS ABOUT THE JUSTICE SYSTEM

371. As I have repeatedly emphasized throughout the Report, it is clear to me that meaningful progress can only be made in improving the representation of First Nations peoples on Ontario's jury roll if steps are also taken at the same time to respond to the systemic issues that have prevented First Nations peoples from participating in Ontario's justice system.

372. These systemic issues include:

- conflict between First Nations and Euro-Canadian approaches to criminal justice;
- the systemic racism that unfortunately still appears to be present in our justice system, including instances of mistreatment of First Nations inmates in prison, general disrespect by police and discriminatory public reaction to First Nations complaints;
- the almost universally-held view of First Nations individuals that the justice system is alien or foreign;
- the problem of inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas;
- but on the positive side, I heard or read some commentary to the effect that if positive changes are made to the justice system then the reticence of First Nations individuals to participate on juries will lessen.

373. In order to address these systemic issues, I recommend that:

- **RECOMMENDATION 3: after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide cultural training for all government officials working in the justice system who have contact with First Nations peoples, including police, court workers, Crown prosecutors, prison guards and other related agencies.**

  I appreciate that a certain level of cultural training is already provided, having been the beneficiary of such training myself as a former judge. However, this training must be consistent, comprehensive and broadly available to all persons working in the justice system who have contact with First Nations peoples, not episodic, ad hoc or limited to certain groups of people.

- **RECOMMENDATION 4: the Ministry of the Attorney General carry out the following studies for eventual input by the Implementation Committee:**

  (a) **a study on legal representation that would involve Legal Aid Ontario, particularly in the north, that would cover a variety of topics, including the adequacy of existing legal representation, the location and schedule of court sittings, and related matters.** Particular attention should be paid to the practice in the Northwest Territories of holding hearings in remote locations and drawing jury rolls exclusively from residents within 30 kilometres of the court. Similarly, in Alaska the jury pool is drawn from residents within 50 miles of remote courthouses and the defendant has the ability to challenge the representativeness of the jury pool, among other improvements implemented by the state of Alaska outlined in paragraph 193. Northern Ontario's geographical and demographic conditions are very similar to these two jurisdictions;

  (b) **a study on First Nations policing issues, including the recognition of First Nations police forces through enabling legislation, the establishment of a regulatory body to oversee the operation of First Nations law enforcement programs, the creation of an independent review board to adjudicate policing complaints, and the development of mandatory cultural competency training for OPP officers; and**

  (c) **a review of the Aboriginal Court Worker program and an examination of resources required to improve the program.**

  These studies and reviews need not be long, drawn-out initiatives, and could be carried out by Ministry staff, of course in consultation with First Nations. Ultimately the studies and review should be submitted to the Implementation Committee for review and recommendations.

- **RECOMMENDATION 5: the Ministry of the Attorney General create an Assistant Deputy Attorney General (ADAG) position responsible for Aboriginal issues, including the implementation of this Report.** This official would need a small support group that could draw on the expertise of officials already in the Ministry. The ADAG would have ongoing responsibility for matters affecting First Nations and jury representation, as well as issues with the justice system, as deemed appropriate. This person should be a member of the Implementation Committee, and his/her colleagues would be actively involved in providing input through him/her to the Committee and to the advisory group to the Attorney General as directed. As an example of his/her role, noting the confusion and lack of transparency regarding jury districts in Ontario, the ADAG should be asked to make a map of these districts publicly available.

- **RECOMMENDATION 6: after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide broader and more comprehensive justice education programs for First Nations individuals, including:**

(a) **developing brochures in First Nations languages with plain wording which provide comprehensive information on the justice system, including information respecting the role played by criminal, civil, and coroner's juries;**

(b) **establishing First Nations liaison officers responsible for consulting with First Nations on juries and on justice issues.** The officers would be assigned approximately 15 reserves for their liaison work and would be First Nations people. The officers would also undergo a training program to provide them with the background information necessary to perform their roles; this program would be developed by the Ministry of the Attorney General. The liaison officers could be tasked with holding Jury Information Forums on the reserves within their purview;

(c) **commissioning the creation of video or other educational instruments, particularly in First Nations languages, that would be used to educate First Nations individuals as to the role played by the jury in the justice system and the importance of participating on the jury; and**

(d) **considering the feasibility of a program that would enlist students from Ontario law schools to participate in intensive summer education and legal assistance programs for First Nations representatives, dealing with the justice system generally and the jury system in particular, in consultation with Chiefs, and Court Services officials.**

It is important to emphasize that all of the education initiatives above would have to be carried out with the input of the Implementation Committee, but also in consultation with PTOs, other associations, and First Nations.

- **RECOMMENDATION 7: With respect to First Nations youth, in addition to having a youth member on the Implementation Committee, the Implementation Committee should request that the Provincial Advocate for Children and Youth facilitate a conference of representative youth members from First Nations reserves to focus on specific issues in the relationship between youth, juries, and the justice system, addressed in this report.** The Provincial Advocate for Children and Youth should prepare a report on that conference; prior to submitting the report to the Implementation Committee the Provincial Advocate for Children and Youth should consult with PTOs and other First Nations associations.

4. RECOMMENDATIONS RESPECTING THE REFORM OF THE JURY SELECTION PROCESS

374. There is a consensus shared with everyone with whom I met, including government officials, that the current practices followed by Court Services officials to compile the jury list are not achieving results that adequately represent First Nations individuals on the jury roll. It is clear that steps must be taken to obtain access to a database that contains an up-to-date record of the names of individuals living on reserve. The current reliance by Court Services officials on obtaining the names from Band List information, though resulting from well-meaning efforts, is ad hoc and leads in many cases to out-of-date and otherwise unreliable information being used to compile the jury roll. In addition to obtaining an accurate and comprehensive data base, it is clear that much more needs to be done to encourage First Nations individuals to complete and return jury questionnaires when they receive them, and to serve on juries when summonsed to do so.

375. As with my recommendations respecting systemic issues, it is crucial that approaches to deal with these challenges be carried out collaboratively with PTOs and First Nations and coordinated through the Implementation Committee described above, that they take into consideration interests of individual privacy, and that they give due respect to First Nations' autonomy. My hope is that if these issues are pursued on the basis of a relationship of mutual respect and consistently with the government-to-government relationship between First Nations and Ontario, First Nations governments will cooperate to find practical solutions that will overcome these privacy and other logistical issues, so that an appropriate comprehensive an accurate database of First Nations individuals living on reserve can be compiled.

376. In order to address these issues, I recommend that:

- **RECOMMENDATION 8: the Ministry of the Attorney General, in consultation with the Implementation Committee, undertake a prompt and urgent review of the feasibility of, and mechanisms for, using the OHIP database to generate a database of First Nations individuals living on reserve for the purposes of compiling the jury roll.** This appears to me to be the most promising means by which First Nations names can be added to jury rolls. It is my hope that, if it proves feasible, the use of the OHIP database will be implemented on an urgent basis.
- **RECOMMENDATION 9: in connection with this review, the Ministry of Attorney General and First Nations, in consultation with the Implementation Committee, consider all other potential sources for generating this database, including band residency information, Ministry of Transportation information and other records, and steps that might be taken to secure these records, such as a renewed memorandum of understanding between Ontario and the Federal government respecting band residency information or memorandums of understanding between Ontario and PTOs or First Nations, as appropriate.**
- **RECOMMENDATION 10: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider amending the questionnaire sent to prospective jurors to:**

  (a) **make the language as simple as possible;**

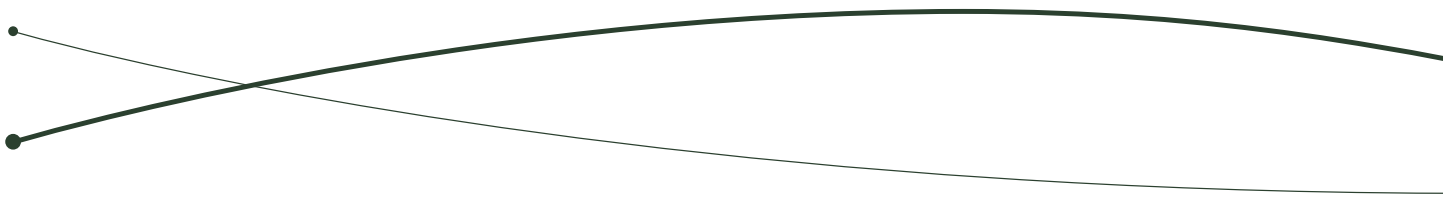
  (b) **translate the questionnaire into First Nations languages as appropriate;**

  (c) **remove the wording threatening a fine for non-compliance and replacing it with wording stating simply that Ontario law requires the recipient to complete and return the form because of the importance of the jury in ensuring fair trials under Ontario's justice system;**

  (d) **on the premise that a First Nations member living on reserve in Ontario satisfies the Canadian citizenship requirement under s. 2(b) of the *Juries Act*, add an option for First Nations individual to identify themselves as First Nations members or citizens rather than Canadian citizens;**

  (e) **enable First Nations elected officials, such as Chiefs and Councillors, as well as Elders, to be excluded from jury duty; and**

  (f) **provide, through an amendment to the *Juries Act*, for a more realistic period than the current five days for the return of jury questionnaires.**
- **RECOMMENDATION 11: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider implementing the practice from parts of the U.S., that when a jury summons or questionnaire is undeliverable or is not returned, another summons or questionnaire is sent out to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness.**
- **RECOMMENDATION 12: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider a procedure whereby First Nations people on reserve could volunteer for jury service as a means of supplementing other jury source lists.** This is practised in New York State as a way to supplement jury rolls drawn from several other lists that might overlook certain individuals, and could serve a similarly valuable purpose with respect to First Nations peoples in Ontario. By supplementing other jury source lists in this manner, the Ministry of the Attorney General and the Implementation Committee would wish to be satisfied that this would not offend the randomness principle.



- **RECOMMENDATION 13: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider enabling First Nations people not fluent in English or French to serve on juries by providing translation services and by amending the jury questionnaire accordingly to reflect this change.**
- **RECOMMENDATION 14: the Ministry of the Attorney General, in consultation with the Implementation Committee, adopt measures to respond to the problem of First Nations individuals with criminal records for minor offences being automatically excluded from jury duty by:**

  (a) **amending the *Juries Act* provisions that exclude individuals who have been convicted of certain offences from inclusion on the jury roll, to make them consistent with the relevant *Criminal Code* provisions, which exclude a narrower group of individuals;**

  (b) **encouraging and providing advice and support for First Nations individuals to apply for pardons to remove criminal records; and**

  (c) **considering whether, after a certain period of time, an individual previously convicted of certain offences could become eligible again for jury service.** In New South Wales, people with prior convictions are barred from jury service for two to five years, depending on the offence.
- **RECOMMENDATION 15: the Ministry of the Attorney General discuss with the Implementation Committee the advisability of recommending to the Attorney General of Canada an amendment to the *Criminal Code* that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries.** A practice that has developed in the U.S. by which judges are able to supervise the exercise of peremptory challenges, if a judge is of the opinion that the challenge is being used in a discriminatory manner. The point of this is that, if every change in the Report is implemented to its fullest, First Nations jury service could still be significantly undermined through discriminatory use of peremptory challenges. It should also be recalled that the Manitoba Inquiry report recommended the abolition of peremptory challenges to avoid the underrepresentation of Aboriginal people on juries.

5. RECOMMENDATIONS RESPECTING JURY MEMBER COMPENSATION

377. The current compensation for jury members of $40 per day from the 11th to 49th day of a trial, and $100 per day after the 49th day, has been in place since 1991. Considering the Consumer Price Index, if these figures had risen with inflation, they would have stood at $57.92, and $144.81 at the end of 2011, respectively.[274]

378. We heard many concerns expressed about the low levels of compensation as well as failure to reimburse for the real costs incurred by a prospective juror for child care or Elder case expenses. We have not had sufficient time or resources to examine this issue with the thoroughness it deserves. However, from all that I have heard on the subject an upward adjustment appears to be warranted, as does a reconsideration of the present provision of no compensation for the first ten days of jury service.

379. RECOMMENDATION 16: In view of the concerns I have heard and the fact that current jury compensation is not consistent with cost-of-living increases, I recommend that the Ministry of the Attorney General refer the issue of jury member compensation to the Implementation Committee for consideration and recommendation.

[274] *Consumer Price Index, historical summary*, online: Statistics Canada <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ46a-eng.htm>.

6. RECOMMENDATIONS RESPECTING CORONER'S INQUESTS

380. The issue of improving First Nations representation on coroner's inquests is worthy of special consideration for at least four reasons.

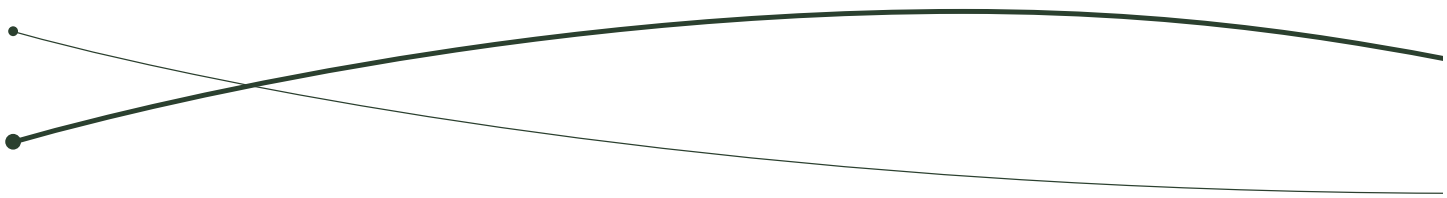
381. First, as described at paragraphs 102 and 103 above, the role played by coroner's juries in answering certain questions and making recommendations, as opposed to making findings of guilt, is remarkably consistent with what has been described to me as the traditional way in which justice has been administered by First Nations communities. My experience in speaking with First Nations individuals was that, while they expressed reluctance to engage in the "judging" involved in being on a criminal jury, they were interested to learn about how the coroner's jury process works and expressed interest in becoming involved.

382. Second, although members of coroner's inquest juries are drawn from the same list as jurors for criminal and civil trials, the process by which the coroner selects a jury is distinct from the criminal and civil jury selection process. As I described at paragraph 102 above, when the coroner begins an inquest, he or she issues a warrant which requires the Provincial Jury Centre to provide a list of jurors living in the area where the death occurred. The Coroner's Constable then selects the names of people whom he or she believes to be "suitable to serve as jurors at an inquest" from that list and issues summonses requiring them to attend at the place of inquest. This process is significantly different from the criminal jury process in particular, which emphasizes the importance of random selection and provides procedural protections for the accused and Crown to challenge jurors and have them removed from the list.

383. Third, it is apparent that the families of First Nations individuals who are the subject of coroner's inquests have a strong and compelling interest in having First Nations individuals, ideally from same community as the individual whose death is being investigated, take part in the coroner's inquest jury. I was very moved to hear these families' stories during the forum organized by Aboriginal Legal Services Toronto. While I do not want to underestimate the importance of First Nations individuals serving on criminal juries, I note that the issue of underrepresentation of First Nations individuals on juries has been particularly prominent in the context of coroner's inquests.

384. Finally, I heard during the engagement process and in the submissions of a number of participants that some First Nations individuals might have an interest in volunteering for jury duty. I understand that this may raise issues of randomness in the context of a criminal or civil trial (though, as I have pointed out, volunteering for jury duty exists in New York State). That is why I have recommended that volunteer service for criminal juries be further considered by the Implementation Committee. But volunteering to be on the jury roll for a coroner's inquest is compatible with the distinct way in which a coroner's jury is empanelled, as well as the unique objectives of a coroner's inquest.

385. RECOMMENDATION 17: For all of the above reasons, I recommend that the Ministry of the Attorney General, in consultation with the Implementation Committee, institute a process that would allow for First Nations individuals to volunteer to be on the jury roll for the purposes of empanelling a jury for a coroner's inquest.



APPENDIX A

ORDER IN COUNCIL
DÉCRET

O.C./DÉCRET 1388/2011

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

WHEREAS the *Juries Act*, R.S.O. 1990, c. J.3, governs the jury process in Ontario, including the process for preparing the jury roll;

WHEREAS subsection 6 (8) of the *Juries Act* prescribes the process for selecting persons living on reserve communities for potential inclusion on the jury roll;

WHEREAS it has been determined that it is desirable to authorize under the common law, pursuant to the prerogative of Her Majesty the Queen in right of Ontario, and in the discharge of the government's executive functions, an individual to review the process for including persons living on reserve communities on the jury roll and to do so independently of government and on a systemic basis;

WHEREAS Nishnawbe Aski Nation has resolved as a political territorial organization to work with the Ontario government and the Independent Reviewer to enhance the representation on jury rolls of First Nations persons living on reserve communities in its territories;

WHEREAS other First Nations have been, and are, or may be desirous of the same goal;

AND WHEREAS it is desirable to set out the terms of reference for such a review;

THEREFORE, it is ordered that the Honourable Frank Iacobucci be appointed as an Independent Reviewer and authorized to conduct such a review;

Sur la recommandation de la personne soussignée, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil exécutif, décrète ce qui suit :

ATTENDU QUE la *Loi sur les jurys* (L.R.O. 1990, chap. J.3) régit le processus de sélection des jurés en Ontario, y compris la préparation de la liste des jurés;

ATTENDU QUE le paragraphe 6 (8) de la *Loi sur les jurys* prescrit le processus de sélection des personnes vivant dans des réserves en vue de leur éventuelle inclusion sur la liste des jurés;

ATTENDU QU'il a été déterminé qu'il est souhaitable d'autoriser, en common law et selon la prérogative de Sa Majesté la Reine du chef de l'Ontario, et dans le cadre des fonctions exécutives du gouvernement, un particulier à examiner la procédure d'inclusion des personnes vivant dans des réserves sur la liste des jurés et ce, indépendamment du gouvernement et sur une base systémique;

ATTENDU QUE Nishnawbe Aski Nation a résolu, en tant qu'organisation territoriale politique, de travailler avec le gouvernement de l'Ontario et l'examinateur indépendant pour accroître la représentation, sur les listes de jurés, des membres des Premières nations vivant dans des réserves situées sur ses territoires;

ATTENDU QUE d'autres Premières nations ont aspiré, aspirent ou peuvent aspirer au même but;

ET ATTENDU QU'il est souhaitable d'énoncer le cadre de référence d'un examen de ce genre;

EN CONSÉQUENCE, il est ordonné que l'honorable Frank Iacobucci soit nommé à titre d'examinateur indépendant et autorisé à procéder à cet examen;

AND THAT the terms of reference for the Honourable Frank Iacobucci be as follows:

MANDATE

1. The Independent Reviewer shall conduct a systemic review and report on any relevant legislation and processes for including First Nations persons living on reserve on the jury roll from which potential jurors are selected for all jury trials and coroners inquests, in order to make recommendations:

   a. to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and

   b. to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.

2. The Independent Reviewer shall conduct the review in an expeditious manner and shall deliver his final report and recommendations to the Attorney General no later than August 31, 2012.

3. While promoting the achievement of the goals described above, any recommendations developed should take into account the challenging fiscal context for government and First Nations in Ontario.

4. In conducting the review, the Independent Reviewer shall:

   a. review the existing legislation and processes, practices and past practices;

   b. review and consider any existing records or reports relevant to this mandate, including jury rolls in a systemic context, and any transcripts relating to public legal proceedings;

   c. conduct interjurisdictional analysis, including any relevant legislation, and identify best practices.

ET QUE le mandat de l'honorable Frank Iacobucci soit le suivant :

MANDAT

1. L'examinateur indépendant procède à un examen systémique et prépare un rapport sur les dispositions législatives et la procédure pertinentes en vue d'inclure des membres des Premières nations vivant dans des réserves sur la liste des jurés à partir de laquelle sont choisis les jurés potentiels pour tous les procès devant jury et toutes les enquêtes du coroner, dans le but de faire des recommandations visant ce qui suit :

   a. garantir et accroître la représentation, sur la liste des jurés, des membres des Premières nations vivant dans des réserves;

   b. consolider la compréhension, la collaboration et les relations entre le ministère du Procureur général et les Premières nations en ce qui concerne cette question.

2. L'examinateur indépendant procède promptement à l'examen et remet son rapport final et ses recommandations au procureur général au plus tard le 31 août 2012.

3. Bien qu'elles visent à favoriser la réalisation des buts énoncés ci-dessus, les recommandations formulées devraient tenir compte de la conjoncture fiscale difficile à laquelle font face le gouvernement et les Premières nations de l'Ontario.

4. Dans le cadre de son examen, l'examinateur indépendant :

   a. examine les dispositions législatives et la procédure en vigueur ainsi que les pratiques actuelles et passées;

   b. examine et étudie les dossiers ou les rapports existants qui se rapportent à son mandat, y compris les listes de jurés dans un contexte systémique, et les transcriptions relatives aux procédures judiciaires publiques;

   c. procède à une analyse interterritoriale, notamment des dispositions législatives pertinentes, et détermine les meilleures pratiques à suivre.

5. In conducting the review, the Independent Reviewer may request any person to provide information or records to him, hold public and/or private meetings and hold consultations with First Nations communities, including attendances on First Nations communities.

6. The Independent Reviewer shall invite and receive submissions in writing from any First Nation, First Nation political territorial organization, First Nation organization, member of a First Nation as well as from any interested party, including ministries of government.

7. In fulfilling his mandate, the Independent Reviewer shall not report on any individual cases that are, have been, or may be subject to a criminal investigation or

8. The Independent Reviewer shall perform his duties without making any findings of fact in relation to misconduct, or expressing any conclusions or recommendations regarding the civil or criminal liability of any person or organization, and without interfering in any investigations or criminal or other legal proceedings.

9. In delivering his report to the Attorney General, the Independent Reviewer shall ensure that the report is in a form appropriate, pursuant to the *Freedom of Information and Protection of Privacy Act* and other applicable legislation, and in sufficient quantity, for public release and be responsible for translation and printing, and shall ensure that it is available in English, French, Cree, Ojibway, Oji-Cree and Mohawk at the same time, in electronic and printed versions. The Attorney General shall make the report available to the public.

RESOURCES

10. Within a budget approved by the Ministry of the Attorney General the Independent Reviewer may retain such counsel, staff, or expertise he considers necessary in the performance of his duties at reasonable remuneration approved by the Ministry of the Attorney General. They shall be reimbursed for reasonable expenses

5. Dans le cadre de son examen, l'examinateur indépendant peut demander à toute personne de lui fournir des renseignements ou des documents, tenir des séances publiques ou à huis clos et engager des consultations avec des collectivités des Premières nations, y compris se rendre sur place.

6. L'examinateur indépendant demande et reçoit des observations écrites des Premières nations, de toute organisation territoriale politique des Premières nations, de toute organisation des Premières nations, de tout membre d'une Première Nation ainsi que de toute partie intéressée, y compris des ministères du gouvernement.

7. Dans le cadre de son mandat, l'examinateur indépendant ne doit pas faire rapport sur des causes particulières qui font, ont fait ou peuvent faire l'objet d'une enquête, notamment pénale, d'une poursuite pénale ou d'une autre procédure judiciaire.

8. L'examinateur indépendant s'acquitte de ses fonctions sans tirer de conclusions de fait en matière d'inconduite ni formuler de conclusions ou de recommandations quant à la responsabilité civile ou pénale de toute personne ou de tout organisme et sans intervenir dans des enquêtes ou des procédures judiciaires, notamment des poursuites pénales.

9. L'examinateur indépendant veille à remettre son rapport au procureur général sous une forme appropriée, conformément à la *Loi sur l'accès à l'information et la protection de la vie privée* et aux autres lois applicables, et en nombre d'exemplaires suffisant pour sa diffusion publique et doit en assurer la traduction et l'impression. En outre, il fait en sorte qu'il soit disponible en même temps en version française, anglaise, cri, ojibway, ojicri et mohawk et tant sur support électronique que papier. Le procureur général met le rapport à la disposition du public.

RESSOURCES

10. Dans le cadre d'un budget approuvé par le ministère du Procureur général, l'examinateur indépendant peut retenir les services des avocats, du personnel ou des experts qu'il juge nécessaires à l'exercice de ses fonctions selon la rémunération raisonnable approuvée par le ministère du Procureur général. Les

incurred in connection with their duties in accordance with Management Board of Cabinet Directives and Guidelines.

11. The Independent Reviewer shall establish and maintain a website and use other technologies to promote accessibility and transparency to the public.

12. The Independent Reviewer shall follow Management Board of Cabinet Directives and Guidelines and other applicable government policies in obtaining other services and goods he considers necessary in the performance of his duties unless, in his view, it is not possible to follow them.

13. The Independent Reviewer may make recommendations to the Attorney General or the Deputy Attorney General regarding funding for parties who have information relevant to the systemic issues and who would be unable to participate in the review without such funding. Any such funding recommendations shall be in accordance with Management Board of Cabinet Directives and Guidelines.

14. All ministries and all agencies, boards and commissions of the Government of Ontario shall, subject to any privilege or other legal restrictions, assist the Independent Reviewer to the fullest extent so that the Independent Reviewer may carry out his duties and shall respect the independence of the review.

Recommandé par : Le procureur général,

Recommended _____
Attorney General

Approuvé et décrété le

Approved and Ordered AUG 11 2011
Date

personnes retenues se font rembourser les frais raisonnables engagés dans l'exercice de leurs fonctions, conformément aux directives et aux lignes directrices du Conseil de gestion du gouvernement.

11. L'examinateur indépendant se dote d'un site Web et utilise d'autres technologies pour promouvoir l'accessibilité et la transparence.

12. À moins que, à son avis, cela ne soit pas possible, l'examinateur indépendant suit les directives et les lignes directrices du Conseil de gestion du gouvernement ainsi que les autres politiques applicables du gouvernement dans le cadre de l'obtention des autres biens et services qu'il estime nécessaires à l'exercice de ses fonctions.

13. L'examinateur indépendant peut faire des recommandations au procureur général ou au sous-procureur général en ce qui concerne le financement des parties qui détiennent des renseignements se rapportant aux questions systémiques et qui, à défaut de ce financement, ne seraient pas en mesure de participer à l'examen. Ces recommandations doivent être conformes aux directives et aux lignes directrices du Conseil de gestion du gouvernement.

14. Sous réserve de tout privilège ou de toute autre restriction légale, tous les ministères ainsi que tous les organismes, conseils et commissions du gouvernement de l'Ontario prêtent sans réserve leur concours à l'examinateur indépendant de façon qu'il puisse s'acquitter de ses fonctions et ils respectent l'indépendance de l'examen.

Appuyé par : Le président du Conseil des ministres,

Concurred _____
Chair of Cabinet

L'administratrice du gouvernement

_____
Administrator of the Government

APPENDIX B

JURIES ACT

R.S.O. 1990, CHAPTER J.3

CONSOLIDATION PERIOD: FROM JUNE 30, 2010 TO THE E-LAWS CURRENCY DATE.

LAST AMENDMENT: 2009, C. 33, SCHED. 2, S. 38.

DEFINITIONS

1. In this Act,

"county" includes a district; ("comté")

"Director of Assessment" means the employee of the Municipal Property Assessment Corporation who is appointed by the Corporation to be the Director of Assessment under this Act; ("directeur de l'évaluation")

"regulations" means the regulations made under this Act. ("règlements") R.S.O. 1990, c. J.3, s. 1; 1997, c. 43, Sched. G, s. 22; 2001, c. 8, s. 206.

ELIGIBILITY

ELIGIBLE JURORS

2. Subject to sections 3 and 4, every person who,

(a) resides in Ontario;

(b) is a Canadian citizen; and

(c) in the year preceding the year for which the jury is selected had attained the age of eighteen years or more,

is eligible and liable to serve as a juror on juries in the Superior Court of Justice in the county in which he or she resides. R.S.O. 1990, c. J.3, s. 2; 2006, c. 19, Sched. C, s. 1 (1).

INELIGIBILITY TO SERVE AS JUROR
INELIGIBLE OCCUPATIONS

3. (1) The following persons are ineligible to serve as jurors:

1. Every member of the Privy Council of Canada or the Executive Council of Ontario.

2. Every member of the Senate, the House of Commons of Canada or the Assembly.

3. Every judge and every justice of the peace.

4. Every barrister and solicitor and every student-at-law.

5. Every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner.

6. Every person engaged in the enforcement of law including, without restricting the generality of the

foregoing, sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the *Fire Protection and Prevention* Act, 1997, and officers of a court of justice. R.S.O. 1990, c. J.3, s. 3 (1); 1994, c. 27, s. 48 (1); 1997, c. 4, s. 82.

(2) Repealed: 1994, c. 27, s. 48 (2).

CONNECTION WITH COURT ACTION AT SAME SITTINGS

(3) Every person who has been summoned as a witness or is likely to be called as a witness in a civil or criminal proceeding or has an interest in an action is ineligible to serve as a juror at any sittings at which the proceeding or action might be tried. R.S.O. 1990, c. J.3, s. 3 (3).

PREVIOUS SERVICE

(4) Every person who, at any time within three years preceding the year for which the jury roll is prepared, has attended court for jury service in response to a summons after selection from the roll prepared under this Act or any predecessor thereof is ineligible to serve as a juror in that year. R.S.O. 1990, c. J.3, s. 3 (4); 1994, c. 27, s. 48 (3).

INELIGIBILITY FOR PERSONAL REASONS

4. A person is ineligible to serve as a juror who,

(a) has a physical or mental disability that would seriously impair his or her ability to discharge the duties of a juror; or

(b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon. R.S.O. 1990, c. J.3, s. 4; 2009, c. 33, Sched. 2, s. 38 (1).

PREPARATION OF JURY ROLLS

DUTY OF SHERIFF

NUMBER OF JURORS ON ROLL

5. (1) The sheriff for a county shall on or before the 15th day of September in each year determine for the ensuing year for the county,

(a) the number of jurors that will be required for each sittings of the Superior Court of Justice;

(b) the number of persons that will be required for selection from the jury roll for the purposes of any other Act; and

(c) the aggregate number of persons that will be so required. R.S.O. 1990, c. J.3, s. 5 (1); 2006, c. 19, Sched. C, s. 1 (1).

NUMBER OF JURORS IN DISTRICTS

(2) In a territorial district, after determining the number of persons that will be required for service during the ensuing year, the sheriff shall fix the total number of persons that shall be selected from municipalities, and the total number that shall be selected from territory without municipal organization. R.S.O. 1990, c. J.3, s. 5 (2).

TRANSMISSION OF RESOLUTIONS

(3) The sheriff shall forthwith upon making the determination under subsection (1) certify and transmit,

(a) to the Director of Assessment,

(i) a copy of the determination declaring the aggregate number of persons required for the jury roll in the county in the ensuing year, and

(ii) a statement of the numbers of jury service notices to be mailed to persons in the county; and

(b) to the local registrar of the Superior Court of Justice, a copy of the determination for the number of jurors under clause (1) (a). R.S.O. 1990, c. J.3, s. 5 (3); 2006, c. 19, Sched. C, s. 1 (1).

JURY SERVICE NOTICES

6. (1) The Director of Assessment shall in each year on or before the 31st day of October cause a jury service notice, together with a return to the jury service notice in the form prescribed by the regulations and a prepaid return envelope addressed to the sheriff for the county, to be mailed by first class mail to the number of persons in each county specified in the sheriff's statement, and selected in the manner provided for in this section. R.S.O. 1990, c. J.3, s. 6 (1).

SELECTION OF PERSONS NOTIFIED

(2) The persons to whom jury service notices are mailed under this section shall be selected by the Director of Assessment at random from persons who, from information obtained at the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*,

(a) at the time of the enumeration, resided in the county and were Canadian citizens; and

(b) in the year preceding the year for which the jury is selected, are of or will attain the age of eighteen years or more,

and the number of persons selected from each municipality in the county shall bear approximately the same proportion to the total number selected for the county as the total number of persons eligible for selection in the municipality bears to the total number eligible for selection in the county, as determined by the enumeration. R.S.O. 1990, c. J.3, s. 6 (2).

APPLICATION OF SUBS. (2) TO MUNICIPALITIES IN DISTRICTS

(3) In a territorial district for the purposes of subsection (2), all the municipalities in the district shall together be treated in the same manner as a county from which the number of jurors required is the number fixed under subsection 5(2) to be selected from municipalities. R.S.O. 1990, c. J.3, s. 6 (3).

ADDRESS FOR MAILING

(4) The jury service notice to a person under this section shall be mailed to the person at the address shown in the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*. R.S.O. 1990, c. J.3, s. 6 (4).

RETURN TO JURY SERVICE NOTICE

(5) Every person to whom a jury service notice is mailed in accordance with this section shall accurately and truthfully complete the return and shall mail it to the sheriff for the county within five days after receipt thereof. R.S.O. 1990, c. J.3, s. 6 (5).

WHEN SERVICE DEEMED MADE

(6) For the purposes of subsection (5), the notice shall be deemed to have been received on the third day after the day of mailing unless the person to whom the notice is mailed establishes that he or she, acting in good faith, through absence, accident, illness or other cause beyond his or her control did not receive the notice or order, or did not receive the notice or order until a later date. R.S.O. 1990, c. J.3, s. 6 (6).

LIST OF NOTICES GIVEN

(7) The Director of Assessment shall furnish to the sheriff for the county a list of persons in the county arranged alphabetically to whom jury service notices were mailed under this section forthwith after such mailing and the list received by the sheriff purporting to be certified by the Director of Assessment is, without proof of the office or signature of the Director of Assessment, receivable in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the mailing of jury service notices to the persons shown on the list. R.S.O. 1990, c. J.3, s. 6 (7).

INDIAN RESERVES

(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available. R.S.O. 1990, c. J.3, s. 6 (8).

SHERIFF TO PREPARE JURY ROLL

7. The sheriff shall in each year prepare a roll called the jury roll in the form prescribed by the regulations. R.S.O. 1990, c. J.3, s. 7.

ENTRY OF NAMES IN JURY ROLL

8. (1) The sheriff shall open the returns to jury service notices received by the sheriff and shall cause the name, address and occupation of each person making such a return, who is shown by the return to be eligible for jury service, to be entered in the jury roll alphabetically arranged and numbered consecutively. R.S.O. 1990, c. J.3, s. 8 (1); 1994, c. 27, s. 48 (4).

ENGLISH, FRENCH AND BILINGUAL JURORS

(2) The jury roll prepared under subsection (1) shall be divided into three parts, as follows:

1. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand English.
2. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand French.
3. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand both English and French. 1994, c. 27, s. 48 (5).

OMISSION OF NAMES

(3) The sheriff may, with the written approval of a judge of the Superior Court of Justice, omit the name from the roll where it appears such person will be unable to attend for jury duty. R.S.O. 1990, c. J.3, s. 8 (3); 2006, c. 19, Sched. C, s. 1 (1).

SUPPLEMENTARY NAMES

(4) The sheriff may request the Director of Assessment to mail such number of additional jury service notices and forms of returns to jury service notice as in the opinion of the sheriff are required. R.S.O. 1990, c. J.3, s. 8 (4).

SUPPLYING OF SUPPLEMENTARY NAMES

(5) Upon receipt of a request from the sheriff under subsection (4), the Director of Assessment shall forthwith carry out such request and for such purpose section 6 applies with necessary modifications with respect to the additional jury service notices requested by the sheriff to be mailed. R.S.O. 1990, c. J.3, s. 8 (5).

SELECTION FROM UNORGANIZED TERRITORY

(6) In a territorial district, the sheriff shall select names of eligible persons who reside in the district outside territory with municipal organization in the numbers fixed under subsection 5(2) and for the purpose may have recourse to the latest polling list prepared and certified for such territory, and to any assessment or collector's roll prepared for school purposes and may obtain names from any other record available. R.S.O. 1990, c. J.3, s. 8 (6).

CERTIFICATION OF ROLL

9. As soon as the jury roll has been completed but not later than the 31st day of December in each year, the sheriff shall certify the roll to be the proper roll prepared as the law directs and shall deliver notice of the certification to a judge of the Superior Court of Justice, but a judge of the court may extend the time for certification for such reasons as he or she considers sufficient. R.S.O. 1990, c. J.3, s. 9; 2006, c. 19, Sched. C, s. 1 (1).

EXTENSION OF TIMES

10. The Chief Justice of the Superior Court of Justice may, upon the request of the sheriff for a county, extend any times prescribed by this Act in connection with the preparation of the jury roll for the county to such date as the Chief Justice considers appropriate and may authorize the continued use of the latest jury roll until the dates so fixed. R.S.O. 1990, c. J.3, s. 10; 2006, c. 19, Sched. C, s. 2 (1).

ADDITIONS TO ROLL BY SHERIFF

11. (1) Where there are no persons or not a sufficient number of persons on the proper jury roll, or where there is no jury roll for the year in existence, the sheriff may supply names of eligible jurors from the jury rolls for the three nearest preceding years for which there is a jury roll or certified copy thereof in existence. R.S.O. 1990, c. J.3, s. 11 (1).

CERTIFICATION OF ADDITIONS BY SHERIFF

(2) The names supplied to the jury roll under this section shall be entered thereon and certified by the sheriff. R.S.O. 1990, c. J.3, s. 11 (2).

JURY PANELS

ISSUANCE OF PRECEPTS

12. A judge of the Superior Court of Justice may issue precepts in the form prescribed by the regulations to the sheriff for the return of such number of jurors as the sheriff has determined as the number to be drafted and returned or such greater or lesser number as in his or her opinion is required. R.S.O. 1990, c. J.3, s. 12; 2006, c. 19, Sched. C, s. 1 (1).

TWO OR MORE SETS OF JURORS

13. (1) Where a judge of the Superior Court of Justice considers it necessary that the jurors to form the panel for a sittings of the Superior Court of Justice be summoned in more than one set, the judge may direct the sheriff to return such number of jurors in such number of sets on such day for each set as he or she thinks fit. R.S.O. 1990, c. J.3, s. 13 (1); 2006, c. 19, Sched. C, s. 1 (1).

SHERIFF TO DIVIDE JURORS INTO SETS

(2) The sheriff shall divide such jurors into as many sets as are directed, and shall in the summons to every juror specify at what time his or her attendance will be required. R.S.O. 1990, c. J.3, s. 13 (2).

EACH SET A SEPARATE PANEL

(3) Each set shall for all purposes be deemed a separate panel. R.S.O. 1990, c. J.3, s. 13 (3).

ADDITIONAL JURORS

14. (1) A judge of the Superior Court of Justice, after the issue of the precept, at any time before or during the sittings of the court, by order under his or her hand and seal, may direct the sheriff to return an additional number of jurors. R.S.O. 1990, c. J.3, s. 14 (1); 2006, c. 19, Sched. C, s. 1 (1).

DUTY OF SHERIFF AS TO DRAFTING ADDITIONAL NUMBER OF JURORS

(2) The sheriff, upon the receipt of an order under subsection (1), shall forthwith draft such additional number of jurors in the manner provided by this Act, and shall add their names to the panel list, and shall forthwith thereafter summon them, and where there are not a sufficient number of jurors on the jury roll for the purpose of the additions, section 11 applies. R.S.O. 1990, c. J.3, s. 14 (2).

HOW SHERIFFS TO DRAFT PANELS OF JURORS

15. Every sheriff to whom a precept for the return of jurors is directed shall, to such precept, return a panel list of the names of the jurors contained in the jury roll, whose names shall be drafted from such roll in the manner hereinafter mentioned. R.S.O. 1990, c. J.3, s. 15.

SHERIFF TO DRAFT PANEL

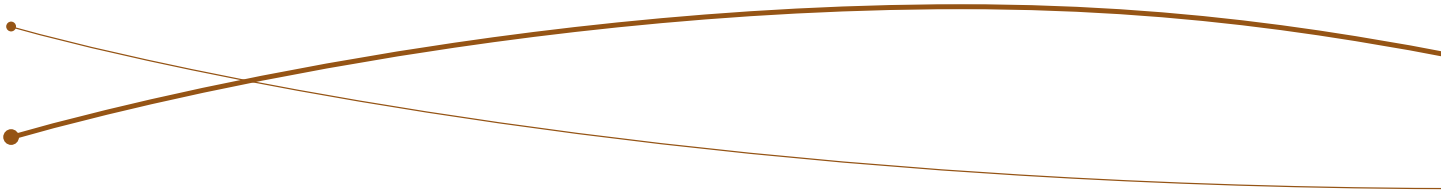
16. Upon receipt of the precept, the sheriff shall post up in his or her office written notice of the day, hour and place at which the panel of jurors will be drafted, and the sheriff shall draft the panel by ballot from the jury roll in the presence of a justice of the peace who shall attend upon reasonable notice from the sheriff. R.S.O. 1990, c. J.3, s. 16.

HOW SHERIFF TO PREPARE A PANEL

17. (1) Before proceeding to draft a panel of jurors from a jury roll, the sheriff shall prepare a proper title or heading for the list of jurors to be returned, to which he or she shall fix an appropriate number according as such panel is the first, second, third or subsequent panel drafted from such jury roll, and the title or heading shall set forth the number of jurors to be returned. R.S.O. 1990, c. J.3, s. 17 (1).

BALLOTS FOR DRAFTING PANEL

(2) The sheriff shall then append to such title or heading a list of numbers from "1" forward to the number required, and shall prepare a set of ballots of uniform and convenient size containing the same number of ballots as there are numbers on the jury roll, allowing one number to each ballot, which number shall be printed or written on it, and the sheriff shall then proceed to draft the panel of jurors. R.S.O. 1990, c. J.3, s. 17 (2).



DRAFTING OF PANEL

18. (1) The sheriff shall draft the panel by drawing at random the ballots from a container in the presence of the justice of the peace. R.S.O. 1990, c. J.3, s. 18 (1).

PANEL LIST

(2) The names of the persons so drafted, arranged alphabetically, with their places of residence and occupations shall then be transcribed by the sheriff, with a reference to the number of each name on the jury roll, and each name shall be thereupon marked by the sheriff or the sheriff's deputy upon the jury roll. R.S.O. 1990, c. J.3, s. 18 (2).

(3) Repealed: 1994, c. 27, s. 48 (6).

IDEM

(4) The panel list so alphabetically arranged and numbered, with a short statement of the precept in obedience to which it has been drafted, the date and place of such drafting, and the names of the sheriff, or the sheriff's deputy and the justice of the peace, present at such drafting, shall then be recorded and attested by the signatures of the sheriff, or the sheriff's deputy and the justice of the peace, and such panel list shall be retained in the custody of the sheriff. R.S.O. 1990, c. J.3, s. 18 (4).

AUTOMATED PROCEDURE FOR DRAFTING PANEL

18.1 (1) Instead of following the procedure described in sections 15 to 18 to draft a panel of jurors, the sheriff may use any electronic or other automated procedure to accomplish the same result. 1994, c. 27, s. 48 (7).

NON-APPLICATION OF CERTAIN REQUIREMENTS

(2) When a jury panel is being drafted under subsection (1),

(a) notice need not be posted as set out in section 16;

(b) the participation of a justice of the peace, as referred to in section 16 and subsections 18 (1) and (4), is not required. 1994, c. 27, s. 48 (7).

CRIMINAL RECORD CHECK

18.2 (1) For the purposes of confirming whether clause 4 (b) applies in respect of a person selected under section 18 or 18.1 for inclusion on a jury panel, the sheriff may, in accordance with this section and the regulations, request that a criminal record check, prepared from national data on the Canadian Police Information Centre database, be conducted concerning the person. 2009, c. 33, Sched. 2, s. 38 (2).

TIMING

(2) A criminal record check concerning a person that is requested under subsection (1) shall be obtained by the sheriff before he or she finalizes the jury panel on which the person is to be included. 2009, c. 33, Sched. 2, s. 38 (2).

COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION BY SHERIFF

(3) Subject to any restrictions or conditions set out in the regulations, the sheriff shall collect, directly or indirectly, use and disclose such personal information respecting a person who is the subject of a criminal record check under subsection (1) as is required for the purposes of this section. 2009, c. 33, Sched. 2, s. 38 (2).

AGREEMENT WITH POLICE FORCE

(4) The sheriff may enter into an agreement with a police force that is prescribed by the regulations respecting,

(a) the preparation of a criminal record check by the police force for the purposes of this section; and

(b) the collection, use and disclosure of personal information by the police force for the purposes of the criminal record check. 2009, c. 33, Sched. 2, s. 38 (2).

REMOVAL AND REPLACEMENT

(5) If, on review of a person's criminal record check, the sheriff determines that clause 4 (b) applies in respect of the person, the sheriff shall,

(a) remove the person from the jury panel on which the person was to have been included;

(b) remove the person's name and other information from the jury roll for the applicable year; and

(c) draft, in accordance with section 18 or 18.1, as the case may be, another person for the jury panel to replace the person who was removed. 2009, c. 33, Sched. 2, s. 38 (2).

NOTICE

SUMMONING JURORS 21 DAYS BEFORE ATTENDANCE REQUIRED

19. (1) The sheriff shall summon every person drafted to serve on juries by sending to the person by ordinary mail a notice in writing in the form prescribed by the regulations under the hand of the sheriff at least twenty-one days before the day upon which the person is to attend, but when the sheriff is directed to draft and summon additional jurors under this Act, such twenty-one days service is not necessary. R.S.O. 1990, c. J.3, s. 19 (1).

EXCUSING OF JURORS

(2) The sheriff may excuse any person summoned for a jury sittings on the ground,

(a) of illness; or

(b) that serving as a juror may cause serious hardships or loss to the person or others,

but unless a judge of the Superior Court of Justice directs otherwise and despite any other provision of this Act, such person shall be included in a panel to be returned for a sittings later in the year or, where there are not further sittings in that year, in a panel to be returned for a sittings in the year next following. R.S.O. 1990, c. J.3, s. 19 (2); 2006, c. 19, Sched. C, s. 1 (1).

SECRECY OF JURY ROLL AND PANEL

20. The jury roll and every list containing the names of the jury drafted for any panel shall be kept under lock and key by the sheriff, and except in so far as may be necessary in order to prepare the panel lists, and serve the jury summons, shall not be disclosed by the sheriff, the sheriff's deputy, officer, clerk, or by the justice of the peace mentioned in section 16, or by any other person, until ten days before the sittings of the court for which the panel has been drafted, and during such period of ten days, the sheriff, or the sheriff's deputy, shall permit the inspection at all reasonable hours of the jury roll and of the panel list or copy thereof in his or her custody by litigants or accused persons or their solicitors and shall furnish the litigants or accused persons or their solicitors, upon request and payment of a fee of $2, with a copy of any such panel list. R.S.O. 1990, c. J.3, s. 20.

ATTENDANCE OF JURORS POSTPONED OR NOT REQUIRED

COUNTERMAND WHERE NO JURY CASES

21. (1) Where there is no business requiring the attendance of a jury at a sittings in respect of which a precept has been issued,

(a) the local registrar, where the sittings is for the trial of actions; or

(b) the Crown Attorney, where the sittings is for the trial of criminal prosecutions,

shall, at least five clear days before the day upon which the sittings is to commence, give notice in writing to the sheriff in the form prescribed by the regulations that the attendance of the jurors is not required. R.S.O. 1990, c. J.3, s. 21 (1).

POSTPONEMENT OF DATE FOR ATTENDANCE OF JURORS

(2) Where the business of the court does not require the attendance of the jurors until a day after the day upon which the sittings is to commence, the appropriate officer determined under subsection (1) shall, at least five clear days before the day upon which the sittings is to commence, give notice in writing to the sheriff in the form prescribed by the regulations that the attendance of the jurors is not required until such later day as is specified in the notice. R.S.O. 1990, c. J.3, s. 21 (2).

NOTICE TO JURORS

(3) Subject to subsection (4), where, upon receipt of such notice it appears to the sheriff that the attendance of jurors is not required or not required until a later date, the sheriff shall forthwith by registered mail or otherwise, as he or she considers expedient, notify in the form prescribed by the regulations each person summoned to serve as a juror that attendance at the sittings is not required or is not required until the day specified in the notice. R.S.O. 1990, c. J.3, s. 21 (3).

SHERIFF MUST ASCERTAIN THAT THERE ARE NO PRISONERS IN CUSTODY

(4) In the case of a sittings for the hearing of criminal proceedings, the sheriff shall not give the notice mentioned in subsection (3) unless he or she is satisfied that there is no prisoner in custody awaiting trial at the sittings. R.S.O. 1990, c. J.3, s. 21 (4).

DIVISION OF PANEL

22. A judge of the Superior Court of Justice who considers it necessary may direct that the jurors summoned for a sittings of the Court be divided into two or more sets as he or she may direct, and each set shall for all purposes be deemed a separate panel. R.S.O. 1990, c. J.3, s. 22; 2006, c. 19, Sched. C, s. 1 (1).

MERGER

22.1 A judge of the Superior Court of Justice who considers it necessary may direct that two or more panels of jurors, including panels established by division under section 22, be merged into a single panel. 1994, c. 27, s. 48 (8); 2006, c. 19, Sched. C, s. 2 (2).

EXCUSING OF JUROR

RELIGIOUS REASONS

23. (1) A person summoned for jury duty may be excused by a judge from service as a juror on the ground that service as a juror is incompatible with the beliefs or practices of a religion or religious order to which the person belongs. R.S.O. 1990, c. J.3, s. 23 (1).

ILLNESS OR HARDSHIP

(2) A person summoned for jury duty may be excused by a judge from attending the sittings on the ground,

(a) of illness; or

(b) that serving as a juror may cause serious hardships or loss to the person or others,

and the judge may excuse the person from all service as a juror, or the judge may direct that the service of a person excused be postponed and that despite any provision of this Act, the person be included in a panel to be returned for a sittings later in that year or in a panel to be returned for a sittings in the year next following. R.S.O. 1990, c. J.3, s. 23 (2).

APPLICATION FOR EXCUSING

(3) A person summoned for jury service may be excused under subsection (1) or (2),

(a) before the day for attendance, by any judge of the Superior Court of Justice;

(b) on or after the day for attendance, by the judge presiding at the sittings,

and the application to be excused may be made to the sheriff. R.S.O. 1990, c. J.3, s. 23 (3); 2006, c. 19, Sched. C, s. 1 (1).

RELEASE AND TRANSFER OF JURORS

RELEASE BEFORE SITTINGS

24. (1) Where jurors are summoned for a jury sittings, a judge of the Superior Court of Justice may, at any time before the sittings, release from or postpone service of any number of jurors summoned for the sittings. R.S.O. 1990, c. J.3, s. 24 (1); 2006, c. 19, Sched. C, s. 1 (1).

RELEASE DURING SITTINGS

(2) The judge presiding at the sittings may release from or postpone service of any number of jurors summoned for the sittings. R.S.O. 1990, c. J.3, s. 24 (2).

TRANSFER TO ANOTHER PANEL

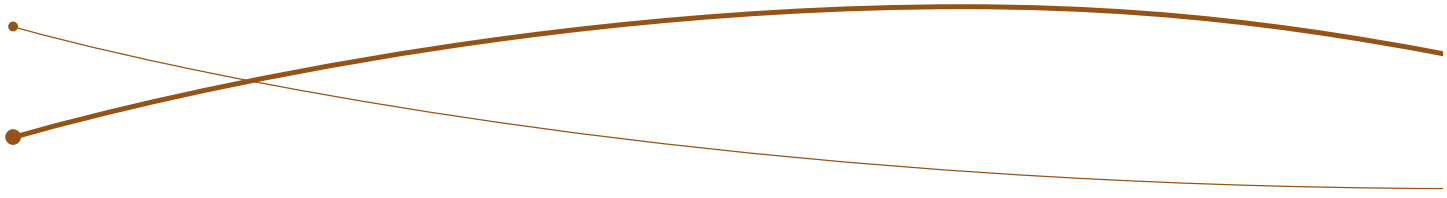
(3) Jurors released from service at a sittings under this section may be resummoned by the sheriff for service at any other sittings, held concurrently with or immediately following the sittings from which they were released. R.S.O. 1990, c. J.3, s. 24 (3).

CONSTITUTION OF PANEL

(4) Where jurors have been released from service or their service has been postponed under this section, the remaining jurors constitute the panel, and jurors recalled or resummoned under this section form part of the panel to which they are added. R.S.O. 1990, c. J.3, s. 24 (4).

SUPERIOR COURT OF JUSTICE MAY ISSUE PRECEPTS AS HERETOFORE

25. Subject to this Act, the Superior Court of Justice and the judges thereof have the same power and authority as heretofore in issuing any precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before the court, or for amending or enlarging the panel of jurors returned for the trial of any such issue, and the return to any precept, award or order shall be made in the manner heretofore used and accustomed, and the jurors shall, as heretofore, be returned from the body of the county, and shall be eligible according to this Act. R.S.O. 1990, c. J.3, s. 25; 2006, c. 19, Sched. C, s. 1 (1).



ACTIONS TRIED BY JURY

WHEN ACTIONS TO BE ENTERED FOR TRIAL

26. Subject to any order of a judge of the Superior Court of Justice, actions to be tried by a jury shall be entered for trial not later than six clear days before the first day of the sittings. R.S.O. 1990, c. J.3, s. 26; 2006, c. 19, Sched. C, s. 1 (1).

DRAWING JURY AT TRIAL

EMPANELLING JURY AT THE TRIAL

27. (1) The name of every person summoned to attend as a juror, with the person's place of residence, occupation, and number on the panel list, shall be written distinctly by the sheriff on a card or paper, as nearly as may be of the form and size following:

15. DAVID BOOTH
OF LOT NO. 11, IN THE 7TH CON. OF ALBION
MERCHANT

and the names so written shall, under the direction of the sheriff, be put together in a container to be provided by the sheriff for that purpose, and he or she shall deliver it to the clerk of the court. R.S.O. 1990, c. J.3, s. 27 (1).

HOW THE CLERK IS TO PROCEED TO DRAW NAMES

(2) Where an issue is brought on to be tried, or damages are to be assessed by a jury, the clerk shall, in open court, cause the container to be shaken so as sufficiently to mix the names, and shall then draw out six of the cards or papers, one after another, causing the container to be shaken after the drawing of each name, and if any juror whose name is so drawn does not appear or is challenged and set aside, then such further number until six jurors are drawn, who do appear, and who, after all just causes of challenge allowed, remain as fair and indifferent, and the first six jurors so drawn, appearing and approved as indifferent, their names being noted in the minute book of the clerk of the court, shall be sworn, and shall be the jury to try the issue or to assess the damages. R.S.O. 1990, c. J.3, s. 27 (2).

NAMES DRAWN TO BE KEPT APART, ETC.

(3) The cards or papers containing the names of persons so drawn and sworn shall be kept apart until the jury has given in its verdict, and it has been recorded, or until the jury has been by consent of the parties, or by leave of the court, discharged, and shall then be returned to the container there to be kept with the other cards or papers remaining therein. R.S.O. 1990, c. J.3, s. 27 (3).

AUTOMATED PROCEDURE FOR EMPANELLING JURY IN CIVIL CASES

27.1 Where a trial is in respect of a civil proceeding, instead of following the procedure described in section 27 to select a jury, any electronic or other automated procedure may be used to accomplish the same result. 2009, c. 33, Sched. 2, s. 38 (3).

SELECTION OF JURIES IN ADVANCE

28. A jury may be selected in accordance with section 27 or 27.1 at any time before the trial of an issue or assessment of damages directed by the judge presiding at the sittings and shall attend for service upon the summons of the sheriff. R.S.O. 1990, c. J.3, s. 28; 2009, c. 33, Sched. 2, s. 38 (4).

SEVERAL CAUSES MAY BE TRIED IN SUCCESSION WITH THE SAME JURY

29. (1) Despite sections 27, 27.1 and 28, unless a party objects, the court may try any issue or assess damages with a jury previously selected to try any other issue or to assess damages. 2009, c. 33, Sched. 2, s. 38 (5).

SAME

(2) Despite subsection (1), unless a party objects, the court may order any juror from the previously selected jury whom both parties consent to withdraw or who may be justly challenged or excused by the court, to retire and may cause another juror to be selected in accordance with section 27 or 27.1, as the case may be, in his or her place, in which case the issue shall be tried or the damages assessed with the remaining members of the previously selected jury and the new juror or jurors, as the case may be, who appear and are approved as indifferent. 2009, c. 33, Sched. 2, s. 38 (5).

IF A FULL JURY DOES NOT APPEAR SUPPLEMENTARY JURORS MAY BE APPOINTED

30. (1) Where a full jury does not appear at a sittings for civil matters, or where, after the appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, the court may command the sheriff to name and appoint, as supplementary jurors, so many of such other able persons of the county then present, or who can be found, as will make up a full jury, and the sheriff shall return such persons to serve on the jury. R.S.O. 1990, c. J.3, s. 30 (1).

ADDING NAMES OF SUPPLEMENTARY JURORS

(2) Where a full jury does not appear, the names of the persons so returned shall be added to the panel returned upon the precept. R.S.O. 1990, c. J.3, s. 30 (2).

THE SHERIFF TO NOTE ON ROLLS NAMES OF JURORS WHO DO NOT SERVE

31. Immediately after the sittings of the court, the sheriff shall note on the jury roll from which the panel of jurors returned to the sittings was drafted opposite the names of the jurors, the non-attendance or default of every juror who has not attended until discharged by the court. R.S.O. 1990, c. J.3, s. 31.

CHALLENGES

LACK OF ELIGIBILITY

32. If a person not eligible is drawn as a juror for the trial of an issue in any proceeding, the want of eligibility is a good cause for challenge. R.S.O. 1990, c. J.3, s. 32.

PEREMPTORY CHALLENGES IN CIVIL CASES

33. In any civil proceeding, the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial, and such right of challenge extends to the Crown when a party. R.S.O. 1990, c. J.3, s. 33.

RATEPAYERS, OFFICERS, ETC., OF MUNICIPALITY MAY BE CHALLENGED

34. In a proceeding to which a municipal corporation, other than a county, is a party, every ratepayer, and every officer or servant of the corporation is, for that reason, liable to challenge as a juror. R.S.O. 1990, c. J.3, s. 34.

GENERAL

PAYMENTS UNDER *ADMINISTRATION OF JUSTICE ACT*
FEES PAYABLE TO JURORS AND JUSTICES OF THE PEACE

35. (1) Such fees and allowances as are prescribed under the *Administration of Justice Act* shall be paid to,

(a) every juror attending a sittings of the Superior Court of Justice; and

(b) the justice of the peace in attendance for each panel drafted under section 16. R.S.O. 1990, c. J.3, s. 35 (1); 2006, c. 19, Sched. C, s. 1 (1).

SUMS TO BE PAID WITH RECORD WHEN ENTERED FOR TRIAL IN JURY CASES

(2) With every record entered for trial of issues or assessment of damages by a jury in the Superior Court of Justice there shall be paid to the local registrar of the Superior Court of Justice such sum as is prescribed under the *Administration of Justice Act*, and the record shall not be entered unless such sum is first paid. R.S.O. 1990, c. J.3, s. 35 (2); 2006, c. 19, Sched. C, s. 1 (1).

ATTENDANCE AND FEES
LIST OF JURORS TO BE CALLED

36. (1) The clerk of the court or the sheriff or sheriff's officer shall, at the opening of the court and before any other business is proceeded with, call the names of the jurors, and the sheriff or sheriff's officer shall record those who are present or absent. R.S.O. 1990, c. J.3, s. 36 (1).

RECORD OF FEES PAID

(2) The sheriff shall keep a record of the payment of fees to jurors for attending sittings of a court. R.S.O. 1990, c. J.3, s. 36 (2).

WHEN FEES PAYABLE

(3) A juror is not entitled to fees or expenses in respect of days that he or she does not or is not required to attend. R.S.O. 1990, c. J.3, s. 36 (3).

JURY AREAS

36.1 (1) A jury area established under clause 37 (c) shall be treated as a separate county for the purposes of this Act. 1994, c. 27, s. 48 (9).

COURT FACILITIES

(2) If there are no court facilities in a jury area, a regional senior judge of the Superior Court of Justice may order residents of the jury area who are summoned for jury duty to attend at a court outside the jury area. 1994, c. 27, s. 48 (9); 2006, c. 19, Sched. C, s. 1 (1).

REGULATIONS

37. The Attorney General may make regulations,

(a) prescribing any form required or permitted by this Act to be prescribed by the regulations;

(b) prescribing the manner of keeping jury rolls and lists of jury panels and records thereof and requiring and prescribing the form of the certification or authentication of entries therein;

(b.1) setting out restrictions or conditions that apply to the collection, use or disclosure of personal information by the sheriff, for the purposes of subsection 18.2 (3);

(b.2) prescribing a police force for the purposes of subsection 18.2 (4);

(c) establishing jury areas, consisting of parts of existing counties, for the purposes of section 36.1. R.S.O. 1990, c. J.3, s. 37; 1994, c. 27, s. 48 (10); 2009, c. 33, Sched. 2, s. 38 (6, 7).

OFFENCES

38. (1) Every person who,

(a) wilfully makes or causes to be made any alteration in any roll or panel or in any certified copy thereof except in accordance with this Act;

(b) falsely certifies any roll or panel; or

(c) influences or attempts to influence the selection of persons for inclusion in or omission from any jury roll or panel, except in a proper procedure under this Act,

is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both. R.S.O. 1990, c. J.3, s. 38 (1).

IDEM

(2) Every sheriff, or clerk or registrar of a court, who refuses to perform any duty imposed on him or her by this Act, is guilty of an offence and on conviction is liable to a fine of not more than $5,000. R.S.O. 1990, c. J.3, s. 38 (2).

IDEM

(3) Every person who is required to complete a return to a jury service notice and who,

(a) without reasonable excuse fails to complete the return or mail it to the sheriff as required by subsection 6(5); or

(b) knowingly gives false or misleading information in the return,

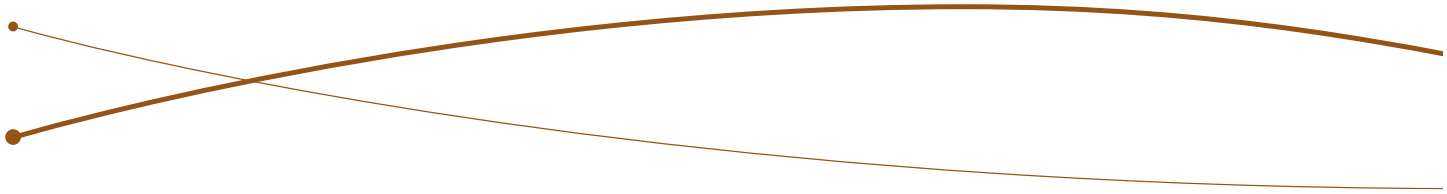
is guilty of an offence and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. J.3, s. 38 (3).

EVIDENCE OF NOT MAILING

(4) For the purposes of subsection (3), where the sheriff fails to receive a return to a jury service notice within five days from the date on which it was required by this Act to be mailed, such failure is proof, in the absence of evidence to the contrary, that the person required to mail it to the sheriff failed to do so in the time required. R.S.O. 1990, c. J.3, s. 38 (4).

CERTIFICATE AS EVIDENCE

(5) A statement as to the receipt or non-receipt of a return to a jury service notice purporting to be certified by the sheriff is, without proof of the appointment or signature of the sheriff, receivable in evidence as proof, in the absence of evidence to the contrary, of the facts stated therein in any prosecution under subsection (3). R.S.O. 1990, c. J.3, s. 38 (5).



CONTEMPT OF COURT

39. Every person is in contempt of court who, without reasonable excuse,

(a) having been duly summoned to attend on a jury, does not attend in pursuance of the summons, or being there called does not answer to his or her name; or

(b) being a juror or supplementary juror, after having been called, is present but does not appear, or after appearing wilfully withdraws from the presence of the court; or

(c) being a sheriff, wilfully empanels and returns to serve on a jury a person whose name has not been duly drawn upon the panel in the manner prescribed in this Act; or

(d) being a registrar or other officer wilfully records the appearance of a person so summoned and returned who has not actually appeared. R.S.O. 1990, c. J.3, s. 39.

IDEM, TAMPERING WITH JURORS

40. (1) Every person is in contempt of court who, being interested in an action that is or is to be entered for trial or may be tried in the court, or being the solicitor, counsel, agent or emissary of such person, before or during the sittings or at any time after a juror on the jury panel for such court has been summoned knowingly, directly or indirectly, speaks to or consults with the juror respecting such action or any matter or thing relating thereto. R.S.O. 1990, c. J.3, s. 40 (1).

REVOCATION OR SUSPENSION OF LICENCE, ETC.

(2) A solicitor, barrister or student-at-law who is guilty of such offence may, in addition to any other penalty, have his or her licence under the *Law Society Act* to practise law or provide legal services revoked or suspended, or his or her name may be erased from the register of the Law Society or removed from the register for a limited time, by the Superior Court of Justice upon motion at the instance and in the name of the Attorney General. 2006, c. 21, Sched. C, s. 114.

EXCEPTION WHERE JUROR IS A PARTY OR WITNESS

(3) This section does not apply where a juror is also a party to or a known witness or interested in the action or is otherwise ineligible as a juror in the action, nor to anything that may properly take place in the course of the trial or conduct of the action. R.S.O. 1990, c. J.3, s. 40 (3).

LEAVE OF ABSENCE FROM EMPLOYMENT

41. (1) Every employer shall grant to an employee who is summoned for jury service a leave of absence, with or without pay, sufficient for the purpose of the discharge of the employee's duties, and, upon the employee's return, the employer shall reinstate the employee to his or her position, or provide the employee with alternative work of a comparable nature at not less than his or her wages at the time the leave of absence began and without loss of seniority or benefits accrued to the commencement of the leave of absence. R.S.O. 1990, c. J.3, s. 41 (1).

LIABILITY OF EMPLOYER FOR BREACH

(2) An employer who fails to comply with subsection (1) is liable to the employee for any loss occasioned by the breach of the obligation. R.S.O. 1990, c. J.3, s. 41 (2).

PENALTY FOR REPRISALS

(3) Every employer who, directly or indirectly,

(a) threatens to cause or causes an employee loss of position, or employment; or

(b) threatens to impose or imposes on an employee any pecuniary or other penalty,

because of the employee's response to a summons, or service as a juror, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three months, or to both. R.S.O. 1990, c. J.3, s. 41 (3).

POSTING UP COPIES OF S. 139 (2, 3) OF *CRIMINAL CODE*

42. The sheriff shall at the sittings of the Superior Court of Justice for trials by jury post up in the court room and jury rooms and in the general entrance hall of the court house printed copies in conspicuous type of subsections 139 (2) and (3) of the *Criminal Code* (Canada) and subsection 40 (1) of this Act. R.S.O. 1990, c. J.3, s. 42; 2006, c. 19, Sched. C, s. 1 (1).

SAVING OF FORMER POWERS OF COURT AND JUDGES EXCEPT AS ALTERED

43. Nothing in this Act alters, abridges or affects any power or authority that any court or judge has, or any practice or form in regard to trials by jury, juries or jurors, except in those cases only where such power or authority, practice or form is repealed or altered, or is inconsistent with any of the provisions of this Act. R.S.O. 1990, c. J.3, s. 43.

OMISSIONS TO OBSERVE THIS ACT NOT TO VITIATE THE VERDICT

44. (1) The omission to observe any of the provisions of this Act respecting the eligibility, selection, balloting and distribution of jurors, the preparation of the jury roll or the drafting of panels from the jury roll is not a ground for impeaching or quashing a verdict or judgment in any action. R.S.O. 1990, c. J.3, s. 44 (1).

PANEL DEEMED PROPERLY SELECTED

(2) Subject to sections 32 and 34, a jury panel returned by the sheriff for the purposes of this Act shall be deemed to be properly selected for the purposes of the service of the jurors in any matter or proceeding. R.S.O. 1990, c. J.3, s. 44 (2).

APPENDIX C

CORONERS ACT
R.S.O. 1990, CHAPTER C.37

CONSOLIDATION PERIOD: FROM JULY 1, 2012 TO THE E-LAWS CURRENCY DATE.

LAST AMENDMENT: 2009, C. 33, SCHED. 18, S. 6.

DEFINITIONS

1. (1) In this Act,

"Chief Coroner" means the Chief Coroner for Ontario; ("coroner en chef ")

"Chief Forensic Pathologist" means the Chief Forensic Pathologist for Ontario; ("médecin légiste en chef")

"Deputy Chief Coroner" means a Deputy Chief Coroner for Ontario; ("coroner en chef adjoint")

"Deputy Chief Forensic Pathologist" means a Deputy Chief Forensic Pathologist for Ontario; ("médecin légiste en chef adjoint")

"forensic pathologist" means a pathologist who has been certified by the Royal College of Physicians and Surgeons of Canada in forensic pathology or has received equivalent certification in another jurisdiction; ("médecin légiste")

"mine" means a mine as defined in the *Occupational Health and Safety Act*; ("mine")

"mining plant" means a mining plant as defined in the *Occupational Health and Safety Act*; ("installation minière")

"Minister" means the Solicitor General; ("ministre")

"Oversight Council" means the Death Investigation Oversight Council established under section 8; ("Conseil de surveillance")

"pathologist" means a physician who has been certified by the Royal College of Physicians and Surgeons of Canada as a specialist in anatomical or general pathology or has received equivalent certification in another jurisdiction; ("pathologiste")

"pathologists register" means the register of pathologists maintained under section 7.1; ("registre des pathologistes")

"spouse" means a person,

(a) to whom the deceased was married immediately before his or her death,

(b) with whom the deceased was living in a conjugal relationship outside marriage immediately before his or her death, if the deceased and the other person,

(i) had cohabited for at least one year,

(ii) were together the parents of a child, or

(iii) had together entered into a cohabitation agreement under section 53 of the *Family Law Act*; ("conjoint")

"tissue" includes an organ or part of an organ. ("tissu") R.S.O. 1990, c. C.37, s. 1; 1999, c. 6, s. 15 (1); 2005, c. 5, s. 15 (1, 2); 2009, c. 15, s. 1 (1).

INTERPRETATION OF BODY

(2) A reference in this Act to the body of a person includes part of the body of a person. 2009, c. 15, s. 1 (2).

EFFECT OF ACT

REPEAL OF COMMON LAW FUNCTIONS

2. (1) In so far as it is within the jurisdiction of the Legislature, the common law as it relates to the functions, powers and duties of coroners within Ontario is repealed. R.S.O. 1990, c. C.37, s. 2 (1).

INQUEST NOT CRIMINAL COURT OF RECORD

(2) The powers conferred on a coroner to conduct an inquest shall not be construed as creating a criminal court of record. R.S.O. 1990, c. C.37, s. 2 (2).

APPOINTMENT OF CORONERS

3. (1) The Lieutenant Governor in Council may appoint one or more legally qualified medical practitioners to be coroners for Ontario who, subject to subsections (2), (3) and (4), shall hold office during pleasure. R.S.O. 1990, c. C.37, s. 3 (1).

TENURE

(2) A coroner ceases to hold office on ceasing to be a legally qualified medical practitioner. 2005, c. 29, s. 2.

CHIEF CORONER TO BE NOTIFIED

(3) The College of Physicians and Surgeons of Ontario shall forthwith notify the Chief Coroner where the licence of a coroner for the practice of medicine is revoked, suspended or cancelled. R.S.O. 1990, c. C.37, s. 3 (3).

RESIGNATION

(4) A coroner may resign his or her office in writing. R.S.O. 1990, c. C.37, s. 3 (4).

RESIDENTIAL AREAS

(5) The Lieutenant Governor in Council may by regulation establish areas of Ontario and the appointment and continuation in office of a coroner is subject to the condition that he or she is ordinarily resident in the area named in the appointment. R.S.O. 1990, c. C.37, s. 3 (5).

CROWN ATTORNEY NOTIFIED OF APPOINTMENT

(6) A copy of the order appointing a coroner shall be sent by the Minister to the Crown Attorney of any area in which the coroner will ordinarily act. R.S.O. 1990, c. C.37, s. 3 (6).

APPOINTMENTS CONTINUED

(7) All persons holding appointments as coroners under *The Coroners Act*, being chapter 87 of the Revised Statutes of Ontario, 1970, shall be deemed to have been appointed in accordance with this Act. R.S.O. 1990, c. C.37, s. 3 (7).

CHIEF CORONER AND DUTIES

4. (1) The Lieutenant Governor in Council may appoint a coroner to be Chief Coroner for Ontario who shall,

(a) administer this Act and the regulations;

(b) supervise, direct and control all coroners in Ontario in the performance of their duties;

(c) conduct programs for the instruction of coroners in their duties;

(d) bring the findings and recommendations of coroners' investigations and coroners' juries to the attention of appropriate persons, agencies and ministries of government;

(e) prepare, publish and distribute a code of ethics for the guidance of coroners;

(f) perform such other duties as are assigned to him or her by or under this or any other Act or by the Lieutenant Governor in Council. R.S.O. 1990, c. C.37, s. 4 (1); 2009, c. 15, s. 2 (1, 2).

DEPUTY CHIEF CORONERS

(2) The Lieutenant Governor in Council may appoint one or more coroners to be Deputy Chief Coroners for Ontario and a Deputy Chief Coroner shall act as and have all the powers and authority of the Chief Coroner if the Chief Coroner is absent or unable to act or if the Chief Coroner's position is vacant. 2009, c. 15, s. 2 (3).

DELEGATION

(3) The Chief Coroner may delegate in writing any of his or her powers and duties under this Act to a Deputy Chief Coroner, subject to any limitations, conditions and requirements set out in the delegation. 2009, c. 15, s. 2 (4).

REGIONAL CORONERS

5. (1) The Lieutenant Governor in Council may appoint a coroner as a regional coroner for such region of Ontario as is described in the appointment. R.S.O. 1990, c. C.37, s. 5 (1).

DUTIES

(2) A regional coroner shall assist the Chief Coroner in the performance of his or her duties in the region and shall perform such other duties as are assigned to him or her by the Chief Coroner. R.S.O. 1990, c. C.37, s. 5 (2).

ONTARIO FORENSIC PATHOLOGY SERVICE

6. The Minister shall establish the Ontario Forensic Pathology Service, to be known in French as Service de médecine légale de l'Ontario, the function of which shall be to facilitate the provision of pathologists' services under this Act. 2009, c. 15, s. 3.

CHIEF FORENSIC PATHOLOGIST AND DEPUTIES

7. (1) The Lieutenant Governor in Council may appoint a forensic pathologist to be Chief Forensic Pathologist for Ontario who shall,

(a) be responsible for the administration and operation of the Ontario Forensic Pathology Service;

(b) supervise and direct pathologists in the provision of services under this Act;

(c) conduct programs for the instruction of pathologists who provide services under this Act;

(d) prepare, publish and distribute a code of ethics for the guidance of pathologists in the provision of services under this Act;

(e) perform such other duties as are assigned to him or her by or under this or any other Act or by the Lieutenant Governor in Council. 2009, c. 15, s. 3.

DEPUTY CHIEF FORENSIC PATHOLOGISTS

(2) The Lieutenant Governor in Council may appoint one or more forensic pathologists to be Deputy Chief Forensic Pathologists for Ontario and a Deputy Chief Forensic Pathologist shall act as and have all the powers and authority of the Chief Forensic Pathologist if the Chief Forensic Pathologist is absent or unable to act or if the Chief Forensic Pathologist's position is vacant. 2009, c. 15, s. 3.

DELEGATION

(3) The Chief Forensic Pathologist may delegate in writing any of his or her powers and duties under this Act to a Deputy Chief Forensic Pathologist, subject to any limitations, conditions and requirements set out in the delegation. 2009, c. 15, s. 3.

PATHOLOGISTS REGISTER

7.1 (1) The Chief Forensic Pathologist shall maintain a register of pathologists who are authorized by the Chief Forensic Pathologist to provide services under this Act. 2009, c. 15, s. 3.

NOTIFICATION RE LOSS OF MEDICAL LICENCE

(2) The College of Physicians and Surgeons of Ontario shall forthwith notify the Chief Forensic Pathologist if the licence for the practice of medicine of a pathologist who is on the pathologists register is revoked, suspended or cancelled. 2009, c. 15, s. 3.

OVERSIGHT COUNCIL

8. (1) There is hereby established a council to be known in English as the Death Investigation Oversight Council and in French as Conseil de surveillance des enquêtes sur les décès. 2009, c. 15, s. 4.

MEMBERSHIP

(2) The composition of the Oversight Council shall be as provided in the regulations, and the members shall be appointed by the Lieutenant Governor in Council. 2009, c. 15, s. 4.

CHAIR, VICE-CHAIRS

(3) The Lieutenant Governor in Council may designate one of the members of the Oversight Council to be the chair and one or more members of the Oversight Council to be vice-chairs and a vice-chair shall act as and have all the powers and authority of the chair if the chair is absent or unable to act or if the chair's position is vacant. 2009, c. 15, s. 4.

EMPLOYEES

(4) Such employees as are considered necessary for the proper conduct of the affairs of the Oversight Council may be appointed under Part III of the *Public Service of Ontario Act, 2006*. 2009, c. 15, s. 4.

DELEGATION

(5) The chair may authorize one or more members of the Oversight Council to exercise any of the Oversight Council's powers and perform any of its duties. 2009, c. 15, s. 4.

QUORUM

(6) The chair shall determine the number of members of the Oversight Council that constitutes a quorum for any purpose. 2009, c. 15, s. 4.

ANNUAL REPORT

(7) At the end of each calendar year, the Oversight Council shall submit an annual report on its activities, including its activities under subsection 8.1 (1), to the Minister, who shall submit the report to the Lieutenant Governor in Council and shall then lay the report before the Assembly. 2009, c. 15, s. 4.

ADDITIONAL REPORTS

(8) The Minister may request additional reports from the Oversight Council on its activities, including its activities under subsection 8.1 (1), at any time and the Oversight Council shall submit such reports as requested and may also submit additional reports on the same matters at any time on its own initiative. 2009, c. 15, s. 4.

EXPENSES

(9) The money required for the Oversight Council's purposes shall be paid out of the amounts appropriated by the Legislature for that purpose. 2009, c. 15, s. 4.

FUNCTIONS OF OVERSIGHT COUNCIL

ADVICE AND RECOMMENDATIONS TO CHIEF CORONER AND CHIEF FORENSIC PATHOLOGIST

8.1 (1) The Oversight Council shall oversee the Chief Coroner and the Chief Forensic Pathologist by advising and making recommendations to them on the following matters:

1. Financial resource management.
2. Strategic planning.
3. Quality assurance, performance measures and accountability mechanisms.
4. Appointment and dismissal of senior personnel.
5. The exercise of the power to refuse to review complaints under subsection 8.4 (10).
6. Compliance with this Act and the regulations.
7. Any other matter that is prescribed. 2009, c. 15, s. 4.

REPORTS TO OVERSIGHT COUNCIL

(2) The Chief Coroner and the Chief Forensic Pathologist shall report to the Oversight Council on the matters set out in subsection (1), as may be requested by the Oversight Council. 2009, c. 15, s. 4.

ADVICE AND RECOMMENDATIONS TO MINISTER

(3) The Oversight Council shall advise and make recommendations to the Minister on the appointment and dismissal of the Chief Coroner and the Chief Forensic Pathologist. 2009, c. 15, s. 4.

COMPLAINTS COMMITTEE

8.2 (1) There shall be a complaints committee of the Oversight Council composed, in accordance with the regulations, of members of the Oversight Council appointed by the chair of the Oversight Council. 2009, c. 15, s. 4.

CHAIR

(2) The chair of the Oversight Council shall designate one member of the complaints committee to be the chair of the committee. 2009, c. 15, s. 4.

DELEGATION

(3) The chair of the complaints committee may delegate any of the functions of the committee to one or more members of the committee. 2009, c. 15, s. 4.

QUORUM

(4) The chair of the complaints committee shall determine the number of members of the complaints committee that constitutes a quorum for any purpose, and may determine that one member constitutes a quorum. 2009, c. 15, s. 4.

CONFIDENTIALITY

8.3 (1) Every member and employee of the Oversight Council and of the complaints committee shall keep confidential all information that comes to his or her knowledge in the course of performing his or her duties under this Act. 2009, c. 15, s. 4.

EXCEPTION

(2) An individual described in subsection (1) may disclose confidential information for the purposes of the administration of this Act or the *Regulated Health Professions Act, 1991* or as otherwise required by law. 2009, c. 15, s. 4.

COMPLAINTS

RIGHT TO MAKE A COMPLAINT

8.4 (1) Any person may make a complaint to the complaints committee about a coroner, a pathologist or a person, other than a coroner or pathologist, with powers or duties under section 28. 2009, c. 15, s. 4.

FORM OF COMPLAINT

(2) The complaint must be in writing. 2009, c. 15, s. 4.

MATTERS THAT MAY NOT BE THE SUBJECT OF A COMPLAINT

(3) A complaint about the following matters shall not be dealt with under this section:

1. A coroner's decision to hold an inquest or to not hold an inquest.
2. A coroner's decision respecting the scheduling of an inquest.
3. A coroner's decision relating to the conduct of an inquest, including a decision made while presiding at the inquest. 2009, c. 15, s. 4.

COMPLAINTS ABOUT CORONERS

(4) Subject to subsection (8), the complaints committee shall refer every complaint about a coroner, other than the Chief Coroner, to the Chief Coroner and the Chief Coroner shall review every such complaint. 2009, c. 15, s. 4.

COMPLAINTS ABOUT PATHOLOGISTS

(5) Subject to subsection (8), the complaints committee shall refer every complaint about a pathologist, other than the Chief Forensic Pathologist, to the Chief Forensic Pathologist and the Chief Forensic Pathologist shall review every such complaint. 2009, c. 15, s. 4.

COMPLAINTS ABOUT CHIEFS

(6) Subject to subsection (8), the complaints committee shall review every complaint made about the Chief Coroner or the Chief Forensic Pathologist. 2009, c. 15, s. 4.

REFERRAL TO OTHER PERSONS OR BODIES

(7) The complaints committee shall refer every complaint about a person, other than a coroner or pathologist, with powers or duties under section 28 to a person or organization that has power to deal with the complaint and that the committee considers is the appropriate person or organization to deal with the complaint. 2009, c. 15, s. 4.

SAME

(8) If the complaints committee is of the opinion that a complaint about a coroner or pathologist is more appropriately dealt with by the College of Physicians and Surgeons of Ontario or another person or organization that has power to deal with the complaint, the complaints committee shall refer the complaint to the College or that other person or organization. 2009, c. 15, s. 4.

NOTICE OF REFERRAL

(9) If the complaints committee refers a complaint to the College of Physicians and Surgeons of Ontario or another person or organization under subsection (8), the committee shall promptly give notice in writing to the complainant, the coroner or pathologist who is the subject of the complaint, and the Oversight Council. 2009, c. 15, s. 4.

REFUSAL TO REVIEW A COMPLAINT

(10) Despite subsections (4) and (5), the Chief Coroner and the Chief Forensic Pathologist may refuse to review a complaint referred to him or her if, in his or her opinion,

(a) the complaint is trivial or vexatious or not made in good faith;

(b) the complaint does not relate to a power or duty of a coroner or a pathologist under this Act; or

(c) the complainant was not directly affected by the exercise or performance of, or the failure to exercise or perform, the power or duty to which the complaint relates. 2009, c. 15, s. 4.

SAME

(11) Despite subsection (6), the complaints committee may refuse to review a complaint if, in its opinion,

(a) the complaint is trivial or vexatious or not made in good faith;

(b) the complaint does not relate to a power or duty of the Chief Coroner or the Chief Forensic Pathologist; or

(c) the complainant was not directly affected by the exercise or performance of, or the failure to exercise or perform, the power or duty to which the complaint relates. 2009, c. 15, s. 4.

REPORTS AFTER REVIEW OR DECISION TO NOT REVIEW

(12) The Chief Coroner and the Chief Forensic Pathologist shall, promptly after completing his or her review of a complaint referred to him or her or deciding to not review the complaint, report in writing to the complainant, the person who is the subject of the complaint and the complaints committee on the results of the review or the decision to not review the complaint, as the case may be. 2009, c. 15, s. 4.

SAME

(13) The complaints committee shall, promptly after completing its review of a complaint or deciding to not review the complaint, report in writing to the complainant, the person who is the subject of the complaint, the Oversight Council and the Minister on the results of the review or the decision to not review the complaint, as the case may be. 2009, c. 15, s. 4.

REQUEST FOR REVIEW BY COMPLAINTS COMMITTEE

(14) If a complaint is made about a coroner or pathologist, other than the Chief Coroner or the Chief Forensic Pathologist, and the complainant or the coroner or pathologist who is the subject of the complaint is not satisfied with the results of the review of the complaint or the decision to not review the complaint by the Chief Coroner or the Chief Forensic Pathologist, he or she may request in writing that the complaints committee review the complaint and the complaints committee shall review the complaint and shall, promptly after completing its review or deciding to not review the complaint, report in writing to the complainant, the person who is the subject of the complaint and the Chief Coroner or the Chief Forensic Pathologist, as appropriate, on the results of the review or the decision to not review the complaint, as the case may be. 2009, c. 15, s. 4.

REFUSAL TO REVIEW A COMPLAINT ON REQUEST

(15) The complaints committee may refuse to review a complaint pursuant to a request made under subsection (14) if, in its opinion,

(a) the complaint is trivial or vexatious or not made in good faith;

(b) the complaint does not relate to a power or duty of a coroner or a pathologist under this Act; or

(c) the complainant was not directly affected by the exercise or performance of, or the failure to exercise or perform, the power or duty to which the complaint relates. 2009, c. 15, s. 4.

ANNUAL REPORTS TO OVERSIGHT COUNCIL

(16) The complaints committee shall submit an annual report on its activities to the Oversight Council at the end of each calendar year. 2009, c. 15, s. 4.

ADDITIONAL REPORTS

(17) The Oversight Council may request additional reports from the complaints committee on its activities or on a specific complaint or complaints about a specific person at any time and the complaints committee shall submit such reports as requested and may also submit additional reports as described at any time on its own initiative. 2009, c. 15, s. 4.

POLICE ASSISTANCE

9. (1) The police force having jurisdiction in the locality in which a coroner has jurisdiction shall make available to the coroner the assistance of such police officers as are necessary for the purpose of carrying out the coroner's duties. 2009, c. 15, s. 5.

SAME

(2) The Chief Coroner in any case he or she considers appropriate may request that another police force or the criminal investigation branch of the Ontario Provincial Police provide assistance to a coroner in an investigation or inquest. 2009, c. 15, s. 5.

DUTY TO GIVE INFORMATION

10. (1) Every person who has reason to believe that a deceased person died,

(a) as a result of,

(i) violence,

(ii) misadventure,

(iii) negligence,

(iv) misconduct, or

(v) malpractice;

(b) by unfair means;

(c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;

(d) suddenly and unexpectedly;

(e) from disease or sickness for which he or she was not treated by a legally qualified medical practitioner;

(f) from any cause other than disease; or

(g) under such circumstances as may require investigation,

shall immediately notify a coroner or a police officer of the facts and circumstances relating to the death, and where a police officer is notified he or she shall in turn immediately notify the coroner of such facts and circumstances. R.S.O. 1990, c. C.37, s. 10 (1).

DEATHS TO BE REPORTED

(2) Where a person dies while resident or an in-patient in,

(a) Repealed: 2007, c. 8, s. 201 (1).

(b) a children's residence under Part IX (Licensing) of the *Child and Family Services Act* or premises approved under subsection 9 (1) of Part I (Flexible Services) of that Act;

(c) Repealed: 1994, c. 27, s. 136 (1).

(d) a supported group living residence or an intensive support residence under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*;

(e) a psychiatric facility designated under the *Mental Health Act*;

(f) Repealed: 2009, c. 33, Sched. 18, s. 6.

(g) Repealed: 1994, c. 27, s. 136 (1).

(h) a public or private hospital to which the person was transferred from a facility, institution or home referred to in clauses (a) to (g),

the person in charge of the hospital, facility, institution, residence or home shall immediately give notice of the death to a coroner, and the coroner shall investigate the circumstances of the death and, if as a result of the investigation he or she is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body. R.S.O. 1990, c. C.37, s. 10 (2); 1994, c. 27, s. 136 (1); 2001, c. 13, s. 10; 2007, c. 8, s. 201 (1); 2008, c. 14, s. 50; 2009, c. 15, s. 6 (1); 2009, c. 33, Sched. 8, s. 11; 2009, c. 33, Sched. 18, s. 6.

DEATHS IN LONG-TERM CARE HOMES

(2.1) Where a person dies while resident in a long-term care home to which the *Long-Term Care Homes Act, 2007* applies, the person in charge of the home shall immediately give notice of the death to a coroner and, if the coroner is of the opinion that the death ought to be investigated, he or she shall investigate the circumstances of the death and if, as a result of the investigation, he or she is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body. 2007, c. 8, s. 201 (2); 2009, c. 15, s. 6 (3).

DEATHS OFF PREMISES OF PSYCHIATRIC FACILITIES, CORRECTIONAL INSTITUTIONS, YOUTH CUSTODY FACILITIES

(3) Where a person dies while,

(a) a patient of a psychiatric facility;

(b) committed to a correctional institution;

(c) committed to a place of temporary detention under the *Youth Criminal Justice Act* (Canada); or

(d) committed to secure or open custody under section 24.1 of the *Young Offenders Act* (Canada), whether in accordance with section 88 of the *Youth Criminal Justice Act* (Canada) or otherwise,

but while not on the premises or in actual custody of the facility, institution or place, as the case may be, subsection (2) applies as if the person were a resident of an institution named in subsection (2). 2009, c. 15, s. 6 (4).

DEATH ON PREMISES OF DETENTION FACILITY OR LOCK-UP

(4) Where a person dies while detained in and on the premises of a detention facility established under section 16.1 of the *Police Services Act* or a lock-up, the officer in charge of the facility or lock-up shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

DEATH ON PREMISES OF PLACE OF TEMPORARY DETENTION

(4.1) Where a person dies while committed to and on the premises of a place of temporary detention under the *Youth Criminal Justice Act* (Canada), the officer in charge of the place shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

DEATH ON PREMISES OF PLACE OF SECURE CUSTODY

(4.2) Where a person dies while committed to and on the premises of a place or facility designated as a place of secure custody under section 24.1 of the *Young Offenders Act* (Canada), whether in accordance with section 88 of the *Youth Criminal Justice Act* (Canada) or otherwise, the officer in charge of the place or facility shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

DEATH ON PREMISES OF CORRECTIONAL INSTITUTION

(4.3) Where a person dies while committed to and on the premises of a correctional institution, the officer in charge of the institution shall immediately give notice of the death to a coroner and the coroner shall investigate the circumstances of the death and shall hold an inquest upon the body if as a result of the investigation he or she is of the opinion that the person may not have died of natural causes. 2009, c. 15, s. 6 (4).

NON-APPLICATION OF SUBS. (4.3)

(4.4) If a person dies in circumstances referred to in subsection (4), (4.1) or (4.2) on the premises of a lock-up, place of temporary detention or place or facility designated as a place of secure custody that is located in a correctional institution, subsection (4.3) does not apply. 2009, c. 15, s. 6 (4).

DEATH IN CUSTODY OFF PREMISES OF CORRECTIONAL INSTITUTION

(4.5) Where a person dies while committed to a correctional institution, while off the premises of the institution and while in the actual custody of a person employed at the institution, the officer in charge of the institution shall immediately give notice of the death to a coroner and the coroner shall investigate the circumstances of the death and shall hold an inquest upon the body if as a result of the investigation he or she is of the opinion that the person may not have died of natural causes. 2009, c. 15, s. 6 (4).

OTHER DEATHS IN CUSTODY

(4.6) If a person dies while detained by or in the actual custody of a peace officer and subsections (4), (4.1), (4.2), (4.3) and (4.5) do not apply, the peace officer shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

DEATH WHILE RESTRAINED ON PREMISES OF PSYCHIATRIC FACILITY, ETC.

(4.7) Where a person dies while being restrained and while detained in and on the premises of a psychiatric facility within the meaning of the *Mental Health Act* or a hospital within the meaning of Part XX.1 (Mental Disorder) of the *Criminal Code* (Canada), the officer in charge of the psychiatric facility or the person in charge of the hospital, as the case may be, shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

DEATH WHILE RESTRAINED IN SECURE TREATMENT PROGRAM

(4.8) Where a person dies while being restrained and while committed or admitted to a secure treatment program within the meaning of Part VI of the *Child and Family Services Act*, the person in charge of the program shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

NOTICE OF DEATH RESULTING FROM ACCIDENT AT OR IN CONSTRUCTION PROJECT, MINING PLANT OR MINE

(5) Where a worker dies as a result of an accident occurring in the course of the worker's employment at or in a construction project, mining plant or mine, including a pit or quarry, the person in charge of such project, mining plant or mine shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. R.S.O. 1990, c. C.37, s. 10 (5); 2009, c. 15, s. 6 (5).

CERTIFICATE AS EVIDENCE

(6) A statement as to the notification or non-notification of a coroner under this section, purporting to be certified by the coroner is without proof of the appointment or signature of the coroner, receivable in evidence as proof, in the absence of evidence to the contrary of the facts stated therein for all purposes in any action, proceeding or prosecution. R.S.O. 1990, c. C.37, s. 10 (6).

INTERFERENCE WITH BODY

11. No person who has reason to believe that a person died in any of the circumstances mentioned in section 10 shall interfere with or alter the body or its condition in any way until the coroner so directs by a warrant. R.S.O. 1990, c. C.37, s. 11.

POWER OF CORONER TO TAKE CHARGE OF WRECKAGE

12. (1) Where a coroner has issued a warrant to take possession of the body of a person who has met death by violence in a wreck, the coroner may, with the approval of the Chief Coroner, take charge of the wreckage and place one or more police officers in charge of it so as to prevent persons from disturbing it until the jury at the inquest has viewed it, or the coroner has made such examination as he or she considers necessary. R.S.O. 1990, c. C.37, s. 12 (1).

VIEW TO BE EXPEDITED

(2) The jury or coroner, as the case may be, shall view the wreckage at the earliest moment possible. R.S.O. 1990, c. C.37, s. 12 (2).

SHIPMENT OF BODIES OUTSIDE ONTARIO

13. (1) Subject to section 14, no person shall accept for shipment or ship or take a dead body from any place in Ontario to any place outside Ontario unless a certificate of a coroner has been obtained certifying that there exists no reason for further examination of the body. R.S.O. 1990, c. C.37, s. 13 (1).

FEE FOR CERTIFICATE

(2) An applicant for a certificate under subsection (1) shall pay to the coroner such fee as is prescribed therefor. R.S.O. 1990, c. C.37, s. 13 (2).

EMBALMING, ETC., PROHIBITED

(3) No person who has reason to believe that a dead body will be shipped or taken to a place outside Ontario shall embalm or make any alteration to the body or apply any chemical to the body, internally or externally, until the certificate required by subsection (1) has been issued. R.S.O. 1990, c. C.37, s. 13 (3).

TRANSPORTATION OF A BODY OUT OF ONTARIO FOR POST MORTEM

14. A coroner may in writing authorize the transportation of a body out of Ontario for *post mortem* examination and, in such case a provision in any Act or regulation requiring embalming and preparation by a funeral director does not apply. R.S.O. 1990, c. C.37, s. 14.

CORONER'S INVESTIGATION

15. (1) Where a coroner is informed that there is in his or her jurisdiction the body of a person and that there is reason to believe that the person died in any of the circumstances mentioned in section 10, the coroner shall issue a warrant to take possession of the body and shall examine the body and make such investigation as, in the opinion of the coroner, is necessary in the public interest to enable the coroner,

(a) to determine the answers to the questions set out in subsection 31 (1);

(b) to determine whether or not an inquest is necessary; and

(c) to collect and analyze information about the death in order to prevent further deaths in similar circumstances. 2009, c. 15, s. 7 (1).

IDEM

(2) Where the Chief Coroner has reason to believe that a person died in any of the circumstances mentioned in section 10 and no warrant has been issued to take possession of the body, he or she may issue the warrant or direct any coroner to do so. R.S.O. 1990, c. C.37, s. 15 (2).

JURISDICTION

(3) After the issue of the warrant, no other coroner shall issue a warrant or interfere in the case, except the Chief Coroner. R.S.O. 1990, c. C.37, s. 15 (3); 2009, c. 15, s. 7 (2).

EXPERT ASSISTANCE

(4) Subject to the approval of the Chief Coroner, a coroner may obtain assistance or retain expert services for all or any part of his or her investigation or inquest. R.S.O. 1990, c. C.37, s. 15 (4).

NO WARRANT

(5) A coroner may proceed with an investigation without taking possession of the body where the body has been destroyed in whole or in part or is lying in a place from which it cannot be recovered or has been removed from Ontario. R.S.O. 1990, c. C.37, s. 15 (5).

INVESTIGATIVE POWERS

16. (1) A coroner may,

(a) examine or take possession of any dead body, or both; and

(b) enter and inspect any place where a dead body is and any place from which the coroner has reasonable grounds for believing the body was removed. R.S.O. 1990, c. C.37, s. 16 (1); 2009, c. 15, s. 8.

IDEM

(2) A coroner who believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation may,

(a) inspect any place in which the deceased person was, or in which the coroner has reasonable grounds to believe the deceased person was, prior to his or her death;

(b) inspect and extract information from any records or writings relating to the deceased or his or her circumstances and reproduce such copies therefrom as the coroner believes necessary;

(c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation. R.S.O. 1990, c. C.37, s. 16 (2).

DELEGATION OF POWERS

(3) A coroner may authorize a legally qualified medical practitioner or a police officer to exercise all or any of the coroner's powers under subsection (1). R.S.O. 1990, c. C.37, s. 16 (3).

IDEM

(4) A coroner may, where in his or her opinion it is necessary for the purposes of the investigation, authorize a legally qualified medical practitioner or a police officer to exercise all or any of the coroner's powers under clauses (2) (a), (b) and (c) but, where such power is conditional on the belief of the coroner, the requisite belief shall be that of the coroner personally. R.S.O. 1990, c. C.37, s. 16 (4).

RETURN OF THINGS SEIZED

(5) Where a coroner seizes anything under clause (2) (c), he or she shall place it in the custody of a police officer for safekeeping and shall return it to the person from whom it was seized as soon as is practicable after the conclusion of the investigation or, where there is an inquest, of the inquest, unless the coroner is authorized or required by law to dispose of it otherwise. R.S.O. 1990, c. C.37, s. 16 (5).

OBSTRUCTION OF CORONER

(6) No person shall knowingly,

(a) hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with; or

(b) furnish with false information or refuse or neglect to furnish information to,

a coroner in the performance of his or her duties or a person authorized by the coroner in connection with an investigation. R.S.O. 1990, c. C.37, s. 16 (6).

APPOINTMENT OF PERSONS WITH CORONERS' INVESTIGATIVE POWERS AND DUTIES

16.1 (1) The Chief Coroner may appoint any person, in accordance with the regulations, to exercise the investigative powers and duties of a coroner. 2009, c. 15, s. 9.

SAME

(2) Subject to subsection (3) and the regulations, this Act applies with necessary modifications to a person appointed under subsection (1) as if he or she were a coroner. 2009, c. 15, s. 9.

LIMITATION

(3) A person appointed under subsection (1) cannot determine whether or not an inquest is necessary or hold an inquest. 2009, c. 15, s. 9.

REPORT

(4) A person appointed under subsection (1) shall report his or her findings to the Chief Coroner or a coroner specified by the Chief Coroner, who shall then determine whether or not an inquest is necessary. 2009, c. 15, s. 9.

TRANSFER OF INVESTIGATION

17. (1) A coroner may at any time transfer an investigation to another coroner where in his or her opinion the investigation may be continued or conducted more conveniently by that other coroner or for any other good and sufficient reason. R.S.O. 1990, c. C.37, s. 17 (1).

INVESTIGATION AND INQUEST

(2) The coroner to whom an investigation is transferred shall proceed with the investigation in the same manner as if he or she had issued the warrant to take possession of the body. R.S.O. 1990, c. C.37, s. 17 (2).

NOTIFICATION OF CHIEF CORONER

(3) The coroner who transfers an investigation to another coroner shall notify the Chief Coroner of the transfer, and the Chief Coroner shall assist in the transfer upon request. R.S.O. 1990, c. C.37, s. 17 (3).

TRANSMITTING RESULTS OF FIRST INVESTIGATION

(4) The coroner who transfers an investigation to another coroner shall transmit to that other coroner the report of the *post mortem* examination of the body, if any, and his or her signed statement setting forth briefly the result of his or her investigation and any evidence to prove the fact of death and the identity of the body. R.S.O. 1990, c. C.37, s. 17 (4).

INQUEST UNNECESSARY

18. (1) Where the coroner determines that an inquest is unnecessary, the coroner shall forthwith transmit to the Chief Coroner a signed statement setting forth briefly the results of the investigation, and shall also forthwith transmit to the division registrar a notice of the death in the form prescribed by the *Vital Statistics Act*. 2009, c. 15, s. 10.

RECOMMENDATIONS

(2) The coroner may make recommendations to the Chief Coroner with respect to the prevention of deaths in circumstances similar to those of the death that was the subject of the coroner's investigation. 2009, c. 15, s. 10.

DISCLOSURE TO THE PUBLIC

(3) The Chief Coroner shall bring the findings and recommendations of a coroner's investigation, which may include personal information as defined in the *Freedom of Information and Protection of Privacy Act*, to the attention of the public, or any segment of the public, if the Chief Coroner reasonably believes that it is necessary in the interests of public safety to do so. 2009, c. 15, s. 10.

RECORD OF INVESTIGATIONS

(4) Every coroner shall keep a record of the cases reported in which an inquest has been determined to be unnecessary, showing for each case the coroner's findings of facts to determine the answers to the questions set out in subsection 31 (1), and such findings, including the relevant findings of the *post mortem* examination and of any other examinations or analyses of the body carried out, shall be available to the spouse, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request. 2009, c. 15, s. 10.

CORONER'S REPORT IF DEATH SUSPECTED NOT OF NATURAL CAUSES

18.1 If the coroner is of the opinion, based on his or her investigation, that the deceased person may not have died of natural causes, the coroner shall advise the regional coroner of that opinion and the regional coroner shall so advise the Crown Attorney. 2009, c. 15, s. 11.

DETERMINATION TO HOLD AN INQUEST

19. Where the coroner determines that an inquest is necessary, the coroner shall,

(a) forthwith notify the Chief Coroner of that determination and give the Chief Coroner a brief summary of the results of the investigation and of the grounds upon which the coroner made that determination; and

(b) hold an inquest. 2009, c. 15, s. 12.

WHAT CORONER SHALL CONSIDER AND HAVE REGARD TO

20. When making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,

(a) whether the matters described in clauses 31 (1) (a) to (e) are known;

(b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and

(c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances. R.S.O. 1990, c. C.37, s. 20.

WHERE BODY DESTROYED OR REMOVED FROM ONTARIO

21. Where a coroner has reason to believe that a death has occurred in circumstances that warrant the holding of an inquest but, owing to the destruction of the body in whole or in part or to the fact that the body is lying in a place from which it cannot be recovered, or that the body has been removed from Ontario, an inquest cannot be held except by virtue of this section, he or she shall report the facts to the Chief Coroner who may direct an inquest to be held touching the death, in which case an inquest shall be held by the coroner making the report or by such other coroner as the Chief Coroner directs, and the law relating to coroners and coroners' inquests applies with such modifications as are necessary in consequence of the inquest being held otherwise than on or after a view of the body. R.S.O. 1990, c. C.37, s. 21.

22. Repealed: 2009, c. 15, s. 13.

INQUEST MANDATORY

22.1 A coroner shall hold an inquest under this Act into the death of a child upon learning that the child died in the circumstances described in clauses 72.2 (a), (b) and (c) of the *Child and Family Services Act*. 2006, c. 24, s. 2 (1).

23. Repealed: 2009, c. 15, s. 14.

CHIEF CORONER MAY DIRECT THAT BODY BE DISINTERRED

24. Despite anything in the *Funeral, Burial and Cremation Services Act*, 2002 or a regulation made under that Act, the Chief Coroner may, at any time where he or she considers it necessary for the purposes of an investigation or an inquest, direct that a body be disinterred under and subject to such conditions as the Chief Coroner considers proper. R.S.O. 1990, c. C.37, s. 24; 2002, c. 33, s. 142; 2009, c. 15, s. 15.

DIRECTION BY CHIEF CORONER

25. (1) The Chief Coroner may direct any coroner in respect of any death to issue a warrant to take possession of the body, conduct an investigation or hold an inquest, or may direct any other coroner to do so or may intervene to act as coroner personally for any one or more of such purposes. R.S.O. 1990, c. C.37, s. 25 (1).

INQUEST INTO MULTIPLE DEATHS

(2) Where two or more deaths appear to have occurred in the same event or from a common cause, the Chief Coroner may direct that one inquest be held into all of the deaths. R.S.O. 1990, c. C.37, s. 25 (2).

DIRECTION TO REPLACE CORONER

(3) If the Chief Coroner is of the opinion that a coroner is unable to continue presiding over an inquest for any reason, the Chief Coroner may direct another coroner to continue the inquest. 1994, c. 27, s. 136 (3).

REQUEST BY RELATIVE FOR INQUEST

26. (1) Where the coroner determines that an inquest is unnecessary, the spouse, parent, child, brother, sister or personal representative of the deceased person may request the coroner in writing to hold an inquest, and the coroner shall give the person requesting the inquest an opportunity to state his or her reasons, either personally, by the person's agent or in writing, and the coroner shall advise the person in writing within sixty days of the receipt of the request of the coroner's final decision and where the decision is to not hold an inquest shall deliver the reasons therefor in writing. R.S.O. 1990, c. C.37, s. 26 (1); 1999, c. 6, s. 15 (3); 2005, c. 5, s. 15 (4).

REVIEW OF REFUSAL

(2) Where the final decision of a coroner under subsection (1) is to not hold an inquest, the person making the request may, within twenty days after the receipt of the decision of the coroner, request the Chief Coroner to review the decision and the Chief Coroner shall review the decision of the coroner after giving the person requesting the inquest an opportunity to state his or her reasons either personally, by the person's agent or in writing. R.S.O. 1990, c. C.37, s. 26 (2).

DECISION FINAL

(3) The decision of the Chief Coroner is final. R.S.O. 1990, c. C.37, s. 26 (3); 2009, c. 15, s. 16.

WHERE CRIMINAL OFFENCE CHARGED

27. (1) Where a person is charged with an offence under the *Criminal Code* (Canada) arising out of a death, an inquest touching the death shall be held only upon the direction of the Chief Coroner and, when held, the person charged is not a compellable witness. R.S.O. 1990, c. C.37, s. 27 (1); 2009, c. 15, s. 17 (1).

IDEM

(2) Where during an inquest a person is charged with an offence under the *Criminal Code* (Canada) arising out of the death, the coroner shall discharge the jury and close the inquest, and shall then proceed as if he or she had determined that an inquest was unnecessary, but the Chief Coroner may direct that the inquest be reopened. R.S.O. 1990, c. C.37, s. 27 (2); 2009, c. 15, s. 17 (2).

WHERE CHARGE OR APPEAL FINALLY DISPOSED OF

(3) Despite subsections (1) and (2), where a person is charged with an offence under the *Criminal Code* (Canada) arising out of the death and the charge or any appeal from a conviction or an acquittal of the offence charged has been finally disposed of or the time for taking an appeal has expired, the coroner may hold an inquest and the person charged is a compellable witness at the inquest. R.S.O. 1990, c. C.37, s. 27 (3); 2009, c. 15, s. 17 (3).

***POST MORTEM* EXAMINATION**

28. (1) A coroner may at any time during an investigation issue a warrant for a pathologist to perform a *post mortem* examination of the body. 2009, c. 15, s. 18.

OTHER EXAMINATIONS AND ANALYSES

(2) A coroner may at any time during an investigation conduct examinations and analyses that the coroner considers appropriate in the circumstances or direct any person, other than the pathologist to whom the warrant is issued, to conduct such examinations and analyses. 2009, c. 15, s. 18.

PATHOLOGIST'S DUTY

(3) The pathologist to whom the warrant is issued shall perform the *post mortem* examination of the body. 2009, c. 15, s. 18.

POWER TO EXAMINE BODY

(4) The pathologist to whom the warrant is issued or, if no warrant has been issued, a pathologist who has been notified of the death by a coroner or police officer and who reasonably believes that a coroner's warrant will be issued to him or her under subsection (1) may,

(a) enter and inspect any place where the dead body is and examine the body; and

(b) enter and inspect any place from which the pathologist has reasonable grounds for believing the body was removed. 2009, c. 15, s. 18.

NOTICE TO CORONER

(5) A pathologist who exercises a power under subsection (4) shall notify,

(a) the coroner who issued the warrant; or

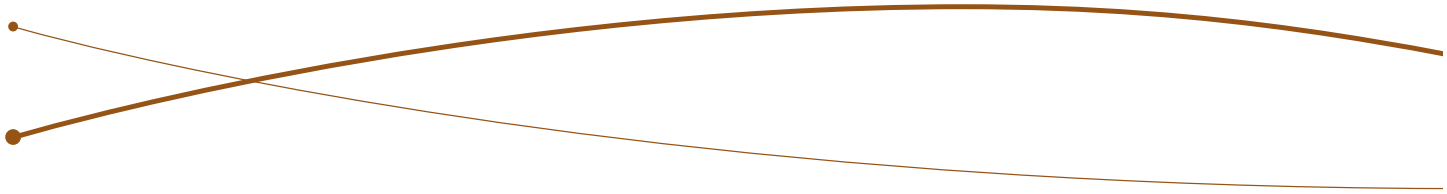
(b) if no warrant has been issued, the coroner by whom the pathologist believes the warrant will be issued. 2009, c. 15, s. 18.

OTHER EXAMINATIONS AND ANALYSES

(6) The pathologist who performs the *post mortem* examination may conduct or direct any person other than a coroner to conduct such other examinations and analyses as he or she considers appropriate in the circumstances. 2009, c. 15, s. 18.

DIRECTION OF CHIEF FORENSIC PATHOLOGIST

(7) The Chief Forensic Pathologist may direct a pathologist or any other person, other than a coroner, to conduct any examinations and analyses that the Chief Forensic Pathologist considers appropriate in the circumstances. 2009, c. 15, s. 18.



ASSISTANCE

(8) The pathologist who performs the *post mortem* examination may obtain the assistance of any person or persons in performing the *post mortem* examination and in conducting any other examinations and analyses. 2009, c. 15, s. 18.

PATHOLOGIST FROM REGISTER

(9) The coroner may issue a warrant under subsection (1) only to a pathologist whose name is on the pathologists register. 2009, c. 15, s. 18.

ASSIGNMENT TO ANOTHER PATHOLOGIST

(10) The Chief Forensic Pathologist may at any time during an investigation assign another pathologist whose name is on the pathologists register to perform the *post mortem* examination in place of the pathologist named on the coroner's warrant, and in that case, every reference in this section to the pathologist to whom the warrant is issued applies to the pathologist assigned to the investigation by the Chief Forensic Pathologist. 2009, c. 15, s. 18.

REPORTS OF POST MORTEM FINDINGS

29. (1) The pathologist who performed the *post mortem* examination of a body under section 28 shall forthwith report in writing his or her findings from the *post mortem* examination and from any other examinations or analyses that he or she conducted to the coroner who issued the warrant, the regional coroner and, if the pathologist who performed the *post mortem* examination is not the Chief Forensic Pathologist, the Chief Forensic Pathologist. 2009, c. 15, s. 18.

SAME

(2) A person, other than the pathologist who performed the *post mortem* examination, who conducted any other examination or analysis under section 28 shall forthwith report his or her findings in writing to the pathologist who performed the *post mortem* examination, the coroner who issued the warrant, the regional coroner and, if the pathologist who performed the *post mortem* examination is not the Chief Forensic Pathologist, the Chief Forensic Pathologist. 2009, c. 15, s. 18.

FURTHER *POST MORTEMS*

(3) If, after a *post mortem* examination of a body is performed, the Chief Forensic Pathologist is of the opinion that a second or further *post mortem* examination of the body is necessary, he or she shall so advise the Chief Coroner, and the Chief Coroner shall issue a warrant for a second or further *post mortem* examination of the body. 2009, c. 15, s. 18.

CROWN COUNSEL

30. (1) Every coroner before holding an inquest shall notify the Crown Attorney of the time and place at which it is to be held and the Crown Attorney or a barrister and solicitor or any other person designated by him or her shall attend the inquest and shall act as counsel to the coroner at the inquest. R.S.O. 1990, c. C.37, s. 30 (1).

COUNSEL FOR MINISTER

(2)The Minister may be represented at an inquest by counsel and shall be deemed to be a person with standing at the inquest for the purpose. R.S.O. 1990, c. C.37, s. 30 (2).

PURPOSES OF INQUEST

31. (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

(a) who the deceased was;

(b) how the deceased came to his or her death;

(c) when the deceased came to his or her death;

(d) where the deceased came to his or her death; and

(e) by what means the deceased came to his or her death. R.S.O. 1990, c. C.37, s. 31 (1).

IDEM

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1). R.S.O. 1990, c. C.37, s. 31 (2).

AUTHORITY OF JURY TO MAKE RECOMMENDATIONS

(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest. R.S.O. 1990, c. C.37, s. 31 (3).

IMPROPER FINDING

(4) A finding that contravenes subsection (2) is improper and shall not be received. R.S.O. 1990, c. C.37, s. 31 (4).

FAILURE TO MAKE PROPER FINDING

(5) Where a jury fails to deliver a proper finding it shall be discharged. R.S.O. 1990, c. C.37, s. 31 (5).

INQUEST PUBLIC

32. An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the *Criminal Code* (Canada) in which cases the coroner may hold the hearing concerning any such matters in the absence of the public. R.S.O. 1990, c. C.37, s. 32.

JURIES

33. (1) Every inquest shall be held with a jury composed of five persons. R.S.O. 1990, c. C.37, s. 33 (1); 2009, c. 15, s. 19 (1).

JURORS

(2) The coroner shall direct a constable to select from the list of names of persons provided under subsection 34 (2) five persons who in his or her opinion are suitable to serve as jurors at an inquest and the constable shall summon them to attend the inquest at the time and place appointed. R.S.O. 1990, c. C.37, s. 33 (2).

IDEM

(3) Where fewer than five of the jurors so summoned attend at the inquest, the coroner may name and appoint so many persons then present or who can be found as will make up a jury of five. R.S.O. 1990, c. C.37, s. 33 (3).

(4) Repealed: 2009, c. 15, s. 19 (2).

LIST OF JURORS

34. (1) A coroner may by his or her warrant require the sheriff for the area in which an inquest is to be held to provide a list of the names of such number of persons as the coroner specifies in the warrant taken from the jury roll prepared under the *Juries Act*. R.S.O. 1990, c. C.37, s. 34 (1).

IDEM

(2) Upon receipt of the warrant, the sheriff shall provide the list containing names of persons in the number specified by the coroner, taken from the jury roll prepared under the *Juries Act*, together with their ages, places of residence and occupations. R.S.O. 1990, c. C.37, s. 34 (2).

ELIGIBILITY

(3) No person who is ineligible to serve as a juror under the *Juries Act* shall be summoned to serve or shall serve as a juror at an inquest. R.S.O. 1990, c. C.37, s. 34 (3).

IDEM

(4) An officer, employee or inmate of a hospital or an institution referred to in subsection 10 (2) or (3) shall not serve as a juror at an inquest upon the death of a person who died therein. R.S.O. 1990, c. C.37, s. 34 (4).

EXCUSING FROM SERVICE

(5) The coroner may excuse any person on the list from being summoned or from serving as a juror on the grounds of illness or hardship. R.S.O. 1990, c. C.37, s. 34 (5).

EXCLUSION OF JUROR WITH INTEREST

(6) The coroner presiding at an inquest may exclude a person from being sworn as a juror where the coroner believes there is a likelihood that the person, because of interest or bias, would be unable to render a verdict in accordance with the evidence. R.S.O. 1990, c. C.37, s. 34 (6).

EXCUSING OF JUROR FOR ILLNESS

(7) Where in the course of an inquest the coroner is satisfied that a juror should not, because of illness or other reasonable cause, continue to act, the coroner may discharge the juror. R.S.O. 1990, c. C.37, s. 34 (7).

CONTINUATION WITH REDUCED JURY

(8) Where in the course of an inquest a member of the jury dies or becomes incapacitated from any cause or is excluded or discharged by the coroner under subsection (6) or (7) or is found to be ineligible to serve, the jury shall, unless the coroner otherwise directs and if the number of jurors is not reduced below three, be deemed to remain properly constituted for all purposes of the inquest. R.S.O. 1990, c. C.37, s. 34 (8).

REPORT TO SHERIFF RE JURY SERVICE

35. On or before the 31st day of December in each year, the coroner shall advise the sheriff of the names of persons who have received fees for service as jurors at inquests and the number of each such name on the jury roll. R.S.O. 1990, c. C.37, s. 35.

JURY IRREGULARITIES NOT TO AFFECT OUTCOME

36. The omission to observe any of the provisions of this Act or the regulations respecting the eligibility and selection of jurors is not a ground for impeaching or quashing a verdict. R.S.O. 1990, c. C.37, s. 36.

JURY'S DUTIES, POWERS

VIEW OF PLACE

37. (1) The jury shall view any place that the coroner directs them to view. 2009, c. 15, s. 20.

QUESTIONS

(2) The jurors are entitled to ask relevant questions of each witness. R.S.O. 1990, c. C.37, s. 37 (2).

MAJORITY VERDICT

38. A verdict or finding may be returned by a majority of the jurors sworn. R.S.O. 1990, c. C.37, s. 38.

SERVICE OF SUMMONSES

39. A summons to a juror or to a witness may be served,

(a) by personal service;

(b) by leaving a copy, in a sealed envelope addressed to the person summoned, at his or her place of residence with anyone who appears to be an adult member of the same household; or

(c) by sending it by registered mail addressed to the place of residence of the person summoned. 2009, c. 15, s. 21.

SUMMONSES

40. (1) A coroner may require any person by summons,

(a) to give evidence on oath or affirmation at an inquest; and

(b) to produce in evidence at an inquest documents and things specified by the coroner,

relevant to the subject-matter of the inquest and admissible. R.S.O. 1990, c. C.37, s. 40 (1).

FORM AND SERVICE OF SUMMONSES

(2) A summons issued under subsection (1) shall be in the form approved by the Minister and shall be signed by the coroner. 2009, c. 15, s. 22.

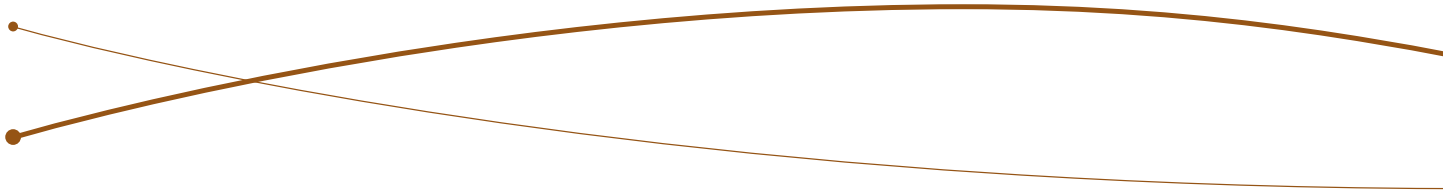
BENCH WARRANTS

(3) Upon proof to the satisfaction of a judge of the Superior Court of Justice of the service of a summons under this section upon a person and that,

(a) such person has failed to attend or to remain in attendance at an inquest in accordance with the requirements of the summons; and

(b) the person's presence is material to the inquest,

the judge may, by a warrant in the prescribed form, directed to any police officer, cause such witness to be apprehended anywhere within Ontario and forthwith to be brought to the inquest and to be detained in custody as the judge may order until the person's presence as a witness at the inquest is no longer required, or, in the discretion of the judge, to be released on a recognizance (with or without sureties) conditioned for appearance to give evidence. R.S.O. 1990, c. C.37, s. 40 (3); 1997, c. 39, s. 4 (2); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 33, Sched. 9, s. 3 (1).



PROOF OF SERVICE

(4) Service of a summons may be proved by affidavit in an application under subsection (3). R.S.O. 1990, c. C.37, s. 40 (4).

CERTIFICATE OF FACTS

(5) Where an application under subsection (3) is made on behalf of a coroner, the coroner may certify to the judge the facts relied on to establish that the presence of the person summoned is material for the purposes of the inquest and such certificate may be accepted by the judge as proof of such facts. R.S.O. 1990, c. C.37, s. 40 (5).

PERSONS WITH STANDING AT INQUEST

41. (1) On the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if the coroner finds that the person is substantially and directly interested in the inquest. R.S.O. 1990, c. C.37, s. 41 (1); 1993, c. 27, Sched.; 1999, c. 12, Sched. P, s. 2.

RIGHTS OF PERSONS WITH STANDING AT INQUEST

(2) A person designated as a person with standing at an inquest may,

(a) be represented by a person authorized under the *Law Society Act* to represent the person with standing;

(b) call and examine witnesses and present arguments and submissions;

(c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible. R.S.O. 1990, c. C.37, s. 41 (2); 2006, c. 21, Sched. C, s. 104 (1).

COSTS OF REPRESENTATION

(3) If the coroner in an inquest into the death of a victim as defined in the *Victims' Bill of Rights*, 1995 designates a spouse, same-sex partner or parent of the victim as a person with standing at the inquest, the person may apply to the Minister to have the costs that the person incurs for representation by legal counsel in connection with the inquest paid out of the victims' justice fund account continued under subsection 5 (1) of the *Victims' Bill of Rights*, 1995. 2006, c. 24, s. 2 (2).

PAYMENT

(4) Subject to the approval of Management Board of Cabinet, payment of the costs described in subsection (3) may be made out of the victims' justice fund account. 2006, c. 24, s. 2 (2).

PROTECTION FOR WITNESSES

42. (1) A witness at an inquest shall be deemed to have objected to answer any question asked the witness upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at an inquest shall be used or be receivable in evidence against the witness in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. R.S.O. 1990, c. C.37, s. 42 (1).

RIGHT TO OBJECT UNDER *CANADA EVIDENCE ACT*

(2) Where it appears at any stage of the inquest that the evidence that a witness is about to give would tend to criminate the witness, it is the duty of the coroner and of the Crown Attorney to ensure that the witness is informed of his or her rights under section 5 of the *Canada Evidence Act*. R.S.O. 1990, c. C.37, s. 42 (2).

RIGHTS OF WITNESSES TO REPRESENTATION

43. (1) A witness at an inquest is entitled to be advised as to his or her rights by a person authorized under the *Law Society Act* to advise him or her, but such person may take no other part in the inquest without leave of the coroner. 2006, c. 21, Sched. C, s. 104 (2).

SAME

(2) Where an inquest is held in the absence of the public, a person advising a witness under subsection (1) is not entitled to be present except when that witness is giving evidence. 2006, c. 21, Sched. C, s. 104 (2).

ADMISSIBILITY OF EVIDENCE

WHAT IS ADMISSIBLE IN EVIDENCE AT INQUEST

44. (1) Subject to subsections (2) and (3), a coroner may admit as evidence at an inquest, whether or not admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the purposes of the inquest and may act on such evidence, but the coroner may exclude anything unduly repetitious or anything that the coroner considers does not meet such standards of proof as are commonly relied on by reasonably prudent persons in the conduct of their own affairs and the coroner may comment on the weight that ought to be given to any particular evidence. R.S.O. 1990, c. C.37, s. 44 (1).

WHAT IS INADMISSIBLE IN EVIDENCE AT INQUEST

(2) Nothing is admissible in evidence at an inquest,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute. R.S.O. 1990, c. C.37, s. 44 (2).

CONFLICTS

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence. R.S.O. 1990, c. C.37, s. 44 (3).

COPIES

(4) Where the coroner is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at an inquest. R.S.O. 1990, c. C.37, s. 44 (4).

PHOTOCOPIES

(5) Where a document has been filed in evidence at an inquest, the coroner may, or the person producing it or entitled to it may with the leave of the coroner, cause the document to be photocopied and the coroner may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by the coroner. R.S.O. 1990, c. C.37, s. 44 (5).

TAKING EVIDENCE

45. (1) The evidence upon an inquest or any part of it shall be recorded by a person appointed by the coroner and approved by the Crown Attorney and who before acting shall make oath or affirmation that he or she will truly and faithfully record the evidence. R.S.O. 1990, c. C.37, s. 45 (1).

TRANSCRIPTION OF EVIDENCE

(2) It is not necessary to transcribe the evidence unless the Chief Coroner or Crown Attorney orders it to be done or unless any other person requests a copy of the transcript and pays the fees therefor except that the coroner may prohibit the transcribing of all or any part of evidence taken in the absence of the public. R.S.O. 1990, c. C.37, s. 45 (2); 2009, c. 15, s. 23.

ADJOURNMENTS

46. An inquest may be adjourned from time to time by the coroner of his or her own motion or where it is shown to the satisfaction of the coroner that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. C.37, s. 46.

MAINTENANCE OF ORDER AT INQUEST

47. A coroner may make such orders or give such directions at an inquest as he or she considers necessary for the maintenance of order at the inquest, and, if any person disobeys or fails to comply with any such order or direction, the coroner may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose. R.S.O. 1990, c. C.37, s. 47.

INTERPRETERS AND CONSTABLES

INTERPRETERS

48. (1) A coroner may, and if required by the Crown Attorney or requested by the witness shall, employ a person to act as interpreter for a witness at an inquest, and such person may be summoned to attend the inquest and before acting shall make oath or affirm that he or she will truly and faithfully translate the evidence. R.S.O. 1990, c. C.37, s. 48 (1).

CONSTABLES

(2) A coroner may appoint such persons as constables as the coroner considers necessary for the purpose of assisting the coroner in an inquest and, on the request of the coroner, the police force having jurisdiction in the locality in which an inquest is held shall provide a police officer for the purpose and, before acting, every such constable shall take oath or affirm that he or she will faithfully perform his or her duties. R.S.O. 1990, c. C.37, s. 48 (2).

ADMINISTRATION OF OATHS

49. The coroner conducting an inquest has power to administer oaths and affirmations for the purpose of the inquest. R.S.O. 1990, c. C.37, s. 49.

FURTHER POWERS OF CORONER

ABUSE OF PROCESSES

50. (1) A coroner may make such orders or give such directions at an inquest as the coroner considers proper to prevent abuse of its processes. R.S.O. 1990, c. C.37, s. 50 (1).

LIMITATION ON CROSS-EXAMINATION

(2) A coroner may reasonably limit further cross-examination of a witness where the coroner is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which the witness has given evidence or where the coroner is of the opinion that the questions being asked are irrelevant, unduly repetitious or abusive. 2009, c. 15, s. 24.

EXCLUSION OF REPRESENTATIVES

(3) A coroner may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, advising a witness if the coroner finds that such person is not competent properly to advise the witness, or does not understand and comply at the inquest with the duties and responsibilities of an adviser. 2006, c. 21, Sched. C, s. 104 (3).

RULES OF PROCEDURE FOR INQUESTS

50.1 The Chief Coroner may make additional rules of procedure for inquests. 2009, c. 15, s. 25.

CONTEMPT PROCEEDINGS

51. Where any person without lawful excuse,

(a) on being duly summoned as a witness or a juror at an inquest makes default in attending at the inquest; or

(b) being in attendance as a witness at an inquest, refuses to take an oath or to make an affirmation legally required by the coroner to be taken or made, or to produce any document or thing in his or her power or control legally required by the coroner to be produced by the person or to answer any question to which the coroner may legally require an answer; or

(c) does any other thing that would, if the inquest had been a court of law having power to commit for contempt, have been contempt of that court,

the coroner may state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the coroner, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. R.S.O. 1990, c. C.37, s. 51.

CONCLUSION OF INQUEST

RETURN OF VERDICT

52. (1) The coroner shall forthwith after an inquest return the verdict or finding, with the evidence where the Crown Attorney or Chief Coroner has ordered it to be transcribed, to the Chief Coroner, and shall transmit a copy of the verdict and recommendations to the Crown Attorney. R.S.O. 1990, c. C.37, s. 52 (1); 2009, c. 15, s. 26.

RELEASE OF EXHIBITS

(2) After an inquest is concluded, the coroner shall, upon request, release documents and things put in evidence at the inquest to the lawful owner or person entitled to possession thereof. R.S.O. 1990, c. C.37, s. 52 (2).

PROTECTION FROM PERSONAL LIABILITY

53. No action or other proceeding shall be instituted against any person exercising a power or performing a duty under this Act for any act done in good faith in the execution or intended execution of any such power or duty or for any alleged neglect or default in the execution in good faith of any such power or duty. 2009, c. 15, s. 27.

SEALS NOT NECESSARY

54. In proceedings under this Act, it is not necessary for a person to affix a seal to a document, and no document is invalidated by reason of the lack of a seal, even though the document purports to be sealed. R.S.O. 1990, c. C.37, s. 54.

OFFENCES

55. Any person who contravenes section 10, 11, 13 or subsection 16 (6) is guilty of an offence and on conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. C.37, s. 55.

REGULATIONS AND FEES

56. (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing powers and duties of the Chief Coroner;

(b) prescribing powers and duties of the Chief Forensic Pathologist;

(c) prescribing the composition of the Oversight Council and of the complaints committee of the Oversight Council;

(d) prescribing matters for the purpose of paragraph 7 of subsection 8.1 (1);

(e) respecting the making, referral and reviewing of complaints under section 8.4;

(f) defining "restrain" for the purpose of subsections 10 (4.7) and (4.8);

(g) governing the retention, storage and disposal of tissue samples, implanted devices and body fluids obtained in performing a post mortem examination of a body or conducting examinations or analyses under section 28. 2009, c. 15, s. 28 (1); 2009, c. 33, Sched. 9, s. 3 (2).

SAME

(2) The Minister may make regulations,

(a) respecting the appointment of persons under section 16.1;

(b) prescribing limits on the powers of persons appointed under section 16.1;

(c) providing for the selecting, recording, summoning, attendance and service of persons as jurors at inquests;

(d) prescribing matters that may be grounds for disqualification because of interest or bias of jurors for the purposes of subsection 34 (6);

(e) prescribing the contents of oaths and affirmations required or authorized by this Act;

(f) prescribing the form of a warrant for the purpose of subsection 40 (3);

(g) prescribing fees and allowances that shall be paid to persons rendering services in connection with coroners' investigations and inquests and providing for the adjustment of such fees and allowances in special circumstances;

(h) requiring and governing the disclosure, collection and use of information, including personal information within the meaning of the *Freedom of Information and Protection of Privacy Act*, about coroners, pathologists and other members of the College of Physicians and Surgeons of Ontario among the Chief Coroner, the Chief Forensic Pathologist, the Oversight Council and the College of Physicians and Surgeons of Ontario. 2009, c. 15, s. 28 (1).

CORONERS' FEES AND ALLOWANCES

(3) The Minister may set fees and allowances for coroners for services performed under this or any other Act and may provide for the adjustment of such fees and allowances in special circumstances. 1997, c. 39, s. 5 (2).

NON-APPLICATION OF *LEGISLATION ACT, 2006*, PART III

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to,

(a) any rules made by the Chief Forensic Pathologist respecting the maintenance of the register of pathologists under section 7.1 or the authorization of pathologists to provide services under this Act; or

(b) the rules of procedure for inquests made by the Chief Coroner under section 50.1. 2009, c. 15, s. 28 (2).

FORMS

57. (1) The Minister may approve forms for the purposes of this Act and provide for their use. 2009, c. 15, s. 29.

SAME

(2) Where the Minister approves a form and requires its use, the form shall be available on the website of the ministry of the Minister. 2009, c. 15, s. 29.

APPENDIX D

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Frank Iacobucci
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November 9, 2011

RE: Independent Review of First Nations Representation on Ontario's Jury Roll

I would like to take this opportunity to introduce myself as the Independent Reviewer appointed by the Attorney General and the Government of Ontario to examine, report and offer recommendations regarding the process for inclusion of First Nation peoples living in reserve communities on the provincial jury roll from which potential jurors are selected for all jury trials and coroners inquests. My report will be submitted to the Attorney General of Ontario on or before August 31, 2012.

The matter of First Nations' representation on Ontario's jury roll has been raised in certain trials and coroners' inquests over the last several years, a development that has prompted some First Nations' organizations to advocate for a systemic review of the creation of the jury roll. The Government of Ontario has responded by establishing a process for an Independent Review with the objective of enhancing First Nations' representation on the provincial jury roll and strengthening the relationship between the Ministry of the Attorney General and First Nations in this regard.

I am keen to meet with First Nation organizations and communities in the next few months to discuss this important matter and obtain an informed view of the issues related to First Nations and the jury roll. I hope you will be interested in participating in this process. I welcome your involvement, or the involvement of your member communities, and look forward to discussing the most effective means by which this could occur, considering the needs of your organization and the parameters of this process. We would be pleased to receive written submissions, convene or attend meetings, or engage in a combination of these approaches.

Throughout the Independent Review process, I will be supported by a legal team led by John Terry, a partner at Torys LLP and Candice S. Metallic, of Maurice Law Barristers & Solicitors as Associate Counsel. Please feel encouraged to follow up with either Mr. Terry or Ms. Metallic if you wish to participate in this process, or if you have any questions, comments or concerns respecting the process.

For further information, please visit the website for the Independent Review at www.firstnationsandjuriesreview.ca. I look forward to meeting with you in the very near future.

Sincerely,

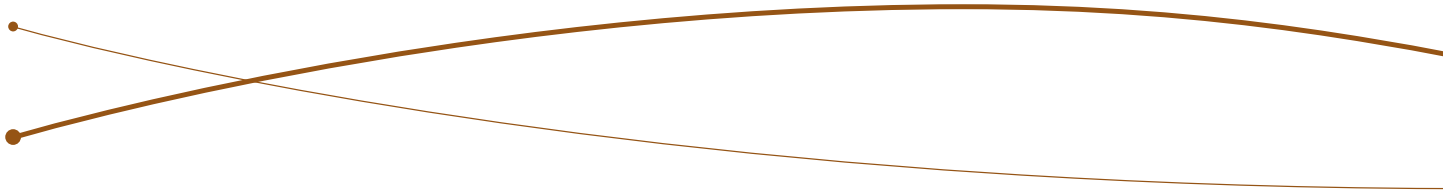
Frank Iacobucci

APPENDIX E

LIST OF ENGAGEMENT SESSIONS

FIRST NATIONS AND OTHER GROUPS AND INDIVIDUALS	OFFICIALS THAT ATTENDED	SUBMISSIONS
Nishnawbe Aski Nation	Several meetings with, then, Deputy Chief Terry Waboose, Bentley Cheechoo and NAN Assembly	Written Submission
1. Keewaywin	Council, Elders & community representatives	
2. Kassabonika Lake	Chief & Council, Elders, community representatives, and justice committee	Written Submission
3. Webequie	Council, community representatives	
4. Mattagami	Chief & Council, community representatives	
5. Moose Cree	Chief & Council, justice worker, probation officer, lawyer	Written Submission
6. Constance Lake	Chief & Council, community representatives	
7. Sandy Lake	Chief & Council, Elders, justice committee	
8. Mushkeegomang	Chief & Council	
9. Poplar Hill	Chief & Council	
10. Sachigo Lake	Chief & Council, community representatives, students	Written Submission
11. Kasheshewan	Chief Solomon (in Toronto)	
Grand Council Treaty 3	Meeting with then Grand Chief Diane Kelly and Chief Simon Forbister	
1. Wauzhushk Onigum	Gathering of 8 Chiefs, Councilors, Elders, and technicians	

Union of Ontario Indians	Meeting with legal counsel	Written Submission
1. Garden River	Gathering of 3 Chiefs, an Elder and technicians	Written presentation
2. Toronto	Gathering of 1 Chief, Councilors from 5 First Nations, and technicians	3 written presentations
Independents		
Akwesasne	Chief & Council, Justice Department	
Chippewas of Saugeen	Chief & Council	
Six Nations	Chief & Council	
Pikwaknagan	Chief & Council	
Organizations		
Aboriginal Legal Services Toronto	a. Several meetings with Director of Legal Services b. Families Forum of those involved in Coroner's Inquests	Written Submission
Provincial Advocate for Children and Youth	Meeting with Provincial Advocate, legal counsel and staff	Written Submission
Government		
Ministry of Attorney General	Meeting with legal counsel and other officials	
Court Services Division	Meeting with Director of Court Services, Northwest Region Meeting with Court Services officials, Kenora Meeting with Assistant Crown Counsel (retired)	
Provincial Jury Centre	Teleconference with officials	
Judiciary		
Judges	Meetings with judges from the Ontario Superior Court of Justice and Ontario Court of Justice	



APPENDIX F

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Frank Iacobucci
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April 20, 2012

RE: Independent Review of First Nations Representation on Ontario's Jury Roll – Points Raised Through Dialogue with First Nations and Further Questions

Last November, I wrote to you to introduce myself as the Independent Reviewer appointed by the Attorney General and the Government of Ontario to examine, report and offer recommendations regarding the process for inclusion of First Nation peoples living in reserve communities on the provincial jury roll from which potential jurors are selected for all jury trials and coroners inquests.

I explained at the time that I would be meeting with First Nation organizations and communities over the next several months to obtain an informed view of the issues related to First Nations and the jury roll. I have now completed most of those consultations, having traveled throughout the province to meet with First Nations leaders and community members, treaty organization representatives, judges, court officials and other interested groups to discuss this very serious issue.

As we move from the consultation phase toward the report-writing stage of my review, I wanted to give you feedback on what I have heard during these consultations and provide you with an additional opportunity to give your input on some follow-up questions that I have. In order to do that, I enclose a short document that describes the points raised through my dialogue with First Nations, organized under five issues, as well as a list of follow-up questions relating to some of those issues.

I encourage you to provide me with your comments or submissions in response to these questions, any of the other issues discussed and points raised in the document, or any other issues relevant to my review. In order to meet the deadline for me to complete my report, I would be grateful if you would provide me with any comments or submissions by no later than May 25, 2012.

Sincerely,

Frank Iacobucci

INDEPENDENT REVIEW OF FIRST NATION REPRESENTATION ON ONTARIO'S JURY ROLL

MANDATE OF INDEPENDENT REVIEW

I. Systemic challenges to First Nations representation on Ontario's jury roll for trials and coroner's inquests

II. Improve relationship between First Nations and Ministry of the Attorney General in the context of the jury roll

POINTS RAISED THROUGH DIALOGUE WITH FIRST NATIONS

ISSUE #1: FIRST NATIONS' PERSPECTIVES ON THE JUSTICE SYSTEM CHILL THE DESIRE TO SERVE ON ONTARIO JURIES

a) Competing values, ideologies and laws with respect to achieving justice, i.e. Canadian system of criminal justice does not accord with traditional First Nations principles of attaining harmony and balance

b) Systemic discrimination – negative experiences have shaped adverse perspectives and mistrust of the whole of the criminal justice system, including jury duty

c) Justice challenges in northern First Nations communities are distinct -- e.g. lack of access -- and compound the problem

d) Lack of education about and awareness of the jury system

e) Self-government objectives for community based justice initiatives and ancillary resource/capacity requirements are not supported

f) Inadequate policing services and funding contribute to negative perceptions of the criminal justice system

ISSUE #2: CURRENT PRACTICES FOR COLLECTION OF NAMES AND CONTACT INFORMATION OF FIRST NATIONS PEOPLES ON RESERVE ARE INADEQUATE

a) Residency vs. membership – A specific list of on-reserve residence is required, rather than the full membership list or voters list

b) First Nations seek capacity to gather and maintain appropriate, accurate and current records, including addresses, for jury roll purposes

c) Voluntariness of First Nation participation is required given extent of existing social and economic pressures. First Nations' administrators are best positioned to solicit interest

ISSUE #3: JUROR QUESTIONNAIRES POSE PROBLEMS AND CONCERNS THAT DETER FIRST NATION RESPONSES

a) Penalty for non-response (fine or imprisonment) within unreasonable time limit (five days of receipt of notice) is perceived as imposing jury duty through intimidation and threat

b) The requirement to declare 'Canadian' citizenship prevents participation of many First Nations peoples

c) List of exemptions from jury duty ought to include elected First Nation leadership

d) English or French-speaking requirement is problematic for many whose primary language is their First Nation language – juries ought to be equipped with translation services, if necessary

e) Lack of translation of questionnaires and instructions pose challenges to completing forms

f) Lack of understanding of the jury selection process and role of juries prevent response to jury questionnaires

g) Confusion and misunderstanding may arise when someone is empanelled but not chosen for a jury

ISSUE #4: PRACTICAL BARRIERS TO JURY PARTICIPATION

a) Transportation – travel to urban centers often requires multiple modes of transportation that occupy significant amounts of time (several days in some circumstances) and costs are beyond what people can afford out of pocket. Transportation presents a significant barrier to northern First Nations who incur higher travel costs which, in turn, further inhibits participation

b) Accommodations and meal allowances are not always sufficient

c) Childcare expenses must be included as a necessary expense

d) Employment income supplements may be required, when necessary

e) All expenses related to the jury system must be paid prior to travel due to lack of resources and credit

f) Community-based supports, such as assistance with process and postjury service psychological effects, are needed by those who participate in juries

g) Lack of translation services while in urban centres creates hardships

h) Criminal records and lack of awareness of pardon procedures present a bar to service

ISSUE #5: RELATIONSHIP BETWEEN THE MINISTRY OF THE ATTORNEY GENERAL AND FIRST NATIONS WITH RESPECT TO THE JURY ROLL NEEDS TO BE IMPROVED

a) Need for collaboration between the Ministry of the Attorney General and First Nations

b) Education and awareness of jury system for both trials and coroner's inquests among First Nations needs to be improved

c) Increased education required for provincial officials regarding First Nations' culture, values and traditions

d) More education about process for pardons and access to support services for First Nations is required

e) Proper funding is required to support community based justice initiatives aimed at enhancing participation on juries in a culturally appropriate manner and to implement First Nation restorative justice initiatives

f) Better cultural sensitivity training is needed for those involved in the justice system

FOLLOW-UP QUESTIONS

1. ON-RESERVE RESIDENCY NAME AND ADDRESS INFORMATION

a) How should this information be collected?

b) Should OHIP information be used?

c) Should band list information be provided?

d) Should First Nations communities collect this information themselves and provide it to the Ministry of the Attorney General?

2. JURY FORMS

a) Should the forms ask whether an individual is "First Nations" as opposed to the current form which asks whether an individual is a Canadian citizen?

b) How can First Nations members be encouraged to complete and submit the forms? For example, should the penalties for non-response be modified in some way?

c) Are there any exemptions from jury service that should be included in addition to exempted First Nations leadership?

d) If the form stated that a translator could be provided for a juror, would that improve First Nations participation?

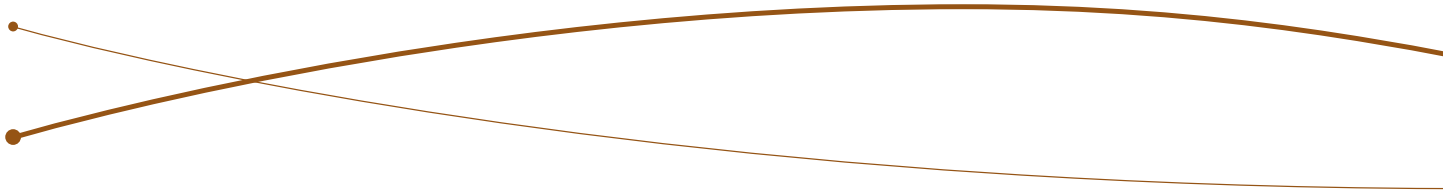
3. PRACTICAL BARRIERS

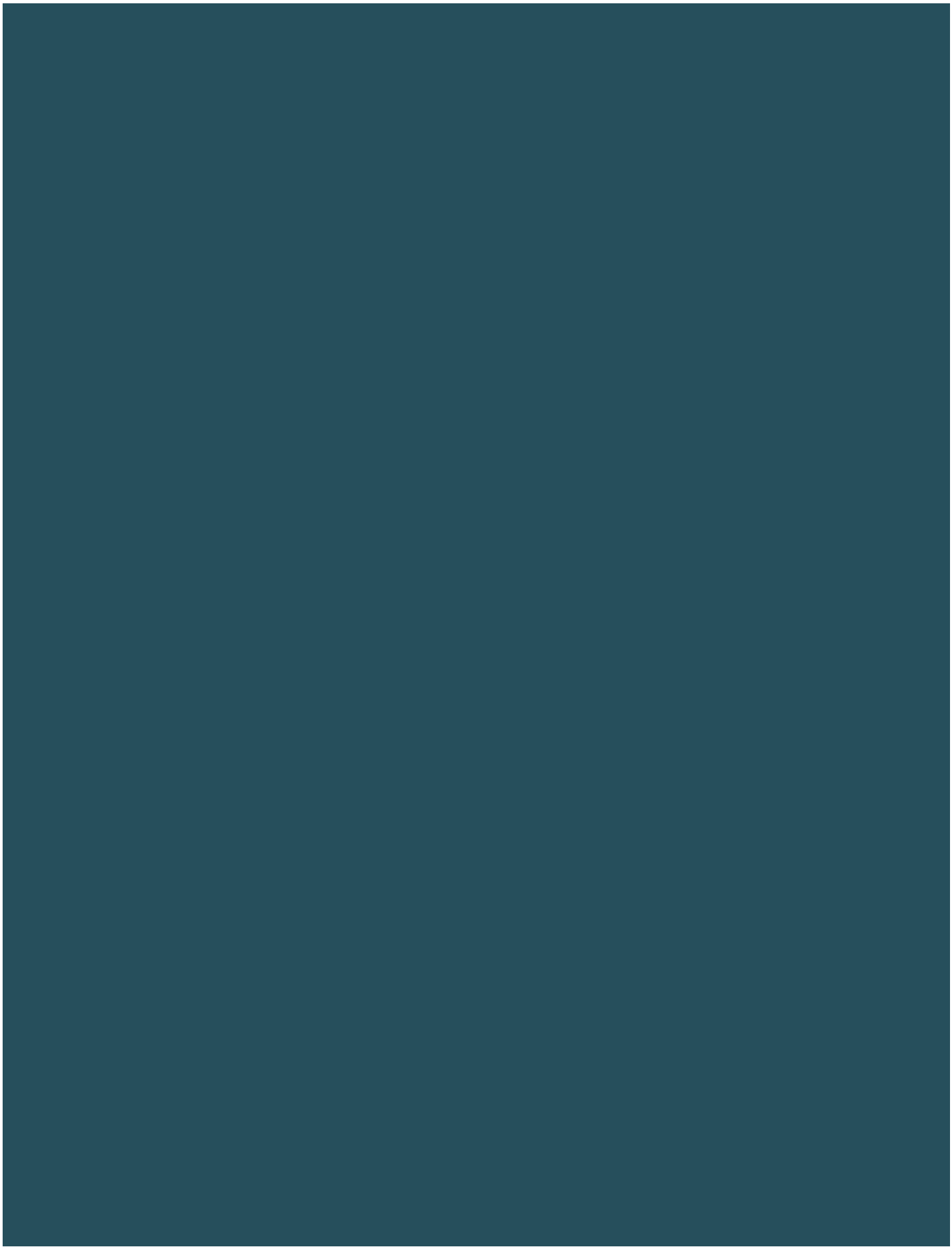
a) What kinds of transportation, accommodation, meals or other costs should be paid for in order to encourage participation?

b) What kinds of community supports for completing jury forms, attending a trial or inquest, or dealing with post-jury psychological effects should be provided?

4. RELATIONSHIP BETWEEN FIRST NATIONS AND MINISTRY OF THE ATTORNEY GENERAL

a) What steps would you recommend be taken to improve this relationship?





Tab 2.2

Treasurer's Advisory Group on Access to Justice
Participant Groups and Organizations

Law Foundation of Ontario
Law Commission of Ontario
Legal Aid Ontario
Pro Bono Law Ontario
Ontario Justice Education Network
Community Legal Education Network
The Association in Defence of the Wrongly Convicted
Canadian Civil Liberties Association
Association of Community Legal Clinics of Ontario

Ontario Bar Association
The Advocate's Society
County and District Law President's Association
Paralegal Association of Ontario
Licenced Paralegals Association

Equity Advisory Group

Treasurer's Liaison Group – which includes representatives from the above and:

Association des juristes d'expression française de l'Ontario (AJEFO)
Indigenous Bar Association
Federation of Asian Canadian Lawyers
South Asian Bar Association of Toronto
Canadian Association of Black Lawyers
Criminal Lawyers' Association
Family Lawyers' Association
Women's Law Association of Ontario

Federal and Provincial governments – courts administration; justice policy

Offices of the Chief Justices of the Ontario Courts

Deans – Ontario Law programs

ACCESS TO JUSTICE THEMES:

"Quotable Quotes"

Background Paper for The Law Society of Ontario's

Access to Justice Symposium: "Creating a Climate for Change"

October 29, 2013

Prepared by Karen Cohl
for The Law Society of Upper Canada
DRAFT – OCT 20, 2013

CONTENTS

Introduction

This is the second of two background papers prepared for participants of the Access to Justice Symposium hosted by the Law Society of Upper Canada on October 29, 2013. It briefly sets out themes observed from reviewing selected Ontario and national reports on access to justice issues from the past several years. The themes are illustrated with quotations, primarily from the reports listed on the following page.

This paper does not attempt to summarize or synthesize the extensive content and recommendations contained in these reports. Nor does it draw on the many articles, books, additional reports, conferences, and symposia on access to justice issues. The themes and quotations have been put forward as "food for thought" to generate ideas, discussion and dialogue at the Symposium.

Ontario and National Access to Justice Reports 2007 - 2013	Short Title used for Citations in this Report
Access to Civil and Family Justice: A Roadmap for Change Action Committee on Access to Justice in Civil & Family Matters, Oct 2013	**"NAC: Roadmap"**
Reaching Equal Justice: An Invitation to Envision and Act A summary report by the CBA Access to Justice Committee, Aug 2013	**"Equal Justice"**
Public Legal Education and Information in Ontario Communities: Formats and Delivery Channels CLEO Centre for Research & Innovation, Aug 2013	**"Public Legal Education"**
CBA Legal Futures Initiative: The Future of Legal Services in Canada: Trends and Issues The Canadian Bar Association, June 2013	**"Legal Futures"**
The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Dr. Julie Macfarlane, Final Report, May 2013	**"National SRL"**
Meaningful Change for Family Justice: Beyond Wise Words Final report of the Family Justice Working Group Action Committee on Access to Justice in Civil and Family Matters, April 2013	**"NAC: Family Justice"**
Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector. Final report of the Prevention, Triage and Referral Working Group Action Committee on Access to Justice in Civil and Family Matters, Feb 2013	**"NAC: Prevention, Triage, Referral"**
Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity The Law Commission of Ontario, Feb 2013	**"LCO: Family Justice"**
First Nations Representation on Ontario Juries Report of the Independent Review by Honourable Frank Iacobucci, Feb 2013	**"First Nations/Juries"**
Access to Justice in French French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, June 2012	**"Access in French"**
Report of the Court Processes Simplification Working Group Action Committee on Access to Justice in Civil and Family Matters, May 2012	**"NAC: Court Processes"**
Report of the Access to Legal Services Working Group Alison MacPhail for the Working Group on Access to Legal Services Action Committee on Access to Justice in Civil and Family Matters, May 2012	**"NAC: Legal Services"**
Addressing the Needs of Self-Represented Litigants in the Canadian Justice System Trevor Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller, Martha Simmons White Paper for the Association of Canadian Court Administrators, March 2012	**"SRL White Paper"**
The Geography of Civil Legal Services in Ontario: Report of the Mapping Phase of the Ontario Civil Legal Needs Project Jamie Baxter and Albert Yoon, Nov 2011	**"Mapping"**
Listening to Ontarians: Report of the Ontario Civil Legal Needs Project A report of the project Steering Committee, May 2010	**"Listening""**
Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services Karen Cohl and George Thomson for The Law Foundation of Ontario, Dec 2008	**"Connecting"**
Report of the Legal Aid Review 2008 Michael Trebilcock, 2008	**"Legal Aid Review"**
Report of the Review of Large and Complex Criminal Case Procedures Honourable Patrick J. Lesage and Professor Michael Code, Nov 2008	**"Large Criminal Cases"**
Civil Justice Reform Project: Summary of Findings & Recommendations Honourable Coulter A. Osborne, Q.C., Nov 2007	**"Civil Justice Reform"**

Importance of Access to Justice and the Need for Change

Theme #1: Access to justice is an issue of fundamental importance.

An explicit and underlying theme is the vital importance of ensuring that members of the public have access to justice, both in terms of process and substantive outcomes.

> Most people agree that access to justice is a fundamental right in a democratic society.
>
> – Listening to Ontarians, p.2

> The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.
>
> – Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, 2007, *Justice in our courts and the challenges we face* (Address to the Empire Club of Canada)

Theme #2: There is an urgent need for significant change.

Despite the innovations and progress achieved by governments, legal organizations, community groups, and multi-stakeholder partnerships, the need for systemic change remains. The reports examined for this paper describe issues that require urgent attention, systems that are unsustainable in many respects, and the need for fundamental transformation as opposed to more modest reform.

> [There is a] broad consensus on the need for significant change to improve access to justice, and an evolving consensus on the central directions for reform…. The civil justice system is too badly broken for a quick fix.
>
> – Equal Justice, pp.1 and 13

> We must make changes urgently….The current system is unsustainable. ….. Change is urgently needed…. Now it is time to act.
>
> – NAC: Roadmap, pp. v, 5, 24

> As long as justice has existed, there have been those who struggled to access it. But as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.
>
> – Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, in Foreword to NAC: Roadmap, p.i

> [T]he justice system, as it relates to First Nations peoples, and particularly in Northern Ontario, is in crisis."
>
> – First Nations/Juries, p.2

> There is today an overwhelming consensus that if the justice system as we know it is to survive, it must undergo significant change to provide greater access to justice for the public.
>
> – Hon. Warren K. Winkler, Chief Justice of Ontario, Opening of the Courts of Ontario, September, 2013

Theme #3: There is no common definition but a common understanding is emerging.

There is no common definition of "access to justice" and the emphasis of what it comprises has evolved over time. However, a review of recent reports indicates a commonality of thinking on the concept, especially for civil and family law. For example, there is recognition that access to justice extends beyond access to lawyers and courts; that it requires a range of ways to prevent and resolve everyday legal problems; and that it includes fair processes and just outcomes.

> [Access to justice] can perhaps be thought of as encompassing a hierarchy of approaches:
> 1) Helping the largest number of people to use the system as it is (by such means as legal aid);
> 2) Changing the justice system to make it more responsive and more user-friendly;
> 3) Helping people to find other ways to avoid or resolve problems such that they do not require access to the justice system.
>
> – Law Society of Upper Canada, Access to Justice Committee Report to Convocation, June 28, 2002, p.8

> [A]ccess to justice refers broadly to the access that citizens have to dispute resolution tools of justice including but not limited to courts. Effective access to justice does not only refer to reductions in costs, access to lawyers and access to courts; but rather, it is a broad term that refers more generally to the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens.
>
> – Canadian Forum of Civil Justice website

> [W]e believe that an accessible family justice system must be affordable and easy to navigate but we also believe that ensuring access to justice in the area of family law requires attention to other factors which create barriers…
>
> – LCO: Family Justice, p.16

> Our central animating principle must be envisioning a truly equal justice system, one that provides meaningful and effective access to all, taking into account the diverse lives that people live.
>
> – Equal Justice, p.2

> Providing justice – not just in the form of fair and just process but also in the form of fair and just outcomes – must be our primary concern.
>
> – NAC: Roadmap, p.9

> In general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters.
>
> – Hon. Justice Thomas Cromwell of the Supreme Court of Canada, cited in NAC: Roadmap, p.27

The NAC's "Roadmap" report succinctly summarizes problems identified with the civil and family justice system: too complex, too slow, too expensive, and often incapable of producing just outcomes (NAC: Roadmap, p.1). One approach to defining access to justice would be to state this in the positive:

> Access to justice exists when the public can understand, use and afford information and services to prevent and resolve their legal disputes and to achieve just outcomes without delay.

New Directions – Cultural Shift

Theme #4: We need to put the public first

There is a strong sense that justice system structures, processes and reforms have too often been designed to serve the needs of legal professionals and service providers. This has created barriers for members of the public in addressing their legal issues and asserting their legal rights. Some reports articulate the need for a major cultural shift within the justice system to focus more on the needs of the public in general and on vulnerable groups in particular.

> An inclusive justice system…focuses on people's needs, not those of justice system professionals and institutions …. Getting to equal justice demands that we first focus on the people who are most disadvantaged by their social and economic situation.
>
> – Equal Justice, pp.14 and 16

> The justice system, through those that work in it, must shift its focus fundamentally and see itself through a more user-centred, rather than provider-centered, lens of service.
>
> – SRL White Paper, p.5

> [M]any people continue to face significant barriers to accessing legal information, including language, literacy, disability, distance, and skill level or confidence.
>
> – Public Legal Education, p.30

> The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups.
>
> – NAC: Roadmap, p.7

> These systemic issues include…the almost universally-held view of First Nations individuals that the justice system is alien or foreign [and] the problem of inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas.
>
> – First Nations/Juries, p.87

> [P]ersons with disabilities… are more likely to identify a civil legal problem they encounter as being very disruptive in their lives.
>
> – Listening, p.12

> [A]ccessing justice in French in Ontario can be more difficult, time consuming and expensive than accessing justice in English….In spite of the goodwill on the part of participants in the justice system, the French-speaking community continues to experience barriers to accessing justice in French.
>
> – Access in French, pp.7 and 48

Theme #5: We need to do more at the front end and on prevention.

Many reports stress the importance of prevention strategies and the need for integrated, front-end services. Early information and access to a range of assistance and tools can help to prevent legal issues from escalating and leading to other problems in an individual's life.

> [W]e should not lose sight of the value of prevention as a means of avoiding civil legal needs altogether.
>
> – Listening, p.56

> Perhaps the most pressing access innovation is to develop effective triage and referral systems in each jurisdiction.
>
> – Equal Justice, p.20

> We have adopted an underlying premise that early intervention in family law disputes can minimize the likelihood of an unnecessary protracted dispute before the court and result in better outcomes for families.
>
> – LCO: Family Justice, p.57

> The justice system must acknowledge this reality by widening its focus from its current (and expensive) court-based "emergency room" orientation to include education and dispute prevention.
>
> – NAC: Roadmap, p.11

> …[T]he "front end" of the justice system…precedes – and often obviates the need for – formal representation in the court system.
>
> – NAC: Prevention, Triage, Referral, p.i

> As with medicine where there is now a greater emphasis on prevention and health promotion, there is already a demand in certain sectors for more preventative lawyering to avoid disputes in the first place and reduce legal costs over the longer term.
>
> – Legal Futures, p.21

> A triage role should be identified for frontline staff who help diagnose the specific needs of particular SRLs and then assist those people to obtain the required information or services….
>
> – SRL White Paper, p.42

> [C]ase management initiated early on in a matter may promote the earlier resolution of the dispute.
>
> – NAC: Court Processes, p.9

Theme #6: We need more integrated and holistic responses

The reports recognize the inter-connectedness of legal problems and various health, social and financial problems that individuals face. This calls for more integrated and holistic approaches to serve people with legal issues. Some suggest greater collaboration among legal service providers and other disciplines, for example by working with social workers and others in multidisciplinary teams.

> The initial problem may be a legal problem, but without early intervention this problem may trigger subsequent problems, legal or otherwise, such as greater demands on other social welfare programs, social housing programs, physical or mental health programs, etc. Early intervention…calls for a more holistic or integrated institutional response….
>
> – Legal Aid Review, p.vi

> [A culture shift is required to] move away from the adversarial model and a reorientation to problem-solving in a multi-professional context.
>
> – Self-Represented Litigants, p.128

> [Services can be provided] through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers). Teams can deliver more comprehensive and holistic services tailored to people's needs. … Target: By 2030, 80% of lawyers in people-centred law practices work with an integrated team of service providers.
>
> – Equal Justice, pp.27 and 28

> Viable solutions require collaboration to create synergy and to respond to people's needs in a holistic way.
>
> – Connecting, p.5

> With some (important) exceptions, our system presumes homogeneity on the part of users... and for the most part, it divorces the legal problem from the other issues that attend relationship breakdown.
>
> – LCO: Family Justice, p.53

Issues to Address

Collectively, the reports examined for this paper press for change in many areas and for various population groups. This section selects three areas that multiple reports indicate as priorities. However, this should not be taken to indicate that these three areas are necessarily the most important issues to be addressed. Other issues may be viewed as equally or more urgent.

Theme #7: The family law system requires urgent attention.

Despite many improvements in the family justice system, many reports call for further and more dramatic changes, including a greater emphasis on non-adversarial approaches and early intervention.

> [F]amily relationship breakdown is the primary reason why most Ontarians enter the civil justice system.
>
> – Listening, p.57

> Major change is urgently needed in the family justice system.
>
> – NAC: Roadmap, p.17

> Canadians do not have adequate access to family justice…. Without access to the mechanisms to implement them, the substantive rules have limited value.
>
> – NAC: Family Justice, p.1 Exec Summary

> The problem [of unrepresented litigants] is particularly pronounced in family law matters.
>
> – Equal Justice, p.9

> Over the past few years, there has been considerable study and reform of the family law system. Yet problems of complexity and difficulties for unrepresented litigants in particular remain.
>
> LCO: Family Justice, p.1

> Extending paralegals' scope of practice to include family law is controversial; however we conclude that this possibility should not simply be dismissed.
>
> – LCO: Family Justice, p.2

> Respondents frequently questioned the limitations placed on the provision of assistance by paralegals, especially in relation to family matters.
>
> – National SRL, p.13

> We must concentrate our efforts on the specific areas of law with the greatest societal need and where we can have the highest impact. It is for this reason that I continue to advocate for ongoing family law reform.
>
> – Chief Justice Warren K. Winkler, Opening of the Courts of Ontario, September 2012

Theme #8: Self-represented parties are not going away

Many reports raise the need for justice system changes in light of high numbers of self-represented persons, whether in civil, family or criminal cases. The phenomenon of self-represented persons is not expected to go away.

> There is an urgent need to address the consequences of the large and growing numbers of people representing themselves in both family and civil court….[It is] likely that a substantial SRL population in the courts is here to stay.
>
> – National SRL, pp.113 and 128

> Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists…. Court and tribunal services must provide appropriate services for self-represented litigants.
>
> – NAC: Roadmap, pp.7 and 16

> The system's design is premised on the presence of lawyers.
>
> – LCO: Family Justice, p.24

> [T]here is a growing gap between what most SRLs need and the services that are available at courts.
>
> – SRL White Paper, p.5

> Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients…. The influx of SRL's into the family and civil courts has dramatically altered the judicial role.
>
> – National SRL, pp.13 and 124

> Both represented and unrepresented litigants must have real access to the civil justice system.
>
> – Civil Justice Reform, p. 4

> [W]ithin a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.
>
> – National SRL, p.9

> Figures from Ontario show that …in 2011/12, 64% of individuals involved in applications under the Family Law Act, the Children's Law Reform Act or the Divorce Act were self-represented at the time of filing.
>
> – National SRL, p.33

> The criminal justice system often does not work as it should when an accused is not represented and cannot present or challenge the evidence in a meaningful way….Particularly in the context of long complex cases, the trial judge may find it necessary to appoint *amicus curiae* to assist the court or, in some exceptional circumstances, to appoint counsel for the accused in order to preserve the integrity of the process and ensure a fair trial.
>
> – Large Criminal Cases, p.156

Theme #9: Creative solutions are required to make legal services more affordable

The affordability of legal services remains a critical aspect of access to justice that seriously affects low- and middle-income residents across Ontario. This is a huge factor that leads people to proceed without legal representation or to abandon attempts to resolve their legal issues. Recent reports comment on the future of legal billing practices, the need to increase legal aid funding and eligibility, and ways to increase affordability through early intervention and greater use of paralegals and multi-disciplinary teams.

> A commitment to the availability of affordable legal services to a broad range of Canadians must be part of any responses to change in the next decade.
>
> – Legal Futures, p.6

> A critical barrier to the public's access to the justice system is the cost of legal services, which can be prohibitive not only for the poor but also for the middle class.
>
> – NAC: Legal Services, p.3

Today legal representation is primarily limited to persons with relatively high incomes or the very poor, and full legal representation only in the case of those with considerable discretionary resources. Yet the system is still for the most part based on the need for a lawyer.

– LCO: Family Justice, p.23

[M]eaningful improvement in access to justice can be achieved only if the justice system can provide mechanisms for the more timely resolution of litigated disputes at a reasonable cost to both the plaintiff and the defendant.

– Civil Justice Reform, p.8

By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel…. Financial retainers and services billed at a rate of $350-400 an hour are beyond the means of many Canadians.

– National SRL, pp.8 and 12

In many cases economic power has shifted to the consumer or client side, with buyers demanding more say on what lawyers do, how they do it, and how much and how they charge for it….. There is considerable resistance by clients to current pricing structures, including billable hours.

– Legal Futures, pp.4 and 21

Ontario lawyers should be encouraged to consider new and innovative billing methods that promote access to justice for litigants with civil legal issues who would not otherwise be able to afford counsel.

– Civil Justice Reform, p.ix

There is a growing consensus that [multidisciplinary teams are] a positive way forward, providing more affordable services to clients and adequate income to lawyers.

– Equal Justice, p.27

[Legal Aid] financial eligibility criteria need to be significantly raised to a more realistic level that bears some relationship to the actual circumstances of those in need.

– Legal Aid Review, p.177

Target: By 2020, all Canadians living at and below the poverty line… are eligible for full coverage of essential public legal services.

– Equal Justice, p.30

Making it Happen

Theme #10: Non-legal organizations have a vital role to play

Non-legal organizations play a vital role in prevention, legal information, triage and referral. They often serve as "trusted intermediaries" that help people recognize that they have a legal problem, provide preliminary information, and make referrals to legal service providers. Examples include Indian Friendship Centres, immigrant settlement agencies, shelters, violence prevention groups, disability organizations, health and social service providers, cultural and religious bodies, community centres, public libraries, and information and referral services (such as 211 Ontario). Efforts to enhance access to justice, especially at the front end, require collaboration among legal and non-legal organizations.

> The key is to provide a seamless continuum of legal and non-legal services, and ensure that representation is available when needed to have meaningful access to justice.
>
> – Equal Justice, p.16

> When individuals do not recognize the legal aspect of their problem, trusted intermediaries trained to refer to appropriate legal services can provide a conduit to the justice system.
>
> – NAC: Prevention, Triage, Referral, p.20

> Trusted intermediaries play a critical role in ensuring low-income and disadvantaged people access and understand PLEI.
>
> – Public Legal Education, p.27

> Access to a "trusted intermediary" in a health, social service, or other organization is particularly important for persons who are isolated, not comfortable with technology, and less able to pursue self-help options.
>
> – Connecting, p. 54

> A more vulnerable person may need the assistance of a lawyer or paralegal while another individual may require access to clear and correct information.
>
> – Mapping, p.7

> One theory worth examining is that the market for legal services in Canada is actually growing, but that the lawyers' share of this market is declining relative to non-lawyer providers.
>
> – Legal Futures, p.17

> The most common source of legal information for SRL's are court staff…. The conventional distinction between legal information and legal advice requires urgent re-examination.
>
> – National SRL, pp.10 and 117

Theme #11: Technology in the justice system has not kept pace

Various reports comment on the lack of technology developments in the justice sector, the need for specific technology solutions, and concerns about the impact of technology on vulnerable populations. Potential technology solutions include the expansion of online dispute resolution, videoconferencing, interactive court forms, simplified scheduling, e-filing and docket management, and electronic accessibility of court and tribunal documents.

> While technological innovations are transforming much of modern life, they appear to be bypassing the justice system.
>
> – NAC: Legal Services, p.3

> Overall, the justice system has not been subject to the same technological transformation as other institutions.
>
> – Equal Justice, p.10

> The technology in all courts and tribunals must be modernized to a level that reflects the electronic needs, abilities and expectations of a modern society.
>
> – NAC: Roadmap, p.16

> Although online information may be helpful for many people, others will require in-person assistance to understand it.
>
> – LCO: Family Justice, p.1

> Clients will likely expect their services to be delivered to them in familiar ways, such as over the internet
>
> – Legal Futures, p.17

> [T]he trend away from professional services and towards a "Do It Yourself" approach may be more closely related to the availability of information on the internet…than any particular dislike or mistrust of lawyers.
>
> – National SRL, p.35

> In the coming years, technology will play both a disruptive role in challenging the status quo and a transformative role in assisting the legal industry into new forms of service delivery, knowledge development, communications, management and administration.
>
> – Legal Futures, p.27

Theme #12: Leadership and collaboration can help to bridge the "implementation gap"

A key concern is an apparent lack of capacity to move from sound recommendations in a report (or series of reports) to implementing those recommendations. This has been referred to as "the Implementation Gap" (NAC: Family Justice, p.8). There is the obvious challenge of finding resources in times of fiscal restraint. However, the divided responsibilities for different elements of the system also create impediments to moving forward with systemic change. Several recent reports therefore recommend strategies and structures to foster leadership and collaboration. This includes recommendations to create coordinated local Access to Justice Implementation Commissions (NAC: Roadmap, p.20) and to appoint Access to Justice Commissioners (CBA: Equal Justice, p.37). Collaboration is seen as a vital element for bridging the implementation gap.

> [T]he responsibility for access to justice transcends organizational boundaries.
>
> – Listening, p.54

> No one department or agency has sole responsibility for the delivery of justice in Canada. That, in our view, is a core reason for why the improvement of access to justice continues to be such a challenge.
>
> – NAC: Roadmap, p.20

> Improving access to justice in Canada is the responsibility of all players in the justice system, including judges, lawyers, all levels of government, paralegals, academics, NGOs, public legal educators and the public.
>
> – NAC: Court Processes, p.25

> [T]he most effective overall leadership could come by appointing access to justice commissioners, individuals given adequate resources and the mandate of striving for equal justice.
>
> – Equal Justice, p.37

> While cost is an extremely important consideration, there must also be consideration for the heavy cost both directly and indirectly in continuing to operate a confusing family justice system primarily premised on services that many people cannot afford.
>
> – LCO: Family Justice, p.85

> [T]here are many reasons to be optimistic….People within and beyond the civil and family justice system are increasingly engaged by access to justice challenges and many individuals and organizations are already working hard for change.
>
> – NAC: Roadmap, p.24

> [I]t is going to take more than wise advice to change the system.
>
> – NAC: Family Justice, p.9

LEGAL ORGANIZATIONS AND ACCESS TO JUSTICE ACIVITIES IN ONTARIO

Background Paper for The Law Society of Ontario's

Access to Justice Symposium: "Creating a Climate for Change"

October 29, 2013

Prepared by Karen Cohl
for The Law Society of Upper Canada
DRAFT – OCT 20, 2013

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Introduction

This is the first of two background papers prepared for participants of the Access to Justice Symposium hosted by the Law Society of Upper Canada on October 29, 2013. It briefly describes legal organizations in Ontario and provides examples of their access to justice activities. The purpose is to stimulate discussion among Symposium participants about potential solutions, gaps and opportunities for collaboration. The paper is not intended to be comprehensive; rather it provides a brief "snapshot" and high level overview of access to roles and activities within the legal community.

Efforts to enhance access to justice involve a multitude of legal and non-legal organizations, often working in partnership with each other. The fact that this paper looks at legal organizations should not detract from the many non-legal organizations that play a vital role in legal information, referral, triage and prevention. They include Indian Friendship Centres, immigrant settlement agencies, shelters, violence prevention groups, disability organizations, health and social service providers, cultural and religious bodies, community centres, public libraries, and information and referral services (such as 211 Ontario).

The descriptions of legal organizations and their access to justice activities have been prepared with input from contacts from the organizations. The focus is on Ontario organizations, although some nationally based organizations have been included, especially those doing on the ground work in Ontario. We recognize that there is not always a clear line between a "legal" and "non-legal" organization, especially in the case of community organizations that provide information or education on legal topics. This paper is a draft that will be revised to add, modify or correct information following the Symposium discussions. Apologies to those we may have inadvertently omitted or insufficiently described.

Table: Examples of Legal Organizations in Ontario

Legal Institutions • The Law Society of Upper Canada • The Law Foundation of Ontario • Legal Aid Ontario • The Law Commission of Ontario	**Provincial and Local Services** • Community legal clinics • Pro Bono Law Ontario • Ontario Justice Education Network • Community Legal Education Ontario • Barbra Schlifer Commemorative Clinic • Office of the Worker Adviser • Office of the Employer Adviser • Human Rights Legal Support Centre	**National Services** • Association in Defence of the Wrongly Convicted • Canadian Civil Liberties Association • Pro Bono Students Canada • Women's Legal Education and Advocacy Fund
Legal Associations: General • Ontario Bar Association/Canadian Bar Association • The Advocates' Society • County and District Law Presidents' Association • Criminal Lawyers' Association • Family Lawyers Association • Ontario Trial Lawyers Association • Refugee Lawyers' Association of Ontario • Paralegal Society of Ontario • Licensed Paralegals Association	**Legal Associations: Demographic** • Arab Canadian Lawyers Association • Association des juristes d'expression française de l'Ontario • Canadian Association of Black Lawyers • Canadian Muslim Lawyers Association • Federation of Asian Canadian Lawyers • Hellenic Canadian Lawyers Association • Hispanic Ontario Lawyers Association • Indigenous Bar Association • Iranian Canadian Lawyers' Association • Korean Canadian Lawyers Association • South Asian Bar Association of Toronto • Women's Law Association of Ontario	**Faculties of Law** • Lakehead University, Faculty of Law • Osgoode Hall Law School, York University • Queen's University, Faculty of Law • University of Ottawa, Faculty of Law • University of Toronto, Faculty of Law • University of Western Ontario, Faculty of Law • University of Windsor, Faculty of Law
Courts and Tribunals • Court of Appeal for Ontario • Superior Court of Justice • Ontario Court of Justice • Administrative Tribunals	**Governments** • Ontario Ministry of the Attorney General • Department of Justice Canada	**Partnerships** • Local, provincial and national partnerships and collaborations, involving legal and community organizations

Legal Institutions

The Law Society of Upper Canada

The Law Society of Upper Canada governs Ontario's lawyers and paralegals in the public interest to ensure that the people of Ontario are served by professionals who meet high standards of learning, competence and professional conduct. In 2006, the Law Society was given an explicit statutory mandate to facilitate access to justice for the people of Ontario. To further this objective, the Law Society established standing committees on Access to Justice and on Equity and Aboriginal Issues and co-sponsored the Ontario Civil Legal Needs research project which laid the groundwork for recent and future initiatives. Throughout 2013, the Law Society has been seeking advice on an enhanced role for itself through the Treasurer's Advisory Group on Access to Justice ("TAG"). TAG has also served to facilitate broader dialogue on access to justice in Ontario and is proposed to become a standing forum for this dialogue.

Sample Access to Justice Activities

- Law Society Referral Service – up to 30 minutes free consultation with a lawyer or paralegal
- "Your Law: Ontario Law" videos on basic concepts such as hiring a lawyer or a paralegal, real estate transactions, wills and powers of attorney, family law, and personal injury matters
- Family Law Portal – designed to integrate Internet information on family law for the public
- Five-year review of the implementation of paralegal regulation
- Review and revision of regulations and rules – unbundled legal services; alternative billing structures; etc.
- Equity and diversity training and model policies; public education in partnership with community groups

The Law Foundation of Ontario (LFO)

The Law Foundation of Ontario funds programs that help people to understand the law and the justice system; help people to use the law to improve their lives; and foster excellence in the work of legal professionals. A priority for the LFO is improving access to justice for disadvantaged groups. The LFO's main source of revenue is interest received from lawyers' and paralegals' mixed trust accounts. Other sources of revenue are court ordered cy-près awards and investment income. LFO grantees include many legal and non-legal organizations that further access to justice including Legal Aid Ontario, law schools and other organizations mentioned in this paper (e.g., Association in Defence of the Wrongly Convicted, Barbra Schlifer Commemorative Clinic, Canadian Civil Liberties Education Trust, Law Commission of Ontario, Ontario Justice Education Network, Pro Bono Law Ontario, Pro Bono Students Canada).

Sample Access to Justice Activities

- Grants that fund ideas generated by non-profit community groups to improve access to justice
- Access to Justice Fund: using cy-près awards to fund national and regional projects
- Connecting Project: improving linguistic and rural access to justice
- Administration of the Class Proceedings Fund: providing financial assistance to parties involved in class action lawsuits in the public interest

- Payment of 75% of net income from mixed trust accounts to Legal Aid Ontario, as required by the Law Society Act

Legal Aid Ontario (LAO)

Legal Aid Ontario has a statutory mandate to promote access to justice for low-income individuals throughout Ontario. Its role is to provide high-quality legal aid services in a cost-effective and efficient manner, to facilitate flexibility and innovation in the provision of legal aid services, to identify, assess and recognize the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario, and to operate independently from the Government of Ontario but within a framework of accountability for the expenditure of public funds.

Sample Access to Justice Activities

- Toll-free number, including summary legal advice for family and criminal law matters, available in 120 languages
- 56 legal aid offices in courthouses throughout the province
- Duty counsel services for people who arrive in criminal, family or youth courts without a lawyer
- Francophone legal advice line
- Issuing certificates to enable eligible low-income clients to retain a private lawyer for the most serious and complex cases
- Funding independent, community-based clinics to provide poverty law services
- Funding Student Legal Aid Services Societies operating out of Ontario law schools
- Refugee Law Office and current review of delivery of refugee law services
- Renewed Aboriginal Justice Strategy
- Mental Health strategy
- Public Legal Education website, LawFacts.ca, providing in-depth legal information and resources pertaining to criminal and refugee law. Content for Family, Aboriginal, and mental health law is coming Fall 2013.

The Law Commission of Ontario (LCO)

The Law Commission of Ontario is an independent organization that researches issues and recommends law reform measures to make the law accessible to all Ontario communities. Its mandate includes stimulating critical debate about the law. It works on a wide range of projects, from short and narrow projects (focused on specific laws) to long projects that require multidisciplinary research and analysis (that might affect many laws). The LCO was created by an Agreement among The Law Foundation of Ontario, the Ontario Ministry of the Attorney General, the Dean of Osgoode Hall Law School, and The Law Society of Upper Canada (all of whom provide funding) and the Ontario law deans. It receives funding and in-kind support from York University.

Sample Access to Justice Activities

Research Projects Underway

- Class Actions and Review of Class Proceedings Act
- Capacity of Adults with Mental Disabilities and the Federal Registered Disability Savings Plan
- Legal Capacity, Decision-making and Guardianship
- Modernization of the Forestry Workers Lien for Wages Act

- Specialized Procedure for Administration of Small Estates

Completed Projects
- Charging Fees for Cashing Government Cheques
- Division of Pensions on Marital Breakdown
- Family Law Reform
- Vulnerable Workers and Precarious Work
- Modernization of the Provincial Offences Act
- Framework for the Law as It Affects Persons with Disabilities
- Framework for the Law as It Affects Older Adults
- Law school curriculum modules for teaching about violence against women

Other Activities
- Roundtables on joint and several liability under Ontario Business Corporations Act and on family law
- Symposium on conversations about law reform
- Co-hosting conferences on elder law, e-health law and policy, and the law and ethics of investigative journalism

Provincial and Local Services

Community Legal Clinics

Ontario's community legal clinics are independent, non-profit corporations that receive the bulk of their funding from Legal Aid Ontario. Clinic lawyers and legal workers provide poverty law services that help low-income and disadvantaged people to meet their most basic needs: a source of income, a roof over their heads, human rights, access to health care, education, etc. The three defining characteristics of the clinics are local community governance, practice in poverty law, and legal response through a broad array of services.

ONTARIO COMMUNITY LEGAL CLINICS –SNAPSHOT		
There are **77** community legal clinics in Ontario.		
60 clinics serve specific geographic communities.		
17 clinics are "specialty clinics" that focus on particular areas of poverty law or client populations:		
• African Canadian • Chinese and Southeast Asian • Children and youth • Community legal education • Corrections • Disability	• Elderly • Environment • HIV and AIDS • Income security • Injured workers (2)	• Landlords self-help • South Asian • Spanish-speaking • Tenants • Workers health and safety

The Association of Community Legal Clinics of Ontario (ACLCO) serves its members as the voice of the clinic system to Legal Aid Ontario, the Law Society of Upper Canada, government, law schools, the media, and the general public.

Sample Access to Justice Activities

Ongoing Work

- Case work and legal representation in areas of law that particularly affect low-income individuals and communities
- Community development, public legal education and law reform activities to achieve systemic solutions to systemic legal issues confronting low income communities

Examples of Strategic Initiatives and Partnerships

- Co-location of Rexdale clinic in a community hub, sharing space with local community agencies serving mutual clients
- A "connecting region" initiative led by the South Ottawa clinic to formally link agencies serving the low-income population in the South Ottawa community
- "Housing as a Right" test case led by Advocacy Centre for Tenants Ontario (ACTO) on behalf of four individuals and a community organization under ss. 7 and 15 of the Charter of Rights and Freedoms
- International conference on workers compensation - organized by academics, legal clinics, and injured workers - to be attended by injured workers from across the province (with Law Foundation funding)
- A Strategic Plan for Ontario's community legal clinic system to expand client access to poverty law services; enhance capacity for systemic work; strengthen community connections; and enhance system-wide coordination and support
- The Knowledge Now project to enhance knowledge sharing among clinics, with support from the Legal Aid Ontario Innovations Fund

Pro Bono Law Ontario (PBLO)

Pro Bono Law Ontario is a charity founded in 2001 to bridge the justice gap between lawyers who want to give back and the many Ontarians who can't afford legal services and have a legal problem not covered by legal aid. PBLO creates and manages volunteer programs that connect these lawyers with low-income Ontarians – either directly or in partnership with charitable organizations working in the community. PBLO serves over 13,000 clients each year who have nowhere else to turn. The demand for these services increases each year. PBLO is funded by The Law Foundation of Ontario, The Law Society of Upper Canada, and private donations.

Sample Access to Justice Activities

- Creating and managing pro bono projects, brokering partnerships and providing consulting services to other groups interested in organized pro bono projects, and addressing regulatory barriers to participation
- Creating and directly managing three streams of programs serving at-risk children and youth, unrepresented litigants, and charitable organizations
- Brokering partnerships to connect charitable organizations with law firms, law associations, and legal departments
- Working with law firms, law associations and legal departments to develop policies that facilitate pro bono participation on an institutional level
- Using technology to deliver legal information and self-help resources (like court form completion software) to the public
- Bringing legal services to people in need, e.g. Court based self-help centres and medical legal partnerships in Ontario's children's hospitals

Ontario Justice Education Network (OJEN)

The Ontario Justice Education Network promotes understanding, education, and dialogue to support a responsive and inclusive justice system in Ontario. OJEN carries out its mandate through education and advocacy programs that focus on engaging Ontario's youth in a positive way with Ontario's justice system. OJEN receives funding from the Law Foundation of Ontario, the Department of Justice Canada, and the Ontario Trillium Foundation.

Sample Access to Justice Activities

- Delivery of justice education projects across the province for approximately 200,000 young people annually, facilitating direct access to judges, justices of the peace, lawyers, and legal professionals, at no cost, in both official languages
- Development of preventative strategies for meaningful justice education provincially, nationally and internationally
- Training high school law teachers and providing free classroom resources
- Working with the Ontario Ministry of the Education to revise the high school curriculum relating to legal issues to reflect pressing and emerging legal needs
- Outreach to communities with historically negative interactions with the justice system to build knowledge and confidence and to introduce youth and families to sources of help (high-risk, newcomer, Aboriginal and Francophone youth and children)

Community Legal Education Ontario (CLEO)

CLEO is an independent non-profit organization that specializes in public legal education and information. It produces clear, accurate, and practical legal rights information to help people who have low incomes or face other barriers, such as language or literacy, to understand and exercise their legal rights. It also supports other community groups in their public legal education work.

Sample Access to Justice Activities

- Specialty community legal clinic produces clear language legal information resources on high-need legal topics, in a variety of languages and formats
- "Your Legal Rights" website offers legal information on a wide range of topics, in a variety of languages, compiled from legal information resources of more than 800 organizations
- Centre for Research & Innovation conducts research and projects to help build the capacity of community organizations to develop and deliver effective legal rights information
- Connecting Communities project fosters training partnerships between legal and community organizations to improve access to legal information and referral for people who do not speak English or French or who live in rural or remote communities
- Public Legal Education Learning Exchange supports organizations across Ontario in providing effective PLE for their communities by hosting a website and networking opportunities to share research, tools, and promising practices

Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic is a not for profit organization providing multi-disciplinary services (legal, counselling and language interpretation) to women who are victims of violence. The Clinic assists women build lives free from violence and ensures women's access justice and other vital services they require for their protection and long term well-being. This Clinic is not part of the LAO funded system of community legal clinics. It is funded primarily by the province of Ontario as well as the Ontario Women's Directorate, the City of Toronto, the United Way of Greater Toronto, the Canadian Women's Foundation, The Law Foundation of Ontario, the Pacifica Fund at the Toronto Community Foundation, and many other corporate and individuals donors.

Sample Access to Justice Activities

- Legal help in family, immigration and criminal law
- Counselling support
- Interpretation and translation in more than 90 languages
- Advocacy for law reform and social changes that benefit women

Office of the Worker Adviser (OWA)

The Office of the Worker Adviser educates, advises and represents non-union workers and their survivors when the worker has been injured at work. The OWA also represents non-union workers who have been threatened or punished for following health and safety laws. The OWA is an independent agency of the Ontario Ministry of Labour. Its services are free and confidential. The OWA was established by statute in 1985, along with the Office of the Employer Adviser and the Workplace Safety and Insurance Appeals Tribunal.

Sample Access to Justice Activities

- Advice, education, and representation at the Workplace Safety and Insurance Board, the Workplace Safety and Insurance Appeals Tribunal, and the Ontario Labour Relations Board
- Self-help information for workers to handle their own claims or applications where appropriate
- Community partnerships with other groups that assist injured workers or who promote health and safety in the workplace
- Educational services in local communities on topics related to the OWA mandate
- System improvement partnerships and activities

Office of the Employer Adviser (OEA)

The Office of the Employer Adviser provides Ontario employers with free and confidential advice, representation and education on workers' compensation issues under the *Workplace Safety and Insurance Act*, and on unjust reprisal issues under the *Occupational Health and Safety Act*. The OEA was created by statute in 1985 as an independent agency of the Minstry of Labour. It provides advice to any size employer and represents primarily employers who employ fewer than 100 employees in workers' compensation matters. It represents employers with fewer than 50 employees in reprisal disputes.

Sample Access to Justice Activities

- Advice and representation of employers in workers' compensation appeals at the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal
- Advice and representation of employers in unjust reprisal matters at the Ontario Labour Relations Board
- Publications designed to meet the day-to-day needs of employers regarding the workplace safety and insurance system
- Proactive strategies for employers to help them avoid becoming involved in unjust reprisal proceedings
- Online webinars and educational seminars to inform and educate employers about their rights and obligations

Human Rights Legal Support Centre

The Human Rights Legal Support Centre is an independent agency funded by the Ontario Government through the Ministry of the Attorney General. It offers human rights legal services to people who have experienced discrimination contrary to Ontario's *Human Rights Code*. The Centre has regional staff in Windsor, Sault Ste. Marie, Thunder Bay, Guelph, Ottawa and Brampton.

Sample Access to Justice Activities

- Legal assistance in filing applications at the Human Rights Tribunal of Ontario and legal representation at mediations and hearings
- Interpretation services in 140 languages, including American Sign Language
- Eligibility guidelines that give priority to disadvantaged applicants
- Special service protocol enabling Aboriginal clients to be served by an Aboriginal lawyer
- Policy to accommodate a variety of physical, mental, language and cultural needs
- Outreach to communities that face cultural and linguistic barriers in accessing the Centre's services
- Community and continuing legal educational programs on human rights

National Services

Association in Defence of the Wrongly Convicted (AIDWYC)

AIDWYC is dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit and to preventing such injustices in the future through education and reform. AIDWYC has played a significant role in the exoneration of eighteen wrongly convicted Canadians.

Sample Access to Justice Activities

- Reviewing and supporting claims of innocence in homicide cases
- Delivering Public Legal Education on topics related to wrongful convictions in marginalized communities
- Coordinating Continuing Legal Education events for lawyers, police, the judiciary and Aboriginal court workers in the hopes of preventing wrongful convictions
- Raising public awareness about miscarriages of justice through speaking engagements and the AIDWYC website and blog

- Intervening in legal cases which seek to rectify miscarriages of justice
- Participating in public inquiries related to wrongful convictions

Canadian Civil Liberties Association (CCLA)

The Canadian Civil Liberties Association is a national, non-partisan, independent, non-profit organization that promotes respect for and observance of fundamental human rights and civil liberties and that defends, extends, and fosters recognition of these rights and liberties. The CCLA's work focuses on four thematic areas: fundamental freedoms, public safety, national security, and equality. CCLA has always been backed financially only by its members and supporters. It has neither sought nor received any government money.

Sample Access to Justice Activities

- Defending human rights and civil liberties through public education, litigation, citizen's engagement, monitoring and research
- Convening conferences and public education programs through its foundation, the Canadian Civil Liberties Education Trust
- Engaging volunteers to keep informed of how civil liberties are observed throughout the country
- Intervention in court cases to represent a human rights and civil liberties perspective

Pro Bono Students Canada (PBSC)

Pro Bono Students Canada is a national, award-winning program with chapters at 21 law schools across the country, including every Ontario law school. By exposing law students to the value of public service, PBSC aims to encourage the next generation of lawyers to make *pro bono* an everyday part of their practice.

Sample Access to Justice Activities

- Placement of law student volunteers in community organizations, legal centres and clinics, law firms and courts and tribunals, training them to provide high quality, professional legal assistance to vulnerable populations and individuals and to non-profit organizations
- Supervised opportunities for students to develop legal skills while increasing access to justice in diverse communities across Canada. Flagship projects include:
    - Family Law Project: document preparation for unrepresented litigants
    - Tax Advocacy project: representing appellants in the informal procedure in the Tax Court of Canada
    - Wills Clinic: preparing wills and powers of attorney, and delivering public legal information sessions
- Campus events to promote the value of public interest lawyering and pro bono service

Women's Legal Education and Advocacy Fund (LEAF)

Founded in 1985, LEAF is a national, non-profit organization that exists to advance the equality of women and girls through litigation, law reform and public education. LEAF addresses inequality and injustice issues experienced by the most marginalized women who are disproportionately disadvantaged

by poverty, racism, disability, colonialism and sexism. LEAF works to ensure Canadian courts provide the equality rights guaranteed to women and girls by Section 15 of the *Canadian Charter*.

Sample Access to Justice Activities

- Intervention to help win landmark legal victories in crucial areas such as violence against women, discrimination, sexual harassment, sex discrimination in employment standards, social assistance, unfair pensions, family law and reproductive rights
- Involvement over the past twenty-eight years in over 150 cases on equality rights, addressing issues such as reproductive freedoms, pay equity, employment, housing, immigration, family law, sexual violence, sexual orientation and disability accommodation for women and marginalized groups

Legal Associations: General

Individual lawyers and paralegals contribute to access to justice in many ways. This can include pro bono services, unbundled legal services, alternative billing arrangements, and specialized firms. They also contribute through the legal associations to which they belong.

Ontario Bar Association (OBA) and Canadian Bar Association (CBA)

The Canadian Bar Association (CBA) represents some 37,000 lawyers, judges, notaries, law teachers, and law students from across Canada. Approximately two-thirds of all practising lawyers in Canada belong to the CBA. The Ontario Bar Association (OBA) is a branch of the CBA and is the largest voluntary legal advocacy organization in Ontario, representing some 18,000 members on the frontlines of our justice system in no fewer than 38 different sectors and in every region of the province. The CBA-OBA mandate is, among other things, to improve and promote access to justice and equality in the legal profession and the justice system.

Sample Access to Justice Activities

CBA Reaching Equal Justice

- Ongoing CBA initiative offering a comprehensive strategic framework to overcome existing barriers, with 31 targets for attaining equal justice by 2030. Each target offers actions that can begin immediately, interim actions or milestones to mark progress along the way, as well as the final target or end goal. The Reaching Equal Justice Report invites collaborative action by all members of the justice community, in an attempt to "balance the scales" of justice in Canada. http://www.cba.org/CBA/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf

CBA Legal Futures Initiative

- Report on the Future of Legal Services in Canada http://www.cbafutures.org/

Additional Activities: OBA

- OBA Access to Justice Committee, with pro-bono and paralegal subcommittees
- OBA Working Group on Court Delay
- OBA "Find a Lawyer" service for the public

Additional Activities: CBA

- CBA Access to Justice Committee
- CBA Legal Aid Liaison Committee, including Legal Aid Leader recognition program and Legal Aid Watch
- CBA Pro Bono Committee

The Advocates' Society

The Advocates' Society is a professional association for advocates with over 5,000 members from the bench and bar throughout Ontario and across Canada. The Society is dedicated to promoting excellence in advocacy and the highest standards of professionalism within a fair and accessible system of justice. The Society is Canada's premier provider of advocacy skills training and plays a prominent role in contributing to justice reform initiatives, preserving and strengthening the role of advocates, and ensuring access to justice. The Society is also committed to giving back to the community, and administers and participates in a number of pro bono initiatives.

County and District Law Presidents' Association (CDLPA)

The County & District Law Presidents' Association provides insight and comment on issues affecting the legal profession in Ontario, particularly around access to justice. In affiliation with the Toronto Lawyers Association, the CDLPA represents the interests of over 12,000 practicing lawyers through a volunteer Executive Board that is elected from among Ontario's 46 county law associations. Many of these lawyers are directly engaged in practice areas which focus on the legal needs of individuals in the province of Ontario, such as family, criminal, wills and estates and small business. They see and understand first-hand the challenges that exist within the current legal system, and are committed to finding solutions on behalf of the public they serve. This broad-based voice of the practicing bar of Ontario gives CDLPA a unique and powerful voice at the grassroots of the practice of law.

Sample Access to Justice Activities

- Finding ways to support solo practitioners and small/midsize firms in order to maintain their presence in all jurisdictions around the province for the benefit of their local communities
- Participation in the Alliance for Sustainable Legal Aid
- Participation in the Working Group on Real Estate
- Providing comments on other important practice issues impacting on the operation and accessibility of the justice system as they arise
- Regular submissions to the Law Society, the Province of Ontario, community justice partners, the media and the general public as part of CDLPA's commitment to being the voice of the practicing Bar in Ontario

Criminal Lawyers' Association (CLA)

The Criminal Lawyers' Association is a specialty legal organization that serves as a voice for criminal justice and civil liberties in Canada. The CLA provides advice and perspective to governments and the judiciary on issues relating to legislation and the administration of criminal justice. It also assists its members in every aspect of the practice of criminal litigation. The Association is often called upon to seek intervenor status in cases before the Court of Appeal and the Supreme Court of Canada.

Sample Access to Justice Activities

- Routinely make submissions to Legislative Committees at both the Commons and Senate level as well as Provincial Legislatures on all proposed Bills affecting criminal justice
- Advocacy for a strong, independent and well-funded legal aid program as a key to equal access to justice for persons charged with criminal offences
- Provision of continuing professional development programs for criminal law practitioners
- Active participant in court administrative committees throughout the province

Family Lawyers Association (FLA)

The Family Lawyers Association is a group of lawyers in Ontario who are actively involved in family law and who wish to share their experiences with other lawyers throughout the province. The Family Lawyers Association provides information to its members and serves as a voice for its members on issues affecting the practice of family law.

Sample Access to Justice Activities

- Participating in committees and initiatives in the areas of Legal Aid, law reform and various family law Bench and Bar Associations

Ontario Trial Lawyers Association (OTLA)

The Ontario Trial Lawyers Association is an organization of more than 1,400 plaintiff lawyers, law clerks, articling students and law students. Its purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating strongly for safety initiatives. Priorities include a continued focus on advocacy for a fair civil justice system.

Sample Access to Justice Activities

- Standing committee on Access to Justice
- Collaboration with community partners on initiatives that work for access to justice and a fair insurance system
- Regular submissions to promote fair access to court system without undue delays
- Safety initiatives to prevent injury from occurring
- Safety awards to recognize work in community
- Award for outstanding contribution to the goals of a fair trial and access to justice, as an advocate, in legal scholarship, continuing legal education, legal writing, journalism, politics or government
- Regular continuing legal education and promoting ongoing public education on access to justice

Refugee Lawyers' Association of Ontario (RLA)

The Refugee Lawyers' Association of Ontario is an association of approximately 200 lawyers in the Province of Ontario in Canada advocating on behalf of refugees. The RLA shares information and updates regarding refugee determination in Canada, provides links to source country information, and comments on important court decisions in refugee law. The Association includes lawyers in private practice as well as Legal Aid clinic and staff lawyers.

Sample Access to Justice Activities

- Advocating to ensure accessibility of lawyers for refugees and refugee claimants, adequate funding for Legal Aid, and minimum standards of representation for refugees and refugee claimants
- Working in cooperation with other legal service providers and associations to support a sustainable Legal Aid plan
- Sharing legal education and information for refugee lawyers

Paralegal Society of Ontario (PSO)

The Paralegal Society of Ontario represents the interests of licensed paralegals across Ontario. It provides educational events, engages in government and college relations, and advocates for paralegals.

Sample Access to Justice Activities

- Assists the public in finding a paralegal in various practice areas
- Commitment to educating the public about paralegals and the paralegal profession

Licensed Paralegals Association (Ontario) (LPA)

The Licensed Paralegals Association (Ontario) is the largest collective of licensed paralegals directly offering legal services to Ontarians. By providing continuing professional development courses, current practice management tips, and ongoing mentoring, the LPA fosters an environment of continuous learning.

Sample Access to Justice Activities

- Supports access to justice and encourages the public to confidently utilize the services of licensed paralegals in permitted areas of practice

Legal Associations: Demographic

Arab Canadian Lawyers Association (ACLA)

Association des juristes d'expression française de l'Ontario (AJEFO)

Canadian Association of Black Lawyers (CABL)

Canadian Muslim Lawyers Association (CMLA)

Federation of Asian Canadian Lawyers (FACL)

Hellenic Canadian Lawyers Association (HCLA)

Hispanic Ontario Lawyers Association (HOLA)

Indigenous Bar Association (IBA)

Iranian Canadian Lawyers' Association (ICLA)

Korean Canadian Lawyers Association (KCLA)

South Asian Bar Association of Toronto (SABA-Toronto)

Women's Law Association of Ontario (WLAO)

Many associations, such as the examples listed above, serve as a voice for members of the legal profession from specific demographic groups. These associations play an important role in access to justice by helping to ensure that people from the groups have access to a strong cadre of legal professionals who understand their culture, language or specific needs and by advocating on public policy issues to advance legal and social justice.

Activities of such associations typically include:

- Serving as a spokesperson and networking forum for their members
- Promoting public awareness and reform of policies and laws affecting the target populations
- Promoting equal opportunity, legal scholarship, professional excellence, and community involvement
- Offering mentorship for students and practitioners
- Providing seminars, speakers' forums and other educational opportunities

Courts and Tribunals

Court of Appeal for Ontario

The jurisdiction of the Court of Appeal for Ontario includes the consideration of civil and criminal appeals from decisions of Ontario's two trial courts, the Superior Court of Justice and the Ontario Court of Justice. At the Opening of the Courts of Ontario in September 2012, Chief Justice Warren K. Winkler stressed the importance of access to justice in upholding the rule of law. At the Opening in 2013, he said, "There is today an overwhelming consensus that if the justice system as we know it is to survive, it must undergo significant change to provide greater access to justice for the public".

Sample Access to Justice Activities

- Ontario Courts Accessibility Committee which is helping to increase the accessibility of courthouse facilities and proceedings, with membership from all levels of court, the Bar, the Ministry of the Attorney General, and people with disabilities
- Programs initiated with the bar, Pro Bono Law Ontario and Legal Aid Ontario to provide legal services for unrepresented persons during inmate appeals, mental health appeals, civil appeals, and motions
- Self-help packages on the website to guide individuals through the steps to bring an appeal or motion, with links to organizations that might be of assistance
- Chief Justice's Committee on Professionalism which gets lawyers more involved in making the system work smoothly

Superior Court of Justice

The Superior Court of Justice has jurisdiction over criminal, civil and family cases, presiding in fifty-one locations in Ontario. In "Mapping the Way Forward", the Court's 2012 Annual Report, Chief Justice

Heather J. Smith stated, “In each of these three areas of law, the Superior Court remains dedicated to providing meaningful, effective, and timely access to justice”.

Prioritizing Children

Chief Justice Smith indicated in her Opening of Courts speeches, in both September 2012 and 2013, that in 2012 the Superior Court embarked on the “Prioritizing Children” initiative, which focussed on improving access to justice for families in crisis and children at risk, particularly in child protection proceedings. The Chief Justice has met with and has received commitments to support this initiative from the Treasurer, the law deans, CBA and OBA representatives, the Children’s Lawyer, and legal assistance organizations.

Scheduling Practices

Chief Justice Smith recently announced the 2013 strategic priority for the court. The court has embarked on a full scale internal review of its judicial scheduling practices, to maximize the effectiveness of its judicial resources and available facilities, to provide more timely access to justice, particularly in civil interlocutory proceedings

Reducing Wait Times

The court has begun an initiative for the Greater Toronto Area, to reduce the undue wait times for long motions and long trials, principally in Toronto. The judicial lead for this initiative, Justice Geoffrey Morawetz, will value the Bar’s input in resolving this issue.

Technology

To more effectively harness technology to improve access to justice, the Superior Court led two significant initiatives in 2013. First, the court developed its own protocol to allow all parties to easily access copies of the court’s digital audio recordings. Second, the court crafted and implemented a court-wide policy that permits the use of electronic devices in the courtroom for parties and their counsel, and for members of the press, because they function as the eyes and ears of the public.

E-Filing

While the court eagerly awaits the technology-based initiatives the Attorney General has planned, the court’s judges have proactively joined with the Bar to move towards the kind of accessible “e-filing” system that will ultimately become the backbone for the administration of justice. The thoughtful and detailed standards developed for delivering e-documents in Commercial List and Divisional Court cases will, no doubt, become the standard for the true “e-filing” system of the future.

Ontario Court of Justice

The Ontario Court of Justice presides over adult criminal, youth criminal, family law, child protection, and provincial offence matters. The Ontario Court of Justice is the largest court in the country, with judges and justices of the peace sitting in close to 200 locations throughout Ontario. In her remarks at the Opening of the Courts of Ontario in September 2012, Chief Justice Annemarie E. Bonkalo stated that, “As society evolves, so too must our courts. Whether in family, criminal, youth or provincial offences matters, our Court always seeks opportunities to provide more innovative and accessible service delivery options.” During the 2013 Opening, she stressed the Court’s focus on access to justice and efforts to modernize the court and demystify the court process.

Sample Access to Justice Activities

- Web-based user guides for defendants in provincial offences cases, accused persons in criminal trials, and self-represented persons at family law trials
- Fly-In Court Working Group report to enhance operations of criminal and family fly-in courts held in First Nations communities in the Northwest and Northeast Regions of Ontario
- Public legal education activities of judges and justices of the peace, in classrooms and other settings
- Streamlining of criminal, family and provincial offence processes
- Implementing in-court orders to reduce waiting time for litigants regarding document preparation
- Posting of court statistics for public transparency

Administrative Tribunals

Many legal matters in Ontario are resolved through specialized adjudicative tribunals established by provincial or federal legislation. The nature and extent of access to justice activities in the tribunal sector can vary considerably depending on the individual tribunal or cluster of tribunals.

Sample Access to Justice Activities

Policies and Procedures

- Service Equity Policy: created by the Society of Ontario Adjudicators and Regulators (SOAR) to provide equity and access for disadvantaged persons
- Training in cultural competencies by SOAR and the Council of Canadian Administrative Tribunals
- Training for adjudicators in mediation and accessibility
- Training on the impact of poverty and mental health on parties' ability to interact with the legal process (Social Justice Tribunals Ontario)
- "Active adjudication" to assist self-represented parties
- Voluntary mediation programs
- Access to interpreters during tribunal hearings
- Production of decisions in accessible formats

Clustering

- Improving access to justice is one of the goals behind the recent creation of three "clusters" involving seventeen of Ontario's tribunals:
    - Environment and Land Tribunals Ontario (ELTO)
    - Social Justice Tribunals Ontario (SJTO)
    - Safety, Licence Appeals and Standards Tribunals Ontario (SLASTO)
- Common information portals for clusters of tribunals

Governments

Ontario Ministry of the Attorney General (MAG)

The Ministry of the Attorney General's role includes court services to support an independent judiciary, prosecution of offences, conducting civil litigation on behalf of government, services for victims and vulnerable persons, justice policy, and legislative drafting. MAG liaises with other Ontario government

ministries on access to justice issues and is responsible for a variety of arms-length agencies and tribunals.

Sample Access to Justice Activities

Information and Guides

- Justice Ontario: a one-stop source of information about Ontario's legal system, including a toll-free telephone line with service in 173 languages. Topics include: Finding a lawyer, Tickets and fines, Lawsuits and disputes, Family and criminal law, Human rights, Wills and estates
- Nine guides for bringing or replying to a Small Claims Court claim, including the enforcement of court orders
- Culturally appropriate family law information for Aboriginal families, with materials in English, French, Ojibway, Cree and Oji-Cree

Technology

- Ontario Court Forms Assistant, an online program that guides litigants through a series of plain language questions to populate commonly used Small Claims Court and family law forms
- Pre-formatted, fillable forms available on the Ontario Court Forms website for Small Claims Court actions and non-contentious estate applications

Family Justice Services

- Expansion of mediation, mandatory information, and Information and Referral Co-ordinator services to all family courts in the province

Justice on Target (JOT)

- Addressing criminal court delay by using an evidence-based approach to increase the effectiveness of criminal court practices, e.g.:
    - Early information, forms and orientation to help accused persons prepare for court
    - Putting legal aid on-site in Ontario’s courthouses so accused persons can apply immediately for legal aid and those who qualify can quickly retain counsel
    - Guidelines for holding low-risk offenders accountable through community service, restitution, charitable donation, or attending programming or counselling

Department of Justice Canada (DOJ)

The federal Department of Justice acts as a policy department to oversee matters relating to the administration of justice that fall within the federal domain, helping to ensure a fair, relevant and accessible justice system for all Canadians. In addition to policy advice and program services, it provides a range of legal advisory, litigation and legislative services to government departments and agencies. The Department also serves as a central agency to support the Minister in advising Cabinet on all legal matters.

Sample Access to Justice Activities

- Published research and reports on a variety of access to justice issues including criminal justice, family law, Aboriginal communities, and creating a more efficient and accessible justice system
- Participation in the National Action Committee on Access to Justice in Civil and Family Matters
- Aboriginal Court Worker Program
- Aboriginal Justice Strategy

- Legal Aid Program
- International Legal Programs
- Public Legal Education and Information Support
- Official Languages Initiatives
- Department of Justice Canada Pro Bono Pilot Project

Faculties of Law

Student Legal Aid Societies

Student Legal Aid Services Societies operate out of Ontario's law schools. Under the supervision of full time lawyers, volunteer law students provide legal advice and represent clients in cases involving minor crimes, landlord and tenant disputes, immigration issues and tribunals. Funding and support are provided from the universities and Legal Aid Ontario. Law Schools also collaborate with community legal clinics such as the University of Windsor's Legal Assistance of Windsor program and Osgoode Hall Law School's long-standing partnership with Parkdale Community Legal Services.

Clinical Programs

In additional to regular classroom courses, Ontario's law schools offer clinical programs with an intensive focus on particular areas of law, legal skills or client communities. Clinical programs provide law students with advanced skills and experience through experiential learning. Many clinical programs – including placement at a student legal aid society – focus on vulnerable groups. A recent example is the Disability Law program created by Osgoode Hall Law School in partnership with ARCH Disability Law Centre.

Pro Bono Services

As described earlier, Ontario law students provide volunteer legal services through chapters of Pro Bono Students Canada. Students also volunteer through pro bono law school clinics such as the Ecojustice Clinic at the University of Ottawa.

New Faculty of Law at Lakehead University

The Lakehead University Faculty of Law is Ontario's first new law school in Ontario in forty-four years. Its first class of students began in September, 2013. This law school is committed to improving access to legal services in Northern Ontario and throughout rural Canada – all places where there is a need for lawyers. It will focus on admitting students from towns across the north, as well as throughout the rest of Ontario and rural or small town Canada. It will emphasize access to justice in non-metropolitan communities by preparing graduates to practise in smaller centres and in smaller firms. In addition to the core curriculum, the program will focus on three main areas: Aboriginal Law and issues related to Aboriginal peoples; establishing a law practice in a small centre; and an emphasis on Natural Resources, with specialties in mining and forestry.

Faculties of Law: Selected Access to Justice Activities

The table below provides additional examples of access to justice activities at Ontario faculties of law. The examples were drawn from a larger table entitled "Access to Justice Initiatives in Canadian Law Schools" that was submitted to the National Action Committee on Access to Justice in Civil and Family Matters (NAC).

Osgoode Hall Law School, York University	**Queen's University, Faculty of Law**
• Public interest requirements: all students must complete 40 hours of unpaid, public interest work before graduation • Innocence Project clinic: researches and investigates claims of wrongful conviction • Innovation Clinic: provides pro bono support to start-up companies	• Correctional Law Program: provides legal support to inmates • Queen's Elder Law Clinic • Tory's Public Interest Summer Internship and Dean's Excellence Fund: awards to students completing internships in public interest programs
University of Ottawa, Faculty of Law	**University of Toronto, Faculty of Law**
• Public interest, social justice and sole practitioner fellowship programs: encourage law students to work in access to justice areas • Access to Justice & Elder Law Community Legal Research Projects • University of Ottawa Refugee Assistance Project	• Advocates for Injured Workers • Centre for Spanish-Speaking People • International Human Rights Clinic • Engaged in multi-year Middle Income Access to Justice Initiative, culminating in international conference in 2011
University of Western Ontario, Faculty of Law	**University of Windsor, Faculty of Law**
• Dispute Resolution Centre • Sport Solution Clinic: offers legal services to athletes • Western Business Law Clinic: offers legal services to small businesses	• Compulsory course on Access to Justice • Law Enforcement Accountability Project on police accountability • Centre for Enterprise and Law clinic: provides legal information to start-up companies • Windsor Yearbook of Access to Justice: peer-reviewed journal

Creating a Climate for Change
Report from TAG Symposium, October 29, 2013

In January of 2013, Treasurer Thomas G. Conway established the Treasurer's Advisory Group on Access to Justice (TAG) to gather input and advice as the Law Society of Upper Canada considered how to enhance its role on these issues and better fulfill its statutory mandate to "act so as to facilitate access to justice for the people of Ontario."

On October 29, 2013, eighty individuals dedicated to improving access to justice gathered for a symposium that furthered the goals of TAG. The objectives were to:

- Facilitate dialogue with a cross-section of individuals committed to access to justice in Ontario
- Enhance awareness of current activities and recommendations
- Discuss ways to enhance collaboration, coordination and engagement on access to justice issues
- Solicit further ideas about the role of the Law Society in meeting its statutory mandate

In his opening remarks, Treasure Conway encouraged participants to engage in concrete and practical discussions about structures and mechanisms for implementing change to make the justice system more accessible for the people of Ontario.

See Appendix A: Agenda and Appendix B: Participant List.

Setting the Stage

Dark Sky / Blue Sky

A multi-media presentation entitled *Dark Sky/Blue Sky* was shown to the symposium participants. The presentation contains video clips and quotes gathered from members of the public during the Canadian Bar Association's *Envisioning Equal Justice* initiative, in collaboration with Pro Bono Students Canada and the Canadian Forum on Civil Justice.

> *In the video, "Dark Sky/Blue Sky", you heard voices explaining clearly and eloquently that today, justice is not accessible to them. --Chief Justice Bonkalo, Ontario Court of Justice*

Address by Chief Justice Annemarie Bonkalo, Ontario Court of Justice

Chief Justice Bonkalo thanked the Treasurer for establishing the Treasurer's Advisory Group on Access to Justice and for bringing everyone together for the symposium. She recommends defining our work ahead as achievable goals to achieve concrete access to justice objectives. She cautioned that we can no longer accept the status quo and continue doing things simply

because we have always done them that way. Chief Justice Bonkalo highlighted areas where her Court has led initiatives to meet the needs of communities, promote accessible and useful information about the workings of the Court, build a network of services for families in crisis, and harness technology to modernize operations.

Overview of Symposium Background Papers

Karen Cohl provided an overview of the two background papers she had prepared for symposium participants. The papers were created to provide "food for thought" in discussions about potential solutions, gaps and opportunities for collaboration.

Although one theme is that there is an urgent need for change, it is important to remember and to give credit for the many positive activities and developments taking place.
--Karen Cohl

The first paper, *Legal Organizations and Access to Justice Activities in Ontario,* contains a brief description of legal organizations in Ontario and examples of their access to justice activities. The second paper, *Access to Justice Themes: "Quotable Quotes",* proposes themes from recent Ontario and national access to justice reports, using quotations from the reports to illustrate each theme.

THEMES FROM ACCESS TO JUSTICE REPORTS
Importance of Access to Justice and the Need for Change • Access to justice is an issue of fundamental importance. • There is an urgent need for significant change. • There is no common definition but a common understanding is emerging.
New Directions – Cultural Shift • We need to put the public first. • We need to do more at the front end and on prevention. • We need more integrated and holistic responses.
Issues to Address • The family law system requires urgent attention. • Self-represented parties are not going away. • Creative solutions are required to make legal services more affordable.
Making it Happen • Non-legal organizations have a vital role to play. • Technology in the justice system has not kept pace. • Leadership and collaboration can help to bridge the "implementation gap".

The background paper, *Legal Organizations and Access to Justice Activities in Ontario*, is a draft that the Law Society hopes to update over time. Comments for future versions can be sent to publicaffairs@lsuc.on.ca.

Roadmap for Change: Where do we go from here?

Presentation by Justice Thomas Cromwell, Supreme Court of Canada

Justice Cromwell presented *A Roadmap for Change*, the final report of the National Action Committee on Access to Justice in Civil and Family Matters. The report promotes a broad understanding of access to justice; promotes a new way of thinking to guide reform; and provides a roadmap for change governed by six guiding principles. Justice Cromwell encouraged the group to think about why there are so many ideas and so little action. He noted that a major impediment is the lack of coherent leadership and institutional structures to design, implement and coordinate change. He also encouraged the group to find ways to connect people to lawyers and cautioned that we not just accept that there are so many self-represented litigants.

There will be no change until the people who can make change believe it is necessary.
--Justice Thomas Cromwell

SIX GUIDING PRINCIPLES FOR CHANGE
• Put the public first • Collaborate and coordinate • Prevent and educate • Simplify, make coherent, proportional and sustainable • Take action • Focus on outcomes

NINE POINTS ON THE ROADMAP
Innovation Goals • Refocus on everyday legal problems • Access to essential legal services • Multi-service centres • Family services
Institutional and Structural Goals • Local and national access to justice implementation mechanisms • Legal education • Innovation capacity
Research and Funding Goals • Research to support evidence-based policy making • Coherent, integrated and sustained funding strategies

Question and Answer Session

Following the presentation, Law Society bencher William McDowell facilitated a question and answer session with the symposium participants and Justice Cromwell and the Treasurer. The following list summarizes ideas and perspectives put forward during this session.

- Consult with business leaders and entrepreneurs for change management ideas.

- Ensure that "putting people first" encompasses an equity principle that includes racialized, low-income people.
- Include tribunal reform in access to justice.
- We must keep pace with technology to hear from youth and how they prefer to communicate with their lawyers.
- The Law Society needs to be less distant and exclusive in order to engage with civil society.
- Provide professional development on legal topics to settlement and social workers.
- Create a "529 LAW" number as a triage line that refers people to an organization that can help with a legal problem.
- Encourage local access to justice working groups – it is at the local level where we help people find paths to justice.
- The system should not regard self-represented litigants as aberrant or as second class citizens. Judicial training is an important component of addressing this issue.
- Some self-represented litigants who participated in the National SRL project are available to participate in justice system reform activities.
- Education about the justice system should begin in elementary school.
- Include paralegals in multi-disciplinary and team approaches to legal services.
- Courts and tribunals should think about self-represented litigants as an institutional responsibility. That will lead to greater consistency and confidence.

Workshops

Symposium participants broke into groups for workshop sessions in the afternoon. Each of the five workshops had a different topic for discussion, with the primary objective of soliciting input into an appropriate role for the Law Society on these issues. Each workshop was chaired by a team of two Law Society benchers from the TAG Working Group and was held twice so that each participant could engage on two topics. Overall leadership for the workshops was provided by Howard Goldblatt, vice-chair of the TAG Working Group.

Workshop #1:
Engaging the Public

Questions for Discussion

- How do we ensure that the voice of the public/user is reflected as we change and innovate?
- What mechanisms exist or can be created to gather input from system users and to reflect back to them how their input or ideas have been used or considered?
- Can we influence Ontarians' investment in justice issues, in turn generating the political will for change and innovation? How?

Discussion and Input:

- Create a role for the Law Society – not to deliver services but to build partnerships with others.
- Create a campaign about how important access to justice is for every citizen – whether they have a legal problem now or in the future.

- Replicate this symposium in regions across the province, with CDLPA as a partner.
- Offer public education and outreach for the public where they are (e.g. libraries, community organizations) and before they are in crisis.
- As part of the regulator's role in entrance into the profession, find ways in which demand and supply issues can benefit the general population seeking justice.
- Discuss possible role for paralegals under supervision in family law
- Pro bono: institute a pay or play requirement for lawyers.
- Help members of the Law Society to understand that if the law Society is not seen to be taking a role in facilitating access to justice, it will not be fulfilling its mandate under the Act.

Workshop #2:
The Regulator's Role in Changing the Culture and Fostering Innovation

Questions for Discussion

- How do our regulatory approaches currently promote or impede change and innovation?
- What regulatory innovations should be of priority in changing the culture?
- How do we protect the public interest while innovating to meet the demand and need for quicker, cheaper and less complicated services – what is necessary to regulate?
- What educational an regulatory trends and issues arising as a result of global, technological and other marketplace changes create opportunities to respond to access to justice needs?

Discussion and Input:

- Establish a mandatory duty to provide pro bono legal services.
- Develop law school curricula for an access to justice course.
- Encourage law schools to educate students about access to justice.
- Review the scope of paralegal practice, especially in family law.
- Enumerate competencies required by a person who works in family law.
- Find ways to provide legal services in remote communities.
- Regulate and leverage the use of technology.
- Pick an area in most crisis, e.g. family law, and set a 5-year goal.
- Communicate more about referral function; legal information websites; unbundling; alternative legal service models.

Workshop #3
Breaking Silos- Ensuring a Collaborative Future – A Role for the Law Society in Ontario?

Questions for Discussion

- How do we become better coordinated and collectively more efficient and effective?
- What structures or mechanisms are needed to ensure ongoing collaboration?
- If the Law Society maintained a standing forum to facilitate collaboration, how should it operate?

Discussion and Input:

- Enhance the Law Society's role as a facilitator and coordinator.
- Be inclusive, but target groups per issue.

- Convene a roundtable to generate momentum. Include government and judiciary. Set the first agenda and let the process unfold organically. Create a new structure so the Law Society can fade into the background.
- Do something!

Workshop #4

Access to "Legal Services" – Early and Ongoing

Questions for Discussion

- What are "legal services" and how might they best be redefined, refocused or reorganized to allow more people to access the assistance they need, when they need it?
- Where is the line between legal advice and legal information and assistance appropriately drawn?
- Can we develop more precise parameters for the tasks that require the attention of a lawyer and those that could be completed by others?
- How do current regulations help or hinder in this area?

Discussion and Input:

Categories of legal providers

There are six categories of legal providers: (1) information providers; (2) navigators, tour guides and referrers; (3) triagers and issue identifiers; (4) form assisters; (5) front line community workers and social workers; (6) paralegals and lawyers.

- Reach out to the first five categories and to their regulars and educators.
- Provide information and clarity about the roles of all six categories.
- Enable all six categories to work together.
- Consider credentialing so that the public can be confident of unregulated providers.

Other

- Simplify forms and make them interactive.
- Educate "trusted intermediaries" (e.g., social workers, librarians, settlement workers) to provide legal information. Clarify the boundaries of information vs. advice.
- Provide on-site legal personnel at community sites (St. Mike's model).
- Establish a mandatory pro bono requirement, with capacity to do it online.
- Lower fees by greater use of paralegals under a lawyer's supervision.
- Designate which online legal information is reliable through a stamp of approval ("reviewed by law Society licensee").

Workshop #5

How do we Measure Success?

Questions for Discussion

- Do we have a common vision of where we want to be or what success would look like in Ontario?
- How should success be measured and by whom?
- What approaches have others taken to measurement?
- What is missing that would better enable us to measure success or progress?

Discussion and Input:

- Pick one or two things the Law Society can do well – a few urgent projects – and measure their success. Define metrics after defining what the Law Society is trying to accomplish.
- Focus on the users, ordinary people.
- Reach out to marginalized communities and conduct research on their needs and perspectives.
- Establish quantitative and qualitative measures – we need both.
- There is no universal measure of access to justice. Measures should be context driven (e.g. very different in criminal and civil law). Engage the public and legal sectors in the dialogue.
- Convene more events like this and measure what comes out of them.
- Measure success at the local level.
- Measure confidence in the justice system, taking into account that people who lose their cases will be unsatisfied.
- Measure changes to the gap between people who need legal services and legal professionals who can provide service.

Wrap Up and Discussion of Next Steps

Remarks from Chief Justice Heather Smith, Superior Court of Justice

Chief Justice Smith indicated that this is an issue whose time has come. She referred to the National Action Committee report as a wonderful roadmap which serves as a clarion call for meaningful change by all justice sector components. She indicated that the Superior Court of Justice will try to implement the NAC recommendations that apply to it and to make each court event meaningful. She noted the importance of making a business case to government for pilot projects.

Treasurer's Concluding Remarks

The Treasurer thanked all presenters, facilitators, participants and staff. He noted that while there are no easy answers, inaction is not an answer. He is committed to doing more to better fulfill the Law Society's access to justice mandate. The Law Society is uniquely positioned to provide leadership – facilitative leadership – by establishing a standing forum for dialogue to help identify priorities, commit to specific actions, and facilitate collaboration. As a regulator, the Law Society also needs to examine its rules and regulations to ensure that they do not themselves constitute access to justice barriers. The next steps for the Law Society are to:

When we see things that work, we should support them and implement them.
--Chief Justice Smith, Superior Court of Justice

- Summarize the input from the Symposium and create a report.
- Formulate a detailed proposal for the Law Society's role within a couple of months.
- Present the proposal to Convocation - a bold proposal that will help to move us from talk to action.

Appendix A: Agenda

Symposium Agenda - *Creating a Climate for Change*

Tuesday, October 29, 2013
Donald Lamont Learning Centre, The Law Society of Upper Canada, Toronto, Ontario

9:30–10:00 a.m.	REGISTRATION
10:00–10:15 a.m.	Welcome and Opening Remarks Thomas G. Conway, Treasurer, The Law Society of Upper Canada
10:15-11:15 a.m.	Setting the Stage: • *Dark Sky / Blue Sky* (Video courtesy Canadian Bar Association) • Address by Chief Justice Bonkalo, Ontario Court of Justice • Overview of Symposium background papers by Karen Cohl: o *Legal Organizations and Access to Justice Activities in Ontario* o *Access to Justice Themes: "Quotable Quotes"*
11:15 a.m. –12:00 p.m.	Action Committee on Access to Justice in Civil and Family Matters: *A Roadmap for Change* Justice Thomas Cromwell – *Where do we go from here?*
12:00–1:00 p.m.	NETWORKING LUNCH
1:00 – 3:30 p.m.	Workshops Five themes – participants assigned to workshop two different themes: • Engaging the Public • The Regulator's Role in Changing the Culture and Fostering Innovation • Breaking Silos – Ensuring a Collaborative Future – A Role for the Law Society in Ontario? • Access to "Legal Services" – Early and Ongoing • How do we Measure Success?
3:30 – 3:45 p.m.	NETWORKING BREAK
3:45 – 4:30 p.m.	Wrap Up and Discussion of Next Steps
4:30 - 5:30 p.m.	Reception – Upper and Lower Barristers' Lounges

*Photographs and video taken at this event may be used in Law Society of Upper Canada publications

Appendix B: Participant List

Thomas G. Conway, Treasurer, The Law Society of Upper Canada

Marion Boyd, Bencher, The Law Society of Upper Canada, TAG Working Group
Christopher Bredt, Bencher, The Law Society of Upper Canada, TAG Working Group
Cathy Corsetti, Bencher, The Law Society of Upper Canada, TAG Working Group
Howard Goldblatt, Bencher, The Law Society of Upper Canada, TAG Working Group
Michelle Haigh, Bencher, The Law Society of Upper Canada, TAG Working Group
Michael Lerner, Bencher, The Law Society of Upper Canada, TAG Working Group
Susan McGrath, Bencher, The Law Society of Upper Canada
Malcolm Mercer, Bencher, The Law Society of Upper Canada
Janet Minor, Bencher, The Law Society of Upper Canada, TAG Working Group
William C. McDowell, Bencher, The Law Society of Upper Canada, TAG Working Group

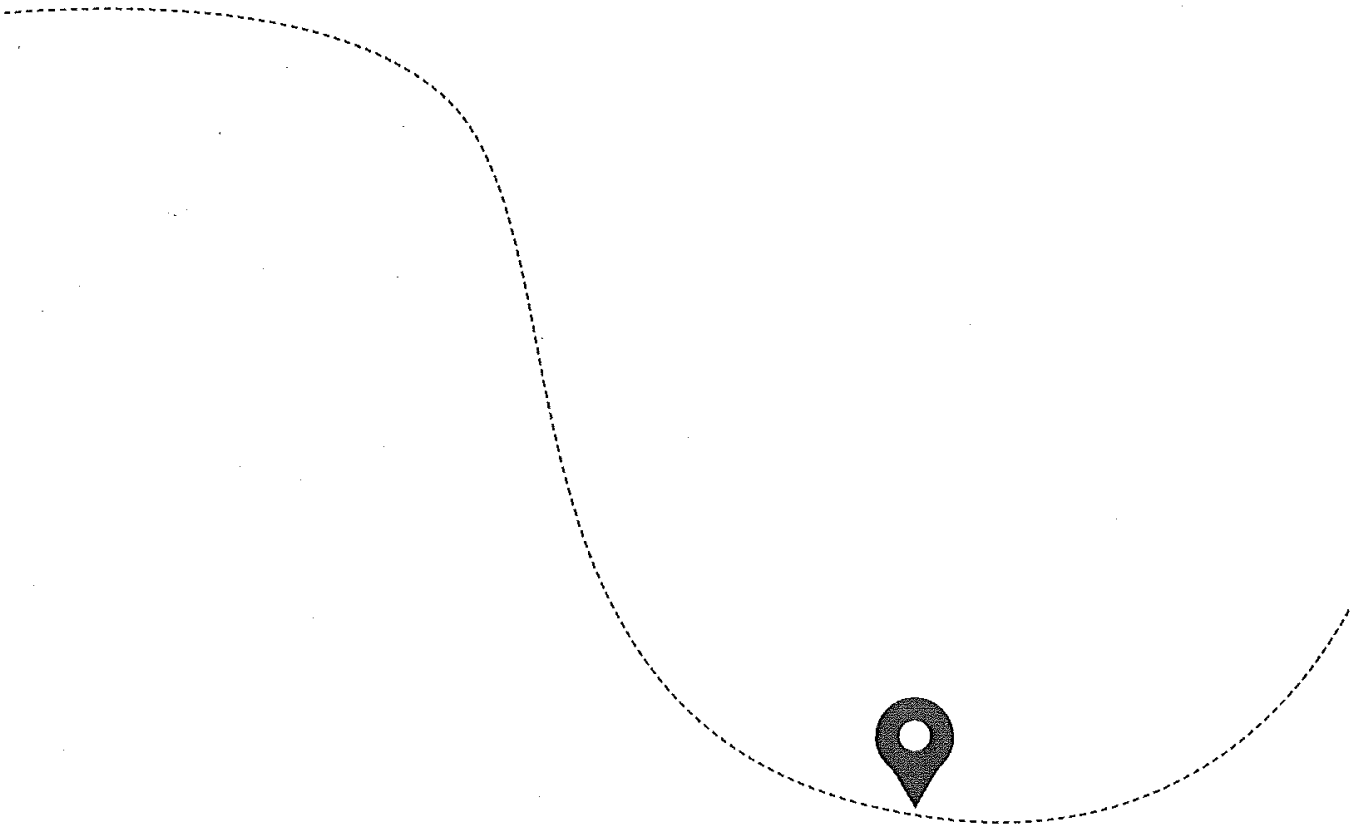
Lenny Abramowicz, Association of Community Legal Clinics of Ontario
Sally Ashton, Public Affairs, The Law Society of Upper Canada
The Honourable Chief Justice Annemarie Bonkalo, Ontario Court of Justice
Meredith Brown, Ministry of the Attorney General
Camille Cameron, Dean, Faculty of Law, University of Windsor
Margaret Capes, Community Law School
Amanda Carling, The Association In Defence of the Wrongly Convicted
Susan Charendoff, Civil Policy and Programs Branch, Ministry of the Attorney General
Chris Cheung, Ontario Bar Association
Karen Cohl, Consultant for the Law Society of Upper Canada
The Honourable Justice Thomas Cromwell, National Action Committee
Pascale Daigneault, Ontario Bar Association
Peter Doody, The Advocates' Society
Bruce Elman, Law Commission of Ontario
Trevor Farrow, National Action Committee
Wanda Forsythe, School of Legal and Public Administration, Seneca College
Jonathan Freedman, The Association In Defence of the Wrongly Convicted
Dada Gasirabo, Oasis Centre des Femmes
Nikki Gershbain, Pro Bono Students
Irwin Glasberg, Ministry of the Attorney General, Policy and Adjudicative Tribunals Division
Avvy Go, Metro Toronto Chinese & Southeast Asian Legal Clinic
Elizabeth Goldberg, The Law Foundation of Ontario
Michael Gottheil, Social Justice Tribunals Ontario
Jeff Hirsch, National Action Committee
Alia Hogben, Canadian Council of Muslim Women
Patricia Hughes, Law Commission of Ontario
Wendy Komiotis, METRAC
Robert Lapper, Chief Executive Officer, The Law Society of Upper Canada
Paul Le Vay, Association des juristes d'expression française de l'Ontario
Michele Leering, Workers Action Centre
The Honourable Regional Senior Justice Timothy Lipson, Ontario Court of Justice
Danielle Manton, Association des juristes d'expression française de l'Ontario
Julie Mathews, Community Legal Education Ontario

Deepa Mattoo, South Asian Legal Clinic of Ontario
John McCamus, Legal Aid Ontario
Trudy McCormick, Association of Community Legal Clinics of Ontario
Sarah McCoubrey, Ontario Justice Education Network
Lucy McSweeney, Office of the Children's Lawyer
Kirsten Mercer, Senior Policy Advisor, Justice - Policy & Research, Office of the Premier
David Mollica, The Advocates' Society
Mayo Moran, Dean, Faculty of Law, University of Toronto
Tami Moscoe, Family Initiatives, Ministry of the Attorney General
Virginia Nelder, African Canadian Legal Clinic
Lori Newton, Office of the Chief Justice, Ontario Court of Justice
Sandra Nishikawa, Federation of Asian Canadian Lawyers
Debbie Oakley, The Association In Defence of the Wrongly Convicted
Dennis O'Connor, Pro Bono Canada
Zeynep Onen, Director, Professional Regulation, The Law Society of Upper Canada
Sue Rice, National Self-Represented Litigants Project
Francisco Rico-Martinez, FCJ Refugee Centre
Paul Saguil, Federation of Asian Canadian Lawyers
Mark Sandler, The Law Foundation of Ontario
Rami Shoucri, St. Michael's Hospital
John Sims, National Action Committee
The Honourable Chief Justice Heather Smith, Superior Court of Justice
Lorne Sossin, Dean, Osgoode Hall Law School, York University,
Lee Stuesser, Dean, Faculty of Law, Lakehead University
John Tzanis, Paralegal Society of Ontario
Frank Walwyn, Community Legal Education Ontario
Bob Ward, Legal Aid Ontario
Sheena Weir, Director, Public Affairs, The Law Society of Upper Canada
Janet M. Whitehead, The County & District Law Presidents' Association
Miriam Young, Toronto Lawyers' Association

ACCESS TO CIVIL & FAMILY JUSTICE

A Roadmap for Change

October 2013



Action Committee on
Access to Justice in
Civil and Family Matters

This report is published by the Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada, October 2013.

Comments on this report can be sent to the Action Committee through the Canadian Forum on Civil Justice, online at: <communications@cfcj-fcjc.org>.

Action Committee on
Access to Justice in
Civil and Family Matters

FOREWORD

It is a great pleasure and honour to acknowledge the tireless dedication and endless commitment of the members of the Action Committee on Access to Justice in Civil and Family Matters by writing a foreword to this final report. As this report marks the conclusion of the first phase of the Action Committee's work, allow me to reflect on how we arrived this far.

Let me start by saying that the problem of access to justice is not a new one. As long as justice has existed, there have been those who struggled to access it. But as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.

Fortunately, governments, organizations, and many individuals responded to the plea for change. Across the country they embarked on initiatives aimed at improving access to justice. However, too often, these initiatives proceeded in isolation from one another. Despite much hard work, it became increasingly clear that what was required was a national discussion and a coordinated action strategy to access to justice. So, in 2008, the Action Committee was convened.

The Action Committee is composed of leaders in the civil and family justice community and a public representative, each representing a different part of the justice system. Its aim is to help all stakeholders in the justice system develop consensus priorities for civil and family justice reform and to encourage them to work together in a cooperative and collaborative way to improve access to justice.

The Action Committee identified four priority areas: access to legal services, court processes simplification, family law, and prevention, triage and referral. In each area, a working group was formed to look at specific ways of improving access to justice. Each working group has now issued its final report, identifying how accessible justice can be achieved, the tools that can assist people in dealing with their legal needs effectively and expeditiously, and changes to the system that will improve access to justice.

Under the leadership of the Honourable Thomas A. Cromwell and each working group's chair, the working groups have produced reports that outline the concrete challenges and provide a rational, coherent and imaginative vision for meeting those challenges. They focus not only on good ideas, but on concrete actions to change the *status quo*. The Action Committee's final report bridges the work of the four working groups and identifies a national roadmap for improving the ability of every Canadian to access the justice system.

Our task is far from complete. The next step is implementation – to put the Action Committee's vision into action. But it is not amiss to celebrate what we have achieved thus far: a plan for practical and achievable actions that will improve access to family and civil justice across Canada. This could not have been accomplished without the contribution of all the individuals and organizations involved with the Action Committee. I thank you all for bringing accessible justice for all Canadians a significant step closer to reality.

Beverley McLachlin, P.C.
Chief Justice of Canada

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EXECUTIVE SUMMARY

There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.

This report has three purposes:

- to promote a broad understanding of what we mean by access to justice and of the access to justice problem facing our civil and family justice system;
- to identify and promote a new way of thinking — a culture shift — to guide our approach to reform; and
- to provide an access to justice roadmap for real improvement.

The report does not set out to provide detailed guidance on how to improve all aspects of the civil and family justice system across Canada's ten provinces and three territories. That needs to come largely from the ground up, through strong mechanisms and institutions developed locally. Local service providers, justice system stakeholders and individual champions must be the change makers. This report can, however, help fill the need for a coordinated and collaborative national voice — a change agent — providing a multi-party justice system vision and an overall goal-based roadmap for change. The ways of the past — often working in silos and reinventing wheels — are not sustainable. A coordinated, although not centralized, national reform effort is needed. Innovative thinking at all levels will be critical for success.

When thinking about access to justice, the starting point and consistent focus of the Action Committee is on the broad range of legal problems experienced by the public — not just those that are adjudicated by courts. As we detail in part 1 of this report, there are clearly major access to justice gaps in Canada. For example:

- Nearly 12 million Canadians will experience at least 1 legal problem in a given 3 year period. Few will have the resources to solve them.
- Members of poor and vulnerable groups are particularly prone to legal problems. They experience more legal problems than higher income earners and more secure groups.
- People's problems multiply; that is, having one kind of legal problem can often lead to other legal, social and health related problems.
- Finally, legal problems have social and economic costs. Unresolved legal problems adversely affect people's lives and the public purse.

The current system, which is inaccessible to so many and unable to respond adequately to the problem, is unsustainable.

In part 2 of this report we offer six guiding principles for change, which amount to a shift in culture:

1. Put the Public First
2. Collaborate and Coordinate
3. Prevent and Educate
4. Simplify, Make Coherent, Proportional and Sustainable
5. Take Action
6. Focus on Outcomes

Taken together, these principles spell out the elements of an overriding culture of reform that is a precondition for developing specific measures of change and implementation.

Part 3 of this report provides a nine-point access to justice roadmap designed to bridge the implementation gap between ideas and action. It sets out three main areas for reform: (A) specific civil and family justice innovations, (B) institutions and structures, and (C) research and funding:

A. Innovation Goals

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems

2. Make Essential Legal Services Available to Everyone

3. Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution

4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible

B. Institutional and Structural Goals

5. Create Local and National Access to Justice Implementation Mechanisms

6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education

7. Enhance the Innovation Capacity of the Civil and Family Justice System

C. Research and Funding Goals

8. Support Access to Justice Research to Promote Evidence-Based Policy Making

9. Promote Coherent, Integrated and Sustained Funding Strategies

Access to justice is at a critical stage in Canada. What is needed is major, sustained and collaborative system-wide change - in the form of cultural and institutional innovation, research and funding-based reform. This report provides a multi-sector national plan for reform. The approach is to provide leadership through the promotion of concrete development goals. These are recommended goals, not dictates. Specific local conditions or problems call for locally tailored approaches and solutions.

Although we face serious access to justice challenges, there are many reasons to be optimistic about our ability to bridge the current implementation gap by pursuing concrete access to justice reforms. People within and beyond the civil and family justice system are increasingly engaged by access to justice challenges and many individuals and organizations are already working hard for change. We hope that the work of the Action Committee and in particular this report will lead to:

- a measurable and significant increase in civil and family access to justice within 5 years;
- a national access to justice policy framework that is widely accepted and adopted;
- local jurisdictions putting in place strategies and mechanisms for meaningful and sustainable change;
- a permanent national body being created and supported to promote, guide and monitor meaningful local and national access to justice initiatives;
- access to civil and family justice becoming a topic of general civic discussion and engagement - an issue of everyday individual and community interest and wellbeing; and
- the public being placed squarely at the centre of all meaningful civil and family justice education and reform efforts.

INTRODUCTION

Today we take an important step on the road to improved access to civil and family justice in Canada. Through this report, the Action Committee on Access to Justice in Civil and Family Matters makes the case that we must make changes urgently, that we must take a collaborative, cooperative and systemic approach and, above all else, that we must act in a sustained and focused way. We are building on firm foundations, but the structure urgently needs attention. The goal should be nothing less than to make our system of civil and family justice the most just and accessible in the world. As one speaker put it recently, we must think big together.

The Action Committee is a group broadly representative of all sectors of the civil and family justice system as well as of the public. Its report is the product of a stakeholder driven process and it is offered as a report back to all of the stakeholders in the civil and family justice system for their consideration and action. While the release of this report is the culmination of the work of the Action Committee, it is only the beginning of the process for reform. We must build the mechanisms that can instigate, manage and evaluate change in ways that are suitable to the widely varying needs and priorities of jurisdictions and regions. We must define specific problems, design solutions, and implement and monitor their success or failure. We must learn how to work together more effectively in the public interest.

I hope that this report will provide an impetus for meaningful change, some effective models to facilitate the sort of collaborative and cooperative work that I believe is essential and a menu of innovative ideas and possibilities for everyone working at the provincial, territorial and local levels. The real work begins now.

The members of the Action Committee, its Steering Committee and its four Working Groups have all worked tirelessly and as volunteers to make the Committee's work possible. Working with these accomplished and committed people has been a highlight of my professional life. We were greatly assisted by the logistical support of the Canadian Forum on Civil Justice, the Canadian Judicial Council, the Justice Education Society of British Columbia and the Department of Justice for Canada where a dedicated group of people made up our highly efficient and effective secretariat without which we could not have completed our work.

We were also assisted by funding from Alberta Justice and Solicitor General, the Law Foundation of British Columbia and the Federation of Law Societies of Canada. Owen Rees, the Executive Legal Officer to the Chief Justice of Canada and my judicial assistant, Me Michelle Fournier have contributed far beyond the call of duty. Diana Lowe, Q.C., the founding Executive Director of the Forum was instrumental in the launch of the Action Committee. Professor Trevor Farrow of Osgoode Hall Law School and Chair of the Board of the Forum has played an invaluable role not only as an active member of the Action Committee but also as the one who held the pen during the preparation of this report.

Finally, I offer my thanks to Chief Justice McLachlin for having the vision to establish the Action Committee and for providing me with the opportunity to be part of it.

Thomas A. Cromwell

PART 1

Access to Civil and Family Justice: *Urgent Need for Change*

> "[A]ccess to justice is the most important issue facing the legal system".[1]

OVERVIEW

There is a serious access to justice problem in Canada.

The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.[2] While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.

PURPOSE

This report has three purposes:

(in part 1) to promote a broad understanding of what we mean by access to justice and of the access to justice problem facing our civil and family justice system; (in part 2) to identify and promote a new way of thinking — a culture shift — to guide our approach to reform; and (in part 3) to provide an access to justice roadmap for real improvement. The report does not set out to provide detailed, line-item guidance on how to improve all aspects of the civil and family justice system across Canada's ten provinces and three territories. That needs to come largely from the ground up, through strong mechanisms and institutions developed locally. Local service providers, justice system stakeholders and individual champions must be the change makers. This report can, however, help fill the need for a coordinated and collaborative national voice — a change agent — providing a multi-party justice system vision and an overall goal-based roadmap for change. The ways of the past — often working in silos and reinventing wheels — are not sustainable. A coordinated, although not centralized, national reform effort is needed. Put simply, we should "think systemically and act locally."[3] Innovative thinking at all levels will be critical for success.

The formal system is, of course, important. **But a more expansive, user-centered vision of an accessible civil and family justice system is required.**

ACCESS TO JUSTICE: AN EXPANSIVE VISION

When thinking about access to justice, the starting point and consistent focus of the Action Committee is on the broad range of legal problems experienced by the public — not just those that are adjudicated by courts.[4] Key to this understanding of the justice system is that it looks at everyday legal problems from the point of view of the people experiencing them. Historically, access to justice has been a concept that centered on the formal justice system (courts, tribunals, lawyers and judges) and its procedures.[5] The formal system is, of course, important. But a more expansive, user-centered vision of an accessible civil and family justice system is required. We need a system that provides the necessary institutions, knowledge, resources and services to avoid, manage and resolve civil and family legal problems and disputes. That system must be able to do so in ways that are as timely, efficient, effective, proportional and just as possible:

- by preventing disputes and by early management of legal issues;
- through negotiation and informal dispute resolution services; and
- where necessary, through formal dispute resolution by tribunals and courts.

Important elements of this vision include:

- public awareness of rights, entitlements, obligations and responsibilities;
- public awareness of ways to avoid or prevent legal problems;
- ability to participate effectively in negotiations to achieve a just outcome;
- ability to effectively utilize non-court and court dispute resolution procedures; and
- institutions and mechanisms designed to implement accessible civil and family justice reforms.

CURRENT GAPS IN ACCESS TO JUSTICE — THE PROBLEM

1. Everyday Legal Problems

Civil justice problems are "pervasive in the lives of Canadians" and frequently have negative impacts on them.[6]

- **Many People Have Everyday Legal Problems.** Nearly 12 million Canadians will experience at least 1 legal problem in a given 3 year period.[7] In the area of family law alone, annual averages indicate that approximately 40% of marriages will end in divorce.[8] These are the problems of everyday people in everyday life.[9]
- **The Poor and the Vulnerable are Particularly Prone to Legal Problems.** Individuals with lower incomes and members of vulnerable groups experience more legal problems than higher income earners and members of more secure groups.[10] For example, people who self-identify as disabled are more than 4 times more likely to experience social assistance problems and 3 times more likely to experience housing related problems, and people who self-identify as aboriginal are nearly 4 times more likely to experience social assistance problems.[11]

We need a stronger and more effective civil and family justice system that is viewed and experienced as such by the public

- **Problems Multiply.** One kind of legal problem (for example, domestic violence) often leads to, or is aggravated by, others (such as relationship breakdown, child education issues, etc.).[12] Legal problems also have momentum: the more legal problems an individual experiences, the greater the likelihood that she or he will experience others.[13] Legal problems also tend to lead to other problems of other types. For example, almost 40% of people with one or more legal problems reported having other social or health related problems that they directly attributed to a justiciable problem.[14]
- **Legal Problems Have Social and Economic Costs.** Unresolved legal problems adversely affect people's lives, their finances and the public purse. They of course tend to make people's lives difficult.[15] Unresolved problems relating (for example) to debt, housing, and social services lead to social exclusion, which may in turn lead to a dependency on government assistance.[16] One recent U.K. study reported that unresolved legal problems cost individuals and the public £13 billion over a 3.5 year period.[17]

2. Importance Of Accessible Justice

To address these problems, we need a stronger and more effective civil and family justice system that is viewed and experienced as such by the public. This is critically important for the daily lives of people and for the social, political and economic well-being of society. For the system to be strong and effective, people must have meaningful access to it.[18]

3. The Current System Has Serious Gaps In Access

According to a wide range of justice system indicators and stakeholders, Canada is facing major access to justice challenges. For example, in the area of access to civil justice Canada ranked 13th out of 29 high-income countries in 2012-2013 and 16th out of 23 high-income countries in 2011.[19] According to the 2011 study, Canada's ranking was "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases."[20]

These international indicators tell us two things. First, Canada has a functioning justice system that is well regarded by many countries in the world. Second, improvement is urgently needed. There is a major gap between what legal services cost and what the vast majority of Canadians can afford. Some cost indicators are:

- **Legal Aid Funding and Coverage is Not Available for Most People and Problems.** Legal aid funding is available only for those of extremely modest means. For example in Ontario, legal aid funding is generally only available for individuals with a gross annual salary of less than $18,000, or for a family of 4 with a total gross annual salary of $37,000.[21] In Alberta, legal aid funding is generally only available for individuals with a net annual salary of approximately $16,000, or for a family of 4 with a total net annual salary of approximately $30,000.[22] In Manitoba[23] and Saskatchewan,[24] the eligibility levels for individuals and families of 4 are, respectively, gross annual salaries of $14,000 and $27,000 and net annual salaries of $11,800 and $22,800. Even within these financial eligibility ranges,

> The "language of justice tends to be ... foreign to most people"
>
> - participant in a recent survey on access to justice

legal aid covers only a limited number of areas of legal services.[25] For example, in Ontario, but for some civil matters covered by community, specialty and student clinics, legal aid coverage for civil matters does not exist.[26]

- **The Cost of Legal Services and Length of Proceedings is Increasing.** Legal fees in Canada vary significantly; however, one recent report provides a rough range of national average hourly rates from approximately $195 (for lawyers called in 2012) to $380 (for lawyers called in 1992 and earlier).[27] Rates can vary from this range significantly depending on jurisdiction, type of case, seniority and experience. The cost of civil and family matters also varies significantly. For example, national ranges of legal fees are recently reported to be $13,561 - $37,229 for a civil action up to trial (2 days), $23,083 - $79,750 for a civil action up to trial (5 days), $38,296 - $124,574 for a civil action up to trial (7 days), and $12,333 - $36,750 for a civil action appeal.[28] The length and cost of legal matters have continued to increase.[29]

4. Unmet Legal Needs

Most people earn too much money to qualify for legal aid, but too little to afford the legal services necessary to meaningfully address any significant legal problem. The system is essentially inaccessible for all of these people.[30] Below are some of the indicators.

- **Unmet Legal Needs.** According to one recent American study, as much as 70%-90% of legal needs in society go unmet.[31] This statistic is particularly troubling given what we know about the negative impacts of justiciable problems, particularly those that go unresolved.[32] In Canada, over 20% of the population take no meaningful action with respect to their legal problems, and over 65% think that nothing can be done, are uncertain about their rights, do not know what to do, think it will take too much time, cost too much money or are simply afraid.[33]
- **Cost is a Major Factor.** Of those who do not seek legal assistance, recent reports indicate that between 42% and 90% identified cost — or at least perceived cost — as the reason for not doing so.[34] An important result of the inaccessibility of legal services and the fact that many people do nothing to address their legal problems is that a proportion of legal problems that could be resolved relatively easily at an earlier stage escalate and shift to ones that require expensive legal services and court time down the road.[35]
- **Self-Representation.** As a result of the inaccessibility of early assistance, legal services and dispute resolution assistance, as well as the complexity and length of formal procedures, approximately 50% of people try to solve their problems on their own with no or minimal legal or authoritative non-legal assistance.[36] Many people — often well over 50% (depending on the court and jurisdiction) — represent themselves in judicial proceedings (usually not by choice).[37] The number is equally — and often more — significant and troubling in family court proceedings.[38] And statistics indicate that individuals who receive legal assistance are between 17% and 1,380% more likely to receive better results than those who do not.[39]

What is needed is major, sustained and collaborative system-wide change — in the form of cultural and institutional innovation, research and funding-based reform.

Not surprisingly, people's attitudes towards the system reflect this reality. According to a recent study of self-represented litigants in the Canadian court system, various court workers were of the view that the "civil system [is] ... very much open to abuse by those with more money at their disposal"; and the "general public has no idea about court procedures, requirements, the language, who or where to go for help".[40]

Further, according to a recent study, people expressed similar concerns about access to justice, including the following:

- "I don't have much faith in the lawyers and the system";
- the "language of justice tends to be ... foreign to most people";
- "[p]eople with money have access to more justice than people without";
- I think there are a lot of people who don't ... understand what the justice system is or how to use it - struggling to earn a living, dealing with addictions..."; and
- the justice system "should be equally important as our health care system...."[41]

5. What is Needed?

There are clearly major access to justice gaps in Canada.[42] The current system, which is inaccessible to so many and unable to respond adequately to the problem, is unsustainable.[43] Two things are urgently needed.

- **First,** a new way of thinking — a culture shift — is required to move away from old patterns and old approaches. We offer six guiding principles for change reflecting this culture shift in part 2 of this report.
- **Second,** a specific action plan — a goal-oriented access to justice roadmap — is urgently needed. That roadmap, which is set out in part 3 of this report, proposes goals relating to innovation, institutions and structures, and research and funding.

Taken together, what is needed is major, sustained and collaborative system-wide change — in the form of cultural and institutional innovation, research and funding-based reform.

PART 2

Moving Forward: *Six Guiding Principles for Change*

We need a fresh approach and a new way of thinking

CULTURE SHIFT

Many dedicated people in our civil and family justice system do their best to make the system work and many reform efforts have been put forward in past years. However, it is now clear that the previous approach to access to justice problems and solutions, far from succeeding, has produced our present, unsustainable situation.

We need a fresh approach and a new way of thinking. In short, we need a significant shift in culture to achieve meaningful improvement to access to justice in Canada — a new culture of reform. As Lawrence M. Friedman observed, "law reform is doomed to failure if it does not take legal culture into account."[44]

This new culture of reform should be based on six guiding principles. Taken together, these principles spell out the elements of an overriding culture of reform. A new way of thinking, while important, is not enough. We also need innovative ideas, creative solutions and specific goals, as we set out in part 3. A full embrace of a new culture of reform is a precondition for developing those more specific measures.[45]

SIX GUIDING PRINCIPLES FOR CHANGE

Here are six guiding principles that make up this new culture.

Guiding Principles For Change

1. Put the Public First
2. Collaborate and Coordinate
3. Prevent and Educate
4. Simplify, Make Coherent, Proportional and Sustainable
5. Take Action
6. Focus on Outcomes

The focus must be on the people who need to use the system

1. Put the Public First

We need to change our primary focus. Too often, we focus inward on how the system operates from the point of view of those who work in it. For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants.

The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups. Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists.[46]

Until we involve those who use the system in the reform process, the system will not really work for those who use it. As one court administrator recently commented, we need to "change ... how we do business within the context of courts."[47] Those of us working within the system need to remember that it exists to serve the public. That must be the focus of all reform efforts.

2. Collaborate and Coordinate

We also need to focus on collaboration and coordination. The administration of justice in Canada is fragmented. In fact, it is hard to say that there is a system — as opposed to many systems and parts of systems. Justice services are delivered at various levels in this country — national, provincial and territorial, and often regional, local and sectoral as well.[48]

Within our current constitutional, administrative and sectoral frameworks, much more collaboration and coordination is not only needed but achievable. We can and must improve collaboration and coordination not only across and within jurisdictions, but also across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.). We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well.

We are long past the time for reinventing wheels. We can no longer afford to ignore what is going on in different regions and sectors and miss opportunities for sharing and collaboration.[49] Openness, proactivity, collaboration and coordination must animate how we approach improving access to justice at all levels and across all sectors of the system.[50] In sum, we all — those who use the justice system and those who work within the justice community — are in this project together. A just society is in all of our interest.

3. Prevent and Educate

We need to focus not only on resolving disputes but on preventing them as well. Access to justice has often been thought of as access to courts and lawyers.[51] However, we know that everyday legal problems mostly occur outside of formal justice structures.[52] This insight should lead us to fundamentally re-think how we approach legal problems in terms of preventing them from happening where possible, and when they do occur, providing those who experience them with adequate

information and resources to deal with them in an efficient and effective way.[53] As the Action Committee's Prevention, Triage and Referral Working Group indicated, "Avoiding problems or the escalation of problems, and/or early resolution of problems is generally cheaper and less disruptive than resolution using the courts. To borrow Richard Susskind's observation, 'it is much less expensive to build a fence at the top of a cliff than to have need of an expensive ambulance at the bottom.'"[54]

To make a meaningful difference in the lives of the people who rely on the justice system, **we need to move beyond "wise words" and bridge the "implementation gap"**

4. Simplify, Make Coherent, Proportional and Sustainable

We must work to make things simple, coherent, proportional and sustainable. One aspect of this task, building on the "public first" principle set out above, is the public's understanding of the system. The Canadian Bar Association acknowledged the system's complexity in its 1996 *Systems of Civil Justice Task Force Report*:

"Many aspects of the civil justice system are difficult to understand for those untrained in the law. Without assistance it is difficult, if not impossible, to gain access to a system one does not comprehend. Barriers to understanding include:

- unavailability and inaccessibility of legal information;
- complexity of the law, its vocabulary, procedures and institutions; and
- linguistic, cultural and communication barriers."[55]

In spite of recent efforts, the civil and family justice system is still too complicated and largely incomprehensible to all but those with legal training. As one participant in a recent access to justice survey of the public put it, we need to "make the whole thing much less complex."[56] Similarly, in a recent study of self-represented litigants, respondents regularly indicated feeling overwhelmed by the complexity of the system. One respondent indicated that the "procedure as I read it sounded easy ... but it was anything but."[57] Another indicated that, as a result of the system's many procedural steps, "I was eaten alive."[58]

Our current formal procedures seem to grow ever more complicated and disproportionate to the needs of the litigants and the matters involved. Everyday legal problems need everyday solutions that are timely, fair and cost-effective. Procedures must be simple and proportional for the entire system to be sustainable. To improve the system, we need a new way of thinking that concentrates on simplicity, coherence, proportionality and sustainability at every stage of the process.

5. Take Action

We need research, thinking and deliberation. But for meaningful change to occur, they are not enough. We also need action. We cannot put off, to another day, formulating and carrying out a specific and effective action plan. There have been many reports and reform initiatives, but the concrete results have been extremely modest. As the Family Justice Working Group indicated, to make a meaningful difference in the lives of the people who rely on the justice system, we need to move beyond "wise words" and bridge the "implementation gap."[59]

6. Focus On Outcomes

Our final guiding principle calls for a shift in focus from process to outcomes. We must be sure our process is just. But we must not just focus on process. We should not be preoccupied with fair processes for their own sake, but with achieving fair and just **results** for those who use the system. Of course fair process is important. But at the end of the day, what people want most is a safe, healthy and productive life for themselves, their children and their loved ones. In a recent survey of public views about justice, one respondent defined justice as "access to society."[60] According to another respondent: "We're not even talking access to justice ... we're talking access to food, to shelter, to security, to opportunities for ourselves and our kids and until we deal with that, the other stuff doesn't make sense."[61]

In order to make justice more accessible, we must keep in mind that we are trying to improve law and process not for their own sake, but rather for the sake of providing and improving justice in the lives of Canadians. Providing justice — not just in the form of fair and just process but also in the form of fair and just outcomes — must be our primary concern.

PART 3

Bridging the Implementation Gap Through Justice Development Goals: *A Nine-Point Access To Justice Roadmap*

The third part of this report sets out an access to justice roadmap, designed to bridge the implementation gap between reform ideas and real reform. It sets out three main areas for reform: (A) specific innovations, (B) institutions and structures, and (C) research and funding. Within each, we offer specific justice development goals.[62] Each of the goals has been significantly influenced by the Action Committee's working group reports.[63] This part of the report lays out an overall approach to respond to the serious access to justice problems facing the public within our civil and family justice system.

Access to Justice Roadmap

A. INNOVATION GOALS

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems
2. Make Essential Legal Services Available to Everyone
3. Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution
4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible

B. INSTITUTIONAL AND STRUCTURAL GOALS

5. Create Local and National Access to Justice Implementation Mechanisms
6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education
7. Enhance the Innovation Capacity of the Civil and Family Justice System

C. RESEARCH AND FUNDING GOALS

8. Support Access to Justice Research to Promote Evidence-Based Policy Making
9. Promote Coherent, Integrated and Sustained Funding Strategies

A. INNOVATION GOALS[64]

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems - By 2018[65]

1.1 Widen the Focus from Dispute Resolution to Education and Prevention

As we saw earlier in part 1,[66] people experience and deal with most everyday legal problems outside of the traditional formal justice system; or put differently, only a small portion of legal problems — approximately 6.5%[67] — ever reach the formal justice system.[68]

The justice system must acknowledge this reality by widening its focus from its current (and expensive) court-based "emergency room" orientation to include education and dispute prevention. As one member of the public recently commented, it would be helpful if "a little more money can be spent on education ... to prevent heading to jail or court, to prevent it before it starts...."[69] This shift in focus is designed to help the most people in the most efficient, effective and just way at the earliest point in the process.

To achieve this shift, the justice system must be significantly enhanced so that it provides a flexible continuum of justice services, which includes court services of course, but which is not dominated by those more expensive services (see Figs. 1 and 2).[70] The motto might be: "court if necessary, but not necessarily court."

1.2 Build a Robust "Front End": Early Resolution Services Sector

A key element of this expanded continuum of services is a robust, coherent and coordinated "front end" (prior to more formal court and tribunal related services), which is referred to by the Action Committee as the Early Resolution Services Sector (ERSS).[71] It is the ERSS that will provide accessible justice services at a time and place at which most everyday legal problems occur (see Fig. 1).

Figure 1: **Involvement of the ERSS and the Formal Justice System in the Overall Volume of Legal Problems**

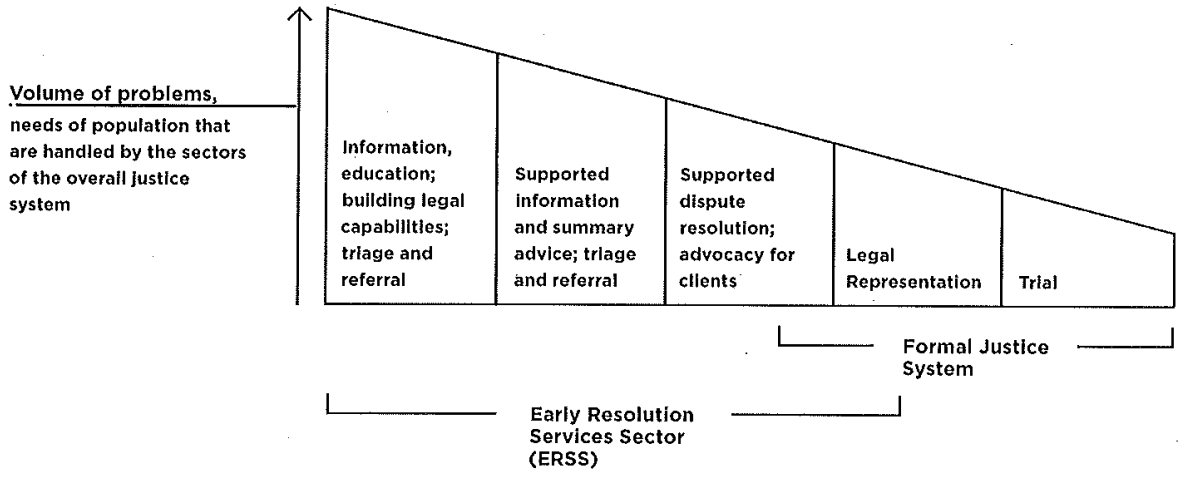
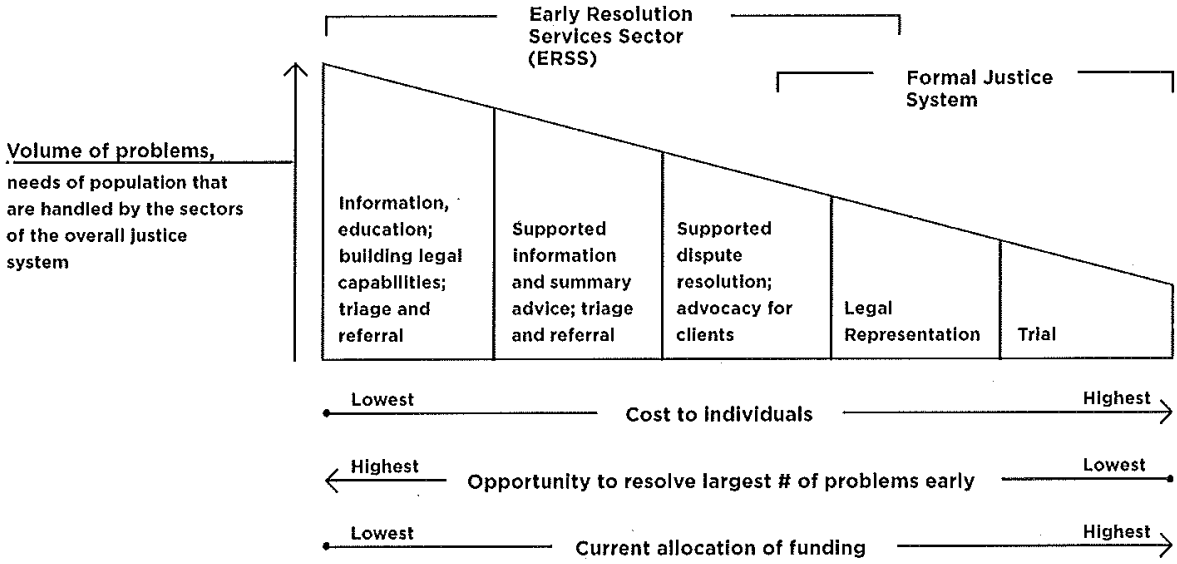


Figure 2: **The ERSS and Formal Justice System: Volume of needs vs. cost and funding allocations**



The ERSS is made up of services such as:

- community and public legal education;
- triage (i.e. effective channeling of people to needed services);
- pro bono services;
- other in-person, telephone and e-referral services;
- intermediary referral assistance (help in recognizing legal problems and connecting them with legal and other services);
- telephone and e-legal information services;[72]
- legal publications programs and in-person and e-law library services;[73]
- dispute resolution programs (e.g. family mediation and conciliation services, small claims mediation, lower cost civil mediation, etc.);
- various legal aid services, including legal clinics, certificate programs, duty counsel, etc.;
- community justice hubs;[74]
- co-location of services;[75]
- student support services including clinical services, student mediation initiatives, public interest programs, etc.; and
- others.[76]

Collectively, the ERSS is designed to provide resources that:

- assist people in clarifying the nature of law and problems that have a legal component;
- help people to develop their legal capacity to manage conflicts, resolve problems earlier by themselves and/or seek early and appropriate assistance;
- promote early understanding and resolution of legal problems outside the court system through alternative dispute resolution mechanisms and/or directly by parties themselves;
- assist people in navigating the court system efficiently and effectively; and
- provide effective referrals.

Given the breadth of servies available as part of the ERSS, it is critical that:

- the ERSS be developed in a coordinated, deliberate and collaborative way (in the context of all justice services) in order to avoid the kinds of overlap, gaps and inefficiencies that currently exist;
- means be established by all those active in this sector and all those providing funding to engage in action-oriented consultation to define and rationalize this sector;
- adequate training for ERSS personnel be provided, including training on how to coordinate services across the ERSS; and
- the ERSS be integrated into the formal justice system as part of an expanded justice system continuum, coordinated as far as possible with the provision of other services, including social services, health services,[77] education, etc., all with a view to meeting complex and often clustered everyday legal needs.[78] Coordination and communication will be critical for this further integration to take place. Examples of this kind of coordination include community hubs, coordinated community service centres, etc.[79]

1.3 Improve Accessibility to and Coordination of Public Legal Information

Providing access to legal information is an important aspect of the ERSS. The good news is that there is an enormous amount of publicly available legal information in Canada and that there are active and creative information providers.[80] But there are significant challenges. It is not always clear to the user what information is authoritative, current or reliable. There is work to be done to improve the accessibility and in some cases the quality of these resources. The biggest challenge, however, is the lack of integration and coordination among information providers. A much greater degree of coordination and integration is required to avoid duplication of effort and to provide clear paths for the public to reliable information. This could be achieved through enhanced coordination and cooperation among providers, the development of regional, sector or national information portals, authoritative online information hubs,[81] virtual self-help information services, certification protocols, a complaints process, etc.[82]

1.4 Justice Continuum Must Be Reflective of the Population it Serves

Services within the justice continuum must reflect and be responsive to Canada's culturally and geographically diverse population.[83] We need to focus on the needs of

Access to justice must become more than a vague and aspirational principle.

marginalized groups and communities and to recognize that there are many barriers to accessing the formal and informal systems — language, financial status, mental health capacity, geographical remoteness, gender, class, religion, sexual orientation, immigration status, culture and aboriginal status. We need to identify these barriers to access to justice and take steps to eliminate them.

2. Make Essential Legal Services Available to Everyone - By 2018[84]

2.1 Modernize and Expand the Legal Services Sector

Many everyday problems require legal services from legal professionals. For many, those services are not accessible. Innovations are needed in the way we provide essential legal services in order to make them available to everyone. The profession — including the Canadian Bar Association, the Federation of Law Societies of Canada, law societies, regional and other lawyer associations — will, together with the national and local access to justice organizations discussed below (see pt.3.B.5), take a leadership role in this important innovation process.[85]

Specific innovations and improvements that should be considered and potentially developed include:[86]

- limited scope retainers - "unbundling";[87]
- alternative business and delivery models;[88]
- increased opportunities for paralegal services;[89]
- increased legal information services by lawyers and qualified non-lawyers;[90]
- appropriate outsourcing of legal services;[91]
- summary advice and referrals;[92]
- alternative billing models;[93]
- legal expense insurance[94] and broad-based legal care;
- pro bono and low bono services;[95]
- creative partnerships and initiatives designed to encourage expanding access to legal services - particularly to low income clients;[96]
- programs to promote justice services to rural and remote communities as well as marginalized and equity seeking communities;[97] and
- programs that match unmet legal needs with unmet legal markets.[98]

2.2 Increase Legal Aid Services and Funding

Legal services provided by lawyers, paralegals and other trained legal service providers are vital to assuring access to justice in all sectors, particularly for low and moderate income communities and other rural, remote and marginalized groups in society. To assist with the provision of these services for civil and family legal problems, it is essential that the availability of legal aid services for civil and family legal problems be increased.

The Canadian justice system is currently served by **excellent lawyers, judges, courts and tribunals.**

2.3 Make Access to Justice a Central Aspect of Professionalism

Access to justice[99] must become more than a vague and aspirational principle. Law societies and lawyers must see it as part of a modern — "sustainable"[100] — notion of legal professionalism.[101] Access to justice should feature prominently in law school curricula, bar admission and continuing education programs, codes of conduct, etc.[102] Mentoring will be important to sustained success. Serving the public — in the form of concrete and measurable outcomes — should be an increasingly central feature of professionalism.[103]

3. Make Courts And Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution - By 2019[104]

3.1 Courts and Tribunals Must Be Accessible to and Reflective of the Society they Serve[105]

The Canadian justice system is currently served by excellent lawyers, judges, courts and tribunals. The problem is not their quality, but rather their accessibility. While many of the goals and recommendations considered elsewhere in this report focus on the parts of the justice system that lie outside of formal dispute resolution processes (see e.g. Fig. 1), there is still a central role for robust and accessible public dispute resolution venues. Justice — including a robust court and tribunal system — is very much a central part of any access to justice discussion: However, to make courts and tribunals more accessible to more people and more cases, they must be significantly reformed with the user centrally in mind.[106]

While maintaining their constitutional and administrative importance in the context of a democracy governed by the rule of law, courts and tribunals must become much more accessible to and reflective of the needs of the society they serve. Put simply, just, creative and proportional processes should be available for all legal problems that need dispute resolution assistance. We recognize that much has been done. We also recognize that much more can be done. Further, the resources and support that are needed for initiatives discussed elsewhere in this report should not come at the expense of service to the public and respect for other important and ongoing initiatives that are working to improve access to justice in courts and tribunals.

3.2 Courts and Tribunals Should Become Multi-Service Dispute Resolution Centres

In the spirit of the "multi-door courthouse",[107] a range of dispute resolution services — negotiation, conciliation and mediation, judicial dispute resolution, mini-trials, etc., as well as motions, applications, full trials, hearings and appeals — should be offered within most courts and tribunals.[108] Some form of court-annexed dispute resolution process — mediation, judicial dispute resolution, etc. — should be more readily available in virtually all cases. While masters, judges and panel members will do some of this work, some of it can also be offered by trained court staff, duty counsel, dispute resolution officers, court-based mediators and others.[109]

Building on the current administrative law model, specialized court services — e.g. mental health courts, municipal courts,[110] commercial lists, expanded and accessible small claims and consumer courts, etc. — should be offered within the court or tribunal structure.

> "We may well have something to learn from online dispute resolution on eBay and elsewhere...."
>
> - Lord Neuberger, President of U.K. Supreme Court

Online dispute resolution options, including court and non-court-based online dispute resolution services, should also be expanded where possible and appropriate, particularly for small claims matters,[111] debt and consumer issues,[112] property assessment appeals[113] and others. As Lord Neuberger, President of the U.K. Supreme Court recently stated, "We may well have something to learn from online dispute resolution on eBay and elsewhere...."[114]

3.3 Court and Tribunal Services Must Provide Appropriate Services for Self-Represented Litigants

Appropriate and accessible processes must be readily available for litigants who represent themselves on their own, or with limited scope retainers. All who work in the formal dispute resolution system must be properly trained to assist litigants in ways that meet their dispute resolution needs to the extent that it is reasonably possible to do so.[115] To achieve this goal, courts and tribunals must be coordinated and integrated with the ERSS information and service providers (some of which may be located within courts and tribunal buildings).[116] Law and family law information centres should be expanded and integrated with all court services.[117] Civil and family duty counsel and pro bono programs (including lawyers and students) should also be expanded.[118]

3.4 Case Management Should be Promoted and Available in All Appropriate Cases

Timely — often early — judicial case management should be readily available. In addition, where necessary, case management officers, who may be lawyers, duty counsel, or other appropriately trained people, should be readily available at all courts and tribunals for all cases, with the authority to assist parties to manage their cases and to help resolve their disputes.[119]

Parties should be encouraged to agree on common experts; to use simplified notices; to plead orally where appropriate (to reduce the cost and time of preparing legal materials); and, generally, to talk to one another about solving problems in a timely and cost-effective manner.[120] Judges and tribunal members should not hesitate to use their powers to limit the number of issues to be tried and the number of witnesses to be examined. Scheduling procedures should also be put into place to allow for fast-track trials where possible.

Overall, judges, tribunal members, masters, registrars and all other such court officers should take a strong leadership role in promoting a culture shift toward high efficiency, proportionality and effectiveness through the management of cases. Of course, justice according to law must always be the ultimate guide by which to evaluate the efficiency and effectiveness of judicial and tribunal processes.

3.5 Court and Tribunal Processes and Procedures Must Be More Accessible and User-Friendly

The guiding principles in part 2 of the report — specifically including (pt.2.1) putting the public first, (pt.2.4) simplification, coherence, proportionality and sustainability, and (pt.2.6) a focus on outcomes - must animate court and tribunal innovations and reforms. The technology in all courts and tribunals must be modernized to a level that reflects the electronic needs, abilities and expectations of a modern society. Interactive court forms should be widely accessible. Scheduling, e-filing[121] and docket management should all be simplified and made easily accessible and all court and

tribunal documents must be accessible electronically (both on site and remotely).[122] Courts and tribunals should be encouraged to develop the ability to generate real time court orders.[123] Courthouse electronic systems should be integrated with other ERSS electronic and self-help services.

Teleconferencing, videoconferencing and internet-based conferencing (e.g. Skype) should be widely available for all appearance types, including case management, status hearings, motions, applications, judicial dispute resolution proceedings, mediation,[124] trials and appeals, etc.[125]

Better public communication, including through the use of social and other media, should be encouraged to demystify the court and tribunal process.[126] Overall, and in all cases, rules and processes should be simplified to promote and balance the principles of proportionality, simplification, efficiency, fairness and justice.[127]

3.6 Judicial Independence and Ethical Responsibilities

The innovations advanced in this report do not and must not undermine the importance of judicial independence or the ethical standards that judges strive to meet.[128] Rather, they must complement and reinforce these important principles.

4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible - By 2018[129]

Major change is urgently needed in the family justice system.[130] The Family Justice Working Group Report sets out a comprehensive list of suggested reforms. That report is readily accessible and it is not necessary to reproduce all of its recommendations here. Instead we set out some of the main themes.

4.1 Progressive Values Must Guide All Family Justice Services

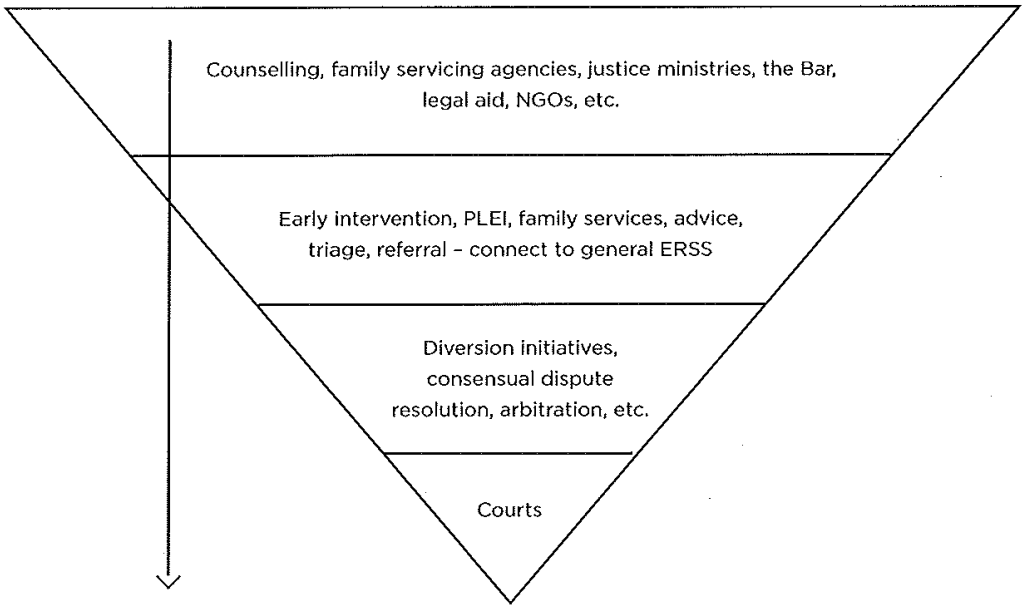
The core values, aims and principles that should guide all family justice reforms include: conflict minimization; collaboration; client-focus; empowered families; integration of multidisciplinary services; timely resolution; affordability; voice, fairness, safety; and proportionality.[131]

4.2 A Range of Family Services Must be Provided

A range of accessible and affordable services and options — in the form of a family justice services continuum — must be available and affordable for all family law problems (see Fig. 3). The family justice services system should offer an array of dispute resolution options to help families resolve their disputes, including information, mediation, collaborative law, parenting coordination, and adjudication.

Early "front end" services in the family justice services system should be expanded.[132] Specifically, this means allocating resources so as to make front-end services highly visible, easy to access and user-friendly; coordinating and integrating the delivery of all services for separating families; and making triage services (i.e. effective channeling of people to required services), including assessment, information and referral, available for all people with family law problems.

Figure 3: **Family Justice Services Continuum**[133]



4.3 Consensual Approaches to Dispute Resolution Should Be Integrated as Far as Possible Into the Family Justice System

We need to expand significantly the availability of integrated family programs and services to support the proactive management of family law-related problems and to facilitate early, consensual family dispute resolution and to support a broader and deeper integration of consensual values and problem-solving approaches into the justice system culture.[134]

4.4 Innovation Across the Family Justice System Must Be Encouraged[135]

A number of specific family justice innovations are suggested below.

- Law society regulation of family lawyers should explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers optimally to manage family law files.[136]
- Ministries of Justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and — to the extent appropriate — the judiciary, should contribute to and advocate for enhanced public education and understanding about the nature of collaborative values and the availability of consensual dispute resolution (CDR) procedures in the family justice system.
- Before filing a contested application in a family matter (but after filing initial pleadings), parties should be required to participate in a single non-judicial CDR session. Rules should indicate the types of processes that are included and ensure they are delivered by qualified professionals. Exemptions should be available

Free or subsidized CDR services should be available to those who cannot afford them.

where the parties have already participated in CDR, for cases involving family violence, or where it is otherwise urgent for one or both parties to appear before the court. Free or subsidized CDR services should be available to those who cannot afford them.

- Except in cases of urgency and consent orders, information sessions should be mandatory for self-represented litigants and all parents with dependent children. The sessions should take place as early as possible and before parties can appear in court. At a minimum, the following information should be provided: how to parent after separation and the effects of conflict on children; basic legal information; information about mediation and other procedural options; and information about available non-legal family services.
- Jurisdictions should expand reliance upon properly trained and supervised paralegals, law students, articling students and non-lawyer experts to provide a range of services to families with legal problems.

4.5 Courts Should Be Restructured to Better Handle Family Law Issues[137]

Recognizing that each jurisdiction would have its own version of the unified court model, to meet the needs of families and children, jurisdictions should consider whether implementation of a unified family court would be desirable.

A unified family court should retain the benefits of provincial family courts, including their distinctive and simplified procedures, and should have its own simplified rules, forms and dispute resolution processes that are attuned to the distinctive needs and limited means of family law participants. The judges presiding over proceedings in the court should be specialized. They should have or be willing to acquire substantive and procedural expertise in family law; the ability to bring strong dispute resolution skills to bear on family cases; training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and an awareness of the range of family justice services available to the families appearing before them.

Jurisdictions that do not consider implementation of a unified family court to be desirable or feasible should take into consideration the hallmarks of unified family courts as set out above and strive to provide them as far as appropriate and possible.

Family courts should adopt simplified procedures for smaller or more limited family law disputes. The same judge should preside over all pre-trial motions, conferences and hearings in family cases.

4.6 Substantive Family Law Should Be Modernized to Reflect More Consensual and Supportive Approaches to Dispute Resolution[138]

Canadian family law statutes should encourage CDR processes as the norm in family law, and the language of substantive law should be revised to reflect that orientation. Substantive family laws should provide more support for early and complete disclosure by providing for positive obligations to govern all stages of a case as well as serious consequences for failure to comply. Overall, substantive family laws should be simpler and offer more guidance by way of rules, guidelines and presumptions.

B. INSTITUTIONAL AND STRUCTURAL GOALS

5. Create Local and National Access to Justice Implementation Mechanisms – By 2016

5.1 Create and Support Coordinated Local Access to Justice Implementation Commissions (AJICs)

No one department or agency has sole responsibility for the delivery of justice in Canada.[139] That, in our view, is a core reason for why the improvement of access to justice continues to be such a challenge. For coherent, collaborative and coordinated change to occur, mechanisms need to be available in all provinces and territories. Where such collaborative mechanisms already exist, they need to be supported and perhaps reformed where necessary. Where they do not already exist, they need to be created and supported. While each region will have to identify or design a structure to suit its own particular needs, some structure or institution is needed to promote, design and implement change on a sustained and ongoing basis.[140] Where new financial or other support is required, it should not come at the expense of service to the public and respect for local organizations and providers. After all, it will be these local organizations, along with others, who will have the important ideas for moving forward together.

In order to provide some assistance in terms of what these mechanisms might look like, particularly in jurisdictions in which such mechanisms do not already exist or are not adequately developed and supported, we set out here an example of the kind of mechanism and approach we have in mind. For the purpose of this report, we call these mechanisms local standing access to justice implementation commissions (AJICs).

5.2 Broad-Based Membership

The membership of AJICs should be broadly based, with judicial and court administration participation, combined with multi-stakeholder collaboration, through top down and bottom up coherent, collaborative and consultative approaches. The public – through various representative organizations – should play a central role. The kinds of individuals and organizations that should be part of these committees include the member organizations of the Action Committee, as well as other relevant stakeholder groups and individuals.[141]

Members from the justice sector must be directly linked at a leadership level with their organizations and must commit for a minimum of three years. In addition to volunteer individual members, AJICs need to have administrative staff and support. The modest support needed for AJICs should come from stakeholders. The AJICs must consist of leaders who are champions of change who will form strong guiding coalitions for change.[142]

There are innovative and efficient ways of bringing these sorts of mechanisms together. Local centres, in-person meetings, electronic and distance participation, and other accessible methods – including the use of social media, streaming, blogging, and other broad-based and participatory tools – should be considered. These tools should also allow for meaningful public engagement and feedback where possible.

The AJICs must consist of leaders who are champions of change who will form **strong guiding coalitions for change**

5.3 Innovation and Action-Oriented Terms of Reference
AJICs must be innovative and action-oriented, not just advisory. They need to inspire, lead and support change by clearly defining problems and crafting solutions and assisting with the piloting, implementation and evaluation of reforms. Early on in the process, AJICs should follow up on various recent mapping initiatives[143] to build on some of the good work that has been done in identifying key players and important initiatives in the access to justice communities.

Key priority areas need to be targeted and promising initiatives developed and pursued, likely through the formation of innovation and implementation working groups within the various AJICs. For example, priority areas could include legal and court services, family law, early resolution services,[144] legal aid, legal education in schools, homelessness, poverty and administrative law, etc. The work and recommendations of the Action Committee, it is hoped, will provide a good place to start.

5.4 Other Sector and Institution Specific Access to Justice Groups
In addition to standing AJICs, other access to justice groups should be encouraged where appropriate in the context of individual organizations and sectors. For example, all courts and tribunals should have an access to justice committee designed to conduct self-studies, share best practices, review performance, develop innovations, etc. Further, all law societies,[145] Bar associations[146] and law schools should create internal standing access to justice committees. These groups should be connected to the AJICs, to avoid duplication and facilitate coordination.

5.5 Establish Permanent National Access to Justice Organization
In addition to the AJICs, a national organization should be established or created within an existing organization or organizations to promote and monitor, on a long-term basis, access to civil and family justice in Canada.[147] Specifically, it will monitor and promote a national access to justice policy framework, best practices and standards,[148] identify and share information, review international developments, potentially conduct and support research on pressing access to justice issues, support "train-the-trainer" programs in the context of AJICs, etc. This organization, which will be critical for continuing the reform agenda following the completion of the Action Committee's work, will provide a coordinated voice to the access to justice agenda in Canada.

6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education – By 2016

6.1 Law School, Bar Admission and Continuing Life Long Learning
Law schools, bar admission programs and continuing legal education providers should put a modern access to justice agenda at the forefront of Canadian legal education. This agenda will be an important part of a new legal reform culture. While

> **"[J]ustice incorporates our life ... perhaps it can be taught in school** as a life skill so that kids are more aware of what it means to make a choice and do the right thing for themselves and each other. **"**
>
> - participant in a recent survey on access to justice

law faculties will need to develop their own particular research and teaching agendas, and recognizing that many innovative initiatives have already begun, the following initiatives should be developed and expanded.

- Modules, courses and research agendas focused specifically on access to justice, professionalism, public service, diversity, pluralism and globalization.[149] The needs of all individuals, groups and communities, and in particular self-represented litigants, aboriginal communities, immigrants, other marginalized and vulnerable groups and rural communities should be specifically considered.
- Increased skills based learning that focuses on consensual dispute resolution,[150] alternative dispute resolution and other non-adversarial skills.[151]
- Social, community, poverty law, mediation and other clinical, intensive and experiential programs.
- The theory and practice of family law should be promoted as a central feature of the law school program.
- Research and promotion of different ways of delivering legal services that provide affordable and accessible services to the public as well as a meaningful professional experience for lawyers, including a reasonable standard of living.[152]

Similarly, bar admission programs and continuing legal education providers should promote access to justice as a central feature of essentially all lawyering programs.[153]

6.2 Promote Access to Justice Education in Primary, Secondary and Post-Secondary Education

Primary, secondary and post-secondary education should promote teaching and learning about access to justice, law and a just society. Building legal capacity through education helps people to manage their lives, property and relationships, to avoid problems and also to understand and address them effectively when they do arise. As one respondent to a recent access to justice survey put it: "[J]ustice incorporates our life ... perhaps it can be taught in school as a life skill so that kids are more aware of what it means to make a choice and do the right thing for themselves and each other."[154]

A national dialogue involving Ministries of Education, Ministries of Justice, legal educators, relevant community groups and others should be promoted to push forward a common access to justice framework for schools,[155] colleges and universities. AJICs should play an important role here.

7. Enhance the Innovation Capacity of the Civil and Family Justice System – By 2016

We need to expand the innovation capacity at all levels and in all sectors of the justice system. The national access to justice organization could be a key leader in this capacity building process, along with the AJICs, other access to justice groups, researchers and others. Research on what exists, what works and what is needed, along with evaluations and metrics of success, will all be important aspects of building innovation capacity.[156]

Money spent on the resolution of legal problems results in **individual and collective social, health and economic benefits**

C. RESEARCH AND FUNDING GOALS

8. Support Access to Justice Research to Promote Evidence-Based Policy Making - By 2015

8.1 Promote a National Access to Justice Research and Innovation Agenda that is both Aspirational and Practical

This goal is directed primarily to researchers and governments, but additionally to all those who care about working with and improving the system - including AJICs, etc.

A national research and innovation agenda should be both aspirational and practical. Innovative and forward thinking will be central to this project.[157] Equally important to this process, however, will be to look at what works.[158] Collaboration among legal researchers, economists, social scientists, health care researchers and others should be encouraged.

8.2 Develop Metrics of Success and Systems of Evaluation

Reliable and meaningful metrics and benchmarks need to be established across all levels of the system in order to evaluate the effects of reform measures. We need better information in the context of increasing demand, increasing costs and stretched fiscal realities.[159]

9. Promote Coherent, Integrated and Sustained Funding Strategies - By 2016

Although research on the costs and benefits of delivering and not delivering accessible justice is still developing,[160] there is meaningful evidence tending to establish the benefits of sound civil and family economic investment.[161] Money spent on the resolution of legal problems results in individual and collective social, health and economic benefits.[162]

Based on this developing body of research, a sustainable justice funding model — recognizing the realities of current fiscal challenges but also recognizing the long term individual and collective social and economic benefits that flow from sound justice investment — needs to be encouraged and developed. There are several aspects to this proposed funding model:

- increased legal aid;
- governments working with participants from all sectors of the justice community;
- funding reallocation within the justice system and across public institutions as better coordination, more effective front end services and better education produce efficiencies;[163] and
- AJICs (which will require sustained funding themselves) to identify key research, innovation and action items and to work collaboratively with the national access to justice organization and others toward developing realistic and sustainable funding goals and strategies.

CONCLUSION

Access to justice is at a critical stage in Canada.... Now is the time to act.

Access to justice is at a critical stage in Canada. Change is urgently needed.[164] This report provides a multi-sector national plan for reform. It is a roadmap, not a repair manual. The approach is to provide leadership through the promotion of concrete development goals. These are recommended goals, not dictates. Specific local conditions or problems call for locally tailored approaches and solutions. We believe that those responsible for implementing change — all local, provincial, territorial and national justice system stakeholders — will find this roadmap useful for making meaningful reforms in the service of the everyday justice needs of Canadians. The timeframes attached to each development goal are suggestions. They may change depending on the scope of the goal as well as on local needs and conditions.

Although we face serious access to justice challenges, there are many reasons to be optimistic about our ability to bridge the current implementation gap by pursuing concrete access to justice reforms. People within and beyond the civil and family justice system are increasingly engaged by access to justice challenges and many individuals and organizations are already working hard for change.

We hope that the work of the Action Committee and in particular this report will lead to:

- a measurable and significant increase in civil and family access to justice within 5 years;
- a national access to justice policy framework that is widely accepted and adopted;
- local jurisdictions, through AJICs with strong multi-sector leadership, putting in place strategies and mechanisms for meaningful and sustainable change;
- a permanent national body being created and supported to promote, guide and monitor meaningful local and national access to justice initiatives;
- access to civil and family justice becoming a topic of general civic discussion and engagement – an issue of everyday individual and community interest and wellbeing; and
- the public being placed squarely at the centre of all meaningful civil and family justice education and reform efforts.

In this report we have described the need, set out the guiding principles and provided a roadmap for change. Now it is time to act.

ACKNOWLEDGMENTS

Access to Civil and Family Justice: A Roadmap for Change is the final report of the Action Committee on Access to Justice in Civil and Family Matters.

The Action Committee is grateful for the tireless efforts of Professor Trevor C.W. Farrow, Osgoode Hall Law School and Chair of the Canadian Forum on Civil Justice, who was the "holder of the pen" for this final report.

ACTION COMMITTEE

The Action Committee was convened in late 2008 at the invitation of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada as a catalyst for meaningful action to justice reform. The Action Committee, which is a collaborative, consultative and stakeholder-driven initiative, includes:

- The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada (Honourary Chair)
- The Honourable Mr. Justice Thomas A. Cromwell, Supreme Court of Canada (Chair)
- Alberta Justice
- Association of Legal Aid Plans
- Canadian Association of Provincial Court Judges
- Canadian Bar Association
- Canadian Council of Chief Judges
- Canadian Forum on Civil Justice
- Canadian Institute for the Administration of Justice
- Canadian Judicial Council
- Canadian Superior Court Judges Association
- Canadian Public (represented by Mary Ellen Hodgins)
- Council of Canadian Law Deans
- Department of Justice Canada
- Federation of Law Societies of Canada
- Heads of Court Administration
- British Columbia Ministry of Justice
- Pro Bono Law Ontario
- Public Legal Education Association of Canada

STEERING COMMITTEE, WORKING GROUPS AND SECRETARIAT

The individual members of the Steering Committee of the Action Committee include:

- The Honourable Mr. Justice Thomas A. Cromwell (Chair)
- Mark Benton, Q.C. (Association of Legal Aid Plans)
- Deputy Minister of Justice Raymond Bodnarek, Q.C. (Alberta Justice)
- Melina Buckley, Ph.D. (Canadian Bar Association)
- The Honourable juge en chef Élizabeth Corte (Canadian Council of Chief Judges)
- Rick Craig (Public Legal Education Association of Canada)
- Professor Trevor C.W. Farrow, Ph.D. (Canadian Forum on Civil Justice)
- Jeff Hirsch (Federation of Law Societies of Canada)
- M. Jerry McHale, Q.C. (British Columbia Ministry of Justice)

The Action Committee is extremely grateful to all members of the Steering Committee for their constant leadership and guidance throughout the work of the Action Committee. Much of the work of the Action Committee, designed to look at four key priority areas, was done by four working groups: the Court Processes Simplification Working Group, the Access to Legal Services Working Group, the Prevention, Triage and Referral Working Group, and the Family Justice Working Group. Reports from these working groups (which include lists of their members) were released as a collection of final working group reports in April 2013. The Action Committee is very grateful to the

members of these working groups for their significant efforts. The working group reports can be found on the website of the Canadian Forum on Civil Justice **(http://www.cfcj-fcjc.org/collaborations).**

The Action Committee would also like to thank members of its effective and efficient secretariat at the Department of Justice for Canada who have worked tirelessly to support the work of the Action Committee, the Steering Committee and the working groups.

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This report was prepared as part of the Action Committee's overall collaborative and consultative process, with direct guidance from the Steering Committee and in consultation with Mary Ellen Hodgins (on behalf of the Canadian public). Research and publication assistance was provided by the Canadian Forum on Civil Justice. The Action Committee has also relied heavily — and at times directly — on the reports of the Action Committee's four working groups.

Comments on this report can be sent to the Action Committee through the Canadian Forum on Civil Justice, online at: **<communications@cfcj-fcjc.org>**.

The Action Committee consists of senior representatives from many organizations in the justice system and a representative of the Canadian public, who share a commitment to working together to improve access to justice for the Canadian public. This report offers a general consensus on the issues discussed, but does not necessarily reflect the formal position of each of the respective organizations represented.

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ENDNOTES

[1]Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", citing the former Chief Justice of Ontario (remarks presented at Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

[2]As the Chief Justice of Canada recently acknowledged, "Regrettably, we do not have adequate access to justice in Canada." Rt. Hon. Beverley McLachlin, P.C., from "Forward" in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix. Similarly, according to Justice Thomas Cromwell: "By nearly any standard, our current situation falls far short of providing access to the knowledge, resources and services that allow people to deal effectively with civil and family legal matters. There is a mountain of evidence to support this view." Hon. Thomas A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach", Viscount Bennett Memorial Lecture, (2012) 63 U.N.B.L.J. 38 at 39.

[3]Melina Buckley, Plenary Address (Canadian Bar Association "Envisioning Equal Justice Summit: Building Justice for Everyone", Vancouver, 26 April 2013). See also Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, August 2013).

[4]See, for example, the following comments from Justice Thomas Cromwell:

> In general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court-centric" view of what this knowledge in these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view access to justice ... as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of what access to justice requires.

Hon. Thomas A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach", *supra* note 2 at 39.

[5]See e.g. Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall L.J. 773 at 777-779. See generally Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W.A. Bogart, Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19.

[6]Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 88.

[7]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 2, 10-12.

[8]Mary Bess Kelly, "Divorce cases in civil court, 2010/2011" (Ottawa: Minister of Industry, 28 March 2012) at 7-9, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.pdf> (this figure is based on marriages ending before a couple's 30th wedding anniversary). For a discussion of the public costs of family breakdown, see Rebecca Walberg and Andrea Mrozek, *Private Choice, Public Costs: How Failing Families Cost Us All* (Ottawa: Institute of Marriage and Family Canada, June 2009).

[9]Everyday legal problems — often termed "justiciable problems" — include a broad range of problems that might raise legal issues and/or might be addressed by way of legal solutions. See e.g. Hazel Genn *et al.*, *Paths to Justice: What People do and Think About Going to Law* (Oxford: Hart, 1999) at v-vi, 12, and generally c. 2. See further Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 5-6; Pascoe Pleasence *et al.*, *Causes of Action: Civil Law and Social Justice* (Norwich: Legal Services Commission, 2004) at 1. For a recent Australian study, see Christine Coumarelos *et al.*, *Legal*

Australia-Wide Survey: Legal Need in Australia (Sydney: Law and Justice Foundation of New South Wales, August 2012).

[10]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 23-26. More vulnerable groups include, for example, people who self-report as aboriginal, being part of a visible minority, disabled, or being on social assistance. See *ibid.* See further Pleasence *et al.*, *Causes of Action*, *ibid.* at 14-31.

[11]Currie, *The Legal Problems of Everyday Life*, *ibid.* at 23-25.

[12]See e.g. Pleasence *et al.*, *Causes of Action*, *supra* note 9 at 37-44; Currie, *The Legal Problems of Everyday Life*, *ibid.* at 49-51. See further Pascoe Pleasence *et al.*, "Multiple Justiciable Problems: Common Clusters and their Social and Demographic Indicators" (2004) 1 J. Emp. Legal Stud. 301.

[13]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 42-48.

[14]*Ibid.* at 73. See further Nigel J. Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems* (London: Public Legal Education Network, March 2010) at 25-26, 42-43. See further Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts* (Edmonton: Canadian Forum on Civil Justice, March 2006).

[15]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 33. See further Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *ibid.* at 20-21.

[16]See e.g. Currie, *The Legal Problems of Everyday Life*, *ibid.* at 88-89. See further Alexy Buck, Pascoe Pleasence and Nigel J. Balmer, "Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups" (2005) 39(3) Soc. Pol'y Admin. 302.

[17]See Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *supra* note 14 at 3 [citation omitted]. See further Pleasence *et al.*, *Causes of Action*, *supra* note 9. For current research on the cost of civil justice in Canada, see Canadian Forum on Civil Justice, "The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems", online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/cost-of-justice>.

[18]As the Chief Justice of Canada has further recognized, the "most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve." Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", *supra* note 1 [citation omitted].

[19]Mark D. Agrast *et al.*, *Rule of Law Index 2012-2013* (Washington, D.C.: The World Justice Project, 2012) at 27; Mark D. Agrast *et al.*, *Rule of Law Index 2011* (Washington, D.C.: The World Justice Project, 2011) at 23.

[20]*Rule of Law Index 2011*, *ibid.* at 23.

[21]Legal Aid Ontario, "Am I eligible for legal aid?", online: LAO <http://www.legalaid.on.ca/en/getting/eligibility.asp>.

[22]Legal Aid Alberta, "Accessing Legal Aid: Eligibility", online: LAA <http://www.legalaid.ab.ca/help/Pages/Eligibility.aspx>. In some cases certain limited advice may be available for individuals and families earning slightly more than these amounts. See *ibid.*

[23]Legal Aid Manitoba, "Who Qualifies Financially", online: LAM <http://www.legalaid.mb.ca/>.

[24]Legal Aid Saskatchewan, "Am I eligible for Legal Aid?", online" LAS <http://69.27.116.234/legal_help/eligible.php>.

[25]See e.g. Legal Aid Ontario, "Types of help", online: LAO <http://www.legalaid.on.ca/en/getting/typesofhelp.asp>.

[26]See Jamie Baxter and Albert Yoon, *The Geography of Civil Legal Services in Ontario*, Report of the mapping phase of the Ontario Civil Legal Needs Project (Toronto: The Ontario Civil Legal Needs Project Steering Committee, November 2011) at 63 [citation omitted], online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486236>.

[27]Charlotte Santry, "The Going Rate" (2013 Legal Fees Survey), *Canadian Lawyer* (June 2013) 33 at 34, online: <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2013/cljune13legalfees.pdf>.

[28]*Ibid.* at 36. As a general matter, a 3-day civil trial is often considered to cost overall in the range of $60,000 (or more depending on the amounts and issues involved). See e.g. Tracey Tyler, "A 3-day trial likely to cost you $60,000" *Toronto Star* (3 March 2007), online: <http://www.thestar.com/news/2007/03/03/a_3day_trial_likely_to_cost_you_60000.html>.

[29]For example, in the U.K., the cost of family law cases involving children reportedly increased by 71% between 1998 and 2003, while the average length of a family law case rose from 50 weeks in 1998 to 63 weeks in 2003. See Vicky Kemp, Pascoe Pleasence and Nigel J. Balmer, "Incentivising Disputes: The Role of Public Funding in Private Law Children Cases" (2005) 27 J. Soc. Welfare & Fam. L. 125 at 126. Indicators of rising costs and fees have also been reported in Australia and Canada. In Australia, see e.g. PricewaterhouseCoopers, *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law* (Australia: Legal Aid Queensland, 2009) at 15. One recent Canadian report indicates that "many [law firms] increased their legal fees in 2011 and 2012". See Santry, "The Going Rate", *supra* note 27 at 33. However, according to the same report, of those who responded, 56% plan to freeze their fees in 2013. See *ibid.*

[30]As the Chief Justice of Canada has recognized, "Among the hardest hit are the middle class. They earn too much to qualify for legal aid, but frequently not enough to retain a lawyer for a matter of any complexity or length. When it comes to the justice system, the majority of Canadians do not have access to sufficient resources of their own, nor do they have access to the safety net programs established by the government." Rt. Hon. Beverley McLachlin, P.C., from "Forward" in Trebilcock, Duggan and Sossin, eds., *Middle Income Access to Justice*, *supra* note 2 at ix.

[31]Russell Engler, "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about when Counsel is Most Needed" (2010) 37 Fordham Urban L.J. 37 at 40 (citing Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, updated report (Washington, D.C.: Legal Services Corporation, September 2009).

[32]See *supra* notes 6-17.

[33]See e.g. Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 55-56 and generally 55-67 and 88. Compare Ontario Civil Legal Needs Project, *Listening to Ontarians* (Toronto: Ontario Civil Legal Needs Project Steering Committee, May 2010) at 31.

[34]See e.g. Ontario Civil Legal Needs Project, *Listening to Ontarians*, *ibid.* at 32, 39-40; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) at 39, online: <http://www.representing-yourself.com/doc/report.pdf>. Compare Ipsos Reid Survey (2009) in Law Society of Alberta, "Most Albertans Satisfied with their Lawyers: Ipsos Reid Poll Shows" *The Advisory* 8:3 (June 2010) 7 at 8 ("Other Challenges in Resolving Legal Problems – Expected Cost"), online: LSA <http://www.lawsociety.ab.ca/files/newsletters/Advisory_Volume_8_Issue_3_Jun2010/PollCharts.pdf>; Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 56.

[35]See e.g. Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *supra* note 14 at 31-36. See further Hazel Genn *et al.*, *Tribunals for Diverse Users*, Department for Constitutional Affairs Research Series 1/06 (London: Department for Constitutional Affairs, 2006).

[36]Ab Currie, "Self-Helpers Need Help Too" (2010) [unpublished] at 1, available online: <http://www.lawforlife.org.uk/data/files/self-helpers-need-help-too-ab-currie-2010-283.pdf>. See also Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 14 (citing the number at 44%); Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *ibid.* at 14 (citing the number at closer to 34%).

[37]See e.g. Trevor C.W. Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, A White Paper for the Association of Canadian Court Administrators (Toronto and Edmonton: 27 March 2012) at 14-16. See also Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 34 at 33-35.

[38]See e.g. Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 U.N.B.L.J. 99 at 100; Canadian Bar Association, Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class" (Ottawa: Canadian Bar Association, February 2013) at 3-4 [citation omitted].

[39]Canadian Bar Association, Standing Committee on Access to Justice, "Toward National Standards for Publicly-Funded Legal Services" (Ottawa: Canadian Bar Association, April 2013) at 18, citing Russell Engler, "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9:1 Seattle J. for Soc. Just. 97 at 115, citing Rebecca Sandefur, "Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes" (26 March 2008) at 24. See further Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall L.J. 71 at 87 (reporting that in refugee cases, claimants represented by lawyers were 70.1% more likely to succeed than claimants represented by consultants, and 275% more likely to succeed than unrepresented claimants).

[40]Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37 at 46.

[41]Trevor C.W. Farrow, "What is Access to Justice?" Osgoode Hall L.J. (in progress), excerpts of which were featured as part of the opening plenary presentation at the Canadian Bar Association, "Envisioning Equal Justice Summit: Building Justice for Everyone", *supra* note 3. See also Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act, supra* note 3.

[42]This problem has been acknowledged and described by the Chief Justice of Canada as follows: "Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up." Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", *supra* note 1.

[43]As Justice Thomas Cromwell has observed, "I have serious concerns that we have hit the iceberg but are being too slow to recognize the seriousness of the damage.... [T]he problem is real and growing." Hon. Thomas A. Cromwell, Address in 66 *Bulletin* (Spring 2011) 22 at 23 (on the occasion of his induction as an Honorary Fellow of the American College of Trial Lawyers, Washington, D.C., 22 October 2011).

[44]Lawrence M. Friedman, "Is There a Modern Legal Culture?" (July 1994) 7:2 Ratio Juris 117 at 130.

[45]For a recent discussion on shifting culture in the legal profession, see Canadian Bar Association, Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013) at 29, 34 and 39.

[46]See Law Commission of Ontario, "Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice System" (Toronto, September 2009) at 11, online: LCO <http://www.lco-cdo.org/familylaw/Family%20Law%20Process%20Consultation%20Paper%20-%20September%202009.pdf>; Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37 at 28-30. See also generally Macfarlane, *The National Self-Represented Litigants Project, supra* note 34; Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, August 1996) at 17.

[47]See Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37 at 29.

[48]See generally Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report, supra* note 46 at 19.

[49]See *ibid.* at 76-78.

[50]According to the Chief Justice of Canada, "If we are to have any success in improving access, a coordinated, collaborative approach ... is necessary." Rt. Hon. Beverley McLachlin, P.C., from "Forward" in Trebilcock, Duggan and Sossin, eds., *Middle Income Access to Justice*, *supra* note 2 at x.

[51]See *supra* notes 4-5 and accompanying text.

[52]See *supra* pt.1.1 and *infra* notes 66-68 and accompanying text.

[53]For general discussions, see e.g. Coumarelos *et al.*, *Legal Australia-Wide Survey: Legal Need in Australia*, *supra* note 9 at 207-214. In Canada, see recently Canadian Bar Association, Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class", *supra* note 38 at 8-9.

[54]Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 9 [citations omitted], online: CFCJ <http://www.cfcj-fcjc.org/collaborations>. See further Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008) at sec. 6.7.

[55]Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report*, *supra* note 46 at 16.

[56]Farrow, "What is Access to Justice?", *supra* note 41.

[57]Macfarlane, *The National Self-Represented Litigants Project, supra* note 34 at 54 [citation omitted].

[58]*Ibid.* [citation omitted].

[59]See e.g. Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 3, online: CFCJ <http://www.cfcj-fcjc.org/collaborations>.

[60]Farrow, "What is Access to Justice?", *supra* note 41.

[61]*Ibid.*

[62]The Action Committee's approach to the use of development goals has been directly influenced by the United Nations Millennium Development Goals (see online: United Nations <http://www.un.org/millenniumgoals/>). The Millennium Development Goals "range from halving extreme poverty rates to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015" and are designed to "form a blueprint agreed to by all the world's countries and all the world's leading development institutions." See *ibid.* The Action Committee has benefitted from the work of Sam Muller and the Hague Institute for the Internationalisation of Law (HiiL). See e.g. HiiL, *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches*, Trend Report/Part 1 (The Hague: HiiL, 2012). For further examples of HiiL's work, see *infra* notes 157-158.

[63]Action Committee on Access to Justice in Civil and Family Matters, Final Working Group Reports, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/collaborations>.

[64]Much of the detail and analysis (and examples) that animate these innovation goals can be found in the four Action Committee working group reports (discussed further in the Acknowledgments section of this report).

[65]Much of the material in this section of the report is very much influenced by, and in some cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54.

[66]See *supra* pt.1.1.

[67]Ab Currie, "Self-Helpers Need Help Too", *supra* note 36 at 1. Compare earlier Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 9 (citing the number at 11.7%). See further Pleasence *et al.*, *Causes of Action*, *supra* note 9 at 96.

[68]As Australia's Attorney-General's Department recently acknowledged:

> "Courts are not the primary means by which people resolve their disputes. They never have been. Very few civil disputes reach formal justice mechanisms such as courts, and fewer reach final determination. Most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms. To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford...."

Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Australia: Attorney-General's Department, September 2009) at 3. Similarly, according to Marc Galanter:

> Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

Marc Galanter, "Justice in Many Rooms" in Mauro Cappelletti, ed., *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff; Brussels: Bruylant; Florence: Le Monnier; Stuttgart: Klett-Cotta, 1981) 147 at 161-162, cited in Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, *ibid.* at 3. It is important to recognize, however, that even in the context of informal mechanisms, the formal justice system - through the production of precedents as well as the potential recourse to its use - plays a significant influencing role. See e.g. Robert H. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

[69]See Farrow, "What is Access to Justice?", *supra* note 41.

[70]See Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54 at 5 and 10.

[71]See e.g. *ibid.* at 5-8.

[72]See e.g. Clicklaw, online: <http://www.clicklaw.bc.ca/>; Legalline, online: <http://www.legalline.ca/>. For a further discussion, see Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 8-10, online: CFCJ <http://www.cfcj-fcjc.org/collaborations>.

[73]For a discussion of innovations in e-learning, see Mohamed Ally *et al.*, *Expanding Access to Legal Services in Alberta through E-Learning* (Alberta: Alberta Law Foundation, November 2012).

[74]See e.g. B.C.'s Justice Access Centres and Family Justice Centres. Other provinces have similar initiatives.

[75]See e.g. Alberta Justice and Solicitor General's current initiative designed to explore opportunities for combining services in one location to coordinate and deliver comprehensive services to the community, with a particular focus on prevention and early resolution.

[76]For further specific examples of these various initiatives (and others), see Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54 at 6-8. See also Canadian Bar Association, Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class", *supra* note 38 at 7-9. For the kinds of services that are currently available (and also that are still needed), see e.g. Canadian Forum on Civil Justice, *Alberta Legal Services Mapping Project*, online: CFCJ <http://www.cfcj-fcjc.org/alberta-legal-services>; Carol McEown, *Civil Legal Needs Research Report*, 2d ed. (Vancouver: Law Foundation of British Columbia, March 2009); Baxter and Yoon, *The Geography of Civil Legal Services in Ontario*, *supra* note 26.

[77]See e.g. the B.C. Legal Services Society's initiatives in B.C.'s Women's Hospital and at a drop-in centre in Vancouver's Downtown Eastside, which provide a lawyer for a short period per week at each location who is available to give legal advice with respect to family law, child protection and other issues.

[78]See *supra* pt.1.1. For a useful discussion of multidisciplinary and collaborative approaches to service delivery, see Canadian Bar Association, Standing Committee on Access to Justice, "Future Directions for Legal Aid Delivery" (Ottawa: Canadian Bar Association, April 2013) at 24-28.

[79]See e.g. Unison Health and Community Services, online: <http://unisonhcs.org/>.

[80]See e.g. Community Legal Education Ontario, online: <http://www.cleo.on.ca/en>; Justice Education Society, online: <http://www.justiceeducation.ca/>; Ontario Justice Education Network, online: <http://www.ojen.ca/welcome>, and others.

[81]See e.g. Australia's "Foolkit", online: <http://www.foolkit.com.au/>.

[82]For further detailed discussions, see Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54 at 17-18, 22-25; Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group", *supra* note 72 at 5-8; Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 10-13, online: CFCJ <http://www.cfcj-fcjc.org/collaborations>.

[83]See e.g. Trevor C.W. Farrow, "Ethical Lawyering in a Global Community" 2012 Isaac Pitblado Lecture, (2013) 36:1 Man. L.J. 141.

[84]Much of the material in this section of the report is very much influenced by, and in some cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group", *supra* note 82.

[85]See e.g. Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act, supra* note 3.

[86]For a useful collection, see Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (September 2012) at 11, online: FLSC <http://www.flsc.ca/_documents/Inventory-of-Access-to-Legal-AccessLawSocietiesInitiativesSept2012.pdf>.

[87]See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended 12 December 2012) at c. 3.2-1.1. See further the various current limited scope retainer initiatives, including in Ontario and Alberta. The initiative in Alberta, for example, which involves Alberta Justice and Solicitor General, the Law Society of Alberta, Legal Aid Alberta, Pro Bono Law Alberta and the Calgary Legal Guidance Clinic, is a good example of cross sector collaboration and coordination. But see D. James Greiner *et al.*, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2013) 126 Harv. L. Rev. 901.

[88]See e.g. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services, supra* note 54 at sec. 7.6.

[89]See e.g. the various paralegal discussions, regulations and innovations in B.C., Alberta, Manitoba, Ontario and Nova Scotia, discussed in Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, supra* note 86 at 7-8.

[90]See e.g. *ibid.* at 2-8.

[91]Outsourcing involves a number of initiatives including subcontracting legal work to other domestic or off-shore lawyers and other service providers (often under the supervision of a lawyer). For a discussion of various outsourcing trends, see e.g. Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* (Santa Monica, CA: RAND Corporation, 2012) at 35-36. See further Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services, supra* note 54 at sec. 2.5.

[92]See e.g. Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, supra* note 86 at 8-10.

[93]See e.g. Law Society of Manitoba, Family Law Access Centre, online: LSM <http://www.lawsociety.mb.ca/for-the-public/family-law-access-centre>, which is designed to provide legal services primarily to middle income families. Other options include alternatives to billable hours, competitive tenders, fixed tariffs, etc. See Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, ibid.* at 16.

[94]See e.g. various initiatives and programs, including most extensively in Québec and also in B.C. and Ontario, discussed in Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, ibid.* at 13.

[95]For a recent discussion of pro bono initiatives and thinking, see Canadian Bar Association, Standing Committee on Access to Justice, "Tension at the Border: Pro Bono and Legal Aid" (Ottawa: Canadian Bar Association, October 2012). See further Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46 Osgoode Hall L.J. 131; Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *ibid.* at 14-16.

[96]See e.g. Law Society of Upper Canada, *Rules of Professional Conduct* (adopted 22 June 2000), rr. 2.04 (15)-(19), which can exempt, for example, short-term pro bono legal advice from typical conflicts of interest rules, which is particularly important for lawyers who practice with larger firms and in institutional settings whose clients may have conflicting interests with those of the clients involved in the short term retainers. This initiative is also a good example of the kinds of collaborations that can occur across sectors of the justice system - in this case with the Law Society of Upper Canada and Pro Bono Law Ontario. See also similar provincial initiatives elsewhere, for example, in B.C. and Alberta.

[97]See e.g. Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *supra* note 86 at 16-19.

[98]See e.g. Law Society of Manitoba, Family Law Access Centre, *supra* note 93.

[99]See e.g. *Law Society Act*, R.S.O. 1990, c. L.8 at s. 4.2.

[100]See Trevor C.W. Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall L.J. 51 at 96.

[101]See further *infra* note 149 and accompanying text. See generally Farrow, "Sustainable Professionalism", *ibid.*; Brent Cotter, "Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada" (2012) 63 U.N.B.L.J. 54; Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dal. L.J. 335; Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45 Alta. L. Rev. 107.

[102]See further *infra* pt.3.B.6.

[103]The specific legal services innovations discussed above, *supra* pt.3.A.2, should be actively considered and implemented by individual lawyers as well as law societies, bar associations and others.

[104]Much of the material in this section of the report is influenced by, and in some cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82.

[105]For a more detailed discussion of court-based innovations, see Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *ibid.*

[106]As Richard Zorza has argued: "Courts must become institutions that are easy-to-access, regardless of whether the litigant has a lawyer. This can be made possible by the reconsideration and simplification of how the court operates, and by the provision of informational access services and tools to those who must navigate its procedures." Richard Zorza, "Access to justice: The emerging consensus and some questions and implications" (2011) 94 Judicature 156 at 157.

[107]See *e.g.* American Bar Association, Report of the American Bar Association Working Group on Civil Justice System Proposals, *ABA Blueprint for Improving the Civil Justice System* (Chicago: ABA, 1992) at 36. See further Frank E.A. Sander, "Varieties of Dispute Processing" in A. Leo Levin and Russell R. Wheeler, eds., *The Pound Conference: Perspectives on Justice in the Future* (St. Paul: West, 1979) 65; Jeffrey W. Stempel, "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?" (1996) 11 Ohio St. J. Disp. Resol. 297.

[108]See Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82 at 13-17.

[109]For a detailed discussion of current court-based dispute resolution options, see Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *ibid.* at 13-17.

[110]See e.g. Montréal's Municipal Court, online: <http://ville.montreal.qc.ca/portal/page?_dad=portal&_pageid=5977,40497558&_schema=PORTAL>.

[111]See e.g. the newly developed B.C. Civil Resolution Tribunal, online: <http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/>.

[112]See e.g. Consumer Protection BC, which is an online dispute resolution service for consumer matters (developed in 2011 with funding from the B.C. Ministry of Justice). See Consumer Protection BC, online: <http://consumerprotectionbc.ca/odr>.

[113]See e.g. Property Assessment Appeal Board of B.C., online: <http://www.assessmentappeal.bc.ca/default.aspx>.

[114]Rt. Hon. the Lord Neuberger of Abbotsbury, quoted in Catherine Baksi, "Neuberger defends judges' right to speak out on cuts" *The Law Society Gazette* (19 June 2013), online: <http://www.lawgazette.co.uk/news/neuberger-defends-judges-right-speak-out-cuts?utm_source=emailhosts&utm_medium=email&utm_campaign=GAZ+19/06/2013>.

[115]See e.g. Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 34; Farrow, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37.

[116]For example, in Québec, the Montréal Bar has prepared a best practices guide for litigation. In Newfoundland and Labrador, there are various booklets available both at the courts and in the Public Legal Information Association's office on a range of legal topics. In Ontario, the Ministry of the Attorney General has created several self-help guides that clarify procedures under the family court rules. Additionally, LawHelp Ontario (a pro bono Ontario project) provides various information booklets and how-to manuals for self-represented litigants.

[117]In Alberta, for example, Law Information Centres provide information about general court procedures and Family Law Information Centres employ staff members who provide advice regarding family law procedures.

[118]See Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82 at 17-19.

[119]See e.g. Court of Queen's Bench of Alberta, Notice to the Profession, "Case Management Counsel Pilot Project", NP#2011-03 (30 September 2011), online: Alberta Courts <http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=liayJcjYAbI%3D&tabid=92&mid=704>.

[120]See e.g. the Québec Superior Court initiative that uses a panel of judges who encourage early reconciliation and conciliation and, if necessary, the use of simplified procedures for various matters including latent defects, inheritance issues, property boundary issues, etc.

[121]For examples of jurisdictions with e-filing options, see Superior Court and Court of Appeal in British Columbia, the Court of Appeal in Alberta, the Superior Court in Newfoundland and Labrador (in estate matters), and the Federal Court of Canada.

[122]For example, B.C. Court Services Online is an electronic service that provides electronic searches of court files, online access to daily court lists and e-filing capacity. For its part, the Alberta Court of Appeal has a practice direction that supports e-appeals if both parties consent or if the court makes such an order.

[123]See e.g. the real time court order initiatives in provincial court - civil in Edmonton and Calgary.

[124]See e.g. Alberta Justice and Solicitor General's Technology Assisted Mediation program, developed in 2009, which parties can now attend via Skype.

[125]See e.g. *Paiva v. Corpening*, 2012 ONCJ 88. See further Justice Québec, "Justice Access Plan", online: <http://www.justice.gouv.qc.ca/english/ministre/paj/index.htm> (last updated 24 April 2012).

[126]For example, the Superior Court in Nova Scotia employs a communications director to answer questions from the general public and the media. Further, the Supreme Court of Canada, for example, is now on Twitter. See Supreme Court of Canada, online: <http://twitter.com/#!/scc_csc>.

[127]See Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82 at 19-20. For a discussion on current and future court simplification initiatives in the U.S., see Richard Zorza, "Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation" (2013) 61 Drake U. L. Rev. 845. See generally Trevor C.W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, forthcoming) at cc. 6-7.

[128]See e.g. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998), online: CJC <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

[129]Much of the material in this section of the report is very much influenced by, and in many cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 59.

[130]For general discussions, see *ibid.* See also Law Commission of Ontario, *Towards a More Efficient and Responsive Family Law System*, Interim Report (Toronto: Law Commission of Ontario, February 2012); Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, Final Report (Toronto: Law Commission of Ontario, February 2013).

[131]See Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 59 at 3-4.

[132]See *ibid.* at 36-38.

[133]See *ibid.* at 3.

[134]See *ibid.* at 25-26.

[135]See e.g. *ibid.* at recs. 5, 7, 9, 12 and 17.

[136]See e.g. Canadian Bar Association - B.C., "Best Practice Guidelines for Lawyers Practicing Family Law" (18 June 2011), online: <http://www.cba.org/bc/bartalk_11_15/pdf/best_practice_guidelines.pdf>.

[137]See Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 59 at e.g. recs. 19-27. The Working Group Report sets out a comprehensive list of reform initiatives. Only a few highlights are given here.

[138]See e.g. *ibid.* at recs. 29-31.

[139]See *supra* pt.2.2.

[140]See e.g. Northern Access to Justice Committee, *Final Report* (Saskatchewan: Ministry of Justice and Attorney General, September 2007), online: Government of Saskatchewan <http://www.justice.gov.sk.ca/Final-Report-Northern-Access-to-Justice.pdf>. See recently the Law Society of Nunavut's Territorial Access to Justice Committee, which it started in 2011, discussed further in Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *supra* note 86 at 11. See generally Chief Justice Karla M. Gray and Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions* (Summer 2008) 47:3 Judges' J.; Access to Justice Partnerships, "State Access to Justice Tools - Access to Justice Checklist" (Washington, National Legal Aid and Defender Association), online: <http://www.nlada.org/DMS/Documents/1117200283.21/>.

[141]Examples include judicial associations, court administrators, government departments, public interest groups and advocacy organizations, legal aid plans, community clinics and service providers, civil and family rules committees, libraries and information providers, public legal educators, family law specialists, NGOs, academics and researchers, various cultural communities with particular justice interests and/or challenges, members of the bar, paralegals and other service providers, legal insurers and the like.

[142]See e.g. John P. Kotter, "Accelerate!", *Harv. Bus. Rev.* (November 2012) 1 at 10. See earlier John P. Kotter, "Leading Change: Why Transformation Efforts Fail", *Harv. Bus. Rev.* (March-April 1995) 1 at 62-63.

[143]See e.g. Ontario Civil Legal Needs Project, "Listening to Ontarians" and Baxter and Yoon, "The Geography of Civil Legal Services in Ontario", *supra* notes 33 and 26; Canadian Forum on Civil Justice, *Alberta Legal Services Mapping Project*, *supra* note 76.

[144]See further *infra* note 157.

[145]See e.g. Nova Scotia Barristers' Society, Justice Sector Liaison Committee and Access to Justice Working Group; Law Society of Upper Canada, Access to Justice Committee; Federation of Law Societies of Canada, Standing Committee on Access to Legal Services, etc.

[146]See e.g. Canadian Bar Association, Access to Justice Committee.

[147]An example of an organization that could play this role is the Canadian Forum on Civil Justice, which was created largely for a similar purpose following the Canadian Bar Association's earlier review of Canada's systems of civil justice. See Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report*, *supra* note 46 at 76-78.

[148]For a recent discussion on the importance of national standards for access to justice, see Canadian Bar Association, Standing Committee on Access to Justice, "Toward National Standards for Publicly-Funded Legal Services", *supra* note 39.

[149]For a discussion of this shift in focus, see e.g. Farrow, "Ethical Lawyering in a Global Community", *supra* note 83. For recent national regulatory approaches, see Task Force on the Canadian Common Law Degree, *Final Report* (Ottawa: Federation of Law Societies of Canada, October 2009), online: FLSC <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf>; Common Law Degree Implementation Committee, *Final Report* (Ottawa: Federation of Law Societies of Canada, August 2011), online: FLSC <http://www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf>.

[150]Discussed further *supra* at pt.3.A.4.4.

[151]See e.g. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 224-232; Farrow, "Sustainable Professionalism", *supra* note 100 at 100-102.

[152]See e.g. Farrow, "Ethical Lawyering in a Global Community", *supra* note 83.

[153]See e.g. Law Society of Upper Canada, "Continuing Professional Development Overview", online: LSUC <http://www.lsuc.on.ca/For-Lawyers/Improve-Your-Practice/Education/Continuing-Professional-Development-Overview/>, as well as other recent provincial continuing professional development ethics requirements. For a general collection, see Stephen G.A. Pitel and Trevor C.W. Farrow, eds., Special Feature - "Life Long Learning in Professionalism" (2010) 4 Can. Legal Ed. Annual Rev. 1-117.

[154]Farrow, "What is Access to Justice?", *supra* note 41.

[155]See e.g Law in Action Within Schools, online: LAWS <http://www.lawinaction.ca/>.

[156]See further *supra* pt.3.A and *infra* pt.3.C.8. See also Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *supra* note 86 at 10-11.

[157]See e.g. HiiL, *Scenarios to 2030: Signposting the legal space for the future* (The Hague: HiiL, 2011); Sam Muller *et al.*, *Innovating Justice: Developing new ways to bring fairness between people* (The Hague: HiiL, 2013). For a recent innovation initiative in Canada, see the Winkler Institute for Dispute Resolution, which is being developed at Osgoode Hall Law School, and which is "devoted to innovation, research, education and the creative practice of methods of dispute resolution through mediation, arbitration and the traditional court system." Winkler Institute for Dispute Resolution, online: <http://winklerinstitute.ca/>.

[158]See e.g. Law and Justice Foundation of New South Wales, "What Works?" research program, online: <http://www.lawfoundation.net.au/ljf/app/&id=7B11620ED3302A0CCA257464001880F4>. See further Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works*, Final Report and Recommendations (London: Nuffield Foundation, November 2006). An example of this kind of innovative research is the Canadian Forum on Civil Justice multi-year collaborative research project, ***"The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems"***, *supra* note 17. See further Maurits Barendrecht *et al.*, *Strategies Towards Basic Justice Care for Everyone* (The Hague: HiiL, 2012) at 17.

[159]For a recent discussion on the importance of metrics in the context of access to justice, see Canadian Bar Association, Standing Committee on Access to Justice, "Access to Justice Metrics: A Discussion Paper" (Ottawa: Canadian Bar Association, April 2013). See further Martin Gramatikov *et al.*, *A Handbook for Measuring the Costs and Quality of Access to Justice* (Apeldoorn, The Netherlands: Maklu, 2009).

[160]For a recent study on costs and the civil and family justice system, see Canadian Forum on Civil Justice, "The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems", *supra* note 17.

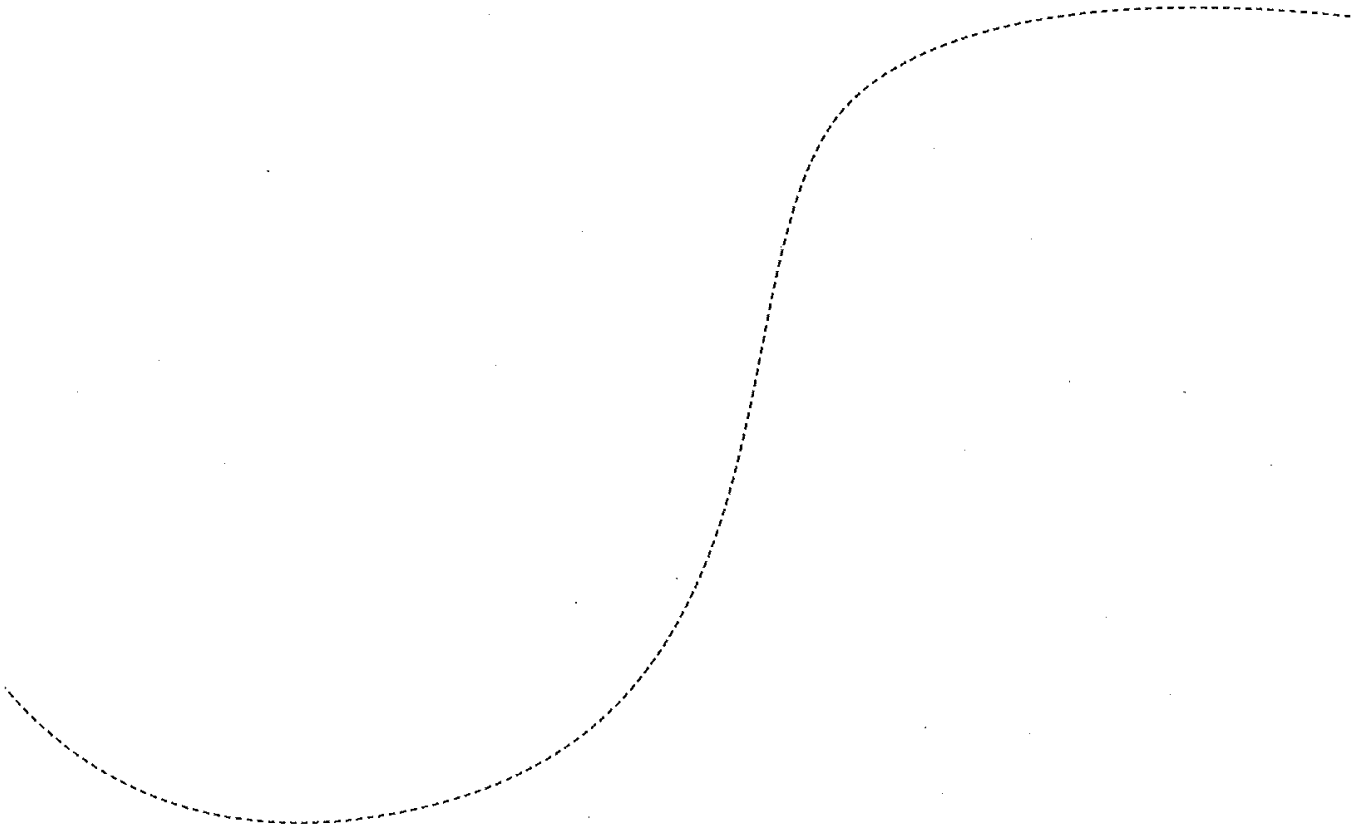
[161]For example, according to one Australian study in the specific context of family cases, legal aid assistance in relation to courts and dispute resolution services demonstrated a positive efficiency benefit for the justice system. Specifically, these benefits reportedly outweighed the costs of providing the services in a range from a return of $1.60 to $2.25 for every dollar spent. See PricewaterhouseCoopers, *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, *supra* note 29 at ix and c. 5. According to a different U.S.-based study, the return on investment for every $1 spent on civil legal aid funding was as high as $6. See Public Welfare Foundation, "Natural Allies: Philanthropy and Civil Legal Aid" (Washington, D.C.: Public Welfare Foundation and the Kresge Foundation, 2013) at 3, online: Public Welfare Foundation <http://www.publicwelfare.org/NaturalAllies.pdf> [citation omitted]. See further John Greacen, *The Benefits and Costs of Programs to Assist Self-Represented Litigants, Results from Limited Data Gathering Conducted by Six Trial Courts in California's San Joaquin Valley*, Final Report (San Francisco: Judicial Council of California, Administrative Office of the Courts, Centre for Families, Children and the Courts, 3 May 2009).

[162]For example, according to a recent U.S. study, money spent on civil legal assistance for protecting against domestic violence had a significant positive protective outcome. It also had a significant collective economic impact, reportedly saving costs for the Interest on Lawyers Account Fund of New York State for medical care, lost wages, police resources, counseling for affected children, etc., in the amounts of $6 million in 2009 and $36 million over the years 2005-2009. See the Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* (New York: State of New York Unified Court System, 23 November 2010) at 25-26. For other reports, see e.g. Jonah Kushner, *Legal Aid in Illinois: Selected Social and Economic Benefits* (Chicago: Social IMPACT Research Center, May 2012); Laura K. Abel, "Economic Benefits of Civil Legal Aid" (National Center for Access to Justice at Cardozo Law School, 4 September 2012); Laura K. Abel and Susan Vignola, "Economic Benefits Associated with the Provision of Civil Legal Aid" (2010-2011) 9 Seattle J. Soc. Just. 139; Maryland Access to Justice Commission, *Economic Impact of Civil Legal Services in Maryland* (Maryland: Access to Justice Commission, 1 January 2013); The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (Waco, TX: Perryman Group, February 2009). For a useful discussion of these and other studies, see Canadian Bar Association, Standing Committee on Access to Justice, "Future Directions for Legal Aid Delivery", *supra* note 78 at 9-11.

[163]The Canadian Forum on Civil Justice, "*The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems*" research project, *supra* note 17, is considering potential allocation issues related to various costs of civil and family justice.

[164]According to Justice Thomas Cromwell, "We have a window of opportunity that comes along quite rarely. Let's not blow it." Hon. Thomas A. Cromwell, quoted in Jeremy Hainsworth, "'Window of opportunity' closing to fix country's access to justice" *The Lawyers Weekly* (10 May 2013), online: Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&articleid=1895>.

Convocation - Report of the Treasurer's Advisory Group on Access to Justice Working Group



Action Committee on
Access to Justice in
Civil and Family Matters

reaching equal justice report:
an invitation to envision and act

equaljustice
balancing the scales

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

reaching equal justice report:
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reaching equal justice:
an invitation to envision and act

Report of the CBA Access to Justice Committee

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

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An invitation to envision and act

Dear Colleagues,

A moment of opportunity is at hand: a moment created by a broad consensus on the need for significant change to improve access to justice, and an evolving consensus on the central directions for reform. This report is an invitation to act, to seize that opportunity. Each of us has a responsibility to contribute to our shared vision of equal access to justice across Canada, from sea to sea to sea.

The term **we** refers to all of us, to affirm the important role and obligation of all justice system stakeholders, including the public, to contribute to equal justice. To refer to the authors, members of the Canadian Bar Association (CBA) Access to Justice Committee, **the Committee** is employed.

Our understanding of the prevalence of legal problems and the severe and disruptive impact of unresolved legal problems has grown exponentially over the past two decades. But we have yet to fully translate that knowledge into action. Many organizations are dedicating a tremendous amount of energy and limited resources to new approaches to improve access to justice. Still, we have been unable to knit this work together to make substantial gains.

I sense here a tremendous level of commitment to making meaningful change in access to justice. That deep commitment is necessary because this will take long term sustained effort. I was reminded recently that Martin Luther King's famous speech did not start with "I have a plan". Of course he had a plan but he first needed to persuade people that change was needed and that things could get better. I hope we leave here with a shared sense of the dream and a commitment to do what we can to make it come true… we need a shared understanding of what success would look like.

So I ask: Is there a widespread firm belief that there is an urgent need for significant change? Do we have the dream and is it widely shared? If not, I doubt we will accomplish very much.

Justice Thomas Cromwell
Keynote Speech at CBA Envisioning Equal Justice Summit
April 2013

To mobilize and take advantage of this moment, we first need to convey the abysmal state of access to justice in Canada today. We need to make visible the pain caused by inadequate access and the huge discrepancies between the promise of justice and the lived reality of barriers and impediments. Inaccessible justice costs us all, but visits its harshest consequences on the poorest people in our communities. We need to illuminate how profoundly unequal access to justice is in Canada. We cannot shy away from the dramatic level of change required: in a very fundamental sense we live in "a world thick in law but thin in legal resources".[1] We need to radically redress this imbalance.

This report and the summary report published last summer provide a strategic framework for action, to set a new direction for the national conversation on access to justice. They are meant to present our current state of knowledge about what is wrong, what types of changes are essential, and the steps and approaches we might take to overcome barriers to equal justice. The objective is to bring together and render the key ideas concrete, to enable and encourage action.

Both reports are designed to engage, rather than dictate or provide 'the answer'. The goal is to enlarge and change the conversation about access to justice to invite and inspire action.

Our greatest challenge is to simultaneously focus on individual innovations and the broader context of the interdependence of all aspects of access to justice. Collaboration works best when based on a shared understanding of the problem and a shared vision of the end goals. Our central animating principle must be envisioning a truly equal justice system, one that provides meaningful and effective access to all, taking into account the diverse lives that people live.

We have a lot of work to do and that work needs to be shared over a broader segment of the legal profession and other justice system personnel than are currently engaged in the access project. While there are some signs of exhaustion, regeneration is in the air. At the CBA Envisioning Equal Justice Summit in April 2013,[2] we witnessed and participated in a radically different conversation, an energized and optimistic conversation about equal access to justice. The reports build on this important breakthrough.

We are poised to make gains at this juncture, but need to travel a little farther for the momentum already achieved to become an irresistible force and take over. As Justice Cromwell of the Supreme Court of Canada said in his Keynote Address at the Summit, this is a critical moment.

The CBA has already pledged to take action and continue to play its role in contributing to equal access to justice. Members of the Committee have taken this on as a personal challenge

[1] Gillian K Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37 Fordham Urban Law Journal 129 at 151.

[2] The CBA Committee held the Envisioning Equal Justice Summit in April 2013 in Vancouver, a national event bringing together over 250 people working for equal justice from every province and territory, as well as international guests.

and we urge you to join us. The challenge is to each think of our roles in the justice system more expansively, each working to produce the best possible results for our individual clients, the individual case, in our association or institution, and simultaneously working to produce the best possible justice system. In a riff on the idea of thinking globally, acting locally, the Committee asks you to **think systemically, act locally.**

Though we are all busy, we can integrate this change in perspective, to work simultaneously on the matter at hand while contributing to broader systemic goals. At first this may appear to conflict with our professional duties to give one hundred percent to the individual client or matter. Yet we know that zero-sum thinking is almost always false: few situations are truly either/or. For lawyers, this challenge can be seen as an extension of our professional duty as officers of the court. By thinking systemically and acting locally, we can create real space for justice innovation.

Rather than simply reading this report, the Committee asks you to engage with it. Consider the targets proposed and the change-oriented ideas and ask yourself: **what can *I* do, either myself or working with others, to contribute to equal access to justice?** Every contact between an individual and the civil justice system is an opportunity for either disempowerment or empowerment, a moment to reinforce inequality and social exclusion or to create equality and inclusion.

As craftily stated in a slogan brainstormed during the Summit's closing plenary, we need to just(ice) do it!

Thank you,
CBA Access to Justice Committee

Introduction

Through the Equal Justice Initiative, the CBA Access to Justice Committee considers four systemic barriers that are blocking efforts to reach equal justice and proposes means to overcome them. The barriers are:

- Lack of public profile
- Inadequate strategy and coordination
- No effective mechanisms for measuring change
- Gaps in our knowledge about what works and how to achieve substantive change

The initiative focuses on human justice, on people law – legal issues, problems and disputes experienced by people (including small businesses), especially those that involve essential legal needs. We understand *essential legal needs* to be those arising from legal problems or situations that put into jeopardy the security of a person or that person's family's security – including liberty, personal security, health, employment, housing or ability to meet the basic necessities of life and extending to other urgent legal needs. Of course, the justice system has an impact on corporations, organizations and institutions, and access issues can arise for these bodies as well, but they are outside of the scope of this report.[3]

The Equal Justice Initiative focuses for the most part on the civil justice system, touching only indirectly on criminal law matters. The Committee recognizes that reaching equal justice engages both civil and criminal justice issues and the interconnection between the two. The focal point is on non-criminal matters because substantive change in the civil justice system has a particular urgency and timeliness, and current initiatives in this area are especially fragmented and under-resourced. There is no hard and fast dividing line, however, and some proposals made here are also relevant to the criminal justice system.

[3] The CBA Legal Futures Initiative considers some of these broader issues.

Learn More: about the Equal Justice Initiative

See Part IV of this report for a project description, acknowledgements of the many individuals and organizations who contributed, and Committee members' reflections.

This report sets out the Committee's proposed strategic framework for reaching equal justice. Based on research and consultations, the framework contains a series of 'targets' reflecting an emerging consensus on what must be done in 31 key areas. The targets are framed as measurable, concrete goals to be achieved at the latest by 2030. Inspired by other multi-sectoral change movements, including the United Nations Millennium Development Goals and approaches used by the environmental movement, the Committee decided to set long range targets for achieving equal justice across Canada. One strong factor influencing this decision is that time will be required to build capacity to evaluate whether reforms work. Part of the change process is increasing our shared capacity for learning and adaptation. The Committee proposes specific timelines for each target, but recognizes that the time needed will differ across regions – certain targets will be more easily achieved in some places than others.

Each target includes milestones (interim goals), as well as actions that can begin right now. The milestones and actions are indicative rather than comprehensive, a starting point rather than a detailed guide. They propose a way forward, recognizing that more detail is required and should be developed over time by those working most closely on the particular target.

While different organizations and individuals may debate the specifics, the targets reflect what the Committee understands to be a general consensus among those working for equal justice as to the

type of action required. Achieving these targets will require individual, coordinated and collaborative efforts – no target falls to a sole justice system player.

This report also gathers together what the Committee has learned over the course of its Initiative and shares it with all individuals and organizations engaged in justice innovation and committed to equal justice. It is a resource for the implementation process, providing background information and detailed discussion relevant to each target. Wherever practicable, it includes examples of emerging good practices and insights from research and evaluations, as well as links to further information.

A summary version of this report was tabled in August 2013 at the CBA Canadian Legal Conference in Saskatoon.

The Committee solicits feedback to these proposals and looks forward to an active and engaged dialogue. At the end of each section is a link to provide your feedback on the targets, milestones and actions, your suggestions on specific innovations and ideas, and your commitment to become involved on the issues on which you are especially passionate. **Please join the conversation and take action!**

> We have a window of opportunity that only comes along rarely - to put it simply, let's not blow it.
>
> ***Justice Thomas Cromwell, Keynote Speech at CBA Envisioning Equal Justice Summit, April 2013***

The Committee's work complements the work of the National Action Committee on Access to Justice in Civil and Family Matters (National Action Committee). Under the stewardship of Justice Thomas Cromwell, the National Action Committee has created a strong awareness of the need for change. Its working group reports have identified a large range of initiatives that have potential for increasing access to justice. The National Action Committee final report provides additional overall guidance, especially on implementing these suggested reforms. The CBA is a member and supporter of the National Action Committee process. Like all members, the CBA has an obligation to contribute what it can. It is anticipated that both the National Action Committee and CBA reports will assist in making the most of this critical opportunity to achieve the substantive change needed to reach equal justice across Canada.

Contemporaneous to the CBA Equal Justice Initiative is the CBA Legal Futures Initiative, a comprehensive examination of the future of the legal profession in Canada. It examines business structures and innovations, legal education and training and ethics and regulation of the profession. Its mandate is to develop original research, consult widely with the profession and other stakeholders and ultimately create a framework for ideas, approaches and tools to assist the legal profession in adapting to future changes. The Legal Futures Initiative identifies access to justice as a foundational value underlying its work.

Recognizing the Power of Words

Words are the tools of the justice system's trade, yet finding the right words is not always easy. This is especially true in choosing words to refer to groups of people. We often refer to people involved in the justice system as 'clients' or 'users,' but the Committee has opted to instead employ 'people' wherever feasible to avoid reducing the individual's role in the justice system to a passive category of recipient of services.

A particular challenge is finding an elegant, inclusive way to refer to groups of people who have been or continue to be excluded from systems, structures and institutions, including the justice system. It is difficult to find language that recognizes the diversity of identity, experience and social situation without creating an 'us-them' distinction, or, alternatively, ignoring the reality of different needs, capacities and perspectives. It is important to recognize this tension between language that is inclusive and language that reinforces disadvantage. Our approach is to use the phrase "people living in marginalized conditions"

or "situations of disadvantage". While not a perfect solution, nor one that always works in constructing intelligible sentences, it reflects the Committee's intention to show respect by separating the person, who is always a person, from the social and economic situation in which they live, while recognizing that this situation can and often does have an impact on their justice system experiences.

In the report, particularly in the proposed targets, the Committee uses the term "Canadians" to refer to all people living in Canada regardless of their citizenship status.

PART I
why change is necessary

Why change is necessary

Public confidence in the justice system is declining.[4] This was apparent during the consultation phase of the CBA Envisioning Equal Justice Initiative.[5] People interviewed randomly 'on the street', and in meetings with marginalized communities consistently described the justice system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people. The Committee's findings are not unique. Two recent surveys of people who represented themselves in civil courts concluded that the experience usually led to reduced confidence in the justice system[6] as have other public consultations over the past few years.[7]

While there is generally low public awareness about legal aid, opinion polls have shown that when asked more detailed questions, people express strong and consistent support for providing adequate publicly funded legal aid. Polls have shown overwhelming support (91-96%), with 65-74% expressing the view that legal aid should receive the same funding priority as other important social services.[8] Canadians believe justice systems must be accessible to all to be, in fact, just – and publicly funded services are required to get to equal justice. The current lack of confidence in our justice system suggests instead a perception that justice is inaccessible and even unfair.

People's Perceptions and Experiences of the Justice System Today

Our change strategies and priorities must be grounded in people's experiences of the justice system today. Amanda Dodge pointed out in her presentation at the CBA's Envisioning Equal Justice Summit[9]: "when we gather to dialogue and strategize about increasing access to justice, if we do so without listening to the voices of those we are trying to serve, we risk developing ineffective measures, as well as the legitimacy of our efforts."

This report reflects the Committee's commitment to a people-centered justice system by bringing in the public voice from the outset. The nine 'stories' in this section illustrate typical experiences with the justice system. The stories are composites of many people's experiences, rather than exact events experienced by a particular person. They allow us in some small way to "come face to face with the anxiety and desperation of ordinary citizens who look to our legal system for their fair share of decent treatment."[10] The stories highlight the complex nature of legal problems and deeply rooted underlying causes. They show non-legal dimensions of the situation that often exist prior

4 See, for example: Julian Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends (2004-2005)* (report prepared for Public Safety and Emergency Preparedness Canada, 2004); see also, www.angus-reid.com/polls/47831/most-canadians-dissatisfied-with-the-state-of-the-justice-system/; and www.angus-reid.com/polls/48758/british-columbians-dissatisfied-with-current-state-of-justice-system/.

5 To benefit from the views of people living in marginalized conditions, the Committee held regional consultations with community organizers familiar to those communities. It also worked with Pro Bono Students Canada and law student volunteers to approach people randomly on the street, in different parts of the country, with similar questions. See paper prepared by Amanda Dodge for the CBA Envisioning Equal Justice Initiative, for a summary of the input received from regional consultations regional consultations (Ottawa: CBA, 2013): www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf

6 See, Rachel Birnbaum, Nick Bala, Lorne Bertrand, "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants" (2013) 91 Canadian Bar Review 67(Birnbaum study); Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) (Macfarlane study).

7 See, for some examples: www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf; www.legalaid.on.ca/en/news/June-2006b.asp; and www.legalaid.ab.ca/media/Documents/2006/LegalAidAlberta_NewsReleaseNov2006.pdf.

8 See: www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf.

9 *Supra* note 2.

10 Laurence H Tribe, Senior Counselor for Access to Justice, US Department of Justice, *Keynote Remarks at the Annual Conference of Chief Justices* (Vale CO: July 26, 2010).

to contact with the justice system but which must also be confronted. Recent consultation reports and studies have confirmed the widespread nature of barriers to meaningful access to the justice system, but nothing is more compelling than stories like those happening to real people every day.

This section also summarizes consultations: these include the Committee's focus group consultations with people living in marginalized conditions; 'on the street' interviews organized by the Committee and those conducted in a separate initiative of the Canadian Forum on Civil Justice. Altogether, 161 people participated in the CBA sessions. In addition, the findings from two recent studies of people who represented themselves in civil courts are reviewed.

Consultations with People Living in Marginalized Conditions

As part of the CBA's Envisioning Equal Justice Initiative, the Committee worked with community partners in Calgary, Saskatoon, Toronto, Montreal and the Maritimes to hold 13 consultation sessions. These focus group sessions were held exclusively with people living in marginalized conditions: low-income adults and youth; racialized groups; single mothers; and people with disabilities. The conversations focused on two questions: what happens when access to justice is denied and what happens when it is afforded. The results were profound and often shocking, and sadly replicate the perspectives, experiences and themes heard in other recent public hearings and town hall sessions in Ontario, Manitoba and British Columbia.[11]

The consultation outcomes are reported under four themes of what the Committee heard: legal rights are just on paper; justice systems cannot be trusted; justice is person-dependent, and justice systems are difficult to navigate.

[11] See Dodge, *supra* note 5. For the townhall sessions, see Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (Toronto: OBA, 2007); Manitoba Bar Association, *Town Hall Meeting on Access to Justice: Report and Summary* (Winnipeg: MBA, 2011): www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf; L.T. Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: March 2011).

Learn More: Perceptions of (In)Justice - What we heard

- Legal Rights are Just on Paper
- Justice Systems Cannot Be Trusted
- Justice is Person-Dependent
- Justice Systems are Difficult to Navigate

Legal Rights are Just on Paper

> "It always feels like, oh, that's the law and there's nothing you can do about it." ***Aboriginal woman, Saskatoon***
>
> "It's just too hard; I guess all you can do is pray." ***Aboriginal woman, Saskatoon***
>
> "Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything." ***Single mother, Moncton***
>
> "To me, legal rights are an unfulfilled promise." ***Person with disability, Toronto.***

The vast majority of community members acknowledged that the law affords rights and protections, but felt those rights and protections were not honoured or accessible. When asked about legal rights, most participants stated plainly that they did not feel they had any legal rights.

It seemed that as a person's marginalization increased, so did the distance to being able to enforce their legal rights. The primary barrier to feeling as though one could access legal rights was, not surprisingly, a lack of financial resources.

Community members identified many other barriers to accessing legal rights and protections. Commonly mentioned were literacy and language barriers, disabilities (both physical and mental), racial discrimination and level of education. Lack of knowledge seemed to be the greatest initial hurdle to enforcing legal rights. Lack of knowledge and

information also aggravated the *emotional impact* of going through justice processes.

The community members recognized that impediments sometimes depend on the individual. They pointed to certain personality characteristics, like tenacity, or attitudes, such as optimism, as determinative of whether someone would pursue legal rights and protections.

When community members were asked whether the law would protect them from abuses of power, or hold a person in authority accountable for breaking the rules, the most common response was to *laugh out loud*. They pointed to significant barriers to holding authority figures to account: they did not know how to make a complaint; they did not know where to go; there was not enough information about how to do it; they did not think they would be believed or taken seriously; they thought they would be intimidated and made to feel stupid; and they were afraid.

Justice Systems Cannot Be Trusted

> "If you believe in the system and think it will help you, you'll get burned." ***Aboriginal woman, Saskatoon***
>
> "Justice is to protect us, not to abuse us. It has been used to overpower or manipulate us." ***Aboriginal woman, Saskatoon***
>
> "I feel intimidated and bullied by the legal system." ***Domestic violence survivor, Calgary***

A strong message heard throughout the consultations is that, inherently, the system is untrustworthy and broken. Several people reported feeling betrayed and abused by the justice system.

The brokenness of the system was evident in the frustrations expressed by community members. Both parties to disputes and adjudications reported that the systems had failed them: offenders and victims, applicants and respondents. Neither side felt the system was fair or had worked for them. There was a sense that they had to find justice on their own.

Excessive and harmful delay was often cited as a frustration. The system itself creates delay. Community members described having to attend court for repeated adjournments, to wait many months to be heard in court, to miss work for repeated court appearances and to wait for legal aid's help. Delay is a frustrating barrier to enforcing legal rights and attaining some measure of justice.

Second, delay is created by community members' lack of information. Insufficient guidance wastes their time. Often the delay is harmful, leading to negative consequences in other areas of their lives.

Some community members defined justice as the right to be heard. Many reported that they were not afforded an opportunity to tell their stories. Even when they did get a chance to tell their story, they often felt they were not believed or taken seriously.

One clear concern was that the justice system does not recognize or understand the social and personal realities of the people living in marginalized conditions progressing through it.

This results in other sorts of problems. One, the system and its actions actually perpetuate or aggravate the problems that got people involved in the system initially.

The second problem created by the system's ignorance of the social and personal realities of people living in marginalized conditions is that it has a "spiraling and multiplying"[12] effect, so

[12] Doust, *ibid* at 21. The feedback outlined in this section is also supported by recent academic research on civil legal needs. See, Ab Currie, "Legal Problems of Everyday Life" in Rebecca Sandefur, ed, *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009); Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006); Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (2006) 13:3 International Journal of the Legal Profession 217; Legal Services Corp, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, DC: Legal Services Corporation, 2005); Carol McEown, *Civil Legal Needs Research* (Vancouver: Law Foundation of British Columbia, 2008); Pascoe Pleasence, Nigel Balmer, Tania Tam, Alexy Buck and Marisol Smith, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Legal Needs Study* (London: Legal Services Commission, 2008); Legal Services Agency, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, New Zealand: Legal Services Agency, 2006); Ipsos Reid for the Legal Services Society, *Legal Problems Faced in Everyday Lives of British Columbians* (Vancouver: LSS, 2008).

Eugene's story

At thirty years of age, Eugene lives in a bachelor apartment in northern British Columbia. He is schizophrenic, a disabling medical condition that is hard to control even with medication, and he cannot hold a job. He receives income assistance from the provincial government but his rent subsidy is not enough, as rent is high and there are few rental units in town. He dips into his food budget for rent, and then goes to the food bank.

Eugene hasn't seen his father since his parents divorced several years ago. His mother lives in Vancouver, like him, on a fixed income. He almost never sees his sister in Ontario, who won't return his phone calls because he owes her a lot of money.

Two months ago, some friends came over to visit with a couple of other guys Eugene didn't know. Later, Eugene realized that someone stole the cash he had in an envelope on the shelf to pay his rent and for food. When his rent was due, his landlord said he would give him 30 days grace, but he would have to pay two month's rent at the end of the 30 days, or he would be evicted. Eugene called his income assistance worker but she said there was nothing she can do.

The 30 days are almost up and Eugene only has enough money for one month's rent. His landlord gave him a paper saying he must move out. The stress has triggered his condition, and he can often not get out of bed in the morning. His income assistance worker told him legal aid doesn't help with landlord-tenant disputes, but gave him a toll-free number for legal help. He called the number, but was embarrassed when he didn't really understand what the person told him, and hung up. Right now he is waiting for the police to come and kick him out of his apartment.

problems spread to other areas of their lives, often worsening them significantly.

Lastly, community members often felt that the remedies they obtained from the justice system were not meaningful or trustworthy. For example, women in particular reported enduring the delay, frustration and trauma of family courts only to obtain an order that was meaningless, as not enforced.

Justice System is Person-Dependent

> "Having [the] right person is key." ***Person with disability, Toronto***
>
> "[I]t depends on the person ... have they had experience, sensitivity training, do they or don't they know what [they] need to do[?] Sometimes [I] go to family law clinic and [it] depends on whether the nice lawyer shows up..." ***Deaf woman, Durham***
>
> "Some judges are terrific, some have no patience, some want to listen ... others just want to get through [it]." ***Deaf woman, Waterloo***
>
> "With lawyers you get the good with the bad, some who care, some who don't." ***Deaf man, Toronto***

When community members discussed their satisfaction or dissatisfaction with the justice system, it often reflected on the particular justice professional they encountered. Whether the service or experience was effective, fair or compassionate depended on the *individual*, be it the judge, lawyer or police officer. A frequently repeated phrase was 'it's the luck of the draw'.

There were some commendations but more complaints about the quality and compassion of the justice professionals**.**

There were positive comments about judges being open-minded and good listeners, and making fair decisions. However, more often concerns and criticisms were expressed.

Judges were not fully trusted and sometimes viewed as biased. Many community members felt pre-judged when they walked into the courtroom. Some identified factors seemingly unrelated to their case that affected its outcome, such as judge's relationship with the lawyers before them.

The consensus was that having a lawyer increased the likelihood of having help and guidance through the process. Without a lawyer, marginalized community members felt left to flounder. However, whether a lawyer was helpful or effective, whether legal aid or private, was again seen as the 'the luck of the draw'. It seemed that the 'good ones' are the minority; frequently the comment was that if you get a good lawyer, you're 'lucky'.

Many community members expressed dissatisfaction with legal aid lawyers. They complained about poor service, delay, lack of caring, a focus on just wanting to 'do deals', lawyers not wanting to listen and not wanting to fight for them. Community members often believed the cause of the poor service was that legal aid lawyers were overworked and underpaid.

Regarding legal aid's scope of service, community members complained about the limits in service provision, including low financial eligibility guidelines5, and that the services were always reactive, not proactive.

Community members clearly distinguished between legal aid and private lawyers, and generally had a higher opinion of private lawyers. There were repeated comments that when lawyers were paid more money, they were more likely to fight for and do a better job for clients. Private lawyers were perceived as more effective and acting more quickly than legal aid lawyers. Private lawyers were perceived as friendlier with judges than legal aid lawyers and thus more likely to get their way in court.

In spite of these generally negative observations, several marginalized community members had positive experiences. There was some discussion about how more 'good' lawyers, those committed to social justice, were needed. Community members believed that greater financial reward in other areas of the profession was the main reason

Phuong's story

Phuong was in her local drugstore in Canora, Saskatchewan. It was hot and she wasn't feeling well. She had spent the night before in the emergency room with her sick daughter.

Her first mistake was to use her cloth shopping bag instead of the store basket. She forgot to get a basket at the door, and was rushing to get back to her daughter. Her second mistake was not to double check the bag at the checkout. Two prescriptions were tucked in a side pocket and she forgot to pay for them.

The security guard and the policewoman who came later to arrest her did not believe that she was exhausted and just forgot. She can't understand it, as she buys all her prescriptions at this store and always pays.

Her friend says to call legal aid in Saskatoon, but they won't help as she wouldn't likely go to jail for this. As a personal support worker, she has no money for a lawyer, but there are no lawyers in her community anyway. She goes to court on the day it says on her papers, and a nice young woman introduces herself as the crown prosecutor. Phuong agrees to plead guilty even though she didn't mean to steal – in Vietnam, it is very frightening to be involved with the police. She received a conditional discharge with six months' supervised probation.

A while later, Phuong's boss asks all employees to update their papers for a criminal record check. Phuong has worked for this agency for five years and her clients all love her so she thinks if it comes up, she'll just explain what happened to her manager. But the results go directly to the management office, and Phuong is fired on the spot. Her manager says the company would be sued if they let someone who had shoplifted go into elderly people's homes.

Phuong has no references to show Canadian experience and can't find another job. Employment Insurance declines her benefits because she was fired due to theft. The relative who sponsored her to come to Canada would have to pay for anything she gets from welfare, so she won't consider applying for welfare. She thinks of ending her life, but wonders who will care for her daughter.

there were too few social justice oriented lawyers, but they were aware that such lawyers existed.

Justice System is Difficult to Navigate

> "They're supposed to be there to help you, but that's not what happens. If you're asking for help, it's because there's something wrong with you." ***Single mother, Montréal***
>
> "I feel alone and I don't know who I am supposed to contact." ***Single mother, Moncton***
>
> "It is overwhelming ... you feel incapacitated." ***Single mother, Moncton***
>
> "It is the stress of all the steps prior to getting to the step where you can even act out your rights, and you get so frustrated with process." ***Deaf woman, Toronto***

Community members consistently complained that the justice system is confusing and difficult to navigate. They pointed out that ignorance of one's legal rights renders them useless. Information is not readily available. They were unsure where to go for help or which forms to use. People are not directed to the right place and often have no one to guide them. They reported feeling like they were 'running in circles' as systems are not integrated; they are in 'silos'.

Many community members reported that lack of information, help and direction exacted an emotional toll. They described how scary and intimidating it is not to know what is happening, what the options are, what possible outcomes might be, and so on. They mentioned the anxiety, fear, frustration, discouragement and stress involved in progressing through justice systems, encountering seemingly endless obstacles. They also talked about their need for emotional support.

Community members described a justice system that is simply overwhelming, too complex, too complicated. They talked about the many steps involved in pursuing a right or protection, such as obtaining information, translating the information, paying the fee, finding an advocate, arranging for an interpreter, and then tackling the legal issue and the opposing party. It seems a Herculean effort is required to deal with a formalistic, lengthy and daunting process, something they said was very discouraging and often insurmountable.

Other barriers to navigating the system were fear of facing the opposing party, desire for privacy (concerns about the Court or tribunal being a public forum, and lawyers speaking openly about their cases in an open hallway), poverty and financial constraints, transportation, child care, interpretive services and arranging and funding accommodation.

These difficulties and barriers to navigating the system are so frustrating, upsetting and discouraging that many community members said they would 'just give up' rather than tackle those challenges. When they described experiences where they *did* pursue their legal rights or protections, it was often framed as a fight against the odds.

Glynnis' story

Glynnis' life is a story of abuse and neglect. Both of her parents grew up in residential schools and had serious problems with alcoholism. Glynnis left her northern Alberta First Nation community when she was 14 and has lived outside of Fort Smith, NWT, ever since. She doesn't read or write very well, but held decent jobs until the last couple of years. Her daughter Destiny was born when she was 20. Destiny is well cared for, excels in school and loves her mother very much.

Glynnis has a criminal record; her last offence was possession of a narcotic about 15 years ago. She has continued to use marijuana for years to dull the pain of her past. Recently, she has not been able to keep a job and has started trafficking marijuana to make ends meet. She knows she cannot keep trafficking or she could lose her daughter but her social assistance, about $1100 a month, is not enough for her and Destiny to live on. Recently, police noticed adults and young people coming and going from her house. She has been charged with trafficking.

Glynnis appeared in court without a lawyer and pled guilty to possession of marijuana for purposes of trafficking. She was later sentenced by a Territorial Court judge to three months' imprisonment with one year probation. The pre-sentence report described her painful childhood, difficulties in school, problems with drugs and alcohol, mental health struggles and the positive parenting she has provided to her daughter. It didn't mention her First Nations ancestry or what services her First Nation might provide. The legal aid lawyer at the sentencing hearing was very busy and did not ask her much. The judge concentrated on the fact that young people, including her daughter, had been exposed to her drug operation and sentenced her to 18 months in jail.

Glynnis has had no contact with her band since leaving Alberta, and never thought she'd have access to treatment programs, either through her First Nation or in her small town. She now lives in a women's correctional centre in Fort Smith, over 700 hundred kilometres from Destiny, who is in a group home in Yellowknife. Glynnis has heard girls at the home are involved in drugs or maybe prostitution. She feels worthless and helpless to make things better. She is now using the harder drugs available in the institution.

Learn More: about Canadians' Perceptions and Experiences of the Justice System

Click here for the full Envisioning Equal Justice *Community Consultation* report

Other Resources:

Ontario Bar Association (2007): "Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit"

Baxter, Jamie Albert Yoon, "The Geography of Civil Legal Services in Ontario: Report of the Mapping Phase of the Ontario Civil Needs Project" (2011): www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486236

Manitoba Bar Association, "Town Hall Meeting on Access to Justice: Report and Summary" (2011): http://www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf

L.T. Doust,"Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" (March 2011).

The Law Society of British Columbia: 2010 Law Society Commissioned Public Opinion Poll of Lawyers and Effectiveness of Law Society.

Ipsos Reid, "Albertans Satisfied with Lawyers" (May 18, 2010): www.lawsociety.ab.ca/files/home/Ipsos_Reid_Release_18May2010.pdf

Mary Stratton and Diana Lowe, Public Confidence and the Civil Justice System: What we know about the Issues (Toronto: CFCJ, 2006): www.cfcj-fcjc.org/sites/default/files/docs/2006/cjsp-confidence-en.pdf

On the Street Perceptions

Working with Pro Bono Student Canada volunteers, the Committee conducted random interviews with people on the street to ask for their views on whether there is access to justice in Canada, if they would know what to do if they had a legal problem and what they thought a truly accessible system would look like. The Canadian Forum on Civil Justice implemented a similar project and shared their interviews with the Committee. What these people have to say is surprising and affirming, discouraging and inspiring.

First, people were asked to talk about the "dark sky": what a lack of access to justice really looks and feels like. Some of what was said includes:

> "Horrible! The rich get off. If you have money you can walk." ***Older man, Toronto***
>
> "My husband and I are middle income so we have access to a justice system. Those who can't afford access to lawyers do not have access to a justice system." ***Middle aged woman, Victoria***
>
> "You see it every day on the news. The richer you are the more you get away with, and that's just not fair. That's what the judicial system you'd hope would be out of everything, fair." ***Middle aged man, Windsor***
>
> "Often people with fewer resources experience more persecution, marginalization and injustice, and that's not fair. That's something I would really like to see change in the world." ***Young woman, Victoria***

Interestingly, compared to the representatives of communities living in marginalized conditions who participated in the focus groups, people interviewed on the street had less experience with and demonstrated limited knowledge of the justice system. For example, they held false impressions about the availability of publicly funded legal resources.

Anna's story

Fleeing violence from her husband in Mexico, Anna and her two daughters arrived in Ottawa to claim asylum. She has 15 days to prepare the government forms, find a home, get her girls into school and hire a lawyer. She has one friend in Ottawa, who helps Anna to apply for legal aid. She is approved and given a list of local lawyers.

Her hearing must be within 45 days of her claim being referred to the Board (60 days from her arrival). When she meets her lawyer, she's told to get more paperwork from Mexico to back up her claim that she was in danger there. She writes to the local police force and her family for help. Meanwhile, she is not entitled to work and has no money, so she applies for social assistance.

Her lawyer says she and her girls will need to go to Montreal for the hearing. The social assistance office won't help with travel costs, and if she can't go, her claim will be called "abandoned" with no appeal. Finally, she gets some work "under the table", enough to pay for the bus fare. Still, the Board member in charge rejects her claim – the documents from Mexico didn't arrive in time.

She has no right of appeal, because Canada has designated Mexico as a 'safe' country. She could seek 'leave' to have the Board's decision reviewed by the Federal Court, but will need a Federal Court judge to give her a 'stay of removal' until the other application is heard. As her legal aid certificate only covered the hearing in Montreal, she must reapply for legal aid. Her lawyer says funding was recently cut that would have paid her to provide an opinion about the merits of the case to legal aid. As that program no longer exists, Anna would have to pay the lawyer.

The legal aid application is denied on the basis of "insufficient merit". Anna and her girls are deported back to the situation they fled in Mexico.

However, some people had a good idea of what they would do when confronted with a legal problem:

> "Generally, these are government matters; I would get in touch with the provincial government responsible. I would want to make sure my voice was heard, and whoever I talked to was the correct individual." ***Middle aged man, Windsor***
>
> "I would try to get someone to mediate the problem and come to a win-win situation." ***Middle aged woman, London***
>
> "I have prepaid legal expense insurance that I prepay monthly. I would just call, and they would get back to me within one business day." ***Middle aged man, London***

At the same time, many recognized that resources make the difference between access or lack of access to justice, and said this was unfair and unacceptable. The majority of people interviewed reported that they would be entirely lost as to what to do if they had a legal problem.

> "If I had a justice problem? I wouldn't know what to do." ***Young woman, Saskatoon***
>
> "Where would I go? I don't know.. (long pause). My MP?" ***Middle aged man, Windsor***
>
> "I don't think many people know where to go or what to do to get access to justice." ***Middle aged man, Ottawa***
>
> "I would go to a lawyer, a free lawyer, I can't afford a lawyer, and I would agree with him on the spot… If I had a problem, where would I go for help? The government of Canada." ***Young man, London***
>
> "I would talk to my mother and get her opinion, and then I would call the police… I just know to call the police." Y***oung woman, London***

People were also asked what justice should be, the 'blue sky' picture:

> "Justice is ensuring everyone gets equal rights and benefits within the country no matter what race, gender, religion and sexual orientation." ***Young man, Toronto***
>
> "Anyone in any circumstance should be treated fairly and equal to any other person." ***Young man, Toronto***
>
> "It should be equally as important as our health care. You just don't know when you could have a legal problem and need access to justice." ***Young woman, Toronto***

Everyone interviewed and consulted held high expectations of what accessible justice should be. Some assumed these ideals are already met, but most knew they are not.

What Unrepresented Litigants Tell Us

The justice system is not proficient at directly surveying client or user satisfaction with their experiences on an ongoing basis, and then learning from it. This is a significant shortfall. Strides have been made by several legal aid programs, public education and information services and governments when introducing recent access programs. New initiatives and pilot projects often have included a user satisfaction evaluation component. Several law societies have also recently conducted surveys on client satisfaction with legal services. Results of these surveys are generally positive; people often express satisfaction when asked about particular services or resources that they have used. But these surveys rarely measure the impact of services on outcomes or in meeting policy goals such as speedy resolution.[13]

[13] A 2010 Alberta Law Society study found that 91% of people who had recently retained a lawyer were satisfied with the 'good cost value' of the experience (presentation by Susan Billington, Policy and Program Counsel, Law Society of Alberta, to International Legal Ethics Conference, July 2012). The Ontario Civil Needs study also noted a widespread public perception that legal fees are prohibitively expensive, but also that 30% of the study's target population with a civil legal problem found free service, and another 20% had paid less than $1000 for help:

Jill's story

When Jill and her ex husband decided to get a divorce, she went to legal aid in Fredericton, NB. Jill was eligible for assistance, but was told there would be a long wait to meet the legal aid lawyer and another long wait after that for a court date. Jill didn't have time to wait, so decided to stay with the lawyer who had helped her in the past, knew her case already and had fought hard for her. Meanwhile, her ex got a legal aid lawyer. The divorce took over three years and $30,000, as her ex contested every step of the proceedings and a long wait was involved to get back to court each time.

That wasn't the end. Later, her ex stopped paying child support. Jill decided to represent herself, but the judge wouldn't hear her without a lawyer. She went back to legal aid, and again was found to qualify financially. But, the province won't help people proceeding under the federal Divorce Act rather than provincial laws. As she was divorced, Jill had no choice but to proceed under the Divorce Act. Her ex still had a legal aid lawyer: he was "grandfathered in" because he had help in the earlier proceedings.

Jill's lawyer agreed to take the case, which now involved an application to reduce child support and change the custody agreement. The three children were refusing to see their father so he was seeking custody.

Some family members were able to help Jill, and she will have to repay them over time. But, Jill calls her experience with justice and the legal aid system a "let down." She knew her ex had extra income from under the table jobs and had hidden his farm income and buildings by putting them in her son's name, but how could she prove those things. She says someone other than a working mother making minimum wage needs to find out where the support payer is working, and ensure all income is disclosed.

Two recent in-depth studies of unrepresented litigants in courts in several provinces look at services and resources from a different perspective and paint a dramatically different picture. The Committee uses the term unrepresented litigants to refer to people who go to court without the benefit of legal counsel because the majority of these people would prefer to be represented but cannot access a lawyer's services. The more common practice is to refer to this group as self-represented litigations (SRLs for short). In this report the two terms are used interchangeably. This section summarizes what these recent studies learned about the experience of unrepresented litigants. The next section reports more broadly on what we know about the increased number of unrepresented litigants and the reasons for this phenomenon.

In the first report, Drs. Rachel Birnbaum, Nicolas Bala, and Lorne Bertrand studied unrepresented litigants in family courts[14] (Birnbaum Study). The authors combined four interrelated surveys: one of judges, two of family law lawyers in Ontario and Alberta, respectively; and one of family law litigants in Ontario. While each group had a different perception of the causes and consequences of being self-represented, there were some common themes.

Judges, lawyers and litigants were united in the belief that unrepresented litigants fare worse in court and experience poorer outcomes compared to those who have access to lawyers.

A majority of self-represented litigants (67%) reported that navigating the court system was difficult or very difficult. 49% believed the lack of a lawyer made the process slower or much slower, though a significant portion (31%) felt that lack of representation did not slow down resolution. Many believed that lawyers for the opposing party usually made problems for the self-represented in court worse than they need to be.

From the perspective of represented litigants, 72% reported that they expect a much better outcome as a result of having a lawyer, and many expected the court process takes less time with a lawyer than if they had been unrepresented. Comments from represented litigants about the court process and the value of having a lawyer included:

> "There is a lot of information available for people to learn about the court system but reading all of that information is just too much. I might as well go to law school to learn all of these things. I am happy that I decided to get a lawyer." ***[female]***

> "Custody of my children is an important matter and I would not trust myself if I had to be self-represented. My lawyer handles things for me and explains the system to me which is definitely easier." ***[female]***

(No significant differences were identified between male and female litigants on these issues.)

Judges express concerns about whether SRLs experience fair outcomes, including that they tend to be "unable to articulate their case" or "fail to address the issues that are probative". In addition, judges commented that unrepresented litigants "are often overwhelmed by their emotions" and generally tend not to explore all possible scenarios. Both judges and lawyers expressed particular concerns about the inequalities experienced by SRLs who were victims of domestic violence.

There were greater distinctions in the survey responses about how well SRLs are treated by judges. Most lawyers (57% in Ontario and 77% in Alberta) believe that self-represented litigants are treated "very well" by the judiciary. They report their own clients' perception that judges generally tend to favour unrepresented litigants. However, only 14% of the self-represented and 9% of the represented litigants believe the self-represented are very well treated. On the other hand, only a relatively small percent of each group feel that self-

R. Roy McMurtry, Chair, *Listening to Ontarians, Report of the Ontario Civil Legal Needs Project* (Toronto: the Ontario Civil Legal Needs Project Steering Committee, 2010) at 57. See also: www.lawsociety.bc.ca/newsroom/2010lawsocietycommissionedpoll_table.pdf.

[14] *Supra* note 6. Their results are published in the Canadian Bar Review, "The Rise of Self Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants". The discussion following in this section summarizes their findings.

Winsome's story

At 75 years of age, Winsome worked as a housecleaner for most of her adult life in the Yukon. She has lived alone since her husband died ten years ago and rarely sees her daughters. She owns the small home where she and her husband raised their children, and has a fixed income that just covers her monthly expenses. She saves what she can.

Winsome recently co-signed a car loan for her grandson, who needs a car to get to work and take his four kids to school and daycare. The used car dealer asked Winsome to sign some papers, and she assumed it must be OK, though she didn't really understand what they said. The dealer and her grandson were in a hurry.

Now, her grandson is behind in his payments, and Winsome is told that if she doesn't pay $2500 immediately, the car dealership will repossess the car and "commence proceedings" to sell her home to get the money owed. Her grandson promises it won't happen again. Her daughters have their own financial stresses and tell her not to pay and hope for the best.

Winsome doesn't know who to call. Her friends say it costs hundreds of dollars just for a lawyer to write a letter. One friend gives her a website address that she says will help, but Winsome has never operated a computer. She has a toll free number for legal information, but after Winsome waits a long time, she doesn't understand what the person tells her to do. She is embarrassed to ask again. In the end, she writes a cheque for $2500 and mails it to the company. She is left with about $500 in her savings account and is terrified this will happen again.

represented litigants are "not well treated at all" by judges.

Some of the comments from those who were unrepresented and who expressed concerns about treatment by judges as a result of not having a lawyer include:

> "Judges can be very disrespectful to litigants who do not have lawyers. For example, they raise their voice and use rude names. I was so surprised that a judge was allowed to call me a name." ***[male]***
>
> "I hope they [judges] do [treat us fairly] but I don't know. ... they [judges] treat them [self-represented] differently cause don't all lawyers know each other and the judges?" ***[male]***
>
> "It seems to depend on the judge. Some judges are friends with some lawyers, and if they are friends with that lawyer, they'll be gentler with their client." ***[male]***
>
> "It's about the judge's character, not about you. That's what I learned early on, to not take things personally cause otherwise you will go crazy." ***[female]***

Some comments from represented litigants reflected similar perceptions about the treatment of the self-represented by judges, which may have influenced their decisions to seek representation:

> "...probably not treated too well. My friend was in court before and she didn't have [a] lawyer and she's the one who told me to get one, so maybe she felt disadvantaged." ***[female]***
>
> "I have previous experiences as self-rep, judge did not listen to me." ***[female]***

The Birnbaum study also found that unrepresented litigants reported that available self-help materials had limited value. Those surveyed recognized that many family litigants did not have the education or literacy skills to benefit from these materials and that some had disabilities that prevented them from using them.[15]

The second study led by Dr. Julie Macfarlane of the University of Windsor Faculty of Law (Macfarlane study) is a scathing indictment of the justice system, and critically important, if uncomfortable, reading for all judges, justice system personnel and the legal profession.[16]

The study involved interviews with over 250 individual SRLs. Participants were broadly representative of the general population. Most were older, had some post-secondary education and an annual income of under $50,000. Over 60% of those interviewed were appearing in court on family law matters, 18% on other civil matters and 13% on small claims matters. More than half the SRLs started with counsel but were unrepresented at the time of the interview (almost always for financial reasons). Over 100 interviews were also conducted with counter staff at court registries, clerks (and some managers) at the courthouses, staff at court programs serving SRLs and duty counsel.

The study details what Macfarlane refers to as the 'arc' of the SRL experience: from optimism to disillusionment, and from bad to worse. She includes some telling quotes from the SRLs surveyed:

> "No more fairy tales about having access to a justice system."
>
> "I am here because I have no other option. I am just a mom, trying to figure this out. It was so complex, daunting, intimidating."
>
> "I didn't think that it would come down like a deck of cards. It's an extremely sharp game… I became a bundle of nerves."

[15] *Ibid*.

[16] Marfarlane, *supra* note 6.

Monique's story

Monique separated from her husband, a difficult controlling man with bipolar disorder, in 2006. She was relieved when he left, and could not face negotiating with him to get a divorce. The bills continued to come in – credit cards, lines of credit and the mortgage. Her husband provided no financial support. As a 66 year old accounting clerk in Montreal, Monique struggles to pay the bills.

In 2010, Monique borrowed $1000 from her daughter to see a lawyer for a divorce, but after the initial consultation, she did not follow up. She slipped into a depression and had to push herself to get through each day. She also feared what would happen if her husband was served with divorce papers.

Monique tried to keep up with the minimum monthly amounts required, borrowing from one credit card to cover the minimum payment on another. She also borrowed money from her adult children, though she found it embarrassing. By 2012, she was seriously in debt and behind in all payments.

A letter from her bank arrived, saying her mortgage was in arrears and they were going to foreclose. Monique and her son went back to the lawyer. The lawyer dealt with the bank and stopped the foreclosure. He assisted Monique in negotiating a deal with her husband and a separation agreement was signed. Monique found a bank that gave her a mortgage in her own name. But just before this was completed, a review of the property registry uncovered that her husband had been sued on a business debt in 2010 and a judgment was registered against the marital home for $25,000. Monique needs to start a court action to attempt to remove this from her house.

The whole thing seems insurmountable. Monique's stress increased and her health declined. After seven years of struggling, she is no farther ahead. She has borrowed over $40,000 on credit lines and from family since the separation, trying to stave off bankruptcy. Her husband has since retired and his health is declining. She sits alone at home and cries, waiting for the next foreclosure notice.

> "My expectations? I can't even remember my expectations anymore. My life just fell apart."
>
> "When I took the forms in to the court, the clerks told me that I had filled the forms in wrongly. I burst into tears. The journey from my home to the courthouse was a 150 mile drive and a ferry ride."
>
> "…as a person with a chronic illness it has been challenging to learn about court procedures and laws. I chose to represent myself because I am on a fixed income and can no longer afford counsel. I have spent all my life savings and more on a five-year divorce process."
>
> "When you read information on the Internet and then it refers you to something else – which refers you to something else – by this time you are overwhelmed. It is endless mayhem."[17]

Most participants in this study had distressing experiences at legal hearings and felt they had been poorly treated by judges and opposing lawyers. They reported feeling embarrassed and humiliated and that they were the targets of an overwhelming bias. It is important to recognize that these perspectives are one-sided. In the Birnbaum Study, the authors point out that it is difficult to assess the validity of these concerns and some SRLs engage in inappropriate conduct, requiring strong direction from the court, or may be overwhelmed and misunderstand what has happened. While it is important to keep these cautions it mind, they cannot be used to discount these negative experiences or as a reason to ignore these widespread concerns. Both Birnbaum and Macfarlane studies underscore the importance of including all voices, particularly those who come to the justice system for help, in addressing access to justice issues.

The main findings of Macfarlane's research include:

- Some SRLs began with a reasonable sense of confidence; others began with trepidation. However within a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.
- While online court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRLs often find they have made mistakes and omissions.
- There has been some progress towards developing user-friendly and simplified court forms, but far too little.
- A law student [employed by the researcher] tried to apply for a divorce in the three provinces and found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.
- Court guides are an important step to assist SRL's to complete forms and understand court procedure but are too often written in a confusing and complex manner.
- SRLs who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they tried to work with what is presently available on-line. On-line resources often require some level of understanding and knowledge to make the best use of them.
- The study data also shows that no matter how comprehensive and user-friendly (standards we are far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced online technologies can be an important component of SRL programming – for example sites developed specifically for SRL's using interactive technology – but cannot provide a complete service.
- Staff working on the court counters and information services are asked to distinguish between offering legal information and advice. Both SRLs and court staff consistently complain about this distinction, at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff required to make constant determinations of how much

[17] *Ibid* at 51-64.

information they can provide to frustrated SRLs. This leads to inconsistent applications and creates a barrier between SRLs and certain basic information if construed as 'legal advice'.

- Court and agency staff described an almost identical set of frustrations and challenges as SRL respondents. They also mirrored the primary frustrations and challenges of the SRLs. Court and agency staff work under enormous pressure in dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they are often poorly trained and remunerated.
- Service providers universally recognized the frustrations of SRLs as a source of pressure on the justice system in general, and on court staff and judicial officers in particular.

Macfarlane's study is a call to action. It details the serious implications of SRLs' experience in attempting to access the justice system with inadequate information, assistance, representation and accommodation by the court system. These implications include: serious personal health issues, financial consequences (including giving up work to prepare for their court case or interference with their employment), social isolation due to the toll of navigating the justice system and failing faith in the justice system.[18]

She concludes that it is difficult to overstate the "depth of skepticism" about the justice system resulting from the direct experiences of SRLs. While accepting that "some of the most extreme reactions border on the paranoid", on the whole SRLs appraise their experience in a rational and balanced way in concluding that the justice system is "broken".[19]

[18] *Ibid* at 108-110.

[19] *Ibid.*

Learn More: about the Experiences of SRLs in Canada

Macfarlane study:
The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report (May 2013)

Birnbaum study: "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants" (May 2013):
www.cba.org/cba_barreview/Search.aspx?VolDate=05/01/2013

Macfarlane et al, *Annotated bibliography of work on SRLS:*
www.representing-yourself.com/bibliography

Ann Sherman, *A Study of Self Represented Litigants in the Supreme Court of Prince Edward Island* (2008):
www.cliapei.ca/sitefiles/File/Project%20Files/SRL%20Report.pdf

Trevor Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller and Martha E. Simmons, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System* (Toronto: CFCS, 2012):
http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf

Macfarlane blog:
www.drjuliemacfarlane.wordpress.com/

Richard Zorza Access to Justice blog:
www.accesstojustice.net/

Some Tools for SRLs:

For international, national and provincial resources, visit The National Self-Represented Litigants Project:
www.representing-yourself.com/resourcessrl.html

American network and resources for self-representation, SelfHelpSupport.org:
www.selfhelpsupport.org/

What We Know and Don't Know about Access to Justice

We have little hard data about Canada's justice system – especially relative to what we know about our healthcare and education systems. Much of what we do know about the system is anecdotal – descriptions rather than measurements.

> Canada's justice system: how does it measure up? Good intentions, usually, some promising reforms. But too many people still can't enforce basic rights.

An international surge in empirical research on the prevalence of civil justice problems, unmet legal need, and their impact on people's lives provides an important knowledge foundation. But we still know relatively little about what works to increase access to justice and how and why it does. Gaps in our knowledge hinder our progress in achieving equal access to justice.

In this section, the Committee draws together available data to provide a patchwork answer about the dimensions of access to justice problems in Canada. It is not comprehensive but rather a partial picture based on indicia of barriers.

Prevalence of Civil Legal Problems and Patterns of Resolution

The biggest evolution in our knowledge base comes from large scale civil legal problem surveys by Dr. Ab Currie and his international colleagues. These surveys tell us about the high incidence of civil legal problems and the fact that they have a "pervasive and invasive presence in the lives of many".[20] The results are similar over time and in various countries.

Over three years, **about 45%** of Canadians will experience a justiciable event,[21] meaning that over the course of a lifetime almost everyone will confront such a problem. Dame Hazel Genn, a pioneer in this field, defines a justiciable event as:

> a matter experienced by a respondent which raised legal issues whether or not it was recognized by the respondent as being "legal" and whether any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.[22]

Civil legal needs arise frequently, touch on fundamental issues and can range from creating minor inconvenience to great personal hardship. The disruption caused by unresolved legal problems is significant and can cause cascading problems for individuals and families.

These surveys also draw an important link between unresolved legal problems and issues of health, social welfare and economic well-being, social exclusion and poverty. In addition to fostering problems in non-legal areas of life, people who experience one legal problem are much more likely to experience more than one, and this is especially true for people living on low incomes and conditions of disadvantage, as the stories in this section so vividly illustrate.

Vulnerable groups generally have more contact with the law than others. A broad-scale study by the Law and Justice Foundation of New South Wales found that **22% of people have 85% of legal problems.**[23] Canadian studies have made the same findings: legal problems tend to 'cluster', multiply, and have an additive effect and this pattern of cascading problems disproportionately impacts people living in marginalized conditions.[24] For every additional problem experienced the probability of experiencing more problems increases.

The surveys also provide an overview of the steps people take or do not take to deal with civil legal problems. Both the experience of legal problems and patterns of resolution are different for different

[20] *Supra* note 12. See, press release for *Listening to Ontarians*, *supra* note 13 www.lsuc.on.ca/media/may3110_oclnreport_final.pdf

[21] *Ibid.*

[22] Dame Hazel Genn, *Paths to Justice: What people do and think about going to law* (Oxford: Hart Publishing, 1999) at 12.

[23] Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. MacDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney: Law and Justice Foundation of NSW, 2012) at 14 [LAW Survey].

[24] Currie (2006), *supra* note 12.

Dave's story

Dave has two children, aged 7 and 5. Their mother, his common-law spouse Mona, aged 26, has not completed high school nor held a job and has had a drug addiction for many years. She kept telling Dave that she quit, but he didn't believe her. Dave works a full-time job in Dartmouth. He had someone in the apartment building keeping a watch on his family, he came home on his lunch hours, and was with the children every weekend while Mona stayed out late. He bought the groceries, cooked the meals and cleaned the house. He knew she wasn't capable of caring for the children alone.

One Friday, Dave refused to give Mona more money for partying, and she told him to leave. On Monday, she went to legal aid in Halifax and got a lawyer. She said she was the primary caregiver and wanted to claim custody of both children. Dave wanted legal advice but could not afford the $5000 retainer charged by most law firms.

He was rejected at legal aid because he earned too much money. Legal aid gave him some pamphlets.

Dave was devastated when he was served with the papers. He approached Mona to talk about a custody agreement, but she knew she would get child support and the child tax benefit if she had custody. Dave raised his voice in frustration and Mona called the police, claiming he was threatening her. Dave spent the night in jail, and was released on the condition that he have no contact with Mona. That means he cannot arrange access except through the legal aid lawyer. It takes days to coordinate a visit, and even then Mona cancels about 50% of the time.

Working 50 hours a week in construction, Dave now spends his nights trying to figure out how to represent himself. He reads the materials from legal aid and talks to friends but he is exhausted and can't figure this out. He can't sleep, and he is very scared for himself and for his children

groups in society, between low income and middle income people.

Most justiciable problems are resolved outside the formal justice system. While positive outcomes can certainly be achieved outside the justice system, it is important to a fair negotiated result that the system be perceived as available and accessible to all parties to get the help they need and enforce their rights. In contrast, the justice system is currently poorly understood or perceived to be inaccessible by many people, and this perception in itself can be seen as a barrier to access. Vulnerable groups in particular may not respond to problems because of perceived or actual barriers to getting help, and research has shown that legal assistance results in better outcomes.[25]

The surveys identify other barriers to finding solutions to civil legal problems, including:

- the complexities of the legal system;
- the qualification process for legal aid;
- too little legal aid coverage for civil legal problems;
- lack of knowledge about the legal system and resources available to support individuals, especially knowledge regarding how to access legal aid or affordable legal services and information;
- fear of becoming involved in the legal system, particularly for those who had previous experience with the civil or criminal legal system;
- the stress of pursuing resolution of legal problems;
- concerns about damaging relationships;
- being intimidated by the court system and generally afraid to take action;
- embarrassment and fear of stigmatization for having a legal problem; and
- fear of loss of privacy.[26]

[25] Russell Engler, "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9 Seattle Journal for Social Justice 97 at 117; Rebecca Sandefur, "The Impact of Counsel: An analysis of the empirical evidence" (2010) 9 Seattle Journal for Social Justice 51.

[26] Summary of findings of studies at *supra* note 12.

Differential Impact of Access Denied

Socially excluded groups are more vulnerable and this vulnerability compounds the effects of unresolved legal problems. It also makes it more challenging to navigate the justice system.

Dr. Patricia Hughes of the Law Commission of Ontario points out that access to justice may be restricted because of geographic factors, institutional limitations, racial, class and gender biases, cultural differences and economic factors. Not only are people living in disadvantaged conditions or socially excluded groups more vulnerable to experiencing multiple legal problems, they are less likely to take action to resolve these problems, less capable of handling their problems alone and more likely to suffer a variety of adverse consequences that may well further entrench their social exclusion.

Individuals and families living on low incomes often experience additional problems that make finding the time and energy to deal with legal issues even more of a hurdle:

> People in poverty who lack services often have legal needs on top of other needs. Even if services could meet the legal needs, the client may not return because their legal needs get subsumed by other needs – accommodation, mental health. Unless other needs are met, legal needs will not be met.[27]

Specific communities have been identified as facing particular barriers in accessing the legal assistance they require to deal effectively with their civil legal problems. Generally, people living in poverty have lower levels of education and literacy. They disproportionately experience physical and mental health and addiction issues, or have experienced significant trauma in their lives compared to people living at higher income levels. According to British Columbia's Legal Services Society report, *Making Justice Work*:

> Legal aid clients are among the most marginalized citizens. They lack the financial

[27] Patricia Hughes, *Inclusivity as a Measure of Access to Justice* (paper prepared for CBA, Envisioning Equal Justice Summit, Vancouver, April 2013).

Arthur's story

A while after their marriage ended, Arthur and his ex-wife stopped adjusting the child support for their three children every year. Arthur knew his ex-wife was remarried to a doctor and was comfortable financially. But, when the first child was ready to go to university, his ex-wife's lawyer served him with papers, demanding money for university expenses and retroactive support increases for the past three years.

Arthur runs his own business in Winnipeg and makes about $60,000 a year. He had expected his share of university expenses to be about $10,000 a year per child, and didn't want to pay more for legal fees. A child support variation would not be more complicated than running his own business successfully, he thought.

He figured out which forms to complete, but called the courthouse with one question. The clerk said he could not provide legal advice, but gave Arthur an internet site to research. He finished the defence at 2am the day it was due.

He had neglected his business working on the case, and felt relieved to finally deliver the papers to the courthouse for filing. The clerk passed it back to him, saying he'd "not complied with the rules of court". When Arthur asked what was wrong, the clerk said he could not provide legal advice. As a taxpayer, Arthur was furious that the clerk would not help him. He looked on the website again, but couldn't find the answer. He did find a toll free number, and after 45 minutes on hold, he spoke with the volunteer lawyer. He had failed to attach his tax returns.

Once the documents were filed, Arthur started educating himself on the Child Support Guidelines to see what he should expect to pay. His friends all had conflicting advice, so that wasn't helpful. He read case law he found online but didn't know what he was looking for, exactly. He missed the HST filing deadline for his company.

Arthur arrived at the courthouse, exhausted and nervous. His ex-wife's lawyer arrived and spoke to him before the judge came in. Soon he realized that they were talking about a settlement of the issues. Arthur had no idea whether the deal proposed was good or bad for him but he was overwhelmed. He took the deal.

means to effectively access the justice system when their families, freedom, or security are at risk. Almost 70% have not graduated from high school, and many struggle with basic literacy. Others face linguistic or cultural barriers. Over 25% are Aboriginal; in some communities, this rises to 80%.[28]

The Legal Australia-Wide Survey (LAW Survey), described as the most comprehensive quantitative assessment of legal needs ever conducted in Australia, found that "65% of legal problems were experienced by just 9% of the respondents, and 85% of problems were experienced by 22% of respondents."[29] Specifically, people with disabilities and single parents were twice as likely as other respondents to experience legal problems. Unemployed people and people in poor housing were also especially impacted. Aboriginal people were more likely to experience compounded problems, involving government, health issues and rights related problems.[30]

The Ontario Civil Legal Needs Project looked at the unmet legal needs of people earning less than $20,000 per year, and found a disproportionate number of women (62%) were impacted; most often single, divorced or widowed. They also found disproportionate representation from equality-seeking communities, particularly people with disabilities. The population was more likely to be unemployed, retired or receiving disability benefits – and almost half were receiving income assistance. The conclusion was that "the poorest and most vulnerable Ontarians experience more frequent and more complex and interrelated civil legal problems."[31]

Private Market Legal Services

The research on civil legal needs demonstrates that many people do not use legal avenues to deal with justiciable problems and only a small minority turn to lawyers. The reasons are complex, including both the perceived and actual cost of a lawyer's services and a tendency to view problems as something that 'just happens', rather than as legal problems.[32] This is an area of active research.

We know little about supply and demand in the legal market for personal legal services. US legal scholar Gillian Hadfield recently noted that the legal marketplace for individuals is poorly documented – meaning it is difficult to understand how well or poorly this marketplace resembles a properly-functioning market.[33] We cannot provide accurate figures for the dollar value of this part of the legal market, the average amounts spent by consumers of legal services, or the amounts earned by lawyers in a comprehensive way.

Surveys on private-market legal services conducted by several Canadian law societies have come to consistent results. The main problem people identify in accessing legal assistance is perceived or actual cost. At the same time, studies show that having legal assistance generally results in better outcomes for the people involved.[34]

One survey found that one quarter of those who resolved their issue alone felt they would have achieved a better outcome had they used a lawyer. One half of respondents, however, felt it would have made no difference, while 16% thought they would have a worse outcome. The main reasons given for hiring a lawyer were that the legal issues were too complex to handle alone and a lawyer would help to achieve a better result.

While complaints about lawyers' fees are often heard, the studies show that clients who have actually retained counsel are generally satisfied, both with the service received and the amount they paid.[35]

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[28] Legal Services Society, *Making Justice Work* (Vancouver: LSS, 2012) at 8.

[29] LAW Survey, *supra* note 23, one page summary: http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Summary_FINAL.pdf

[30] *Ibid*.

[31] Ontario Civil Legal Needs Project, *supra* note 13 at 45.

[32] Rebecca L Sandefur, "Money isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services" in Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

[33] Hadfield, *supra* note 1. See also Sandefur, *ibid*.

[34] Engler, *supra* note 25 at 117; Sandefur, *ibid*.

[35] *Supra* note 13.

Another important trend is that people want more active involvement in the management, strategy and decision making about their legal matters, and more certainty in terms of cost. People seek legal information to enable them to make more informed choices, but often get advice from friends and family, rather than legal professionals.

There is also a movement away from 'all or nothing' lawyering, with clients seeking legal advice and assistance for parts of their legal problems rather than following the traditional full representation model. Lawyers are responding through unbundled legal services, alternative billing arrangements, specialized law firms, and in other ways, but significant gaps in private market services remain and contribute to unequal justice. The two current CBA initiatives (Equal Justice and Legal Futures) are considering these means of providing legal services, along with related concepts like preventative lawyering, use of technology in dispute resolution and non-lawyer providers of legal services, as potential innovations for increasing access to justice.

Public Legal Services

Publicly funded legal services are provided by legal aid plans in each province and territory, but plans cannot meet current demands for legal help. There are huge regional disparities in who can access legal aid based on financial eligibility, the types of legal matters covered, and the amount and type of legal assistance and representation provided. One illustration of these disparities is that the national average annual per capita funding for legal aid (both criminal and civil matters) is $16.21, but it ranges from only $10.32 in one province to close to $30 in another.[36]

In some jurisdictions, there is no legal aid (beyond information) for many civil legal problems that affect areas of vital interest, such as housing. Some legal aid services such as public legal information are generally available to all, but most assistance and representation is available only on the basis of means testing. Often, an individual or family has to be receiving social assistance or earning just above this threshold to qualify for legal aid. Currently in Alberta, even recipients of Assured Income for the Severally Handicapped are ineligible for legal aid. People working full time for minimum wage qualify for legal aid only in a few provinces. The Barreau du Québec implemented an advocacy campaign to raise eligibility rates so that those earning minimum wage qualify for services, and Québec has recently announced a significant increase in eligibility levels.[37]

> "[I was ineligible] simply because [I am] a hardworking, frugal and responsible citizen."
>
> ***B.C. resident***

At the Summit, Nye Thomas, Director General, Policy and Strategic Research at Legal Aid Ontario (LAO) noted that LAO offers a broad range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada's Low income Measure (LIM) – a common measure of poverty in Canada. They found a wide and growing gap between LAO financial eligibility and LIM in Ontario. Today, a single person earning more than $208 per week would not qualify for legal aid representation in Ontario. The impact of this gap has been significant. Since 1996, all demographic groups have lost ground relative to LIM. Fewer than 7% of all Ontarians are currently eligible for full representation legal aid, even though more than 16% live below the LIM.[38] LAO estimates approximately 1 million fewer Ontarians are financially eligible for a legal aid certificate today than in 1996. This means more hardship, less access to justice, more court delays, more court ordered counsel and more unrepresented litigants. Absent corrective action, things will get worse. Other provinces have more generous eligibility guidelines

[36] Statistics Canada, Canadian Centre for Justice Statistics, *Legal Aid in Canada: Resource and Caseload Statistics 2011/2012* (Ottawa: Government of Canada, March 2013).

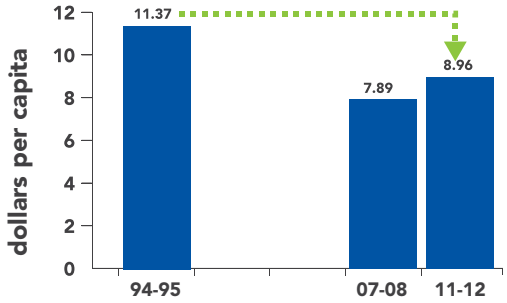
[37] See: www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm

[38] Nye Thomas, Presentation at CBA Envisioning Equal Justice Summit (Vancouver: April 2013): www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf

but ration legal aid by providing it in a smaller range of legal matters.

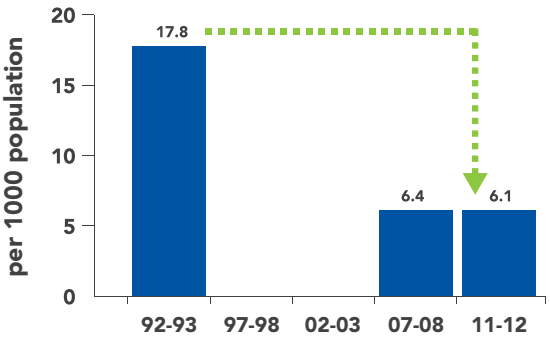
The current inadequacy of civil legal aid is largely attributable to underfunding. Although there has been some increased funding for legal aid in the past five years, a longer range perspective shows a 20% overall decrease from the pre-1994 spending on civil legal aid.[39] This trend is illustrated in Chart 1: Civil legal aid spending per capita, 1994-2012. In 1994-1995, governments spent $11.37 on a per capita basis, declining to a low of $7.89 in 2007-2008 and rebounding slightly in 2011-2012 to $8.96.

Chart 1: Civil legal aid spending per capita, 1994-2012[40]



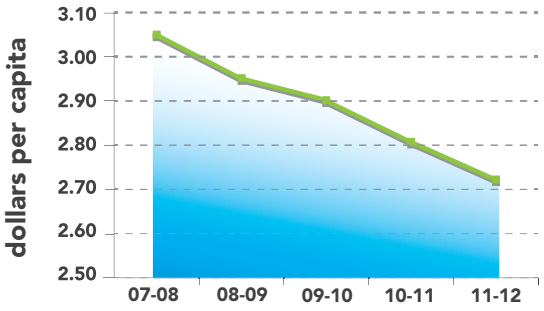
The reduction in legal aid funding and its particular impact on non-criminal matters is illustrated in Chart 2: Approved applications for civil legal aid, 1992-2012. Over two decades, the number of approved civil legal aid applications was reduced to a third: in 1992-1993, there were almost 18 approved applications for every 1000 Canadian residents; by 2011-2011 this number hovered just over six for every 1000 people. This represents a 65.7% decline.

Chart 2: Approved applications for civil legal aid, 1992-2012[41]



One major change is that the federal government has gradually reduced contributions to criminal legal aid from a high of 50-50 sharing until 1995, to now contributing about 20-30% of the cost. At the same time, the federal government discontinued dedicated funding for civil legal aid in 1995. Direct per capita spending by the federal government on criminal legal aid is illustrated in Chart 3, Federal contributions to legal aid plans.

Chart 3: Federal contribution to legal aid plans (criminal legal aid) (per capita, 2002 constant dollars)[42]



The next chart illustrates rising provincial and territorial spending on legal aid over the same period, for both criminal and civil matters. Any federal contribution to the provinces for civil legal aid is contained in a global transfer (first called the

[39] Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (Toronto: CFCJ, 2013): www.cfcj-fcjc.org/commentary/the-state-of-civil-legal-aid-in-canada-by-the-numbers-in-2011-2012

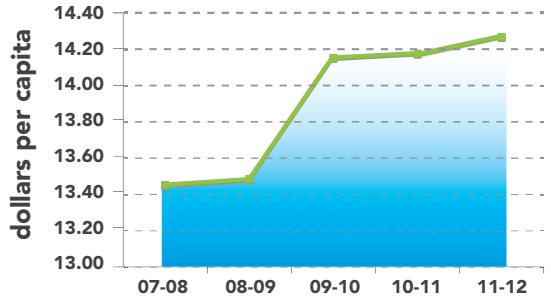
[40] "Current levels of expenditures and services are considerably lower than the historical high levels in the early to mid 1990's. In 1994-1995 direct service expenditures on civil legal aid were $329,787,000. This was $11.37 per capita. In 2007-2008 per capita direct service expenditures had declined to $7.89 per capita ($259,946,000). Per capita direct service expenditures on civil legal aid increased to $8.96 in 2011-2012 ($309,022,000). This represents a 13.6% increase in per capita direct service expenditures over the recent five-year period. However, it reflects a 21.2% decline from the level of per capita direct service expenditure in 1994-1995." *Ibid.*

[41] *Ibid.*

[42] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t003-eng.htm

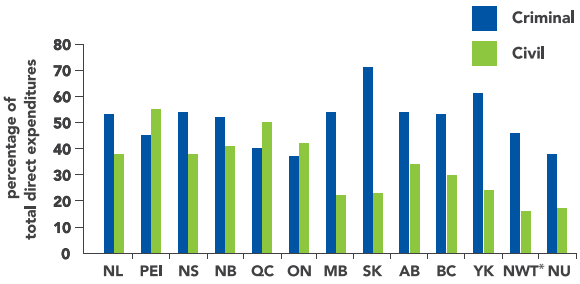
Canada Health and Social Transfer, now the *Canada Social Transfer*), to allow regions to determine their own priorities. For that reason, it is impossible to say what, if any, federal contribution actually goes to civil legal aid. Provincial and territorial Ministers of Justice have recently challenged the existence of a federal contribution for civil legal aid in the *Canada Social Transfer*, and called for additional dedicated funding.[43]

Chart 4: Provincial/territorial contribution to legal aid plans (criminal/civil legal aid) (per capita, 2002 constant dollars)[44]



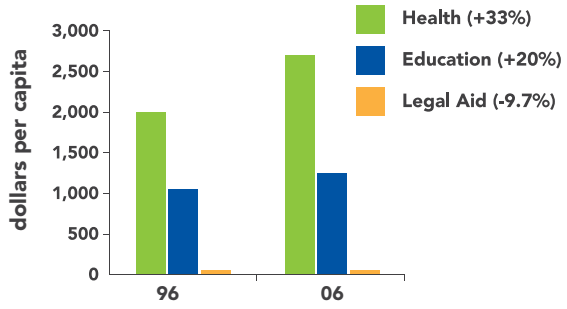
The second important change is that spending on criminal legal aid, some aspects of which have been deemed to be constitutionally required by Canadian courts, accounts for an increasing proportion of overall spending. Of twelve legal aid plans that provided information to StatsCan, nine spent more on criminal matters than on civil matters in 2011/2012. The proportion spent on criminal matters ranged from 52% for New Brunswick to 71% for Saskatchewan.[45] Of the remaining three jurisdictions, Prince Edward Island and Québec allocated 45 and 40% of direct expenditures to criminal matters, respectively, and Ontario 37%. Chart 5 compares the 2011/12 figures for direct expenditures on criminal legal aid compared to civil legal aid, as a percentage of total plan expenditures.

Chart 5: Regional legal aid spending (criminal/civil)[46] 2011-2012



Further, spending on legal aid has not kept pace relative to health care and education. In his 2008 study in Ontario, Professor Michael Trebilcock used public accounts data over a decade to demonstrate that while health and education spending had risen 33% and 20% respectively from 1996-2006, legal aid spending over the same period decreased by 9.7%. This trend is illustrated in Chart 6: Ontario Spending on Health, Education and Legal Aid, 1996-2006. There has been some improvement in Ontario's spending on legal aid since 2006, but comparative data is not available for other periods or in other jurisdictions.

Chart 6: Ontario per capita spending on health, education and legal aid 1996-2006[47]



[43] See, for example: www.news.gc.ca/web/article-eng.do?mthd=advSrch&nid=182679&crtr.dpt1D=&crtr.tp1D=&crtr.yrndVl=

[44] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2011000/t003-eng.htm.

[45] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm.

[46] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm. *Note that while these figures are mainly for 2011/12, NWT figures are for 2009/10, the most recent data provided to StatsCan for that region.

[47] Michael Trebilcock, *Report of the Legal Aid Review, 2008* (report prepared for Ontario Attorney General, Chris Bentley) (Toronto: AG ON, 2008) at 74. www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf [relying on 1996 and 2006 as ON census years].

The reduction in federal spending overall, increased complexity in the substantive law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in a way often inconsistent with the general purpose and public policy values underlying the program.

Currie notes that the "vitality of the legal aid system is of vital importance."[48] Because the legal aid system is not as healthy as it once was, "it probably will not play the important, and perhaps key, role it might in the evolution of access to justice in Canada, without resources to repair the erosion" that has occurred since the early 1990s.[49]

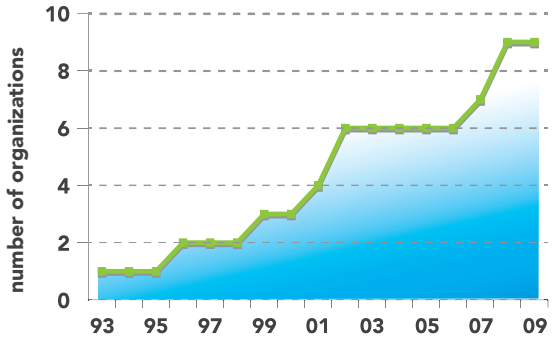
Exponential Growth of Pro Bono

The Committee defines pro bono work as free legal services provided to people or organizations who cannot otherwise afford them and that have a direct connection to filling unmet legal needs. The legal profession has always provided services to people with modest means on a charitable basis and indeed our legal aid system grew out of these pro bono roots.

The numbers of people assisted through pro bono efforts has grown exponentially. Increasingly institutionalized organizations have developed to act as a broker, taking applications from individuals and small organizations in need of legal assistance and linking them to lawyers willing to volunteer to help.

Pro Bono Students Canada was formed in 1996 and now operates out of 21 law schools across the country. In the last decade, formal pro bono organizations have been established in five provinces, providing an infrastructure and paid staff. (Ontario (Pro Bono Law Ontario); B.C. (Access Pro Bono); Alberta (Pro Bono Law Alberta)); Saskatchewan (Pro Bono Law Saskatchewan) and Québec (Pro Bono Québec)). This growth in pro bono organizations is illustrated in Chart 7.

Chart 7: Growth in formal pro bono organizations in Canada 1990-2009



Pro bono organizations play an important role in promoting voluntary services: they develop programs that facilitate lawyer involvement, provide training and match lawyers willing to donate their time to clients with unmet legal needs. Once a client and lawyer are matched, the file might proceed as any other regular paying client file would, or the lawyer or organization might offer assistance with only certain aspects of the file or provide referrals, legal information or self-help materials.

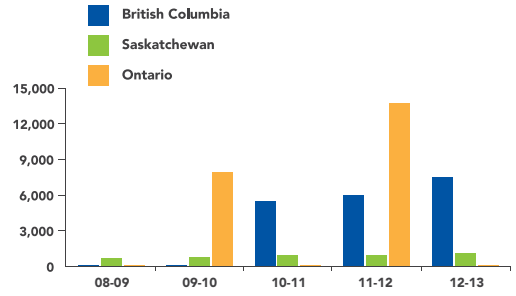
Many pro bono organizations can be more flexible as to who qualifies for help than legal aid programs. The organizations supply administrative support, an intake and screening process to ensure clients meet established financial criteria and need the type of assistance offered by the organization, and a roster of volunteer lawyers to call on as needed, or who regularly attend at a designated location.

As with so many aspects of the access to justice landscape in Canada, there are few firm statistics on the number of lawyers who provide pro bono services, people helped or the value of this contribution. Several law societies collect statistics on pro bono contributions from their members, but reporting that information is optional for lawyers. Anecdotally, most pro bono organizations report that they cannot keep pace with growing demand. Many pro bono organizers describe how quickly their services become oversubscribed, finding it impossible to keep up. The exponential growth in the number of people and matters aided by pro bono lawyers is illustrated in Chart 8, based on information provided by the organizations that have begun to collect comparable data.

[48] Currie, *supra* note 39.

[49] *Ibid.*

Chart 8: Pro Bono – cases accepted 2008-2013[50]



There is a growing schism in the profession about pro bono work, between those who believe that lawyers should have a mandatory obligation to donate legal services and those who oppose this trend. Adam Dodek of the University of Ottawa (and member of the CBA Legal Futures Initiative's Ethics and Regulatory Issues Team) recently wrote:[51]

> Unfortunately, no Canadian law societies or bar associations have any rules imposing an ethical let alone a regulatory obligation on Canadian lawyers to provide legal services to those who cannot afford them. The CBA's Code of Professional Conduct rather meekly states that
>
> > Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession.
>
> (This is in chapter 14 on "Advertising, Solicitation and Making Legal Services Available").
>
> The Federation of Law Societies of Canada does no better. Its now-completed Model Code of Conduct states at Rule 3.01(1) that "A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective client by any means." The commentary states:
>
> > As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

However, unmet legal need and the demand for legal services in Canada far exceeds availability and what can reasonably be provided on a charitable basis. Some question the sustainability of increased dependence on volunteerism by the profession. More fundamentally, the increased emphasis on pro bono services as a solution to the access to justice crisis is seen by some to discourage facing the fundamental inadequacies of our justice system. From this end of the spectrum of views regarding pro bono, the profession's work in the public good "does nothing to ensure that there is a healthy *public* commitment" to access to justice, particularly to the disadvantaged, and in fact it can be seen as letting "the government off the hook too easily."[52]

> A distinguished Ontario practitioner, well known for his contributions of low-rate or pro bono services, likened pro bono work to a sort of legal food bank: pro bono services alleviate hunger for some on a daily or monthly basis, but it absorbs the energy of those who provide these so that they have little energy left for changing the underlying conditions that create the hunger.
>
> ***Mary Eberts reference to Andrew Orkin in "Lawyers Feed the Hungry", note 52.***

[50] In the spring of 2013, CBA contacted the five major pro bono organizations for any data they could share in regard to cases accepted annually. The chart reflects data received that could readily be compared.

[51] Adam Dodek, "Mandated or Mandatory Pro Bono", May 3 2012, SLAW: www.slaw.ca/2012/05/03/mandated-or-mandatory-pro-bono/

[52] Mary Eberts, "'Lawyers Feed the Hungry': Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76:1 Saskatchewan Law Review 91.

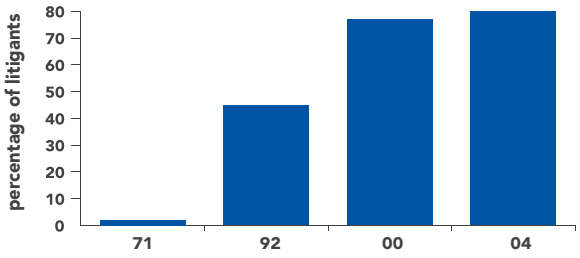
There are many unresolved questions about the extent to which unmet legal needs can reasonably be addressed by pro bono efforts, and the extent to which those efforts are the profession's responsibility.[53]

Unrepresented Litigants

Perhaps the most obvious consequence of the gap between the prevalence of legal problems and inadequacies in the availability of public and private legal services is the exponential growth in recent years of unrepresented and under-represented[54] litigants in the courts. Unrepresented people are now so common place that we tend to quickly refer to them as 'SRLs' (self-represented litigants), despite the fact that the vast majority state that they would prefer to have access to counsel to assist them with their legal matter.

Historically, we did not keep track of unrepresented litigants and courts do so only inconsistently today. As a result, data on this phenomenon is still limited. Twenty years ago, best estimates are that less than 5% of litigants were not represented by counsel. Today anywhere from 10-80% of litigants are unrepresented, depending on the nature of the claim and the level of court. While provincial court family matters and small claims courts have the highest levels of unrepresented litigants, even the Supreme Court of Canada is experiencing this trend. One recent study estimates that 50% of family law litigants across Canada are unrepresented.[55] Of the few longitudinal studies of unrepresented litigants, one from California's Family Courts shows that in just over 30 years the percentage of unrepresented litigants went from 1% or less to 80% (see Chart 9). At least one international study has demonstrated a link between cuts to legal aid and the growth of unrepresented litigants.[56]

Chart 9: Percentage of unrepresented litigants: California family courts 1971-2004[57]



A recent Canadian study[58] examines how lawyers and judges perceive changes in the numbers of unrepresented litigants in recent years, and documents their strong perception that numbers have grown significantly. The majority of litigants in this study reported earning under $30,000 per year although significant numbers reported earning up to $60,000.

They conclude that the reasons for not having counsel are complex. The main reason is financial, including ineligibility for legal aid. Among middle income earners were those able to afford legal fees, but who chose not to because they did not believe they would receive good value relative to other financial priorities. Other reasons for not retaining counsel include that litigants believe they have sufficient knowledge about family law to represent themselves, that lawyers increase the adversarial nature of the proceedings and that lawyers increase the time and cost involved.

While the study identified these various reasons for not retaining counsel, it also found that litigants who had lawyers were almost all satisfied with their decision to have representation. A significant number of lawyers and judges noted gender differences for being unrepresented. The common perception is that women are more likely to be unrepresented because they cannot afford a lawyer, while men are more likely to want to deal directly with their former partner or are confident of their ability to represent themselves. Some comments include:

[53] These questions are explored further in CBA Access to Justice Committee discussion paper, *"Tension at the Border": Pro Bono and Legal Aid* (Ottawa: CBA, 2012) www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf.

[54] By "under-represented" we mean litigants who may have received some legal help short of full representation but require full representation for their matter.

[55] Birnbaum study, *supra* note 6.

[56] See, Dewar, cited in Birnbaum study, *ibid* at footnote 13.

[57] Macfarlane study, *supra* note 6 at 34.

[58] Birnbaum study, *supra* note 6.

> "For women, it is finances; men think they do as well as a lawyer but without the expense." ***[lawyer]***
>
> "Sometimes abusive men want to be able to have direct contact with their partner." ***[lawyer]***
>
> "Men more often believe they don't need a lawyer. Women do not have the money." ***[judge]***[59]

Again, there is little hard data on the impact of unrepresented persons on court services. There is a strong perception – supported by the quantitative findings in the study by Macfarlane – that unrepresented persons, through no fault of their own, take up more court time and court services. Court registry staff walk the fine line between legal information (which they are authorized to offer) and legal advice (which they must not provide). They are often placed in difficult positions because of requests for information and assistance they are unable to meet. There is a strong perception among judges and lawyers that unrepresented parties are less likely to settle (partially due to unrealistically high expectations about outcomes), proceedings take longer and represented parties bear higher costs when the opposing party is unrepresented because proceedings are less efficient. Judges say they find it challenging to meet the needs of unrepresented litigants while maintaining their neutrality and independence.[60]

> These results indicate that professionals clearly believe that lack of representation makes settlement less likely, takes longer, and therefore implicitly increases the costs to the represented party as well as to the publicly funded justice system.
>
> ***Birnbaum study (note 6).***

[59] *Ibid* at 79.

[60] Macfarlane study, *supra* note 6.

Concerns have been raised about a two-tier justice system – with unrepresented litigants getting less than their fair share. One unrepresented litigant put it this way:

> Either lawyers should charge less, or there should be more legal aid. Something's gotta give or they can't say it's really justice, right?
>
> ***Unrepresented litigant from Macfarlane study (note 6)***

Similarly, in large scale civil legal needs surveys, Currie found that although many respondents were able to resolve problems on their own and get on with their lives, "[m]any of the self-helpers achieve outcomes that they consider to be unfair and, among those, some feel, in retrospect, that some help would have produced a better outcome. Many people who do not resolve their problems feel that the situation is becoming worse."[61]

Unrepresented litigants' perception that they do not receive fair outcomes is validated by empirical research. More than 200 US studies in a wide range of legal proceedings and matters have demonstrated that unrepresented parties lose significantly more often – and in a bigger way – than represented ones. Several studies of this question are now underway using the more rigorous methodology of randomized testing, and early results appear to substantiate the earlier research. Further, recent US studies show that unbundled legal services, where an unrepresented litigant has some assistance from a lawyer (for example the lawyer drafts the court documents but the litigant appears in court on his or her own), make little difference to outcome, although these limited services do contribute to procedural fairness.[62]

[61] Currie (2009), *supra* note 12 at 89.

[62] Jessica Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2011) 18 Geo. J. Poverty Law & Pol'y 453 at 455; D. James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessy, "The Limits of Unbundled Legal Assistance: a Randomized Study in a Massachusetts District Court and Prospects for the Future" (draft March 2012). For a more detailed discussion, see CBA Access to Justice Committee, *Toward National Standards for Publicly Funded Legal Services* (Ottawa: CBA, 2013) at 20-22.

As noted above, Macfarlane found serious implications of the SRL experience, including health issues, financial consequences, social isolation and declining faith in the justice system generally.[63] Lack of representation or under-representation has a disproportionately negative effect on individuals living in marginalized conditions. Many reports and studies have shown the increasingly prevalent 'self-help services' are most effective for people with higher levels of literacy and comprehension, while people who face other barriers are less able to effectively use those tools to navigate the legal system.[64]

Courts and the Civil Justice System

Access to legal services is one piece of the access to justice puzzle. Others include court structures, rules and procedures, administrative tribunals, alternatives to adjudication, and substantive law. Courts and tribunals across Canada face a range of challenges in providing equal access to justice, challenges too complex to sum up here. A scan of recent annual reports shows an ongoing concern in many courts and tribunals with delays and the growing length of proceedings,[65] despite

Learn More: about Reforming Legal Services to Meet Legal Needs

Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queen's Law Journal 825.

Gayla Reid Donna Senniw and John Malcolmson, **"***Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs***."** (Vancouver: Justice Education, 2004): http://www.justiceeducation.ca/themes/framework/documents/srl_mapping_repo.pdf

CBA Access to Justice Committee, *Toward National Standards for Publicly Funded Legal Services* (Ottawa: CBA, 2013): http://www.cba.org/cba/equaljustice/PDF/TowardNationalStandards.pdf

Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family law Self-Help through an Access to Justice Lens – Themes and Recommended next Steps* (Toronto: CLEO, September 2009).

Kathryn Alfisi, "Access to Justice: Helping Litigants Help Themselves" (January 2010) *Washington Lawyer*: www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm

Benjamin H. Barton, "Against Civil Gideon (and for Pro Se Court Reform)" (2010) 62:5 Florida Law Review 1227.

John M. Greacen, "Self-Represented Litigants: Learning From Ten Years of Experience in Family Courts" (2005) 44:1The Judges' Journal 24.

Richard Moorhead, "Litigants in Person: What the Research Actually Says" (posted 16 December 2010) *Lawyer Watch*: http://lawyerwatch.wordpress.com/2010/12/16/litigants-in-person-what-the-research-actually-says/

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[63] *Supra* note 6 at 108-110.

[64] See for example, Carol McEown, *Civil Legal Needs Research Report* (Vancouver: Law Foundation of BC, 2nd Edition, March 2009) at 30; Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family law Self-Help through an Access to Justice Lens – Themes and Recommended next Steps* (Toronto: CLEO, September 2009) at 3.

[65] See, for example, the following annual reports:

Supreme Court of BC 2012 *Annual Report* at 24: www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2012%20Annual%20Report.pdf

Alberta Court of Queen's Bench *Annual Report* at 41: www.albertacourts.ab.ca/LinkClick.aspx?fileticket=q1Bq8QoSalk%3D&tabid=92&mid=704

The Provincial Court of Manitoba 2010 *Annual Report* at 10, 17, 18: www.manitobacourts.mb.ca/pdf/annual_report_2010-2011.pdf

Ontario Superior Court of Justice *Annual Report* at 25: www.ontariocourts.ca/scj/en/reports/annualreport/10-12.pdf

Ontario Court of Justice Biennial Report 2008-2009: www.ontariocourts.ca/ocj/ocj/publications/biennial-report-2008-2009

concerted efforts toward reform over more than two decades.[66]

Few justiciable problems are actually resolved through the formal justice system. More informal assisted dispute resolution processes, including mediation in, connected to and separate from court and tribunal processes, are available. While only a small fraction of civil matters are ultimately resolved by a court or tribunal, these institutions have a central and irreplaceable role in maintaining a legal framework for resolving disputes. Reaching equal justice requires the formal and informal aspects of the justice system – courts, tribunals and the broader civil justice system – to work together effectively.

Recent studies emphasize the importance of timely intervention and assistance as key to enhancing access, avoiding problems, achieving positive outcomes and saving money. Public legal education and information providers are leading the way, often relying on online resources as a gateway. This significant trend to provide more online information and tools is important and welcome, as it can reach many people regardless of income. However, it is less helpful to the almost 48% of Canadians[67] who lack the literacy skills to make use of this type of information. As well, many people, especially those already living in situations of disadvantage, need 'human help' in tailoring information and tools to their own problems and to answer their questions.

Currently, courts and tribunals are engaged in an ongoing process of modernization to make their processes efficient and effective. In addition to expanding the range of dispute resolution processes, many courts are streamlining their work, in particular by integrating the principle of proportionality to civil procedures and using other mechanisms to simplify court processes. The National Action Committee Court Simplification Working Group report provides an overview of the current status of these reforms.[68]

Overall, the justice system has not been subject to the same technological transformation as other institutions or sectors. A recent newspaper article highlighted the fact that technological transformation was actually "bypassing the justice system".[69] As one example, there is still a lack of widespread capacity for scheduling of court dates (motions and trials) online. Administrative tribunals have been more nimble than courts in using technology to become more accessible. While technology offers courts "mind-boggling" opportunities to address shortcomings and efficiency gaps, courts have been cautious in embracing this potential.[70] This caution is at least in part for good reason. Technology is never neutral.[71] Reforms must be measured for whether they actually advance meaningful access to justice and questions need to be answered. For example, a report on remote court appearances by phone or video prepared for the Association of Canadian Court Administrators/Canadian Center for Court Technology noted:

> Such questions concern the availability and reliability of the technologies, how they are best used, whether justice would be compromised,

[66] For example, see the Canadian Bar Association Task Force on Court Reform, *Court Reform in Canada* (Ottawa: CBA, 1991); Canadian Bar Association Committee on Court Cost and Delay, *Court Cost and Delay in Canada* (Ottawa: CBA, 1989); Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (Toronto: OLRC, 1973); Ontario Government, *White Paper on Court Reform* (Toronto: Queen's Park, 1976); Thomas Zuber, *Report of the Ontario Courts Inquiry* (Toronto: ON AG, 1987) [Zuber Report]; Deschenes Report, *Masters in Their Own House* (1981); Perry S. Millar and Carl Baar, *Judicial Administration in Canada* (Toronto: Institute of Public Administration in Canada, 1981), Huguette St-Louis, "Reform of Trial Courts in Québec" in Peter H. Russell, ed, *Canada's Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press, 2007) at 123; British Columbia Minister of Justice and Attorney General, *White Paper on Justice Reform System* (Victoria: British Columbia Attorney General, 2012); Geoffrey Cowper, QC (Chair), *BC Justice Reform Initiative: A Criminal Justice System for the 21st Century* (Victoria: British Columbia Attorney General, 2012).

[67] National Literacy Survey, see: www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=31

[68] Action Committee on Access to Justice in Civil and Family Matters, Report of the Court Processes Simplification Working Group (May 2012): www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf

[69] Kirk Makin, "Technology seen as Key to solving Justice System Problems", April 24 2013, *Globe and Mail*: www.theglobeandmail.com/news/national/technology-seen-as-key-to-solving-justice-system-problems/article11539656/

[70] Dr. Erich P. Schellhammer, *A Technology Opportunity for Court Modernization: Remote Appearances* (January 2013) at 2 [A white paper prepared for Association of Canadian Court Administrators and Canadian Centre for Court Technology].

[71] Landgon Winner, *The Whale and the Reactor: A Search for Limits in an Age of High Technology* (Chicago: The University of Chicago Press, 1986), cited in Schellhammer, *ibid* at 2.

whether the common law principle of confrontation can be upheld, how demeanour can be assessed, how the remote location is set up to be suitable for a court proceeding, whether the solemnity of the court can be preserved, and what costs are involved.[72]

In the same vein, innovation has largely bypassed the justice system. Many factors contribute to this deficit, but one looms above all others: the civil justice system is an incoherent system likened by American scholar Rebecca Sandefur to a "body without a brain". Less colorfully, it has been said that the justice system lacks a CEO. The justice system is a system of systems, each with its own diffuse leadership (levels of court, levels of government, professional bodies, service providers) and underdeveloped mechanisms for communication, cooperation and collaboration.

Our lack of capacity for innovation is illustrated in an approach to reform dominated by pilot projects, often with insufficient commitment to follow through even on those that prove successful, let alone integrating learning from less successful ones into the process of trial and error needed for innovation. Pilot projects have become synonymous with disappointed expectations and "nothing reduces trust in a system more than disappointed expectation."[73] Reports have also emphasized how the existing judicial and legal culture itself can serve as a barrier to innovation in courts and the civil justice system.[74]

Internationally – How are we Doing?

The Chief Justice of Canada has galvanized the national agenda for access to justice, in part by highlighting Canada's poor rating on international access to justice indicators. She has noted with dismay that the World Justice Project found that on civil justice, Canada ranked ninth out of 16 North American and Western European nations and 13th among the world's high-income countries, just ahead of Estonia.[75]

Two particular sub-factors contribute to Canada's low ranking – delays in the resolution of civil matters and inadequate access to legal counsel

How Canada Ranks in the World on Access to Justice

9/12 in North America and Western Europe in 2011

13/29 of high income countries in 2012

54/66 in access to legal counsel (legal aid)

According to the 2011 World Justice Project report, one of Canada's greatest weaknesses is in access to civil legal aid, especially for marginalized segments of the population. Here Canada ranks a shocking 54th in the world, well behind many countries with lower Gross Domestic Product (GDP). Somewhat surprisingly given the greater volubility of Canada's public commitment to a social safety net, Canada even ranks behind the US, ranked at 50th in the world on this indicator.

[72] Schellhammer, *ibid.*

[73] Geoff Mulherin comment, during Plenary 3: Building Capacity and Creating an Environment for Innovation, at CBA Summit, *supra* note 2.

[74] Report of the Civil Justice Reform Working Group to the Justice Review Task Force, *Effective and Affordable Justice* (Vancouver: British Columbia Justice Review Task Force, 2006), and studies cited at footnote 78 and 79, which says : "For a more detailed analysis of legal culture, see Rodney Macdonald, "Legal Culture" (discussion paper prepared for the British Columbia Justice Review Task Force, February 2005): www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp, and Barbara Young, Q.C., "Change in Legal Culture: Barriers and New Opportunities" (discussion paper prepared for the BC Justice Review Task Force, February 2006): www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp Also cited, Steven J. Kelman, "Changing Big Government Organizations: Easier than Meets the Eye?" (paper prepared for the Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University, 2004): www.ssrn.com/abstract=563163. See also, National Action Committee Family Justice Working Group report (Toronto: CFCJ, 2013): www.cfcj-fcjc.org/sites/default/files/docs/2013/Report/%20or%20the%20Family%20Law%20WG%20.

[75] The World Justice Project (2012): http://worldjusticeproject.org/country/canada

Complexity in Law and Legal Process

The growing complexity of law and legal process, including vocabulary, protocols, procedures and institutions, contributes to an inaccessible justice system. This is perhaps the most evident contributor to barriers to equal justice. This complexity can be traced to various sources, including "the current state of rules of procedure, a multiplicity of practice directions, and the substantive law, which is often obscure and uncertain."[76] The volume of legal materials continues to expand at an exponential rate. Court decisions are longer, legislation runs to hundreds of pages and regulations can be even thousands of pages long. This growing complexity is in large measure a reflection of modern society.

> Gone are the days of basic domestic contracts, which are now the stuff of massive disclosure and debate. Gone are the days of the short, quick interlocutory motion for interim parenting and support, which are now the stuff of lengthy, and often repeated examinations, leading to the requirements for legal briefs preliminary to special chambers motions, such that while a lawyer's billing rate may have increased 100% in a decade or two, the time required to address a matter may have also increased by perhaps even two or three times what would have been contemplated 20 years ago.
>
> ***Comment received from Alberta lawyer during consultations***

Law reform initiatives can help to increase accessibility. For example, the federal child support guidelines are credited with clarifying and simplifying the law. But, when we look back we can see that many other attempts to simplify legal process to save cost and time have had perverse results. While there have been some positive gains from certain reforms, generally procedures are as elaborate as ever and the cost of litigation continues to rise. One example given in our consultations is that recent changes in Alberta court rules for entry of orders actually make it more difficult, time consuming and expensive to resolve orders in dispute because of added demands on court staff (from judges or administration), resulting in greater delays and expense.

Proactive legal regimes such as consumer protection measures and regulatory oversight can contribute to equal justice by shifting the burden of enforcing legal rights and responsibilities and ensuring compliance to the regulator, rather than individual legal claims. In Canada, however, we have witnessed an opposite trend where administrative agencies, such as human rights and employment standards commissions originally intended to protect individuals through systemic enforcement and reliance, now rely almost exclusively on individuals to launch complaints.[77] This move away from state enforcement of standards has led to rising demand for related legal assistance, undermining the original objective of preventing disputes and improving public protection.

The Australian strategic framework for access to justice recognizes this dimension of the access to justice issue, noting that "clearer laws" are critical. It sets out the following principle to guide reform:

> Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.[78]

[76] CBA Systems of Civil Justice Task Force, The Right Hon. Brian Dickson, Hon. Chair, *Systems of Civil Justice Task Force Report* (Ottawa: CBA, 1996) at 16.

[77] See for example, Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: CHRA Review Panel, 2000) at 6; Anthony Duggan and Iain Ramsay, "Front-End Strategies for Improving Consumer Access to Justice" in *Middle Income Access to Justice*, *supra* note 32 at 95.

[78] Attorney General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Canberra: Australia Attorney General's Office, 2009) at 62.

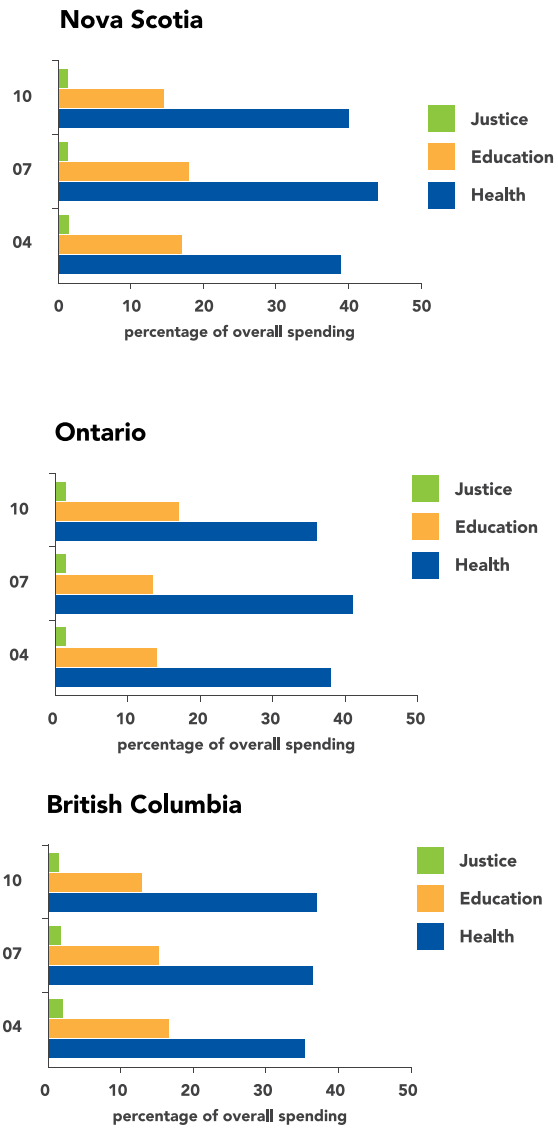
Low Relative Spending on the Justice System

Spending on the justice system (excluding policing and corrections but including prosecutions, courts, victim and other justice services, and legal aid) is roughly 1% of government budgets. This 1% includes prosecution, court services and justice services such as legal aid and law reform.

Ratio of spending on health to justice: 40:1

Government spending on justice compared to overall government spending shows a trend: health and education funding is generally stable or gradually increases, while spending on justice is flat or declines from year to year.[79] This is illustrated in the following charts, showing numbers from three sample provincial budgets (Nova Scotia, Ontario and British Columbia) for justice, education and health over the same period.

Chart 10: Comparative government spending in 3 sample regions 2004-2010



At about the same time, federal government spending on prisons and policing has increased significantly, while Canada's crime rate continued to decline. At the federal level, police services use more than half the justice budget (57.2%), followed by corrections (32.2%), courts (4.5%), prosecutions (3.5%) and legal aid (2.5%).[80] The next chart sets out the percentage of public spending on justice in the same provinces (Nova Scotia, Ontario, British

[79] Data taken from the *Annual Budget Estimates* from those sample provinces over the past decade.

Nova Scotia

www.novascotia.ca/finance/site-finance/media/finance/budget2010/EstimatesAndSupDetail2010-11.pdf

www.novascotia.ca/finance/site-finance/media/finance/2007_estimates.pdf

www.novascotia.ca/finance/site-finance/media/finance/2004-2005_Estimates_Book.pdf

Ontario

www.fin.gov.on.ca/en/budget/estimates/2010-11/volume1/

www.fin.gov.on.ca/en/budget/estimates/2007%2D08/volume1/

www.fin.gov.on.ca/en/budget/estimates/2004-05/volume1/index.html

British Columbia

www.bcbudget.gov.bc.ca/2010/estimates/2010_Estimates.pdf

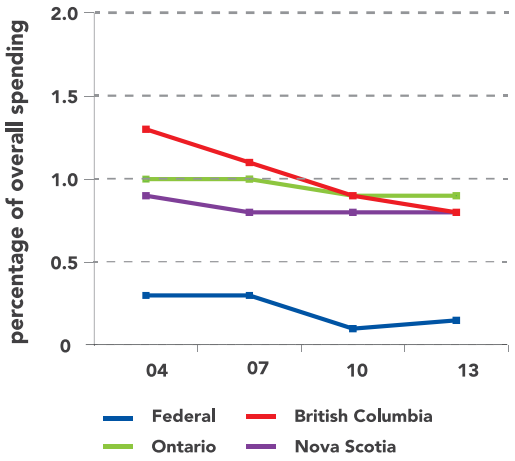
www.bcbudget.gov.bc.ca/2007/pdf/2007_Estimates.pdf

www.bcbudget.gov.bc.ca/2004/est/pdf/default.htm

[80] Ting Zhang, *Costs of Crime in Canada, 2008* (Ottawa: Justice Canada, 2008) at 5.

Columbia) as well as the federal government. Again, keep in mind that for every dollar spent on the justice system, our governments spend about $40 on health.

Chart 11: Justice spending in Canada[81]



So Much to Learn

This brief overview of what we know and don't know about access to justice shows there are still many gaps in our knowledge and these gaps impact our capacity for reform.

Over the past two decades the justice system has become more adept at collecting baseline data, but the empirical basis for decision making is still extremely limited compared to what is known about health and education. The justice system has a long way to go in terms of what information is collected, how it is collected and how open it is. Overall we have become better at counting inputs and outputs, although not all of this data is open or transparent and there is no coordination across agencies to collect information in a manner that permits comparison. The Canadian Association of Provincial Court Judges and the Association of Legal Aid Plans are both in the early stages of developing a protocol for standardized data collection. These commitments mark a welcome step in the right direction.

In 1996, the CBA identified the lack of court management information data as an obstacle. This information is essential for planning and evaluating access to justice initiatives and understanding the role of legal and justice services vis-à-vis other support services.[82] But that is just the tip of the iceberg. We know little about the relative effectiveness and efficiency of various service delivery models, legal information, assistance and representation, or dispute resolution mechanisms across different types of legal matters, and how to match processes and legal services to the nature and intensity of the legal dispute.[83] At this time, we do know that we fall far behind the health and education systems in our commitment to and capacity for evidence-based decision making. It contributes to our justice innovation deficit.

This lack of knowledge cannot be an excuse for inaction. Nor can we focus only on what is currently measured or easy to measure and ignore what cannot be measured or what we have chosen not to measure. It is detrimental and wrong-headed to suggest a lack of evidence justifies inaction, where it is obvious that action should be taken. Action is needed on many fronts, including developing and maintaining a stronger knowledge base.

The Case for Fundamental Change

What has gone wrong? The simple answer is that justice has been devalued. We see justice as a luxury that we can no longer afford, not as an integral part of our democracy charged with realizing opportunity and ensuring rights. The justice system has been starved of resources and all but paralyzed by lack of coordinated leadership and a tendency to focus on how justice institutions other than our own are contributing to the problem. As one person put it: "access to justice is even more undervalued in an already undervalued area." Meaningful access to justice is a scarce resource and the mechanisms used to ration this scarce resource are largely hidden. The implications of this rationing are often also invisible.

In this section, the Committee considers arguments in support of a fundamental reexamination of the value we put on our justice system, and ways

[81] *Ibid.*

[82] CBA Systems of Civil Justice Task Force, *supra* note 76.

[83] The CBA Legal Futures Initiative is canvassing the legal profession, the public, and other stakeholders for their opinions about these concepts.

to create conditions that promote justice system change.

JUSTICE = GROWTH.
JUSTICE IS A VALUE IN ITSELF.
IT IS A VERY GOOD INVESTMENT.

Hague Institute for the Internationalisation of Law (HiiL), Innovating Justice (2013)

Everyone Experiences Legal Problems

We live in a society regulated by law. Everyone's lives are shaped by the law and everyone is likely to experience a legal problem at some point. This is not to say that everyone will engage with the formal justice system: many problems can and should be resolved in more informal ways. Still, we should know for certain that we – and those we care about – will have meaningful access to justice if and when we need it. **Everyone is entitled to justice. This point needs to be a common thread of public discourse and individual understanding.** Needing recourse to the justice system does not suggest a personal failure, any more than a health problem requiring access to the medical system does. It is a simple fact of 21st century life in a developed political economy: law "knits together the fabric of our society".[84]

Direct Relationship between the Courts and Democracy

The courts are one branch of government (in addition to the executive and the legislature) and an essential component of Canadian democracy. Courts are essential to a society committed to the rule of law, ensuring the peaceful resolution of disputes in a system where no individual or institution is above the law. The rule of law is two-dimensional: it shapes and protects the relationship between the individual and the court and between courts and other branches of government. In this way, access to justice is a democratic imperative. Basing arguments for justice innovation on democratic principles and the rule of law may seem abstract, as the straight line between those concepts to the services that may help an individual to resolve a legal problem is not immediately obvious. Yet this line is very real.

> Can therefore a country be said to be governed by the rule of law if some of its populace is excluded from accessing the law or is faced with significant challenges in doing so, cannot benefit from using the legal process or is disadvantaged in proceedings brought against them by the state?
>
> ***Dr. Patricia Hughes***

Growth in Poverty and Social Exclusion

The reality today is that not everyone has meaningful access to justice regardless of income. When social exclusion becomes more entrenched because a person cannot get the legal help needed to redress a wrong or enforce a right, the justice system aggregates, rather than mitigates, inequality. We know that poverty is deepening across Canada and it is changing the structure of society.[85]

The growth in income disparity and social exclusion is a leading public policy concern and has specific ramifications for justice policy. In a section discussing the lack of access to legal services in Canada, the World Justice Project report notes that these issues "require attention from both policy makers and civil society to ensure that all people are able to benefit from the civil justice system." A recent US study by the RAND Institute of Civil Justice similarly concluded, "[t]he policy ramifications of diminished legal aid, in terms of what the civil justice system actually accomplishes and whom it serves, present a troubling set of questions for society".[86]

Providing suitable legal advice and assistance can play a crucial role in helping people move out of some of the worst experiences of social exclusion.

[84] Eberts, *supra* note 52.

[85] See: www.cwp-csp.ca/poverty/just-the-facts/.

[86] Michael Greenberg, Geoffrey McGovern, *An Early Assessment of the Civil Justice System after the Financial Crisis* (Santa Monica, CA: Rand Institute, 2012) at 62.

> I just wanted to say when I first started working in community people were poor. We were just poor. Today there are different types of poverty, not just that people are poor. I have young people that I work with. Young couples with children, where 20 years ago they would have been working middle class, and they're not anymore. They're homeless. They make enough money between the two of them to keep their kids fed and to be able to buy clothing for them and send them to school. But they don't have money to pay rent. There's no way that they can pull that kind of money. One of them gets minimum wage and the other one is making a bit more but there's still not enough to cover. So there's a whole new kind of poverty that's becoming even more prevalent in the community.
>
> ***Maria Campbell, Metis Elder, Envisioning Equal Justice Summit, April 2013***

Timely intervention in a life crisis triggered by a problem with a legal component, like debt or homelessness, can make all the difference, preventing the situation from becoming more extreme. For these reasons, the UK National Action Plan on Social Inclusion (2003) gave access to justice similar priority to health-care and education, recognizing access to justice as a basic right and a vital element in policies that address social exclusion. Currie's Canadian research highlights the relationship between legal problems and health problems, demonstrating a strong policy rationale for connecting access to justice policy with other public policy concerns. His findings also illustrate the ways that lack of access to justice reinforces social exclusion faced by certain groups in Canada, particularly people with disabilities.

Canadians have a strong commitment to equality, exemplified in domestic and international human rights commitments, and Canadian governments have an important role in offsetting income inequality. For example, the Canadian Institute for Health Information recently found that public health care alone reduces the income gap by 16%, as wealthier Canadians pay more in taxes than they reap in benefits. As stated by Hughes: "While responding to the needs of members of less advantaged communities matters if there is to be equal access to justice, a failure to achieve 'equal justice' also has implications for other aspects of people's lives and inevitably therefore for society at large."[87]

Poor Public Policy

There are strong practical reasons for ensuring meaningful access to justice. Adequate representation leads to a smoother and more effective functioning of the system. When people receive appropriate assistance in reading and preparing documents and making arguments, it saves public money in the long run and results in better outcomes.

Justice degrades with delay: while the outcome may look the same when a resolution is finally reached or a decision rendered, the justice the person receives is not the same. The parties' position or personal safety may be compromised and the damage may be irreparable. People whose legal issues are not resolved face ongoing difficulties. Problems spread to other areas of their lives, at significant individual and social cost. For example, a mother and children unable to get timely, effective assistance or an expedited court hearing to determine their right to support may eventually get the requested order and judgment, but that won't cure the deprivations or repercussions suffered in the meantime. Further, since we know that people whose legal issues are unresolved face ongoing and escalating problems in different areas of their lives, at significant individual and social cost, society as a whole benefits from providing timely access to justice.

Empirical research shows a false dichotomy between focusing on "efficiency and effectiveness rather than equality and ideals." Equal justice

[87] Hughes, *supra* note 27 at 5.

makes sense for both "the wallet and the heart."[88]

Costs of Inaccessible Justice

Studies are now demonstrating how unresolved legal problems and inadequate access to justice can be costly for both the individual and to society at large. For example, Macfarlane's national SRL study notes some costs of inaccessibility in terms of stress and health effects, loss of income and loss of employment. Children can be secondarily affected if parents are not afforded the fair outcomes that they need. This may be obvious in child support or parenting cases, but is equally true when families with dependent children are at risk because of other unmet legal needs, such as those impacting housing or income issues. The costs and benefits of equal justice are also documented in reports prepared by the Canadian Forum on Civil Justice[89] and others.[90] However, we have as yet been unable to quantify the impact of these costs in Canada.

Other jurisdictions are further ahead. For example, one British study calculated that each legal problem reported to cause physical illness ultimately costs Britain's National Health Service between £113-£528, depending on which service provider was used, or more if multiple providers were involved. Stress-related effects cost between £195-£2224 per patient, again depending of which service provider was used.[91] Similarly, an Australian study found that providing legal aid at the committal stage of a criminal procedure would save the equivalent of three or four district court judges per year.[92]

The Canadian Forum on Civil Justice is collaborating with a range of individuals and institutions on a five-year study to define the economic and social costs of justice. The study will develop methods to measure what our civil justice system costs, who it serves, whether it is meeting the needs of its users and the price of failing to do so. The project has two prongs: the costs of providing an accessible system and the costs of not providing an accessible system. The costs of justice system inaccessibility will be measured at four levels:

- individual (health, well-being, power, security, economics, education)
- private sector (business, lawyers, paralegals)
- government (justice system, health care system, other social services (housing, social welfare, policing, for example)), and
- civil society (rule of law, democracy, sustainability).

The results of these research projects are eagerly awaited. They will offer an in-depth understanding of the value of an accessible justice system and a convincing case for institutions and citizens to invest in access to justice.

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[88] Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism* (2003) 30:1 Journal of Law and Society at 1.

[89] Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts* (Toronto: CFCJ, 2008).

[90] Pascoe Pleasence, Nigel J. Balmer, Alexy Buck, Marisol Smith, Ash Patal, "Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems" in Pascoe Pleasence, Alexy Buck, Nigel J. Balmer, eds, *Transforming Lives: Law and Social Process*, (Belfast: 2006) at 61-63 [Papers from the Legal Services Research Centre's International Research Conference, *Transforming Lives*].

[91] *Ibid* at 83-84.

[92] Mulherin, *supra* note 73.

Learn More: about the landscape of civil justice problems experienced by Canadians

Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007): www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf

Access to justice and social exclusion: Pascoe Pleasence, Alexy Buck and Nigel J. Balmer (eds.), *Transforming Lives: Law and Social Process*, note 90.

A. O'Grady, Pascoe Pleasence, Nigel J. Balmer, Alexy Buck and Hazel Genn, "Disability, Social Exclusion and the Consequential Experience of Justiciable Problems" (2004) 19:3 Disability & Society 259.

Patricia Hughes, Inclusivity as a Measure of Access to Justice, note 27.

Costs of Inaccessible Justice: Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism*, note 88.

Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative, "Intervening at the Intersection of Poverty and the Justice System" (March 2013): www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf

Return on Investment for Legal Aid Spending

In recent years, we have repeatedly heard that legal aid is not sustainable. But legal aid is our most important access to justice program. In addition to being a significant down payment on the promise of equal justice, funding for civil legal aid represents a good social and economic investment.

Synthesizing several studies on the economic benefits of civil legal aid, Dr. Laura Abel notes that it can actually save public money by reducing domestic violence, helping children leave foster care more quickly, reducing evictions and alleviating homelessness, protecting patient health and helping low-income people participate in federal safety-net programs.[93]

A growing number of studies are contributing to a business case for adequately funding legal aid by actually quantifying the return on investment for legal aid dollars spent:

- A 2012 Australian study, *Cost Benefit Analysis of Community Legal Centres* (CLCs), finds that, on average, CLCs have a cost benefit ratio of 1:18. For every dollar spent by government they return a benefit to society that is 18 times the cost. To express this in dollar terms, if the average held constant for CLCs in Australia, the $47 million spent on the program nationally in 2009/10 would yield around $846 million of benefit to Australia.[94]
- A PricewaterhouseCoopers study, also in Australia, found that every dollar spent on family law legal aid provided a $1.60 to $2.25 benefit to the overall justice system. "Legal aid demonstrably benefits those receiving legal aid support, those people and businesses they have contact with, the community more broadly and the efficiency of the legal system as a whole. Therefore there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government."[95]
- A 2009 Texas study found that "investment in legal aid services led to economic growth in the community by increasing jobs, reducing work

[93] Laura K Abel, *Economic Benefits of Civil Legal Aid* (National Centre for Access to Justice, Cardoza Law School, 4 September 2012) http://ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf.

[94] Judith Stubb and Associates, *Economic Cost Benefit Analysis of Community Legal Centres* (Sydney: National Association of Community Legal Centres, 2012) http://www.communitylawaustralia.org.au/wp-content/uploads/2012/08/Cost_Benefit_Analysis_Report.pdf.

[95] PricewaterhouseCoopers, *Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law* (National Legal Aid, 2009) at ix-x www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf

days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity." In fact, "for every direct dollar expended in the state for indigent civil legal aid services, the overall annual gains to the economy are found to be $7.42 in total spending, $3.52 in output (gross product), and $2.20 in personal income.[96] Reductions in legal aid spending, therefore, have a negative impact on spending and create an economic burden on the community."

- A 2011 UK Citizens' Advice Bureau Report, *Towards a business case for Legal Aid*, found that for every pound of legal aid expenditures on housing advice, debt advice, employment benefits and income benefits advice, the state potentially saves between €2.34 and €8.80.[97]

One British study approached this issue from the opposite perspective: how cuts to legal aid increase costs in other areas of public spending. In a 2011 report for the Law Society of England and Wales, Dr. Graham Cookson of the School of Social Science and Public Policy of King's College London was asked to consider any "knock on" costs (unintended costs) because of significant cuts to legal aid, and the overall impact of those cuts on government budgets. His advice was that the cuts would involve such significant "knock on" costs that the promise of any cost savings should be reevaluated. He also noted significant areas where additional longer-term costs were likely, but were difficult to precisely evaluate.

Similarly, a British study on the effectiveness of legal aid in the asylum (refugee) context found that restrictions on the quality of legal aid as a cost savings measure resulted in higher costs overall: "poor quality work costs much more in the longer term to the public purse and in human terms to individual asylum seeker applicants."

These studies from Australia, the UK and the US conclude that the average demonstrated social return on investment is that for every $1 of legal aid spending about $6 of public funds are saved elsewhere (a range from 1:2 to 1:18.)

Average Social Return on Investment from Legal Aid Spending
$1 = $6

US civil legal aid providers increasingly report the economic impact of their programs in concrete terms. Program impacts are quantified in millions of dollars, on an annual basis. The impacts measured include: income benefits and cost savings received by low income families, cost savings to tax payers, economic impact of federal dollars flowing into local economies as an outcome of legal aid cases, increased tax revenue, and systemic changes resulting in savings for state residents. These reports also note additional economic impacts that while difficult to quantify are no less real, including for health care providers, court efficiencies, and for costs and losses to the state from homelessness and domestic violence.[98]

Unfortunately no Canadian studies to date have quantified the economic impact of legal aid in this way. Several legal aid plans have reported in general terms the ways legal aid can save public funds.[99] In 2012, the Law Foundation of British Columbia commissioned Yvon Dandurand and Michael Maschek to conduct a feasibility study on the economic impact of legal aid. They identified a number of promising areas for future research, proposing four studies on the impact of legal aid.[100]

[96] The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (Waco: Perryman Group, February 2009) at 3.

[97] Citizens Advice Bureau, *Towards a Business Case for Legal Aid* (London: International Research Conference, July 2010).

[98] See sources in "Learn More", *infra* at 55.

[99] For example, see Legal Aid Ontario, Business Plan, 2006-07: www.legalaid.on.ca/en/publications/PDF/Public Business Plan April 2006.pdf; for other Canadian discussions of the cost benefit of funding legal aid, see Doust, *supra* note 11; Sharon Matthews, *Making the Case for the Economic Value of Legal Aid* (Vancouver: CBA-BC, 2012); Kamloops Chamber of Commerce: www.kamloopschamber.ca/files/documents/Go%20Long%20on%20Legal%20Aid%20Funding%20FINAL.pdf; Alberta Government, *New Ways for Families: Social Return on Investment Case study: Medicine Hat Family Services* www.newways4families.com/images/pdfs/Medicine%20Hat%20Family%20Services_Executive%20Summary.pdf

[100] Yvon Dandurand and Michael Maschek, *Assessing the Economic Impact of Legal Aid - Promising Areas for Future Research* (Vancouver: Law Foundation of British Columbia, 2012).

Learn More: about Bang for the Legal Aid Buck! [#1]

PricewaterhouseCoopers for National Legal Aid (Australia), "Economic Value of Legal Aid" (Sydney: PricewaterhouseCoopers, 2009): www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf

The Perryman Group, "The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential" (2009): www.nlada.org/DMS/Documents/1236008203.14/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf

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Kenneth A. Smith et. al., "Economic Impacts of Civil Legal Aid Organizations in Virginia: Civil Justice for Low-Income People Produces Ripple Effects That Benefit Every Segment of the Community" (Legal Services Corporation of Virginia, 2011): www.vplc.org/wp-content/uploads/2012/10/VA-Report-on-Economic-Impacts.pdf

Access to Justice Commission, "Economic Impact of Civil Legal Aid Services in Maryland" (Access to Justice Commission, 2013): www.mdcourts.gov/mdatjc/pdfs/conomicimpactofcivillegalservicesinmd201301.pdf

Learn More: about Bang for the Legal Aid Buck! [#2]

Laura K. Abel and Susan Vignola, "Economic and Other Benefits Associated with the Provision of Civil Legal Aid" (2011) 9 Seattle J. for Soc. Justice 139: www.law.seattleu.edu/Documents/sjsj/2010fall/Abel.pdf

Laura K. Abel, Economic Benefits of Civil Legal Aid, National Centre for Access to Justice at Cardoza Law School (2012): www.ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf

The National Legal Aid Defenders Association, *Economic Benefit of Meeting Civil Legal Needs*: www.nlada.org/DMS/Index/000000/000050/document_browse#topics

James A. Richardson, *Legal Services Programs in Louisiana: Their Economic Impact on the State of Louisiana* (2011): www.lsba.org/2007Documents/NewsDocuments/NewsDocument-647.pdf at page 5.

Rod Feelhaver and Jerome A. Deichert, *The Economic Impact of Legal Aid in Nebraska: National Legal Aid & Defender Association*, (2008): www.nlada.org/DMS/Documents/1236007550.3/NE impact 2007.doc

Florida Tax Watch, The Economic Impact of Legal Aid Services in the State of Florida (2010): www.nlada.org/DMS/Documents/1309704171.89/florida%20legal%20aid%20economic%20impact%20study%202010.pdf

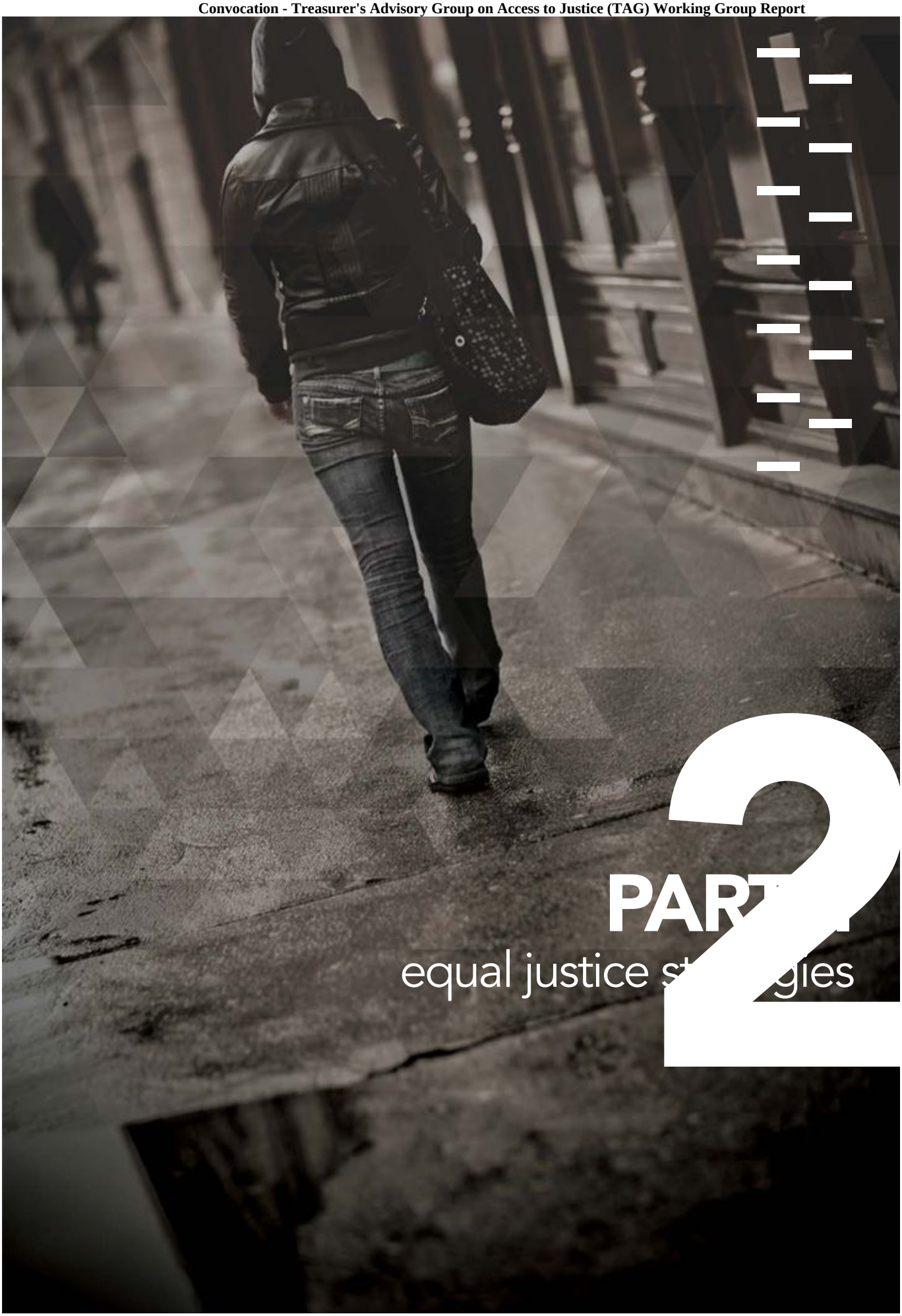
Task Force to Expand Access to Civil Legal Services in New York, *Report To The Chief Judge Of The State Of New York* (2010): www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf

Why Tinkering is Insufficient

The civil justice system is too badly broken for a quick fix. People fall between the cracks at an unacceptable cost. Injustice is too deeply woven into the system's very structure for piecemeal reforms to make much of a dent. It is unclear whether the myriad of ad hoc access to justice interventions currently proliferating outside an overarching strategic framework are actually helping. Individual interventions may work at cross-purposes and risk hindering progress by fostering complacency and diminishing support for more substantive reform. An excess willingness to compromise makes achieving the equal justice vision impossible.

> Believing that we are doing something effective can reduce our perceptions of injustice, whether or not our beliefs are factually justified.
>
> ***Gary Blasi, How Much Access? How Much Justice? (2004)***

We need to abandon a "culture of martyrdom"; we need to stop trying to simply make do. It is time to reach for equal justice, not some limited vision based on a short term view of current constraints. The enormity of the challenge may seem paralyzing, but access to justice problems are not intractable, and committing to achievable reforms can be empowering. Change will not happen quickly, but every step along the right path, with a common vision and commitment to measure how effective each innovation has been in achieving that vision, can help. Missteps can be corrected when evidence shows a better way, but we should not waiver about the need to start walking, or the ultimate destination.



PART 2
equal justice strategies

Equal justice strategies

Envisioning Equal Justice

Finding the 'Soul' of Reform

At the Summit, Sam Muller of the Hague Institute for the Internationalisation of Law (HiiL) urged participants to consider the 'soul' of reform, that is to work toward a consensus on the animating purpose of our access to justice efforts. Agreeing on the 'soul' of reform would give us a shared focus and a measuring stick for progress, while allowing flexibility on how the animating principles are actually achieved in particular circumstances. It would also recognize that diverse approaches are needed and should be encouraged.

Improving access to justice is an ongoing project, and contemporary efforts date back to the 1960s. The focus of these efforts has changed over time, with succeeding waves of the access to justice movement. Early on, access to justice was seen as one prong of an agenda to build a more equitable society, joined with a focus on human rights and increased accountability of government institutions. This gave rise to the spectacular growth of administrative tribunals and legal aid, including community-based clinics. In the 1980s, the focus shifted away from institutional change to processes and procedures, with a renewed interest in alternative dispute resolution in both court and community settings. In the 1990s, the focus was more on court reform, with an emphasis on reducing costs, delays and complexity. And, the new millennium has ushered in an emphasis on cost efficiency and meeting budgetary targets, seemingly based on the general belief that as a society, we can no longer afford justice.

The emphasis on rationing civil justice has been linked to the steady rise in the cost of legal aid and the dramatic increase in spending on criminal justice. Some reforms of the 21st century have been more about eradicating barriers to the courts[101], though couched in the overall language of rationing access to justice. More recently, empirical research into unmet legal needs and their impact on people's lives and society as a whole has begun to shift the discourse back to a focus on client needs, but the trend now is more towards problem-solving than based on the idea of a right to equal justice.

The earlier generations' access to justice agendas were never finished, and they continue to motivate individual and institutional positions and reform priorities. This gives rise to distinct and sometimes conflicting goals for reform. The lack of clarity and agreement about the purpose (or 'soul') of reform is a key barrier to change and impedes progress. It also adds a layer of unintended, negative consequences to the process of reform.

Reaching agreement on the 'soul' of reform involves delineating the goal: a vision that is ambitious but possible. The Committee proposes a tangible vision of equal justice to guide reform:

An inclusive justice system requires that it be equally accessible to all, regardless of means, capacity or social situation. It requires six concrete commitments:

1. *People – The system focuses on people's needs, not those of justice system professionals and institutions.*
2. *Participation – The system empowers people. It builds people's capacity to participate, by managing their own matters and having a voice*

[101] When the Committee refers to "courts" in the general or conceptual sense in this Part, it views this term as potentially encompassing court-like tribunals that adjudicate disputes for individuals.

TIMELINE of Unfinished Access to Justice Agendas

1960s & 1970s	1980s	1990s	2000s	2010s
Commitment to"A Just Society" - rights-based entitlements, ending poverty	ADR - the iconic "Fitting the Forum to the Fuss"	Court reform - costs, delays, complexity - case management	The Cost-Efficiency Mantra	Renewed Focus on Client Need - "Putting the Client at the Centre" - helping people to solve their legal problems

in the system as a whole.

3. *Prevention – The system focuses attention and resources on preventing legal problems, not just on resolving them after they arise.*
4. *Paths to justice – A coherent system involves several options and a continuum of services to arrive at a just result. People get the help they need at the earliest opportunity, and find the most direct route to justice.*
5. *Personalized – Access to justice is tailored to the individual and the situation, responding holistically to both legal and related non-legal dimensions, so that access is meaningful and effective.*
6. *Practices are evidence-based – The system encourages equal justice by ensuring justice institutions are 'learning organizations', committed to evidence-based best practices and ongoing innovation.*

Equal and Inclusive Justice

It is hard to object to the goal of building a Canadian justice system that is equally accessible to all regardless of means, capacity or social situation. Equality, after all, is what the rule of law is all about. Despite this, there is a long way to go to ensure equality and inclusivity in practice.

At the Summit, Hughes reminded us that acknowledging diversity is not about including the 'other' but rather it is about all of us. The challenge is to approach the task of building an inclusive justice system not from a list of categories, like gender or Aboriginality, but based on people's relationship to the justice system and their need for assistance in different situations. Maria Campbell also spoke about the importance of working across differences in a manner that builds trust and empowers, rather than erects or reinforces boundaries.

> You're lawyers, you know that words have power. Words like marginalization, all of these things; we separate ourselves from people, from each other when we use that kind of language. It's like establishing boundaries if I'm coming to you for help and I'm seeing that kind of language on brochures or I'm hearing that kind of language used then that barrier is there between us before I even get started. Which would make me powerless even more.
>
> ***Maria Campbell, Metis Elder, Envisioning Equal Justice Summit, April 2013***

What's the fix? Focus on users' needs and how they need it. No one-size-fits-all solution for poor, middle class and distinct communities.

In this report, we highlight differences between the needs of the middle class and the needs of lower-income, poor and people living in marginalized conditions, as they are often not the same. While this approach oversimplifies the realities, it is a shorthand way of reminding us that individuals are socially-situated and that social situation relates to both the characteristics of the individuals and the complexity and extent of their legal needs. As such, many of the solutions to the crisis in access to justice for the middle class and the poor are distinct.

We need to continually question: who needs what kind of help in accessing justice? And what can be done to ensure that they can find it regardless of their particular characteristics and situation?

Dr. Ab Currie, the leading Canadian legal needs researcher, has shown that experiencing more than one form of disadvantage, say disability and remoteness, has an "additive effect". Multiple disadvantage results in multiple problems in different areas of life, like health and employment, and legal issues themselves compound at an ever-increasing rate. These realities result in further entrenching social exclusion.

At the Summit, Geoff Mulherin, Executive Director of the Law and Justice Foundation of New South Wales, provided a practical example of how paying attention to inclusivity will affect reform initiatives. He warned us to be careful about focusing too much on 'early intervention' – a current trend in Australia and Canada. The

research by his foundation demonstrates that "many disadvantaged people will turn up late in the process, not early." Focusing on early intervention is a positive direction for reform, but not when it has the perverse result of reinforcing barriers for people who need assistance the most. '*Timely* intervention' is a more inclusive, more effective policy.

The Committee employs broad categories to distinguish between the legal needs of different segments within Canadian society, recognizing that these categories are imperfect and there are no hard and fast rules that separate the legal needs of various groups of people. They do however reflect differing means, capacities and social situations in a general way, and assist us to keep in mind significant differences in legal needs, the impact of unresolved legal problems, and problem-solving and dispute resolution behavior, so we can assess who is most likely to benefit from proposed innovations.

While "100% access is the only defensible ultimate goal",[102] the Committee recognizes that this will be challenging. To the extent that rationing justice must be done, and undoubtedly is done on a daily basis, how can it be done to mitigate rather than reinforce patterns of inequality? Getting to equal justice demands that we first focus on the people who are most disadvantaged by their social and economic situation.

Designing a People-Centered Justice System

Over time, our justice system has developed to reflect the needs, approaches and imperatives of courts, court administration, tribunals and the legal profession. Justice institutions are not alone in this tendency. It is common to the way many organizations and professions work, and is difficult to overcome. But the civil legal needs research has demonstrated how far removed this approach is from what people actually want, need and expect from their courts and justice system. The way legal services are delivered by the legal profession, the nature of court and tribunal proceedings, including procedural requirements and the language used, the complexities and the costs, all act as barriers limiting people's opportunity to obtain justice.

A people-centred justice system will be easier to use, transparent and fair. It will ensure just outcomes so that people can go on with their lives and have confidence in the justice system. It will operate on the basis of reciprocity, actively transcending the standard 'us-them' divide between service provider and the user of services.

Participants in the Committee's community consultations were clear that justice and equality are primary goals underpinning the law. When asked what they meant by 'justice', comments included:

> "Fairness, equality and being held accountable." ***Person with Disability, Toronto***
>
> "Due consideration of all the facts and circumstances." ***Man with mental disability, Toronto***
>
> "Being heard. Being taken seriously." ***Single mother, Kentville***
>
> "It makes it possible to fix the damage." ***Youth, Montréal***

The Committee summarizes the broad vision of the justice system gained from the consultations it held with people living in marginalized conditions this way:

> *Justice is inviolable. It ensures fairness and equality for all, and respect for all who come before it. Being accorded respect from a justice system means being heard and provided with an effective, meaningful outcome.*

A justice system designed for the people using it will have strong linkages to other services. Legal issues are often experienced as part of a constellation of issues or problems, many that are not legal in nature.

[102] Richard Zorza, "The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes" (2012) 89:4 Denver University Law Review 859 at 861 http://www.zorza.net/Sorting-Hat.pdf.

> "People don't have federal problems or state problems. They have problems. They're multiple, complex, legal and non-legal. We have this real problem in Australia where things are driven by stovepipes [silos], by area of law, by is it a commonwealth matter, is it a state matter.
>
> People don't have problems that way as you all know. So we need to break down the stovepipes."
>
> ***Geoff Mulherin, Executive Director, Law and Justice Foundation of New South Wales***

When lawyers and judges talk about access to justice, we usually talk about law, justice systems and sometimes about how legal services and information are provided. Our vision is often limited by our own frame of reference. One of the most palpable and crucial findings of the Committee's consultations, consistent with other broad based surveys, is that the public has a more holistic view of justice.

The community consultations made it clear that people's legal issues are intimately interwoven with other social and personal issues in their lives. This can flow in two directions. In one sense, what is happening in the justice system has a ripple effect on their lives, like the single mother experiencing excessive delay in family court who fears she may lose her home as a result. In another sense, what is happening in people's lives and households can create legal problems and promote involvement in the legal system, for example, when a youth flees a troubled home life to become easy prey for gangs on the street. These realities illustrate the link between prevention and integration.

A Participatory Justice System

The only way to ensure a people-centred justice system is to ensure that members of the public are engaged in its oversight. Many also want to be active participants in preventing and resolving legal problems. The goal is to move away from traditional approaches that set lawyers and courts apart, denigrating any non-professional knowledge. Enhanced public accountability and participation depends upon informed and capable citizens and disputants or litigants. Strong commitments and resources must be devoted to building people's individual legal capabilities.

A Standard for Meaningful Access to Justice

A meaningful access to justice standard should guide our reform agenda, in particular, our evaluation of services designed to increase and ensure access. **Assessing whether the system, process, service or resource provides meaningful access to justice depends on the nature of the right, interest or legal problem at issue, the capacity of the individual, the complexity of the legal process or proceeding, and the seriousness and impact of potential outcomes.** These factors are supported by a growing body of jurisprudence[103] and empirical research.[104]

Developing a meaningful access to justice standard will involve a commitment to transcending the SRL phenomenon. SRLs appear to be an increasingly accepted fixture of our justice system, yet the current situation is unacceptable.[105] A tripartite approach to reform is required, including:

[103] See, *G (J) v New Brunswick*, [1999] 3 SCC 46 and *British Columbia (Attorney General) v Christie,* [2007] 1 SCC 873. In the criminal law context, some examples include *R v Sechon* (1995), 104 CCC (3d) 554 at 560 (Que CA); *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985), 48 CR (3d) 166 (Ont Div Ct); *R v Cormier* (1988), 90 NBR (2d) 265 (QB); *R v McKibbon* (1988), 45 CCC (3d) 334 (Ont CA); *R v James* (1990), 107 AR 241 (QB); *Spellacy v Newfoundland* (1991), 91 Nfld & PEIR 74 (Nfld SC); *Mireau v Canada (Attorney General)* (1991), 96 Sask R 197 (Q.B.); *R v Rothbotham, 1988* CanLII 147 (ON CA); *R v Fisher,* [1997] S.J. No. 530. (QB); *R v Brydges,* [1990] 1 SCC 190; *R v Bartle,* [1994] 3 SCC 173; *R v Prosper,* [1994] 3 SCC 236; *R v Matheson,* [1994] 3 SCC 328. See also, *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc. A/810 (1948), cited by the New Brunswick Court of Appeal in G(J) above.

[104] For example, see the work of Russell Engler, including "Towards a Context-Based Civil Gideon Through Access to Justice Initiatives" (2006) Clearinghouse Review 196; "Shaping a Context-Based Civil Gideon from the Dynamics of Social Change" (2006) Temple Political & Civil Rights Law Review; "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9:1 Seattle Journal for Social Justice 97; "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed" (2010) 37:37 Fordham Urban LJ.

[105] See comments from SRLs and findings from Macfarlane and Birnbaum studies, *supra* note 6.

- reducing the need for representation through enhanced legal information and assistance services;
- where feasible, developing paths to justice (including forms of adjudication) that do not require representation; and
- re-engineering the delivery of private and public legal services to make representation available in a greater range of situations.[106]

Full legal representation is not required in every case: meaningful access can be assured through a range of legal services and forms of assistance, depending on the circumstances. A growing body of research can assist in translating this general standard into best practices to guide the delivery of legal services and decision making processes (both court and non-court-based). The key is to offer a seamless continuum of legal and non-legal services, and ensure that representation is available when needed to have meaningful access to justice. While a lawyer is not required in every case, people must have access to a lawyer when their situation requires it, regardless of their financial capacity.

A Dual Focus on Prevention and Resolution

Our long range goal is to shift justice system resources away from finding effective ways to deal with legal problems, conflicts and disputes, toward preventing them in the first place. At the Summit, many discussions circled back to the need to invest in building the fence at the top of the cliff,[107] rather than spending all of our resources for the ambulance at the bottom. This does not mean abandoning those who require the ambulance, but it does mean finding ways to reduce the need for responsive interventions by increasing capacity for prevention and resilience. To use another analogy, we need to find ways to provide legal help "further upstream". This analogy is used frequently in health prevention literature and derives from the parable of the fisher, tired of continually saving people being swept downstream, who decided to go upstream to find out why so many people were ending up in the water.

It is useful to think of this as a dual-track approach that provides a better balance of justice system services aimed at both preventing and resolving legal problems. A proposed statement of civil justice system objectives developed by the Australian Attorney-General's Department distinguishes between a system in which "people can solve their problems before they become disputes" *and* "people can resolve disputes expeditiously and at the earliest opportunity." Importantly, it recognizes the need for both approaches.

Reform must not be approached in a monolithic fashion or based on an idealized view of how people should approach their legal problems. Relying on concepts of "ideal" citizens, those sensible people who know their rights and responsibilities, resolve their disputes by discussion, act quickly and are always prepared, and know how to navigate the system, is not useful. While we shift the emphasis towards prevention, we must also keep in mind that there is no way to prevent all problems and disputes.

One System, Many Paths

Another central component of this proposed vision is building a more coherent civil justice system. There is rarely only one solution or resolution to a legal problem. There are many paths to justice, some leading toward and others away from formal court and tribunal processes. Those paths must be integrated to a much greater degree than at present and we need additional paths to meet everyone's needs. The keys to greater coherence are effective navigation assistance and enhanced collaboration amongst stakeholders and participants.

Access to justice means more than simply access to the courts, but there are diverging views on what this insight means for the courts. For some, recognizing multiple paths to justice results in a 'de-centering' of courts, setting up an alternate system that is opposed to formal justice. However, in the Committee's vision, access to the courts remains a central component within a broader access to justice system. It is the threat of coercion

[106] Engler, *supra* note 25.

[107] See, Richard Susskind, *The End of Lawyers?* (Oxford: Oxford University Press, 2008). Susskind also acts as a Special Advisor to the CBA's Legal Futures Initiative.

from the formal justice system that brings many defendants to the negotiating table, and the courts that ultimately decide what is just under the law. The Committee, like Hazel Genn, does not want to abandon "the language of justice".[108] It is not a question of de-centring courts, but re-centring them in an integrated, well-ordered justice system. Re-centred courts are required to ensure that the resolution of disputes is consistent with legal norms. Re-centred courts will also keep our laws and legal system alive through ongoing judicial interpretation.

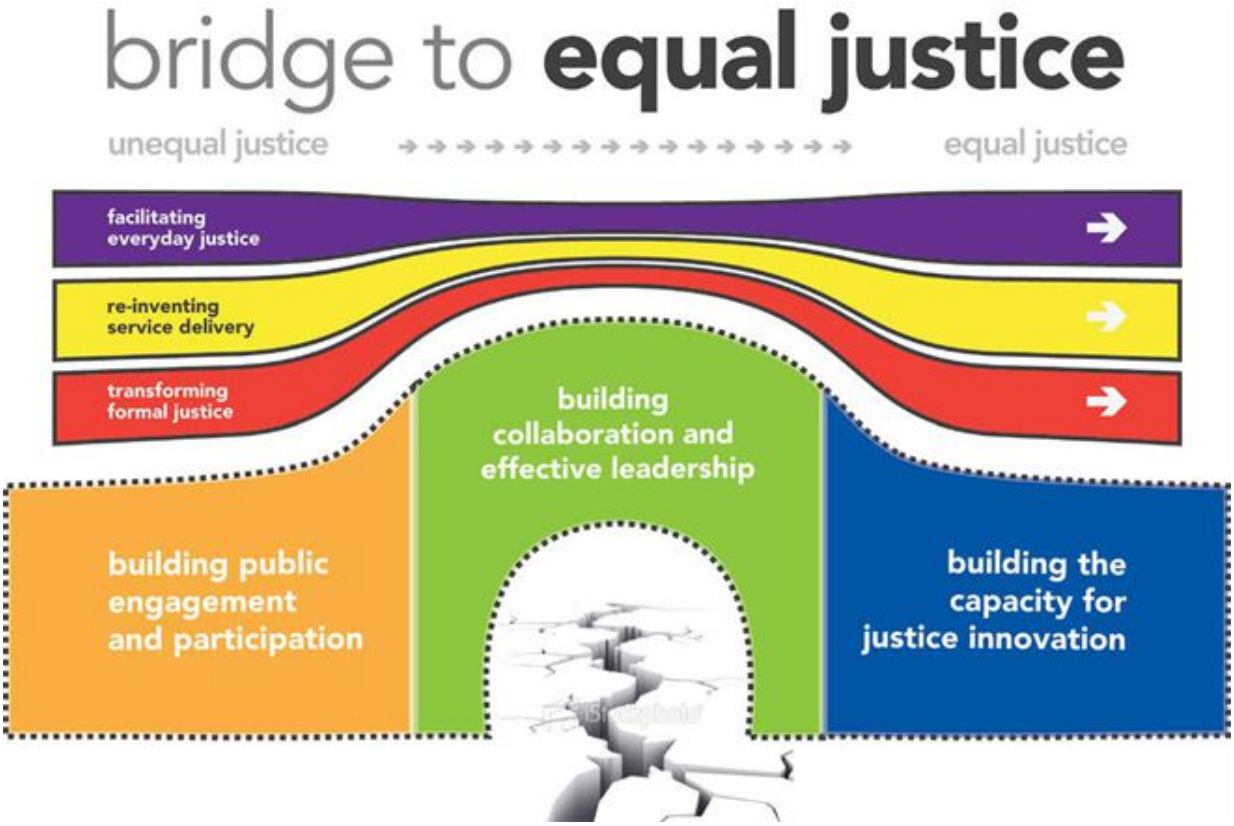
Learning Institutions, Organizations and Systems

If we have learned anything from decades of access to justice reform, it is that these issues are complex and cannot be addressed through one-off initiatives. Equal, inclusive justice is a shared aspiration, one that can only be achieved through an ongoing commitment to learning, continuously developing evidence-based best practices and supporting innovation. Learning is required at many levels, ranging from adapting procedures based on public feedback and evaluation, to testing and refining mechanisms for the improved delivery of legal services to better meet the public's needs, to integrating knowledge about common legal problems into systemic solutions.

Building a Bridge to Equal Justice

Reaching equal justice requires us to bridge the distance from the current state of inequality to the vision articulated above. The Committee imagines this 'bridge' as having three lanes, each representing different strategies for moving to equal justice. One lane is facilitating everyday justice, the second is transforming formal justice

[108] Hazel Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24:1 Yale Journal of Law and the Humanities" 415.



and the third is reinventing the delivery of legal services. Those three lanes are the topic of this part of the report.

The conceptual bridge rests on three structural supports: increased public participation and engagement; improved collaboration and effective leadership; and enhanced capacity for justice innovation. Those structural supports will be discussed in part III.

The Committee has proposed targets, milestones and actions for each lane and structural support. The targets are framed as measurable, concrete goals to be achieved at the latest by 2030. While different organizations and individuals may debate the specifics, the targets are designed to reflect a consensus of what is required. Achieving these targets will require individual, coordinated and collaborative efforts – none is in the purview of a sole justice system player.

Examples of immediate and interim actions and strategies are offered to illustrate the way forward, recognizing that much more detail is required and can be developed over time. Wherever possible, examples of emerging good practices and insights from research and evaluations, as well as links to further information are included in the discussion. The goal is to enlarge and change the conversation about access to justice in a manner that invites participation and inspires action. The Committee solicits feedback to these proposals and looks forward to an active and engaged dialogue.

Facilitating Everyday Justice

A new paradigm for access to justice is gradually evolving out of civil legal needs research that has taken place over the past several years. Currie has been a strong proponent of this shift, centred on the concept of "everyday justice". The idea of everyday justice is that few problems, in reality, are dealt with in the formal justice system. Knowing this, we need to take a much broader view of access to justice. Facilitating everyday justice requires three main changes. We need to:

- Recognize that there are many paths to justice.
- Find ways to deal with a larger number of legal problems through a larger range of mechanisms.
- Shift our attention "far upstream from the courts" by investing in timely intervention and preventative services.

Facilitating everyday justice means improving legal capability, taking legal health seriously, enhancing triage and referral systems to navigate paths to justice and taking active steps to ensure that technology is well used to facilitate equal, inclusive justice.

Law as a Life Skill

Law should be seen as a life skill, with opportunities for all to develop and improve legal capabilities at various stages in their lives, ideally well before a legal problem arises. Law is a fact of life in the 21st century. Almost everyone will experience a legal problem at some point in their lives, but until that happens, most people don't know what to expect from the justice system, the benefits of different paths and legal services and so on. Those involved in the justice system and in legal service delivery have a shared responsibility to increase the legal capabilities of everyone in Canada.

Building legal capability involves knowledge, skills and attitudes. Teaching law as a life skill also helps to cultivate trust and confidence in the justice system. All justice system participants can find ways to help build capability in their daily contact with members of the public.

Poor people and potential

"All people, including the poor, have enormous capacity to help themselves. Despite appearances, deep inside of every human being lies a precious treasure of initiative and creativity waiting to be discovered, to be unleashed, to change life for the better."

Muhammad Yunus, Founder Grameen Bank, Lawyers Can Help Us to Win the War Against Poverty (2013)

Legal capability training is a new approach that builds on a rich foundation of public legal education and information (PLEI) resources and curriculum.

PLEI is key for people to develop their capacity to understand the law. Information is a basic element of access to justice. The focus of this section is on PLEI approaches to building law as a life skill, but PLEI is also an important aspect of the continuum of legal services, discussed later in the report, assisting people when they confront a specific legal problem or problems.

At present, most people seek out legal information when they are in a legal bind, during a time of crisis. The goal is to change this so that everyone develops basic legal capabilities as part of public education curriculum and has a continuing opportunity to build on this base of knowledge and understanding throughout their lives.

As Sarah McCoubrey, Executive Director of the Ontario Justice Education Network, explained in her Summit presentation, building legal capability involves three components: knowledge; skills and attitudes. Teaching law as a life skill helps to cultivate trust and confidence in the justice system.

Seeing law as a life skill is also consistent with what the Committee learned in the community consultations. Many individuals said they experience the justice system as withholding critical information. In their view, information about law and its processes *empowers*; it enables community members to know their rights and how to enforce them. Being informed helps to ensure equal participation in the justice system.

McCoubrey offered her framework for the elements of legal capabilities and highlighted the value of legal professionals sharing our advocacy skills.

Framework for Building Legal Capabilities

Knowledge

- Know where to find out more
- Understand the issues
- Know the routes to a solution (or processes)
- Know where to get help.

Skills of Legal Capability

- Listening
- Communication
  Distinguishing between interests
- Imagining alternative solutions
- Ability to collect and record details
- Identifying between facts and emotions
- Empathizing with others in a dispute
- Identifying bias or self-interest

Attitudes of Legal Capability

- Trusting the professionals working in the system
- Believing that the system is impartial
- Believing that one deserves a fair resolution
- Having confidence that decision makers are unbiased (bribes, connections etc.)
- Believing that system evolves or can change
- Seeing that the system responds to injustices

Sharing our Advocacy Skills

- Consider All Perspectives
- Listen
- Find Evidence
- Talk to Experts
- Look for Bias
- Evaluate Sources
- Empathize with Others
- Be Curious
- Take Responsibility
- Give Reasons

The Summit workshop on PLEI centred on new challenges, emphasizing the need to empower the public and engage the legal profession to a greater extent. Legal practitioners need to do better at integrating public legal education and information resources into their delivery of legal services. Providing reliable legal information can help to build trust between a lawyer and client. Lawyers can also assist in developing PLEI materials, using plain language and providing specialized legal content to technology specialists, while also making their clients aware of and promoting easy access to those materials.

Learn more: about Emerging practices – some examples:

Use of Wiki books, wiki resources, and crowdsourcing:

Clicklaw Wikibooks (eg. See, JP Boyd on family law)
www.wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law

Partnering with public libraries and others to increase access Legal aid at the library:
www.lasclev.org/legal-aid-at-the-library/

Public libraries - Access to Justice project:
www.lawhelpmn.org/resource/public-libraries-access-to-justice-project

Finding Legal Help – San Francisco Public Libraries Project:
www.sfpl.org/index.php%3Fpg%3D2000024801

Code, Laws and Legal Help/Oakland Public Library:
www.oaklandlibrary.org/online-resources/government-resources/code-laws-and-legal-help

Connecting resources:

www.clicklaw.bc.ca/
www.povnet.org/

Clicklaw BC Help Map: www.clicklaw.bc.ca/helpmap

Platforms to compile resources:
www.yourlegalrights.on.ca/\videoshttp://vimeo.com/channels/yourlegalrights

Mobile phone: www.mobile.dudamobile.com/site/yourlegalrights

FLIP – Family Law Advice: www.legalaid.on.ca/en/getting/flip.asp

Use of video/audio:
Video tutorials from BC Courthouse library: www.courthouselibrary.ca/training/videos.aspx

Self Help materials:

What young mothers should know about Children's Aid Societies: www.vimeo.com/75326555

Going to the tribunal work book: www.bccpd.bc.ca/docs/cppworkbook_web.pdf

PEI:
www.cliapei.ca/content/page/publications_court/
www.cliapei.ca/content/page/publications_family

Keeping PLEI resources "open":
Declaration of an explicit grant of permission for attributed, non-commercial use:
Courthouse Libraries BC and Clicklaw offer.

Some PLEI providers have expressed concern that lawyers may discount research that clients have done because they perceive it as threatening the lawyer's role. It is difficult to gauge whether this concern is widespread or founded. Many lawyers, including John Paul Boyd, a leading proponent of integrating PLEI with delivery of legal services in the family law context, have suggested that an informed client is "not a threat, it is a blessing".

PLEI providers agree there is room for more coordination and opportunities to learn from each other, as well as a need for more creativity, collaboration, neutrality and rigour. Open licensing can be used to encourage borrowing and reduce duplication. There is an ongoing debate about the best ways to aggregate information, whether by linking web resources through portals or by other means. PLEI should not be framed as a complete answer to the public need for legal education, advice and representation, but it is a valuable starting point to assist people to connect to other resources.

Target: *By 2030, 5 million Canadians have received legal capability training.*

Milestones:

- *Law as a life skill courses are integrated into public education curricula*
- *Legal capabilities training modules are available to specific groups during life transitions (e.g. newcomers to Canada, older adults at retirement, young adults entering the workforce)*
- *Legal capabilities training is embedded into workplaces and other environments where training can be sustained*
- *Lawyers integrate legal capabilities approaches and work with public legal education and information providers (PLEI) in their delivery of legal services*

Actions:

- *The CBA and PLEI organizations work with the Council of Ministers of Education, departments of education, school boards and other interested organizations to advocate for the integration of law as a life skill courses into schools across Canada*
- *The CBA encourages lawyers to integrate PLEI materials and a legal capabilities approach in the delivery of legal services (where appropriate) and to assist PLEI organizations to develop and update materials*
- *PLEI organizations develop stronger partnerships with public and private sector organizations to integrate legal capabilities training into their existing programs, including those organizations serving members of the public experiencing life transitions (e.g. newcomers and seniors organizations)*
- *PLEI organizations develop, pilot and test national model legal capabilities training modules and protocols*
- *Justice system stakeholders work with PLEI organizations to develop and train rosters of law students, and current and retired lawyers and judges to deliver legal capabilities training in a variety of settings*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Legal Health Checks

The access to justice literature has long recognized that preventing legal disputes is a key facet of an effective justice system. Prevention can be enhanced by better access to legal information and by public policy initiatives, such as no-fault insurance, proactive regulation or consumer protection, which remove the need for legal assistance to resolve problems by shifting the burden of demanding compliance to public bodies. Systemic advocacy to reform laws, regulations and institutions is often the only effective way to eliminate recurring problems because they can get at the root causes of repeated and often routine legal issues.

WHAT IS LEGAL HEALTH?

Everyone knows that by eating the right foods, having enough sleep and exercise and avoiding stress you can stay healthy, strong and be better able to ward off illness.

Just like your body, your "legal health" needs attention. By following some simple steps your legal health can also be strong and you can avoid or minimize problems that could otherwise be expensive, time consuming and stressful.

There are certain events that most people face in life, such as entering or exiting a relationship, buying, selling or renting a house, the death of a loved one and possibly being questioned or arrested by the police. By being informed and by following some simple steps you can be prepared for these life events, even the unexpected ones.

Women's Legal Services, Tasmania

Lawyers have traditionally played a pivotal role in preventing legal disputes, by providing strategic advice and planning services. This role is diminished now when many people have limited access to lawyers, so we must consider new means to make preventative measures more available. For example, providing post-dispute resolution support can assist in preventing legal issues from recurring or resolving related problems before they also develop into legal disputes. This approach is often referred to as building resilience to future legal problems.

Initiatives that focus on legal health advance our capacity to prevent legal problems and build resilience to future or recurring legal problems. Just as the health system aims to both prevent and treat disease, so too the justice system should aim to prevent legal problems in addition to providing assistance when they arise.

The legal health checklist model ties together the ideas of prevention, resilience and building legal capability. A number of legal practice websites encourage people to have an "annual legal health checkup" or offer checklists of situations in which legal needs or issues often arise. While to some extent these checklists are marketing tools, they could be a significant preventive measure if properly developed and employed. For example, Australian legal providers are developing legal health checklists that can be self-administered to create awareness of common legal problems and how to address them, or used by service providers to ascertain whether an individual who is seeking one form of assistance, say in a homeless shelter, has other types of problems that could be addressed through an appropriate referral. These checklists can also offer general advice on "how to stay legally healthy".

Women's Legal Services Tasmania has published an excellent booklet called *Legal Health Checkup – What shape is your legal health in?* It opens with an engaging introduction and definition of legal health. The booklet aims "to encourage people to take basic steps in their day-to-day life, which will help ward off legal nasties and other situations, which could otherwise be avoided." It points out that both physical and legal health are important: "Taking basic steps like the ones outlined in this booklet and knowing your rights or where to go to get the right advice can be the difference between legal health and a legal disaster."[109]

According to the booklet, there are three essential items at the foundation of legal health: a will; a reliable post address; and a safe place for important documents. The booklet also provides checklists about legal issues that arise in ordinary day to day life, and in other more specific situations. These situations include: relationships (moving in together, getting married, having a baby, separation, divorce); putting a roof over your head (moving house, being a tenant, being a landlord, buying a house, selling a house); money money money (watching out for the credit crunch, mortgages, personal loans and other forms of finance, email offers and overseas lottery wins, rent to buy, financial abuse, bankruptcy); when someone dies

[109] Women's Legal Services, *Legal Health Check Up: What Shape is Your Legal Health In?* (Tasmania, Australia, August 2013) http://www.womenslegaltas.org.au/uploads/booklets/Legal_Health_Checkup.pdf.

(registering the death, find the will, funeral plans); and the police.

Legal service providers, including legal aid plans and community-based clinics, have a particularly key role to play in contributing to legal health, both at the individual and systemic levels. In addition to administering or making available personal legal health checklists, with appropriate resources these organizations could also carry out broader heath checks — providing valuable feedback about the incidence of legal problems in a community and potential systemic solutions. These organizations could offer an early warning system about general increases in certain types of legal problems with a view to timely intervention and prevention. In some communities, this work would need to be carried out in conjunction with trusted intermediaries. However best established for a particular community, the idea would be to enhance opportunities for contact between members of the public and service providers, creating more everyday opportunities for ameliorating social exclusion and disadvantage and creating equality.

At the Summit, Allan Seckel, CEO of the British Columbia Medical Association and former Deputy Attorney General for British Columbia, introduced the idea of "capitation" in the sense of assigning responsibility for the legal health of a community to a particular individual or organization. This idea takes the concept of legal health checks one step further. Both systemic legal health checks and the idea of assigning responsibility for the legal health of a community share the advantage of moving from an opt-in to an opt-out system. A valuable lesson from health care delivery is that services provided on an opt-out basis, such as vaccinations, have a much higher take up rate than those provided an opt-in basis – particularly in reaching people living in marginalized conditions.[110]

We have a long way to go to integrate these insights, and develop measures of legal health and mechanisms to contribute more proactively to prevention. A commitment to rebalancing the emphasis on prevention and resolution requires us to broaden our thinking about how the justice system functions now. The concept of legal health encourages the kind of 'outside the box' thinking required to make this profound shift.

Learn More: What is a legal health checklist?

From Canada

LAWPRO's practicePRO initiative Annual Legal Health Check-Up: www.practicepro.ca/practice/pdf/Annual-Legal-Check.pdf

From Around the World

State Bar of California, "How Is Your Legal Health? Legal Health Checklist": www.calbar.ca.gov/LinkClick.aspx?fileticket=REVCXS6ShNQ%3D&tabid=1322

The Women's Legal Service Tasmania, "Legal Health Check Up: What Shape Is Your Legal Health In?": www.womenslegaltas.org.au/uploads/booklets/Legal_Health_Checkup.pdf

Legal Aid Act, Australia, "Legal Health Checklist": www.legalaidact.org.au/pdf/publications_legalhealthchecklist.pdf

YOUTUBE VIDEO! Queensland Public Interest Law Clearing House, "Legal Health Check Training Videos": www.qpilch.org.au/cms/details.asp?ID=692

ChristieLaw, Australia, "A Legal Health Check – for Personal Needs" and "A Legal Health Check – for Small Businesses": www.christielaw.com.au/a-legal-health-check-for-personal-needs/

Contact Law, United Kingdom, "Small business legal health check": www.contactlaw.co.uk/small-business-health-check.html

[110] Mulherin at CBA Summit, *supra* note 73.

Target: ***By 2020, individual and systemic legal health checks are a routine feature of the justice system.***

Milestones:

- *Legal aid/assistance providers have a strong capacity to undertake follow up with clients on a routine basis, including, for example, through post-resolution follow up*
- *Legal aid/assistance providers have a strong capacity to carry out systemic health checks and routinely provide input to law and justice reform processes to enhance capacity to prevent/ minimize frequent legal problems*

Actions:

- *The CBA partners with PLEI organizations to establish a universal Canadian legal health checklist and make it broadly available to individuals, to students as part of high school and other training curriculum, or by service providers to review with people using their services*
- *The CBA promotes the use of legal health checklists at Law Day and other forums and encourages other justice stakeholders to do the same*
- *Legal aid/assistance providers collaborate with each other and community groups to adapt the legal health checklist to their communities/ specific contexts. The adapted checklist includes a tool kit with information on where to go for help and best practices guide for integrating checklists into service delivery*
- *The CBA collaborates with interested organizations to prepare an options paper on the broader concept of legal health and the prevention of legal disputes, including the use of legal health system checklists*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Effective Triage and Referral to Navigate the Paths to Justice

There are many paths to justice and more are required to ensure that people are quickly and properly directed to services and assistance so they can effectively address their legal problems. The way people enter the system and the way they are treated on day one is the essence of a people-centred justice system.

People currently report finding it difficult to navigate the justice system. The need for improvement was highlighted in the Committee's community consultations and on the street interviews:

> "There should be a place that everyone should know about. If you have a legal issue, you can go explain your situation and they would tell you where to go, YWCA, website, etc. A sort of triage service to get you on the right track. Right now it's all disjointed and hit or miss. It's difficult to get good information." ***Single mother, Moncton***

> "Have a central place with information and a "triage" service to point everyone in the right direction, e.g. both victims and offenders. Develop a checklist or questionnaire to identify people's needs. Make sure it is flexible to respond to our realities, such as being available evenings and weekends, via telephone and the internet." ***Single mother, Moncton***

> If I was a person who needed a legal service, I would have trouble knowing where to start. Most people just have no idea.... what programs are new, who do I call?
>
> ***Woman in Victoria, Envisioning Equal Justice on the street interviews***

The hurdles people typically encounter in navigating current paths to justice and locating the services they need is underscored by mapping projects, such as the Canadian Forum on Civil Justice's Alberta Legal Services Mapping Project

and the American Bar Foundation's Access Across America Civil Justice Infrastructure Mapping Project. So often programs and services have been developed ad hoc, adding an agency here and a program there as unmet legal needs become apparent or funding and other resources are identified. There has been no overarching vision or plan, and correspondingly, a lack of integration among various services. A step back is required to reorder what is available, as the current paths to justice are too complex, sometimes even for service providers themselves to effectively navigate.

Services must be designed to meet individuals' needs at the particular stage they are at with their problems, rather than waiting for them to develop to the point that the formal justice system is involved. At the Summit, Mulherin noted that people do not always approach their legal problems or behave in the way that legal service providers expect or want them to. Australian research demonstrates though that people can learn about more effective pathways and "one of the indicators of what people will do with a problem this time is what they did last time." Reform efforts must also account for changes that reduce accessibility by "breaking pathways". For example, existing services may be de-funded, a service may be renamed, or a location or contact person may change.

Accessible services that help people resolve their issues without recourse to the formal justice system are critical. Often, providing specific appropriate services at the right time can avoid or ameliorate the problem without it getting worse and becoming a legal issue potentially implicating the formal justice system. Any triage system needs to recognize the role in preventing legal problems from developing initially, and intervening in a timely way to address those that do arise.

At present, points for people to access the civil justice system are highly decentralized. The advantage is that entry points tend to reflect the way people most often approach problems, for example through trusted intermediaries such as health care providers or social workers. The disadvantages are that it is uncertain where people will actually seek help, and their success relies too often relies on their degree of resilience and willingness to keep knocking on different doors, repeating their stories, until they finally resolve the matter. With each additional step, more people become discouraged and many give up, often at significant personal cost.

Even in the current model, the paths to justice can be made easier to navigate through standardized or generic entry forms that simplify transitions. Another option is providing 'warm' referrals, where the organization approached takes responsibility for ensuring that a referral leads to follow up and action, rather than leaving that with the individual. Equal justice does not depend on an individual's resilience or 'stick-to-it-ive-ness' to effectively navigate the system and achieve a just outcome.

Perhaps the greatest single innovation required right now is an effective triage system in each jurisdiction. This is not a new idea. Community-based legal clinics or offices were initially designed to play this function, efficiently linking community resources and the justice system. Where clinics exist and resources permit, many continue this function. Significant steps have been made recently in some locations, including Family Law Information Centres in Alberta and Ontario, Justice Access Centres in British Columbia, and Centres de justice de proximité in Québec. Triage also takes place in some courthouses and many tribunals, but too often this is attributable to the skills and dedication of an individual staff person, like Louise, a well-known court case management coordinator in one Committee member's community.

Still, we are far from having "integrated well-designed, transparent and intellectually defensible" triage and referral systems.[111] The goal is to build an efficient and transparent sorting system to replace what Richard Zorza, a leading American access to justice scholar, of the Self-Represented Litigants Network, has described as "the multiple, inconsistent and non-transparent processes used by various separate programs and institutions". He has argued that this is an essential feature of reform and that the current US system is the "complete antithesis" of what is needed.[112] The situation is no better in Canada.

[111] *Ibid.*

[112] Zorza, *supra* note 102 at 866.

Zorza suggests that one reason for the lack of progress in access to justice has been a fear of "identifying individual cases in which services are required but cannot be provided for resource reasons."[113] Tackling this concern would require building a system that could be modified to match service need and availability, while setting priorities based on principles (e.g. protecting those with lower capacity or those facing the highest stakes and most difficult issues). This makes sense, but the lack of existing services cannot be used as a rationale for inaction. In fact, one of the benefits of an effective triage system is that it would make the 'mismatch' or gaps between people's needs and capacities and the services available to them much more visible. It would build learning into the system.

Awareness of this problem is growing, but there is no consensus about how best to address it. Three main approaches are currently part of the conversation:

- enhanced single points of entry such as justice access centres;
- building well-networked referral systems based on the "no wrong number, no wrong door" philosophy; and
- putting services in the path of clients who are unlikely because of their geographic or social situation to come into contact with established entry points, including by working with trusted intermediaries.

More consideration should also be given to previous community-based options, including well-resourced community legal offices that serve as a clearinghouse for both legal and non-legal services, or an information and referral service to direct clients to the best sources of assistance for all aspects of their problems. Ontario's community clinics provide a Canadian model.

> Clinics provide services in areas of law that most affect low income individuals and disadvantaged communities, and particularly focus on issues around which a low-income "community of interests" can coalesce. Often clinics assist people with meeting their most basic needs, such as a source of income, a roof over their heads, human rights, rights to education and health care, etc... Clinics provide these services through a variety of methods, including traditional casework, summary advice, self help, public legal education, community development and law reform initiatives. Clinic work often involves trying to effect systemic change on behalf of the broader community.[114]

These approaches should be seen as complementary, as long as they are a part of an effective overall triage and referral system.

The NAC Working Group on Prevention, Triage and Referral envisions triage and referral taking place

[113] Zorza, www.accesstojustice.net/2013/01/30/sorting-hat-triage-article-now-posted/

[114] See, www.aclco.org/about_Clinics_overview.html. See also Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from BC and Abroad* (Vancouver: Social Planning and Research Council, 2004) [SPARC report], which surveyed legal service providers about the impact of the loss of community-based services following 2002 cuts to legal aid in British Columbia. See also findings summarized in Melina Buckley, *Renewed CBA Legal Aid Policy* (Ottawa: CBA, 2010) (unpublished 2009 background paper for *Moving Forward on Legal Aid,* on file at CBA National Office), including:

- cuts increased demand for advocate services, with several respondents indicating a doubling or tripling of their client caseload.
- opportunities for one-on-one client services substantially declined – a format many respondents identify as the most valuable type of assistance.
- impact is particularly strong for clients who experience other barriers to access such as language and literacy barriers.
- additional pressure on poverty law organizations, resulting in longer wait times for clients, increased stress for advocates, and a need to 'triage' clients to focus on crisis management rather than prevention.
- more clients simply giving up hope because there is nowhere to turn for assistance.
- lack of legal services is obliging women to return to, or remain within, unhealthy relationships.
- increase in the number of clients trying to represent themselves.
- outcomes for self-represented litigants tend not to be as good, and increase delays in the legal system when claimants lack adequate preparation.
- declining service quality and organizational support for providers.
- concerns about the place of appeals and judicial review, as legal representation is essential for these more complex and technical proceedings.
- limited availability of legal representation means that people's rights are simply not being respected, and access to justice is accordingly compromised.

at three stages: the early resolution stage before a dispute crystallizes; on entry to the larger justice and advocacy system; and after entry into the formal system.[115] Others have focused on a single court-based system, an option discussed later in the section on transforming formal justice.

In the Committee's view, it is critical to move to a well-designed, sufficiently resourced and effective triage system, staffed by highly-trained and capable staff. Different approaches are likely needed to meet the needs of different communities within an overarching province- or territory-wide system. As with all major innovations proposed, it is critical that we evaluate and compare different triage and referral services to understand what works, and to integrate this knowledge on an ongoing basis.

Target: *By 2020, each provincial and territorial government has established effective triage systems guiding people along the appropriate paths to justice.*

Milestones:

- *Triage and referral demonstration projects, including an evaluation component, are in place in each province and territory, building on existing initiatives and experience*
- *A national mechanism is in place to integrate evolving knowledge on the effectiveness of triage and referral services, policies and protocols, including the evaluation of demonstration projects*
- *A best practices guide is available presenting Canadian research and knowledge*

Actions:

- *Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers to prepare and maintain a comprehensive list of early resolution, legal and related services in each jurisdiction or region*
- *Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers to develop an agreed upon set of core principles to guide the design of triage and referral processes, including a common intake form. Some of this work could take place on a national basis or through the development and testing of prototypes in one jurisdiction to avoid duplication of effort.*
- *Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers, to develop and implement training in support of triage and referral policies and protocols*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Learn More: about some effective Triage and Referral initiatives

National Action Committee on Access to Justice in Civil and Family Matters, *Report of the Working Group on Prevention, Triage and Referral*: http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf

Family Law Information Centres: Alberta: http://www.albertacourts.ab.ca/fjs/flic.php

Family Law Information Centres: Ontario: http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp

Family Mediation Services: Ontario: http://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.asp

Justice Access Centres in British Columbia: http://www.ag.gov.bc.ca/justice-access-centre/

Centres de justice de proximité in Québec: http://justicedeproximite.qc.ca/

[115] National Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, *Final Report: Responding Early, Responding Well* (February 2013) at 15 http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf.

Inclusive Technology Solutions

Canada's justice system lags behind other sectors for integrating technology. Technology (including information technology) can be harnessed to improve access to justice and is an integral part of all three major strategies for change discussed in this report: facilitating everyday justice; transforming formal justice; and reinventing the delivery of legal services.

Technology can:

- automate current processes and make them more efficient and accessible to individuals
- create new pathways to justice
- provide direct access to justice services (e.g. online dispute resolution).

While technology can support justice innovation generally, it is particularly useful for facilitating everyday justice. At the same time, careful planning is needed to prevent technological innovations from creating or reinforcing existing barriers to equal justice.

Trends in Harnessing Technology to Improve Access

Technology is increasingly used as a tool to both deliver information and expeditiously link people to the services that best contribute to equal access to justice. A recent Australian report on harnessing the benefits of technology in this context provides a helpful framework[116]:

[116] Australian Government, *Harnessing the benefits of technology to improve access to justice –Analysis paper* (Sydney: Commonwealth of Australia, 2012) [Australian Report].

Access to justice benefit

	Providing access to information	Supporting the delivery of services	Providing seamless & integrated services
How does technology support this?	• assisting people to access and understand the law and information about how to resolve problems early and cost-effectively	• improving access to other third party support and assistance such as ADR, court services and tribunals • improving the efficiency and scope of service delivery to the public on a cost effective basis	• providing a 'no wrong door approach' for entry into the civil justice system • integrating delivery of services across agencies/ organisations
Examples of technology initiatives	• legal information and referral websites • apps • social media	• videoconferencing • online dispute resolution • e-court services such as e-filing and e-lodgement • online transaction services	• whole of government web portals • integrated information systems that share information e.g. between government agencies

Today, the Canadian focus is primarily on applying existing technology initiatives, such as the internet and software applications, telephone and audio-visual technology, to improve access to justice. However, internationally, some sectors of the civil justice system are also applying emerging technologies, such as online dispute resolution, social media, cloud computing, smart phones, mobile software applications and mobile computing. In some jurisdictions, civil justice sector agencies and organizations are using websites for more than just providing information. There is increasing use of websites and Web 2.0 initiatives (such as blogs and social media) to both engage the public and gather information, for example, through polls, surveys and online consultations. Five main trends are identified in the Australian report:

- interactive web initiatives
- integrated legal assistance services
- online dispute resolution and telephone-based ADR services
- increased use of technology in courts and tribunals, and
- 'one-stop shops' for government services.

In this section, the Committee includes examples from Canada and abroad to demonstrate how technology is currently being harnessed to facilitate everyday justice. The use of technology by courts and tribunals is discussed in the next section.

Learn More: about Online Dispute Resolution and Telephone-based ADR services

HiiL online divorce program:
www.hiil.org/project/divorce-online

Online family mediation in the Netherlands:
www.adrresources.com/adr-news/802/online-family-mediation-netherlands-tilburg-university-tisco

Other examples:

www.equibbly.com/
www.odr.info/
www.mediate.com/odr/
www.europa.eu/rapid/press-release_MEMO-13-192_en.htm

Smartsettle is aimed at conflict resolution and dispute prevention for different decision making and negotiation situations, ranging from complex negotiations to simpler single issue disputes—eg family and small claims disputes. It is based in Vancouver, Canada but the software can be used for eNegotiations worldwide. It can provide parties with more control to decide, with a facilitator, on a combination of online and face-to-face meetings for their particular situation:
www.smartsettle.com/

Consumer Protection BC has a self-help online tool for consumers to settle disputes with businesses. This is a relatively simple form of ODR that is delivered by email:
www.consumerprotectionbc.ca/odr

Remote mediation by teleconference is another obvious choice, but these services tend to be available in fewer areas, and often only for those who can afford to pay and are represented by legal counsel on both sides to coordinate it: www.odr2013.org/

Technology can increase the channels of communications and access between legal assistance providers and community service providers to assist people living in marginalized conditions or in rural and remote areas far from most services. Properly employed, technology can improve access for Aboriginal persons, and for people with disabilities, from culturally or linguistically diverse backgrounds and in low socio-economic situations. A key consideration is to ensure that people receive the support they require at the first point of contact to avoid 'referral fatigue'. Integrated web and telephone assistance services, telephone and audio-visual technology, social media and mobile software applications can all be recruited toward this end.

Best Practices – Example:

MIDLAS community legal centre in Western Australia has implemented a highly effective social media campaign to share relevant and up-to-date information and advocacy options with clients, while raising awareness about the plight of the disadvantaged, offering information and building stronger connections within networks. MIDLAS currently has six dedicated and integrated social media platforms: www.midlas.org.au/media/socialmedia/

Australian Report, note 116

The Australian report concluded:

> …while technology can offer great benefits in simplifying processes, reducing costs, improving communication and promoting access to justice as a whole, implementing technology solutions without a clear strategic purpose and policies underpinning their implementation may diminish the effectiveness of the solution. There is the risk of resources being wasted if the procurement and implementation of these initiatives is carried out without well thought out strategies.[117]

The report also noted that the civil justice sector's slow progress in developing policies and strategies around the use of emerging technology has delayed the uptake of these initiatives. This delay can be partly explained by the interconnection between technology initiatives and technical and information management issues relating to confidentiality, privacy, identity security, record keeping and storage of information.[118]

US reports reach similar conclusions about trends in harnessing technology to facilitate access to justice. A growing number of technology tools are used by legal aid providers, courts tribunals and others, and new tools appear frequently. Adoption of the best tools is sporadic, and their use is far from widespread.[119] Two US experts, Linda Rexer and Phil Malone, have identified barriers to adopting effective technology strategies for improving access to justice:

a) Lack of uniformity, standardization and simplification;

b) Perception that using technology is not full justice;

c) Resistance to change and planning for usability and quality;

d) Lack of top leadership support and impediments in large programs;

e) Lack of adequate and appropriately targeted funding;

f) Lack of guidelines for making technology decisions;

g) Lack of adequate policy framework and unauthorized practice of law; and

h) Fragmentation of the delivery system and lack of national support mechanisms.[120]

Many of these barriers overlap or interrelate. For example, being able to make good technology

[117] *Ibid.*

[118] *Ibid.*

[119] Linda Rexer and Phil Malone, "Overcoming Barriers to Adoption of Effective Technology Strategies for Improving Access to Justice" in James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, "Using Technology to Enhance Access to Justice" (2012) 26:1 Harvard Journal of Law & Technology 243 at 305.

[120] *Ibid.*

decisions may be negatively affected, not only by a lack of guidelines but also by resistance to change, inadequate executive-level support for using technology or a fragmented delivery system with too few common systems to maximize resources.

Rexer and Malone propose ways to overcome these barriers:

- Incentives
- Money for evaluation
- Bring leaders together to provide them with info about IT
- Accurate info about costs of projects (upfront, support and maintenance)
- Cost savings can be achieved by consolidating hardware and software for multiple organizations into shared, virtual servers.
- Technology funding should be seen as iterative, rather than one-time, and funders should be mindful of the need for ongoing support and maintenance.[121]

Q Wonder about an app that would show wait times for different processes.

Or, one to empower people to provide feedback about the system and gather important information

A Yay – great idea !!

From discussion at Summit workshop on Administrative Tribunals

An intriguing way to foster innovation and engage public and private sectors is to sponsor "app development" competitions. This is an innovative and cost effective way to encourage new ideas, as the value of the apps created generally far exceeds the prize money offered to the winning entrants.[122]

There is significant scope for further growth in this area and public expectations for accessibility are likely to increase. For example, people will increasingly expect to access up to date information through mobile media devices.

The CBA Legal Futures Initiative is also taking a close look at how new technology platforms can impact the delivery of legal services. Its June 2013 report summarizing preliminary research, "The Future of Legal Services: Trends and Issues,"[123] concludes that none of the critical change factors currently in play is more important than the rapid growth in innovation and adoption of new technology. It notes an uneven adoption of technology by law firms and lawyers; there have been few incentives and because of partnership structures and tax laws, very few firms re-invest profits in basic research and development, new processes, services and technology. Some key technology trends affecting the practice of law are online dispute resolution, an electronic marketplace (including virtual law firms), computer intelligence systems with capacity to manage and access data, solve problems, and draw conclusions and social networking.

[121] *Ibid.* See also discussion in Australian Report, *supra* note 116.

[122] *Ibid* at 12.

[123] www.cbafutures.org/trends

Learn More: about Using Technology

Youtube videos for unrepresented clients going to court (Pro Bono Law Alberta and the CBA-Alberta Branch): www.pbla.ca/news/http://www.pbla.ca/news/

Australian national A2J website: www.nationalprobono.org.au/page.asp?from=5&id=287
www.accesstojustice.gov.au/Pages/default.aspx

20 Territory Growth Towns – Talking posters: www.adc.nt.gov.au/media/2012/ADC_talking_posters.pdf

South Korea downloadable mobile applications from their websites provide information on various everyday justice initiatives run by their government: http://english.mw.go.kr/front_eng/al/sal0401ls.jsp?PAR_MENU_ID=1002&MENU_ID=100205

Illinois Legal Aid Online: www.illinoislegalaidonline.org/

Immigration Advocates Network : www.immigrationadvocates.org/nonprofit/

Pine Tree Legal Assistance: www.ptla.org/

SelfHelpSupport.org: www.selfhelpsupport.org/

LawHelp.org:www.lawhelp.org/

The Self-Help Assistance Regional Project ("SHARP") uses videoconferencing equipment to link four court-operated self-help centers in California. This means one supervising attorney and minimal support staff can offer assistance through workshops and individual support to more than 1200 people monthly: www.lawhelpca.org/organization/self-help-assistance-and-referral-program-sha?ref=85a6G

Techno.la Blog – Julia Gordon, Project for the Future of Equal Justice, Equal Justice and the Digital Revolution: using Technology to meet legal needs of low income people: www.clasp.org/admin/site/publications_archive/files/0110.pdf

LSNTAP - Legal Services National Technology Initiative Project: www.lsntap.org/

LSNTAP provides technology leadership to the poverty law community through on-site assistance, tutorials & training, online information & services, and promoting successful technology tools that improve efficiency or client services. NTAP receives funding from the Legal Services Corporation Technology Initiative Grants, and is supported by over 50 legal aid progra ms across the country. LSNTAP's wiki site for information on training and legal aid technology tools being used across the country: http://lsntap.org/

Nonprofit Technology Network: http://www.nten.org/

Self-Represented Litigants Network: http://www.representing-yourself.com/bibliography

Contra Costa, California Self Help:
http://cc-courthelp.org/index.cfm?fuseaction=Page.ViewPage&pageId=5818

Center for Access to Justice & Technology (Chicago-Kent College of Law):
http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/self-help-web-center

Concerns about IT Solutions

Integrating technology solutions into justice system reform while ensuring that those solutions advance equal justice and inclusivity requires us to identify existing barriers and avoid creating new ones. Bonnie Hough, a US legal aid lawyer, has said about the adoption of new technology: "let's not make it worse".

Hough is concerned about the "specter of a digital divide that institutionalizes a two-tiered system incapable of delivering appropriate justice to low-income persons."[124] She says:

> Technology offers many options for the largely underserved rural population. It can assist those who do have web access by providing legal information online and allowing litigants to access court files, pay fines and fees, and file documents remotely. Legal aid programs have also succeeded in using videoconferencing to reach rural residents. Videoconferencing and telephonic appearance procedures are also making it possible for rural residents to participate in some court proceedings without incurring the cost of traveling to the courthouse… However, [these developments are] not possible in all areas because of significant technological challenges. Indeed, many rural service providers do not have access to high-speed Internet connections, some lack cell phone reception, and others have little nearby access to fax machines. In addition, rural areas have high levels of illiteracy, which limits the value of text-based information. For these reasons, courts and legal aid providers must maintain traditional services even as they expand into new technological frontiers.[125]

She also points out that while technology can be particularly helpful in providing meaningful access to information and the courtroom for people with disabilities, other disabilities get in the way of accessing the internet and gateways commonly used to offer information and help. Thoughtful web design can overcome many challenges, but it cannot change the fact that fewer adults living with a disability use the Internet, compared to adults without a disability.[126] Even 'smart' programs with built-in ratings/assessments/feedback features cannot reach or help people who for whatever reason will not use it to begin with, or try it once or twice but then give up.

For service or information providers, one of the greatest challenges to using technological solutions to increase access to justice is the lack of personal contact with an individual, contact that allows the provider to better gear what is offered to the needs of that particular individual. That personal contact can be the key for successfully navigating either informal or formal justice sectors, pursuing a process through to a satisfactory conclusion and achieving a just outcome. Integrating technology and access to justice must not replace personal assistance where it is needed to ensure equal justice.

Fostering Inclusive IT Innovation and Planning

The Committee proposes that by 2020, all justice sector organizations will have plans to harness technology to increase access to justice, ensuring inclusivity by eliminating barriers to underserved populations and avoiding new barriers. Developing and implementing these plans will be done in a way that ensures technology is integrated in a systematic, efficient and inclusive manner.

To accomplish this ambitious goal, Canada's justice community could consider principles developed in other jurisdictions. The California Judicial Council commissioned an independent agency to survey California legal service providers and self-help centre staff to identify potential benefits and barriers from increased use of technology for low-income persons. The Council eventually adopted guiding principles that articulate fundamental core values for future use of technology in the courts, and offer guidance to courts and court partners on how to avoid barriers to access to justice.

The principles suggest considerations for court technology decision makers, rather than mandating

[124] Bonnie Rose Hough, "Let's Not Make it Worse: Issues to Consider in Adopting New Technology" in Cabral et al, "Using Technology to Enhance Access to Justice", *supra* note 119 at 256.

[125] *Ibid* at 261-262.

[126] *Ibid.*

any particular step.[127] They recognize the need for those implementing court technology to not only ensure that innovations improve access to justice, but also that the innovations lead to appropriate and neutral substantive outcomes. They say that the first and most fundamental principle is to "Ensure Access and Fairness", recognizing that the unique needs of certain groups of litigants must be at the forefront in technology planning.

Other main principles address real concerns about technologically assisted access by underserved populations, as several groups face particular challenges with using technologies:

- Preserve traditional access for those persons challenged by technology — encourage but do not mandate technological solutions
- Provide education and support to potential users of these services on an ongoing basis
- Secure private information including by informing individuals of risks associated with use of public computer terminals and ways to mitigate those risks.[128]

Courts and legal aid providers should also consider hybrid legal service systems that integrate human and automated assistance. The question of inclusive design can be addressed in the early phases of planning and development, rather than left to the implementation stage. For example, software developers and web designers must recognize that features making an application 'friendly' for unsophisticated users may make it 'unfriendly' for those who use the application more frequently: "unsophisticated users are best served by an application that leads them step-by-step, whereas more frequent users are best served by an application that allows the fastest and most efficient data entry possible".[129] In some cases, two or more versions of an application may best meet the reasonable needs of both types of users.

> A tremendous body of knowledge has developed around the strengths and weaknesses of particular technologies, strategies for choosing appropriate technologies, the challenges of effectively implementing and maintaining valuable technologies, and the effectiveness and return on investment of particular tools. To be most effective, courts and organizations deploying access to justice technologies need to be able to build on and leverage these experiences and best practices to design and implement their projects as state-of-the-art and integrated solutions, rather than reinventing the wheel and making avoidable mistakes. Beginning new projects from the strongest possible knowledge base prevents organizations from going down technology paths that end up conflicting with or excluding other valuable options and avoids wasteful mid-course corrections.
>
> ***Linda Rexer and Phil Malone, "Overcoming Barriers to Adoption of Effective Technological Strategies for Improving Access to Justice", note 119.***

Inclusive integration of technology should be supported on a national basis. Taking stock regularly will build a better understanding of how the current use of technology initiatives is doing to promote access to justice in the civil justice sector. Gaps, emerging trends and opportunities can be identified and inform a strategic approach for implementing technology initiatives that promote access to justice.

In the US, there are a number of national sources of information: National Technology Assistance Project, National Center for State Courts Information and Resources, Future Trends in State Courts reports, the Self-Represented Litigation Network and its www.selfhelpsupport.org collection

[127] See, Court Technology Advisory Committee, Judicial Council of California, *Advancing Access to Justice through Technology, Guiding Principles for California Judicial Branch Initiatives* (2012) www.courts.ca.gov/documents/SP12-05_State_Bar_of_CA_COAF.pdf, cited in Hough, *ibid* at 257.

[128] *Ibid.*

[129] *Ibid.*

of materials, and the LSC TIG grant program.[130]

Several annual conferences present sessions on access to justice technology topics, including the LSC TIG conference, NCSC Court Technology Conferences and e-Courts conferences, and portions of the ABA Equal Justice Conference. Many states share specific examples of best practices and lessons learned with one another. The Kleps Award process in California's courts involves a committee of judges and court staff who review and select innovations to improve court proceedings, with mechanisms for evaluation to assess effectiveness.

In Canada, the important national information sharing and evaluation role has being filled to some extent by the Canadian Forum on Civil Justice and the Canadian Centre for Court Technology, but more is needed. A comprehensive source for lessons learned, best practices and opportunities for more in-depth exchange about what works well could avoid repetitive research and duplicative efforts in developing new technology. Shared learning and joint evaluations would also promote technology that is holistic, strategic, efficient, and inclusive. A national strategy to ensure equal justice should include this critical component.

Target: *By 2020, all justice sector organizations have plans to harness technology to increase access to justice, ensuring inclusivity by eliminating barriers to underserved populations and avoiding the creation of new barriers*

Milestones:

- *Evaluation and feedback mechanisms for internet-based and other technology-assisted solutions assess user experience as well as the reasons people do not use the technology or try to use it and give up*
- *Grants and other incentives foster the development of inclusive access to justice technologies*

Actions:

- *Technological innovations preserve traditional access for people challenged by technology, including access to a service provider, and the use of technological solutions is not mandatory*
- *Justice system stakeholders survey legal services and community services providers, court staff and others to identify potential benefits and barriers posed by increased use of technology for low-income persons*
- *Justice system service providers offer ongoing education and support to people using technology to accessing their services*
- *Justice system service providers provide active warnings to people about the need to secure private information and protect confidentiality; users receive messages about the limitations of the technology-based service and value of review by a legal service provider*
- *The National Action Committee, its successor, or another national organization:*
  1) *develops guiding principles for justice system stakeholders on how to avoid barriers to access to justice when using technology;*
  2) *provides centralized support for making good technology decisions, including by developing an evaluation tool for investments in new technology, and*
  3) *offers knowledge, experience and data about using technology to advance the planning and delivery of justice services for the most disadvantaged and vulnerable populations. The Federation of Law Societies, law societies or the CBA Ethics Committee, provides guidance on ethical and professional obligations when using technology to deliver legal services*

[130]See: National Technology Assistance Project, www.lsntap.org/; National Center for State Courts Information and Resources, www.ncsc.org/Information-and-Resources.aspx; Future Trends in State Courts report, www.ncsc.org/~/media/Microsites/Files/Future%20Trends%202012/PDFs/TRENDS%202012%20BOOK.ashx; Self-Represented Litigation Network and its selfhelpsupport.org collection of materials, www.srln.org/ & www.selfhelpsupport.org/; LSC TIG grant program, www.tig.lsc.gov/.

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

Transforming Formal Justice

Courts around the world are engaged in a process of transformation. At the Summit, Zorza described this as a "thousand year change." His point is that the last time courts changed this dramatically was when they became people's courts. He describes a metamorphosis from courts as we have known them to "access to justice institutions". There are two major dimensions to this process: external changes to the relationship of courts to other aspects of the civil justice system and internal changes to the functioning of the courts.[131]

Many of these developments are a response to challenges and pressures on court systems, including changes in demands, limited resources and enhanced knowledge about the multifaceted nature of people's legal problems. The goal of reform of the formal justice system is to complement informal everyday justice innovations, and eliminate gaps between formal and informal justice to create one seamless civil justice system. Here too, the central theme is forging more effective paths to justice and a greater variety of processes to ensure fair procedures and just outcomes, while at the same time building greater coherence. HiiL, an advisory and research institute for the justice sector, frames this as the need to focus on both specific justiciable problems as well as "justice supply chains."

Transformation is a strong word, suggesting thorough, dramatic change. The Committee's view is that it is the appropriate term for the challenges facing courts today, in Canada and elsewhere. Justice remains a cherished public good, and courts and an independent judiciary are essential to our public justice system and democracy itself. Court innovation need not threaten these bedrock constitutional principles. Indeed, transforming formal justice has the potential to ensure the continued vitality of courts by halting a growing disaffection on the part of the public attributable to costs and delay, and inspiring increased public confidence in judicial conflict resolution.

Global Trends and Strategies

Many court systems around the world are undergoing transformative processes but the purpose and direction of the changes are not always clear. Based on its international scan, HiiL sets out three possible scenarios for the future role of civil courts: courts as the forum of last resort; courts as the solver of legal issues; and courts as *the* central service responsible for adjudicating people's problems.[132] HiiL makes the following points about these three scenarios.

Courts as a last resort

- A place to go when all else fails.
- Legitimizing the view that people should avoid courts and solve their own problems instead.
- Courts should deal with only the most complicated cases.
- All routine issues dealt with elsewhere.
- Procedural issues, not the substance of the conflict, are more likely to dominate the litigation process.
- Maybe only role is checking whether other decision-makers did an acceptable job.
- Means courts cannot ensure application of the law to everyone.
- Courts may lose some of their legitimacy because they are further from contact with people.

[131] Richard Zorza, "Access to justice: The emerging consensus and some questions and implications" (2011) 94 Judicature 156 at 157.

[132] HiiL, "Three Implied Strategies and Their Implications" (Hague: 17 June 2013) www.futureofcourts.org/strategies/.

Courts as solvers of legal issues

- Courts are there to provide answers to legal questions.
- The court "will not go into the conflict itself, but is the help desk for the legal problem or for qualification of facts under the law".
- This model matches the tradition of legal education and refers users to other professions for other types of help.
- Mismatches between legal, psychological and technical expertise, perhaps leading to procedural issues and extended litigation. Risk of being too bureaucratic or legalistic: "A lawyer's paradise, but not necessarily a paradise of justice."

Courts as adjudicators of problems between people

- Courts are THE service that adjudicates problems: crimes and disputes as they are experienced by people in their personal lives, in in business or in dealing with their government.
- Deal with large volumes of cases in a standardized way quickly.
- Problem solving courts will use many techniques to stimulate settlement and make decisions when settlement efforts fail.
- Great added value to society as they can be counted on to solve any serious issue in a fair way.
- Courts will need to adapt to new demands and some judges may find it difficult to adopt these new skills.
- Funding may be a serious issue and the system would depend on cooperative lawyers.

This framework provides a useful starting point to discuss the implications of court reform. The first two scenarios would result in a de-centring of courts in the civil justice system, and a corresponding decrease in their accessibility and role in people's lives. The last scenario is favoured by the Committee, involving re-centring of the courts to be the main path to dispute resolution processes and referral to other services for non-legal aspects of people's problems.

This re-centring of courts would involve transformation and overarching innovations. Global trends offer insight into which tools and approaches are most effective for court-based reform. These include a systems approach that integrates the wider context, using new information technology, distinguishing the minority of complicated cases from standard cases, distinguishing high and low value users, involving the private sector and empowering communities, users and staff.[133] Some specific reforms have proven to be particularly effective, such as court specialization.[134] Good results have also been obtained from making early hearings focused on providing advice about possible settlement options and early neutral evaluation the normal starting point. These early hearings would be followed by a second hearing a few weeks later.

Transcending the SRL Phenomenon

One of the greatest pressures on civil courts in Canada and the US today is the exponential growth of unrepresented or self-represented litigants. From one perspective, this is and should be the driving force of reform: courts should change to be more directly accessible to litigants without representation. While recognizing the immediate need to accommodate people without representation, the Committee questions this as a principled foundation for reform. There is mounting evidence that unrepresented litigants are at a high risk of not receiving meaningful access to justice. It is also unfair to all involved for judges and court staff to be responsible for finding solutions to a critical systemic problem resulting from failures of the justice system as a whole, notably including governments and the legal profession.

[133] Sandford Borins, "Public Management Innovation: Toward a Global Perspective" (2001) 31 American Review of Public Administration 5.

[134] Sam Muller, Maurice Barendrecht, Robert Porter, Wilfried de Wever, Eva Pouwelse and team, *Innovating Justice: Developing new ways to bring fairness between people* (The Hague: HiiL, 2013) at 55-58 http://www.hiil.org/data/sitemanagement/media/Sneakpreview%20Innovating%20Justice.pdf.

Certainly, short-term strategies must include accommodating unrepresented litigants and ensuring fair treatment (including by opposing counsel), as outlined in the Macfarlane study, but the ultimate goal should be to transcend the unrepresented litigant phenomenon by providing more seamless delivery of legal services to everyone, including representation when required. This perspective does not mean that there will be no unrepresented people by the Committee's suggested target date of 2030, but it does mean that unrepresented litigants will no longer be considered a "problem". Some people will self-represent, not because there is no viable alternative, but because they are able to do so competently given the nature of their problem or dispute, the process and their capacity to participate fully and effectively with available supports.

Court-based Triage and Referral

Effective triage and referral to appropriate services and processes is key to transcending the unrepresented litigant phenomenon and transforming courts to be fully centred in the broader civil justice system. Re-centred courts will develop capacity for triage and referral that complements and works in coordination with the jurisdiction-wide and community based networks that facilitate everyday justice, as proposed in the previous section.

Zorza has developed two models for court-based triage, one based on an individual decision-maker and the other on a computerized algorithm.[135] The aims and general approach of the two models are fundamentally the same. Either model would unify the two sorting processes required; to determine how a court will handle a case and how litigants will obtain the services they need to interact with the court and other players. (This would include situations in which going to court would not be involved.)

Zorza and other US civil justice researchers, including Russell Engler, have written extensively about the importance of understanding the relationship between court processes and providing services for litigants. These are "moving targets" and the goal is to "figure out how the two processes can work together to provide both optimum case handling from the court's point of view and access from the litigants' point of view."[136] An embedded centralized triage system would take into account innovations on both fronts, again serving as a focal point for learning and integrating new insights.

Zorza's models are well-developed and offer an excellent starting point for an initiative of this type in Canada. He recommends that the system be based not on categories of cases, but on the tasks required of the litigant and the court or other decision-maker. He identifies the following potential "court tracks":

- Non litigation situations (which would jump to the next step, with the process possibly then managed by a services program rather than by the court)
- Uncontested cases requiring no court involvement beyond approval
- Uncontested cases requiring non-judicial court involvement to optimize agreement and decisions for fairness and finality
- Contested cases amenable to alternative dispute resolution
- Contested cases requiring single final resolution between parties
- Contested cases requiring extensive supervision of the pre-trial process
- Contested cases likely to require ongoing decision making and compliance activity.[137]

Breaking down litigant tasks and sub-tasks (such as preparing pleadings, presenting evidence, preparing analysis and judgments) so litigant capacity can be assessed is a complex task. However, a growing body of research in this area centred on the experience of unrepresented litigants to date can be

[135] Zorza, *supra* note 102.

[136] *Ibid.*

[137] *Ibid.*

harnessed to develop principled criteria.[138]

Court Specialization

Specialized courts, both by problem type and target group, have been demonstrated to contribute to access to justice and quality of decision making. Indeed, the administrative law revolution was based on this premise. Despite the knowledge that specialized courts generally enhance efficiency, there is substantial resistance to this trend in the legal community. At the Summit, Muller spoke about the dichotomy between generalization and specialization, and the tension between the two. He emphasized that most innovation comes from specialization and so allowing for specialization is a positive goal.

Court specialization goes hand in hand with community-based justice models and integrated support systems able to assist people in a more holistic and collaborative way. Often these models and systems focus on criminal law matters and the intersection between people facing particular challenges, such as drug addiction or mental illness, and minor crime. In the civil context, specialization and holistic approaches have mainly been developed in the family law area and there is much scope for expansion on this front. Some specialized courts, including domestic violence courts, deal with overlapping criminal and civil matters. Others focus on a particular group of people, rather than an area of law. For example, there is a strong movement in Canada to approach issues faced by people with Fetal Alcohol Spectrum Disorder as an access to justice issue and to develop specialized approaches to the multiple legal problems experienced by members of this vulnerable group (child welfare, family, criminal, guardianship and trustee), including fully integrated preventative measures.[139] This approach acknowledges that access to justice involves systemic issues and is not simply about how individuals can handle legal problems.

Learn More: about Good Practices in Court Specialization

Ontario - Domestic Violence Court (DVC) Program:
www.attorneygeneral.jus.gov.on.ca/english/about/vw/dvc.asp

New Brunswick – Mental Health Court:
www.mentalhealthcourt-sj.com/home.html

British Columbia - First Nations Court:
www.lss.bc.ca/aboriginal/firstNationsCourt.php

Alberta - New Ways for Families initiative:
www.newways4families.com/HCI-Articles/current-program-locations.html

UK - Specialist Domestic Violence Courts 2013:
www.cps.gov.uk/publications/equality/vaw/sdvc.html

US - San Diego Superior Court Launches Behavioral Health Court:
www.internationalbipolarfoundation.org/san-diego-superior-court-launches-behavioral-health-court

Australia - Mental health court diversion and support program:
www.mentalhealth.wa.gov.au/mentalhealth_changes/Mental_Health_Court_Diversion.aspx

New Zealand - Family Court of New Zealand:
www.justice.govt.nz/courts/family-court/what-family-court-does/mental-health

and, about Unified Family Courts -
www.attorneygeneral.jus.gov.on.ca/english/family/famcourts.asp

www.court.nl.ca/supreme/family/index.html

www.gov.mb.ca/justice/family/law/englishbooklet/chapter2.html

[138] Some examples include the work of Engler, *supra* note 25 or Sandefur, *supra* note 25 and 32. Also, see report on online family mediation by Tilburg University's Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems in the Netherlands: www.adrresources.com/adr-news/802/online-family-mediation-netherlands-tilburg-university-tisco.

[139] Consensus Development Conference on Legal Issues of FASD held in Edmonton Alberta, September 2013 www.fasdedmonton2013.ca/FASD-Legal/Default.aspx. See also, Canadian Bar Association Resolutions 10-02-A and 13-12-A.

Courts as Learning Organizations

Re-centred courts would have increased capacity and resources to engage in sustained innovation and more assertively become learning organizations. A learning organization is one that can continually transform itself by integrating evidence-based practices and facilitating individual and shared learning and systemic thinking.[140] This model would assist in meeting the challenges of change by replacing structures and individual thinking, which tends to grow rigid and be best suited for short term or single loop learning, with an evolving understanding and problem-solving capacity. Learning organizations develop responsive cultures that maintain knowledge about new processes, understand the outside environment and produce creative solutions using the combined knowledge and skills in the organization.[141] This requires cooperation between individuals and groups, strong communication and a culture of trust.[142]

In the context of courts, learning involves soliciting feedback from the people accessing court services and effectively using that feedback to inform innovations and reforms. Learning also involves developing and testing prototypes for procedures and evaluating them to ensure that reform is evidence-based to the greatest extent possible. Much can be gained by sharing best practices between courts and tribunals and by coordinating reforms across different courts to minimize duplication of efforts. The Canadian Institute for the Administration of Justice already facilitates an important dialogue between courts and administrative tribunals, but these opportunities for exchange should be increased.

Global developments and initiatives can also contribute to innovation in Canada. The International Centre for Court Excellence is developing a framework for court excellence that includes draft global measures for court performance to help courts improve their operations. The global measures consist of eleven "focused, clear, actionable, core court performance measures" consistent with "universally accepted judicial values and areas of court excellence".

These measures deconstruct the key question, "How are we doing?" The measures are court user satisfaction, access fees, case clearance rate, on-time case processing, pre-trial custody, court file integrity, case backlog, trial date certainty, employee engagement, compliance with court orders, and cost per case. The measures and particularly public reporting on them contributes to both transparency and accountability. At the same time, while responsibility for performance is mainly assumed by the courts, it must be shared by all actors and organizations engaged in justice. It is ambitious but possible to imagine that by 2030, courts around the world, including Canadian courts, will report in a common framework of this type on their websites.[143]

To achieve equal justice, judges, and particularly those in positions of judicial leadership, must advocate for reform within and beyond the court, and be concerned about the functioning of the civil justice system as a whole. Canada is fortunate to already have powerful role models in this regard. This critical role would be supported by the robust internal structure of the court as a learning organization. These issues are discussed more fully in Part III, including the US experience with access to justice commissions, where judicial leadership is often cited as the main prerequisite for success.

[140] See, for example: M. Pedler, J. Burgogyne, and T. Boydell, *The Learning Company: A strategy for sustainable development,* 2nd ed (London: McGraw-Hill, 1997); T. O'Keefe, "Organizational Learning: a new perspective" (2002) 26:2 Journal of European Industrial Training 130; C.L. Wang and P.K. Ahmed, "Organizational learning: a critical review" (2003) 10: 1 The Learning Organization 8; D. McHugh, D. Groves and A. Alker, "Managing learning: what do we learn from a learning organization?" 5:5 *The Learning Organization* 209; David R. Schwandt and Michael J Marquardt, *Organizational Learning* (Boca Raton: St. Lucie Press, 2000); Peter M. Senge, *The Fifth Discipline: The art and practice of the learning organization* (New York: Doubleday, 1990); Peter Senge, Art Kleiner, Richard Ross, George Roth and Bryan Smith, *The Dance of Change* (New York: Currency Doubleday, 1999); P.M. Senge, "The art and practice of the learning organization" in *The new paradigm in business: Emerging strategies for leadership and organizational change* (1990) at 126-138 www.giee.ntnu.edu.tw/files/archive/380_9e53918d.pdf.

[141] C. Argyris, *On Organizational Learning* (2nd ed) (Oxford: Blackwell Publishing, 1999).

[142] *Ibid.*

[143] See the work of HiiL at www.hiil.org/.

Expanding Judicial Functions

As members of the justice community, many of us share a traditional and limited conception of the role of judges, presiding over trials, hearing and evaluating evidence, finding facts, applying the appropriate legal standards, making judgments and dispensing justice. Particularly during the pre-trial phase of civil cases, judges have traditionally assumed a fairly passive role, allowing lawyers to control the progress and pace of the litigation. In the words of Lord Denning, he or she "must wear the mantle of a judge and not assume the robe of an advocate". Judges must be free of bias and perceived as neutral and impartial at all times, and a more active role can suggest that the adjudicator has taken sides and prejudged the facts, evidence or credibility.

At the same time, judges have an overarching responsibility to ensure fairness of the proceedings and the efficiency and effectiveness of court procedures. At the Summit, Ottawa-based mediator and arbitrator Ian Mackenzie discussed contemporary challenges to the traditional role of judges, noting that it assumes:

- parties are well represented,
- truth will emerge from a contest of positions,
- parties will ensure that the public interest is reflected in evidence and arguments, and
- lawyers will be officers of the court (not relevant for unrepresented litigants).

According to Mackenzie, these traditional assumptions will be challenged by the "excessive adversarialism" that can result when parties are not represented. Unrepresented parties often lack knowledge about substantive law, procedures and rules, do not understand why processes need to be followed, lack objectivity or advocacy skills, and possibly have misplaced confidence in their abilities.

A more expansive view of the judicial function has developed in response to current challenges. This expansion is centred on more active case management, increased judicial dispute resolution and more active adjudication. Administrative tribunals have led the way in these developments, due in part to their greater institutional flexibility.

Many courts around the world have already embraced an expanded view of judicial roles and responsibilities in individual cases. In Canada, acceptance and comfort with this expansion varies widely in the judiciary and the bar, with enough discomfort to slow, and in many cases halt, reform. The Committee proposes that by 2025, these processes will have become mainstream in all courts and courts will be performing new functions in line with their re-centred status in the civil justice system. In some cases, effective implementation of novel functions will require courts to have a broader range of quasi-judicial officers with specialized functions, such as alternative dispute resolution.

Courts and judges must be provided with the knowledge and resources to make these changes effectively. There are also implications for the judicial appointment process, such as the need to allow consideration of candidates' openness to and suitability for broader judicial functions.

Active Case Management

Case management was adopted by Canadian courts from the 1990s onward to address costs and delays in the justice system. Parties traditionally controlled the timing of case events within the overarching structure of court rules. Case management systems proscribe the timing of events to a greater degree. 'Active' case management means the judge takes responsibility for improving efficiency in the court, displacing the role of lawyers in this regard. This judicial function is essential both in the pre-hearing and hearing phases.

Summit participants cautioned that it is uncomfortable for many in the justice system to challenge or suggest changes to traditional approaches to the respective responsibilities of judges and lawyers. Some judges are more willing to take on the responsibility of preventing unnecessary delays. Also, active judicial case management can lead to other problems such as increased complaints of judicial bias and lawyers relying too heavily on case managers. Changes in this area must be fully supported by effective rule making and measures to promote cultural change through education. An iterative implementation process with enhanced opportunities for feedback and evaluation about how more active case

management is in fact being implemented is necessary.

Judicial Dispute Resolution

The Committee proposes that by 2025, re-centred courts will offer more tailored dispute resolution processes, with a greater range of approaches to timely settlement. In some cases, this could mean referring parties outside of the court to more suitable processes, but it could also involve a greater capacity for judicial dispute resolution, particularly for the range of mediation processes.

Some Canadian courts and judges have embraced judicial dispute resolution, while others maintain the view that judges are appointed to decide. Similarly, the legal profession is not uniformly supportive of these developments. However, at least one provincial court has a new regulation for the judicial selection committee, allowing that committee to explore applicants' capability and willingness to engage in new dispute resolution methods. The Ontario Bar Association is also engaged in a two-year study on judicial dispute resolution aimed at fostering similar developments. "The courts in Alberta administer a judicial dispute resolution program that provides litigants with an opportunity to schedule a confidential dispute resolution session with a Superior Court or Court of Appeal judge. Research undertaken in respect of the efficacy of this program suggests that approximately 90% of the cases subject to judicial dispute resolution… settle in whole or part."[144] Still, there are remaining concerns about the availability of dates for this process, and the cost and complexity for the preparation of materials, which limits how accessible these options actually prove to be.

Active Adjudication

Judges engage in active adjudication by taking on a greater role in ensuring that the court has the evidence it requires to make a just decision. At its most basic, this approach suggests a judge simply looks at the decision required and determines what is needed to make that decision. This is a direct response to the growing number of unrepresented litigants and recognition that the adversarial process does not serve them well. Mackenzie describes active adjudication as "bending" the adversarial process to make it more amenable to unrepresented people without actually 'breaking' it and becoming an inquisitorial system. The major concern is that judges may 'cross a line' of involvement and appear to be biased – this is particularly valid when one party is represented and the other is not.

Zorza describes active adjudication as judges being engaged while remaining neutral. At the Summit, he described a research project that videotaped hearings with unrepresented litigants in courtrooms in four states. The videotapes were then shown to the litigants and judges separately, and each had the opportunity to explain what they were trying to say and what they saw happening. Litigants also offered their views on characteristics of 'good judges', as those who:

- are good at framing their cases – explain what happened in last court hearing, what is expected to be discussed that day, remind that all decisions are in best interests of the children (if family), explain that the judge will be asking questions
- are good at probing – trying to identify the issues and resolving them; questioning and framing the questions and reminding that the judge is asking questions because they need to get to the facts
- explain decisions very clearly
- use reassuring language – affirming without judging, saying things like, "I'm not judging you

[144] National Action Committee, Court Simplification report, *supra* note 68 at 14. At footnote 33, the Working Group notes that, "[a] review of all of the provincial rules of court indicates that settlement conferences are generally in use across the country. For example, British Columbia's Court of Appeal offers judicial settlement conferences (see British Columbia Court of Appeal Practice Directive, "Judicial Settlement Conferences"); the Queen's Bench Rules in Saskatchewan contemplate judges assisting with settlement (see rR 1-3(1)-(4), 4-7(1)(e)); judges hearing a case management conference in the Northwest Territories can facilitate settlement and as a means of doing so, assist with settlement discussions or even hold a mini-trial in which he or she can provide a "non-binding advisory opinion" (see Rules of the Supreme Court of the Northwest Territories, R-010-96, pt. 19, r 292); a judge-assisted settlement conference process, which was recently expanded, has been in place in Quebec for a number of years now (see *Code of Civil Procedure*, R.S.Q., c. C-25); Nova Scotia, Newfoundland and Labrador and New Brunswick also have judicial settlement conference regimes (see respectively Civil Procedure Rules of Nova Scotia, pt. 4, r 10.11-10.16; Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sched. D, as amended at r 39; and Rules of Court, N.B. Reg. 82-73, r 50.07-50.15)."

as people" or "I really appreciate you both love your children"

- discuss when the next court hearing will be or what will happen next
- have effective body language, for example "using hands to convey equality"
- use simple clear respectful caring words.[145]

Mackenzie described a model of active adjudication currently employed for some cases by the Ontario Human Rights Tribunal (in others the hearing is run like a traditional trial). Tribunal rules say the:

> Tribunal can define or narrow issues, limit evidence or submissions, require witness statements, and require narrative at beginning of the hearing. An adjudicator can conduct examination in chief and cross-examination, can prescribe stage at which preliminary procedural or interlocutory matters are dealt with, and require party to adduce evidence or call witnesses "reasonably within their control".[146]

Mackenzie describes his "active adjudication toolkit" as including the following skills:

- Defining or narrowing the issues to be decided
- Limiting evidence or submissions on any issue
- Requiring witness statements
- Permitting a party to give a narrative before questioning
- Determining the order of evidence and issues
- Conducting examination-in-chief and cross-examination
- Prescribing the stage at which preliminary, procedural or interlocutory matters will be dealt with
- Requiring a party to adduce evidence or call witnesses "reasonably within their control".

Other assistance provided to unrepresented litigants by judges and adjudicators includes less active forms of intervention, such as directing litigants to resources available on the internet that may apply to their case, advising of other available resources including public mediation services, and at the trial management conference, offering litigants a summary of what will be expected of them at their forthcoming trial.

Supporting Court Innovation: Technology and Rules

The task of transforming formal justice should begin by considering broad strategies for reform, the implications of those strategies for the structures and processes used by courts, and the courts' relationship to external service providers and the civil justice system as a whole. Closely connected are questions related to the judicial functions needed to meet these new roles and responsibilities, and how to support those functions by integrating technology to re-engineer processes and communication with users of court services and to support management functions. Court rules and administration can also play a key role in either supporting or deterring innovation.

The Australian report on enhancing access to justice through technology provides an overview of how courts and tribunals are increasingly using technology. Initiatives include a move to virtual courtrooms that allow documents to be filed electronically (e-filing) and, in some instances, for formal submissions, directions and other orders in pre-trial matters to be conducted by electronic means. There is also some progress toward integrated court management systems to give all courts and tribunals a single, integrated technology platform and set of applications, rather than having them work across different systems.[147]

In Canada, similar initiatives are underway. British Columbia's Court Services Online provides electronic searches of court files, online access to daily court lists and e-filing capacity. E-filing initiatives are in place in several courts, including the Alberta Court of Appeal, the Superior Court in Newfoundland and Labrador (in estate matters) and the Federal Court of Canada. An Alberta Court of Appeal practice direction supports

[145] www.accesstojustice.net/2013/08/04/tools-for-srl-courtroom-observation-project/.

[146] www.hrto.ca/hrto/index.php?q=en/node/28.

[147] Australian Report, *supra* note 116.

e-appeals if both parties consent or the court orders them.[148] Other initiatives include internal web-based tracking of court files, online access to court record information, electronic storage and retrieval of court documents, interactive court forms, e-hearings so proceedings can be held entirely electronically, and online information to assist self-represented litigants.[149] Examples of online information include the Montréal Bar's "best practices guide" to assist individuals with different aspects of litigation, Newfoundland and Labrador and the Public Legal Information Association's booklets on a range of legal topics at the courts, Clicklaw in British Columbia, the Ontario Attorney General's self-help guides about family court rules and procedures and LawHelp Ontario's information booklets and how-to manuals for unrepresented litigants to assist in preparing court documents and participating in certain court processes. Québec has also recently implemented a Justice Access Plan with increased and new uses for technology to enhance access to justice, such as by obtaining testimony through videoconferencing.

A concrete example of the potential of technology highlighted at the Summit was in the area of family law. Segments of the Canadian population move around the country for employment. This results in multi-jurisdictional family law issues, which can be difficult to navigate without legal help. Use of information technology for court processes across jurisdictions could transform these issues. One participant noted that: "interjurisdictional child and spousal support orders take months, or sometimes years, to flow through the system in two jurisdictions. Making efficient technology available to allow for the transmission of documents and attendance at hearings electronically could substantially impact how mobile families (and other litigants) access the justice system."

Simplifying court processes and rules to support the transformation of formal justice is another important path to equal justice. As Muller highlighted at the Summit, rules should not lead the innovation process, as rulemaking is too rigid a process compared to problem-solving methods.

Further, our rapidly changing environment and the need to tailor processes to particular types of disputes suggest that flexible guidelines may often be more useful than rules. Rules that are permissive, as those discussed above in the Ontario Human Right Tribunal context, may be most effective. Some Summit participants spoke about the ways that rule changes can have a mixed impact on access to justice. For example, they can contribute to judicial efficiency but also add costs for litigants (particularly those requiring documents submitted in writing before court appearances). Zorza has proposed guidelines for choosing measures for court simplification:

1. Work for all stakeholders
2. Help ensure focus on law rather than technicalities
3. Help ensure parties are fully heard by decision maker
4. Increase transparency
5. Underlying substance of law should be able to be applied in simplified process
6. Result in less time, less cost
7. Prevent reintroduction of complexity.[150]

The focus on learning through feedback from users of court services and rigorous evaluation is essential for ensuring that changes are doing what they were intended to do. Evidence from other jurisdictions is mounting on what rule changes work best to enhance access to justice, with fixed trial dates within two years of commencement at the top of the list (unless the dispute is not ripe for settlement, e.g. a personal injury case when it is too early to assess damages).

[148] National Action Committee, Court Simplification report, *supra* note 68.

[149] *Ibid* at 5.

[150] Richard Zorza, "Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation" (2013) 61 Drake Law Review 845.

Learn More: about Court Reform and Rule changes

National Action Committee, Court Simplification Working Group Report: www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf

Hague Institute for the Internationalisation of Law (HiiL): www.hiil.org/

Rechtwijzer 2.0: www.rechtwijzer.nl/ www.hiil.org/project/rechtwijzer

Roger Smith, "Can digital replace personal in the delivery of legal aid?" A discussion paper for the conference of the International Legal Aid Group, 2013: www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/The_Hague_2013/Session_Papers/5.1_-_Roger_Smith.pdf

Canadian Centre for Court Technology: www.ccct-cctj.ca/

E. Rowden, A. Wallace, D. Tait, M. Hanson & D. Jones, "Gateways to Justice: design and operational guidelines for remote participation in court proceedings" (Sydney: University of Western Sydney: 2013), accessed from: www.uws.edu.au/justice/justice/publications

Association of Canadian Court Administrators: www.acca-aajc.ca/

Laboratoire de cyberjustice laboratory, University of Montreal and Towards Cyberjustice project: www.site.cyberjustice.ca/en/Home/Home

International Centre for Court Excellence: www.courtexcellence.com/

Global Measures of Court Performance: www.courtexcellence.com/~/media/Microsites/Files/ICCE/Global%20Measures_V3_11_2012.ashx

BC Property Assessment Appeal: www.assessmentappeal.bc.ca/

BC Civil Resolution Tribunal: www.ag.gov.bc.ca/public/WhitePaperTwo.pdf

Centre for State Courts: www.ncsc.org/Topics/Technology/Technology-in-the-Courts/Resource-Guide.aspx)

Re-centring Courts

Re-centred courts will offer tailored public dispute resolution services with effective internal and external triage and referral processes, and will employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes. Re-centred courts will be dedicated to innovation, learning and integration of evidence-based best practices. They will be open to feedback from users of court services and to developing transparent performance evaluation measures. As a result, judges will need to be ready to integrate new functions and approaches, potentially including active case management, judicial dispute resolution, specialization, court simplification and active adjudication models. Many Canadian courts have already taken steps in these directions and should be supported in these reform efforts. Reaffirming the role of courts at the centre of the civil justice system also involves building a new type of relationship between courts and other justice organizations. Issues for relationship building, structures for collaboration and leadership functions are discussed further in Part III.

Target: ***By 2025, courts are re-centred within the civil justice system and resourced to provide tailored public dispute resolution services with effective internal and external triage and referral processes.***

Milestones:

- *All courts have effective triage and referral systems*
- *All courts have the capacity to provide a range of dispute resolution processes and provide tailored, simplified processes*
- *Courts employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes*
- *Courts have the resources to carry out this range of functions*

Actions:

- *Courts develop and employ a range of mechanisms to solicit feedback from people*

accessing court services and use these perspectives to inform innovations and reforms

- *Courts develop and test prototypes of specialized procedures for priority categories of cases. Piloting different prototypes in each jurisdiction within an overarching strategy could maximize use of resources, avoid duplication of effort and enhance evidence-based reform*
- *The National Action Committee, its successor or another national organization develops an evidence-based best practices guide to assist courts in their access to justice innovations*
- *Judicial appointment processes take into consideration candidates' openness to and suitability for broader judicial functions, including active case management and judicial dispute resolution methods*
- *The CBA champions this re-centred role for the courts within a coherent civil justice system: a central role not based on traditional, status quo role of the courts but on this people-centred vision*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Re-inventing the Delivery of Legal Services

The third lane of the bridge to equal justice is reinventing the delivery of legal services. Both everyday justice and formal justice depend on having a spectrum and continuum of legal services available to meet the range of legal needs. The goal is seamless legal services delivery: to ensure meaningful access to justice in every case without the 'legal assistance deserts' in the current inequitable landscape of services.

The Committee believes that the first step is to define the concept of essential legal needs and then to find ways to meet those needs. **Essential legal needs are those that arise from legal problems or situations that put into jeopardy a person's or a person's family's security – including liberty, personal safety and security, health, employment, housing or ability to meet the basic necessities of life.** A main objective of equal justice efforts must be to provide the necessary legal services to meet all essential legal needs.

The Committee's *Proposed Responsibility for Legal Needs* connects the spectrum of legal service providers and the continuum of legal services with categories of essential legal needs. A range of approaches is needed to reach this goal, along with a commitment to finding new and creative ways to address existing gaps in legal services.
Some essential legal needs can be fully met by the private market, while others can only be adequately met through publicly funded legal services. Over the past two decades, the centre area of the spectrum between these two sources of legal services has grown in response to failures of both private and public providers to meet the most pressing and/or essential legal needs. Organized pro bono efforts and other specialized services, many based on public-private partnerships, have developed and expanded greatly during this period to fill gaps in legal service provision.

Reinventing legal services for equal justice involves meeting three challenges:

- ensuring the most effective delivery of both private and public legal services;
- achieving a consensus on where responsibility for meeting legal needs falls on this spectrum, from private to public service deliverers; and
- reaching a better understanding of the structure and role of service providers in the middle area between private and public services.

As shown in the diagram below, the Committee proposes that the main targets of reform should be to improve capacity at both ends of the publicly funded/private spectrum, to provide meaningful access to justice for people experiencing legal problems related to essential legal needs. Pro bono organizations and programs and public-private partnerships are best positioned to deliver legal services for important but non-essential and specialized needs that people cannot meet within the private market. This section also discusses the significant contribution of law schools and law societies to reaching equal justice. [151]

Two competing pressures on legal representation services cut across the spectrum of service providers: the increasing unaffordability of legal services has given rise to a demand for piecemeal or partial services delivered by a broader range of providers, while the growing understanding that legal problems are often intertwined with non-legal problems has led to a demand for more holistic approaches that meld legal and non-legal services. Health care and dental care services are increasingly delivered in teams, for cost-effectiveness and quality of service, and legal services providers are at an early stage of incorporating this service delivery model.

[151] The extent to which law firms and practitioners can innovate to better address the range of legal needs is also being examined by the CBA Legal Futures Initiative in the areas of business structures and innovation, legal education and training, and ethics and regulation of the profession.

Limited Scope Retainers

The greatest potential for achieving meaningful access to justice and fair and lasting outcomes comes from a comprehensive, holistic approach. Yet, a current trend to make legal services more affordable to clients or reduce cost to the providing organization is moving *away* from the holistic approach, and to limited scope retainers or unbundled legal services. This issue cuts across the service delivery spectrum, affecting lawyers in private practice, legal aid and those working pro bono, as well as those providing other forms of legal assistance, also increasingly in a limited, piecemeal fashion.

Limited scope services often rely on clients to sort out what services they need and when. Delivering these services also pressures lawyers to help clients find their way to other services.

Lawyers and legal regulators have been somewhat wary about this development. Professional obligations require a cautious approach to isolating elements of legal services for limited representation. This does not mean that it cannot be done, only that it must be done in a manner that ensures protection of individual clients and the overall public interest. Five law societies have provided detailed guidance to their members on how to meet their professional obligations when providing unbundled services.

Empirical research to date has found that limited scope services are of questionable benefit to many people participating in adversarial proceedings. An unbundled service is not the same as having legal representation. The Australia Law Reform Commission concluded that "unbundling can really only work for educated, articulate litigants in routine matters".[152] A US study found that SRLs have to carry out an average of 193 tasks to prepare for and participate in a formal hearing.[153] Further, individuals need to "pull it all together" which many SRLs, including the majority of participants in the Macfarlane study, find very difficult.[154] Other specific concerns are lawyers' ability to offer sound advice without the full picture of their clients' situation and how to ensure that an individual understands and is able to follow through on the instructions provided by the lawyer.

> It is at least possible that the unbundled model, despite serving many more low-income people, might actually be making inefficient use of resources. To use a simplified analogy: If there exists a finite supply of AIDS drugs to distribute in sub-Saharan Africa, should it be divided equally among those who want it, even if this requires lowering the dose to an untested level that has not been proven to improve survival rates? Or should a full dose of medication, proven to boost survival, be provided to a smaller number of AIDS patients, with the remainder of the population required to wait for the next shipment of drugs? Unless and until it is proven that limited intervention on behalf of low-income clients is successful in producing better outcomes than litigants can attain on their own, a return to the traditional model of full representation for fewer clients--a proven model of success--should at least be considered, and resource and policy decisions should be made to facilitate increased access to full representation.
>
> ***Jessica Steinberg (see note 62)***

From an equal justice perspective, the question is whether limited scope services in a particular context are consistent with the **meaningful access to justice** standard?[155] To answer this question we need to consider who may benefit from what types of limited legal services and in which situations. Meaningful access is advanced when

[152] LAW report, *supra* note 23.

[153] Ronald W Staudt and Paula L Hannaford, "Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers" (2002) 52 Syracuse L Rev 1017 at 1021.

[154] Macfarlane study, *supra* note 6.

[155] See *infra* at 61.

these services are provided to capable litigants through an effective relationship between lawyer and client. For example, coaching, particularly during a hearing, can mean the difference between ineffective or effective assistance. However, limited scope services are not the solution for everyone.

The Committee proposes an overarching goal should be to ensure that limited scope services are only offered where the "meaningful access" standard is met. Overall this requires a range of private market and publicly funded solutions aimed at making representation more accessible. It also requires a new model of lawyering based on a reciprocal partnership between the provider of legal services and the client and where the service provider knows about alternate sources of information useful to their clients and collaborative networks with other service providers. This point underscores the importance of lawyers and other legal service providers collaborating with PLEI providers.

Target: ***By 2020, limited scope legal services are (only) offered in situations where they meet the meaningful access to justice standard.***

Milestones:

- *Best practice guidelines, based on empirical studies of emerging limited scope service models and their impact on meaningful access to justice are in place.*

Actions:

- *All law societies provide detailed guidelines to lawyers providing limited scope services, including advice and precedents for limited scope retainers*
- *Bar associations, law societies and legal aid organizations develop resources to assist lawyers to provide limited scope services in an integrated, seamless way by equipping lawyers to inform clients about other service providers and sources of information*
- *The CBA provides professional development on coaching and other skills that support the delivery of effective limited scope services*
- *The CBA, law societies, other bar associations and legal aid organizations work with PLEI organizations to inform the public about limited scope services*
- *The CBA and the Federation of Law Societies ensure the integration of existing research and evaluations of limited scope service models to formulate evidence-based best practices and identify further research needs*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Team Delivery of Legal Services

Recognizing the value of a continuum of legal services approach means recognizing the importance of increased diversity and specialization among legal service providers and enhanced capacity to provide comprehensive, cost-efficient services through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers). Teams can deliver more comprehensive and holistic services tailored to people's needs.

Advances have been made in the team delivery of legal services in both law centres and community-based and specialized courts. Inter-professional collaboration in one agency has many advantages: allowing clients to "one-stop-shop" and avoid referral fatigue, making legal services more time and cost effective by relieving legal staff from lengthy counseling sessions they may be ill equipped to handle and providing in-house education for legal staff through regular meetings and ad hoc consultations with other staff professionals.[156] The presence of other professionals can also give legal staff a different and useful perspective about client circumstances.

[156] SPARC report, *supra* note 114.

Learn More: about Integrated Legal Assistance Services

See, Australian report (note 23), specifically Ch 10:
A Holistic Approach to Justice:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Multifaceted Justice for Diverse Needs:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Tailoring Services for Specific Demographic Groups:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Accessible Legal Services:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

More Integrated Services:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Tailoring Services for Specific Legal Problems:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Canadian examples:

Youth Criminal Defence Office – Alberta:
In addition to providing counsel, YCDO has youth workers authorized to assist clients with broad spectrum support - ranging from bus tickets to advocacy for suitable residential placements - to address the issues they face from a holistic perspective:
www.legalaid.ab.ca

Legal Aid Alberta, Calgary Legal Guidance and Edmonton Community Legal Centre are working to develop a common intake form that will assist with cross referrals to provide more efficient services to clients.

Legal Aid Nova Scotia:
For Newcomers to Canada: www.legalinfo.org/i-have-a-legal-question/newcomers-to-canada/
Mi' Kmaw Legal support network: www.cmmns.com/Legal.php

Legal Services Society (British Columbia)
Aboriginal services: www.lss.bc.ca/aboriginal/index.php

Legal Aid Ontario:
Interactive Voice Response (IVR) so clients receive automated services from the help line 24 hours a day

Automated call back systems that permit prioritization of calls (eg people with domestic violence complaints spend less time in the queue)

Instant messaging and social media software for call centre reps to engage with staff and management

Online mapping tools to allow reps to locate specific community resources and provide accurate directions to clients

Fixed telephone lines and voice over internet protocol (VOIP) softphones with computer screen interfaces.

While there has been some resistance to these developments in the legal profession, there is a growing consensus that it is a "win/win" situation, providing services to clients at a more affordable rate and lawyers with adequate income.

The Committee proposes that as a profession and legal community we increase the diversity and range of services available to clients through the integrated team delivery of legal and related services, so that by 2030 the vast majority, in the range of 80%, of personal people law legal services are provided through a team approach. To smooth the way for team delivery of legal and related non-legal services, licensing, insurance and professional and ethical issues such as confidentiality and solicitor-client privilege, have to be resolved. Some Canadian law societies have examined alternative delivery of legal services, focusing on paralegals. Diversification in the legal profession also contributes to a team approach to service delivery. Other countries recognize a broader range of legal service providers with regulations and protections in place. For example, the UK has eight categories of legal practitioners and the State of Washington recently began providing limited licenses to legal technicians.[157]

Target: *By 2030, 80% of lawyers in people law practices work with an integrated team of service providers; in many cases these teams will operate in a shared practice that includes non-legal services and services provided by team members who are not lawyers.*

Milestones:

- *Evidence-based best practice guidelines for team delivery of legal and non-legal services in people law practices are available*

Actions:

- *The CBA prepares a discussion paper and models for team legal service delivery and coordination of legal and non-legal services for both private market and publically-funded legal services*
- *The CBA offers professional development materials and online discussion groups*
- *Law societies develop comprehensive regulatory frameworks for alternate delivery of legal services*
- *Law offices partner with other service providers facilitating team delivery of services*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Reorienting The Practice of Law

This section looks at three proposals for changing the practice of law to enhance equal justice: establish sustainable people law practices; learning from the European experience about the potential of legal expense insurance; and enhanced regulatory approaches.

Sustainable People Law Practices

Our models for providing personal services law, or people law practices, have often not kept pace with the changing demands of our clients and pressures in the justice system. Changes are needed to:

- provide a greater range of legal services to respond to client needs
- provide a more predictable idea of costs to clients, and
- deliver services through a more engaged/ participatory relationship between the client and lawyer.

Making people law practices more attractive to lawyers is also a key component of reinventing the delivery of legal services. Lack of affordability is perceived to be the main barrier to legal services but research in Canada, the US and the UK

[157] Although outside its mandate of examining changes to the legal profession, the CBA's Legal Futures Initiative may ultimately determine these innovations to be in the public interest as they deliver increased access to legal services.

shows that deciding whether to hire a lawyer is influenced by a range of factors.[158] These issues are canvassed in the Committee's discussion paper on *Underexplored Alternatives for the Middle Class*.[159]

Here the Committee highlights strategies to build and maintain sustainable people law practices through different organizational models from the current model of legal partnerships. In the US, the UK, and Australia in particular, there are already many examples. Law firms operate virtually and use alternative business practices to enhance flexibility and reduce overhead, for example, allowing them to reduce the cost of legal services to clients.

Alternative organizational models for providing legal services that focus on meeting the legal needs of people with low and moderate income are emerging and should be supported in a manner that contributes to reaching equal justice. This approach garnered much support in the Committee's consultations and at the Summit. The Summit discussion was energized in particular by the work of Andrew Pilliar, a lawyer and doctoral candidate at the University of British Columbia Faculty of Law, who advocates for a reinvigorated sense of entrepreneurship for young lawyers keen to build viable social justice/access to justice practices and broader definitions of professional success. His master's thesis investigates the experience of Pivot LLP, a law firm established as a social enterprise and funding source for the public interest work carried out by Pivot Legal Services. Pivot LLP also pursued associated goals, including providing affordable legal services.

Pilliar offers a "toolbox for legal entrepreneurs" based on his case study of the Pivot experience and related research.[160] These tools set out 11 challenges for law firm models attempting to provide accessible legal services to a greater range of people: focus; recruiting; income stream; support staff; mentorship; keeping overhead low; using existing work forms; location; branding; decision making models and sources of business. The legal profession can help to build and expand these tools, and so assist in what they can offer in reaching equal justice.

In the UK and Australia, regulations have been modified to allow law firms to seek outside investment or operate under external ownership. As a result, alternative business models are becoming common. For example in England and Wales, co-ops now offer legal services[161] and in Australia, Melbourne, Slater & Gordon became the world's first publicly traded law firm.[162] In the US, innovation has found its way into law firms in other ways. The alternative legal practice making the largest impact is Axiom,[163] which describes itself as "a place where lawyers are passionate about practicing law, not billing hours". Axiom has found innovative ways to offer quality legal services cheaper and more efficiently. As a result, it has grown exponentially to a 1000-person firm operating in 11 offices and four delivery centres across three continents. Other US examples include Gateway Legal Services and Chalmers Consulting, both building 'self-supporting legal services programs' through sliding scale fees, contingency fee awards and payments from third party beneficiaries.

In Canada, alternative models are starting to emerge as well. An innovative firm in Vancouver, Miller Titerle[164] has developed around the principle of "helping people do good things". The firm is structured as an open office space and operates "in the cloud" at all times. They reduce overhead by outsourcing legal research and other work to contract lawyers and paralegals who prefer to work from home. They offer flexible work arrangements for lawyers and support staff, and flexible fee structures for clients, including fixed fee arrangements. Recently, the firm has started offering a value guarantee, which allows clients to discount their bills by 25% if they believe the value guaranteed was not met. The firm is developing innovative programs to allow clients to access their

[158] Andrew Pilliar, "Exploring a Law Firm Business Model to Improve Access to Justice and Decrease Lawyer Dissatisfaction" www.cba.org/CBA/cle/PDF/JUST13_Paper_Pilliar.pdf.

[159] CBA Access to Justice Committee, *Underexplored Alternative for the Middle Class* (Ottawa: CBA, 2013) www.cba.org/cba/equaljustice/PDF/MidClassEng.pdf.

[160] *Supra* note 158. Note that Pivot LLP no long exists, but Pivot Legal Services continues its work.

[161] www.co-operative.coop/legalservices/.

[162] www.slatergordon.com.au/investors/.

[163] www.axiomlaw.com/.

[164] www.millertiterle.com/.

corporate records and start new businesses online, including incorporation, corporate structuring, organization, and basic corporate/commercial transactions, at a low fixed cost.[165]

Some other particularly innovative law firms in Canada include Cognition LLP, Conduit Law, Sky Law, Wise Law, AnticIPate Law, Heritage Law, and Valkyrie Law Group.[166] These law firms are re-designing the legal service delivery model based on entirely new propositions about what clients identify as the value they receive from their lawyers, and eradicating paradigms like the billable hour while doing so.[167]

Bar associations and law societies have an important role in fostering and supporting the development of alternative organizational models for viable and sustainable people law practices. Support from the legal profession as a whole is needed to facilitate the transition to these new models to ensure that by 2025, a wide range of alternative organization models for delivering legal services exists to meet the legal needs of low and moderate income Canadians, including those living outside major urban centres.

The legal profession can foster initiatives through 'incubator programs' that help recent law graduates transition into sustainable practice situations to serve individuals and small businesses, as well as through virtual practice arrangements.

In the US, 'law school incubator' programs successfully help graduates transition into sustainable practice. Incubators accelerate the development of start-up companies by providing entrepreneurs with instruction in financial management, marketing, networking and sound business practices. The idea started at City University of New York in 2007 and spread quickly throughout the US. In some cases, law firms and other service providers donate office space and money.

In some law schools this takes the form of 'legal residency programs' where recent graduates offer low-cost legal assistance while attending seminars on obtaining and billing clients, malpractice insurance and setting up a law office. Another approach is through 'solo and small firm institutes' or facilities, where recent graduates receive substantial training or have access to a facility for hands on training, including in some cases office space, office assistance, access to lawyer mentors and law practice guidance. All of this is geared to assisting young lawyers to launch their own practices. 'Entrepreneurial lawyering' classes help students develop business plans provided participants are committed to establishing a solo or small firm practice and helping underserved populations after completion of their incubator training. They are generally encouraged to provide pro bono and low-bono services to increase access to civil legal services for those in need.

New initiatives are especially significant outside urban centres, where barriers to accessing legal services are even more acute. Various legal organizations have worked collaboratively, particularly in Manitoba, Alberta and British Columbia, to encourage the practice of law outside major centres. Virtual legal practices should be fostered including through expanded forums for learning, sharing and networking about these innovations.

[165] See their recent newsletter: www.millertiterle.com/2013WinterUpdate.pdf.

[166] www.cognitionllp.com/, www.conduitlaw.com, www.skylaw.ca/,www.wiselaw.net/, www.anticipatelaw.com/, www.British Columbia, heritagelaw.com/, www.valkyrielaw.com/

[167] The CBA Legal Futures Initiative highlighted international examples of innovative service delivery models in its background paper, "Innovations in Legal Services: 14 Eye-Opening Cases," and expects to highlight more examples of innovations through the recommendations of its Business Structures and Innovations Team.

Learn More: about Service Delivery Options

Andrew Pilliar - Master's thesis:
www.circle.ubc.ca/handle/2429/43478
CUNY's solo-focused Community Legal Resource Network

Law Society of Alberta, Alternate Delivery of Legal Services Committee, "Alternate Delivery of Legal Services: Final Report" February 2012:
www.lawsociety.ab.ca/files/adls/ADLS_Final_Report.pdf

Manitoba's Forgivable Loans program - The Law Society offers a forgivable loan to selected students from under-serviced Manitoba communities, if they are accepted into the University of Manitoba Faculty of Law. 20% of the loan if forgiven for each year after call to the bar that the recipient practices in the home community:
www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm

Lawyers in Vancouver and Red Deer provide legal advice to remote communities in British Columbia and Alberta through Skype and other Internet services.

Legal residency:
www.colorado.edu/law/careers/information-employers/legal-residency-colorado-law

Bala, Nicholas, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (note 32):
http://www.jstor.org/stable/10.3138/j.ctt2tv2dr

Beg, Samreen & Lorne Sossin. "Should Legal Services Be Unbundled?" **in** *Middle Income Access to Justice* **(**note 32):
http://www.jstor.org/stable/10.3138/j.ctt2tv2dr

Fedorak, Jeanette, "Unbundling Legal Services: Is the Time Now" (2009) 12 *News & Views on Civil Justice Reform* 14.

Kent Roach and Lorne Sossin, "Access to Justice and Beyond" (2010) 60:2 *University of Toronto Law Journal* 373.

Report of the British Columbia Unbundling Legal Services task force:
http://www.lawsociety.bc.ca/docs/publications/reports/LimitedRetainers_2008.pdf
http://www.lawsociety.bc.ca/docs/publications/reports/legalservices-tf_2010.pdf
https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

Target: *By 2025 a wide range of alternative organizational models for the provision of legal services exist to meet the legal needs of low and moderate income Canadians, including those living outside of major urban centres.*

Milestones:

- *An evaluation of the effectiveness of sustainable people law practices at filling legal services gaps and providing meaningful access to justice is carried out, and the results are broadly shared to encourage learning, further innovation and best practices*
- *All jurisdictions have legal practice incubator programs.*

Actions:

- *The CBA provides professional development materials, and hosts a PD webinar and online discussion groups to foster conversation and learning about alternative organizational models for providing people law services*
- *The CBA develops a "startup package" for alternative organizational models for sustainable people law practices comprising for example, a handbook, contracts, other documents and training materials*
- *A consortium of bar association, law society, law schools, law firms and business enterprises support the development of one or more accessible legal practice incubators in at least three jurisdictions*
- *The CBA supports the establishment and maintenance of networking among these incubator programs to facilitate information exchange, development of best practices and continuous improvement*
- *The CBA and law societies provide ongoing opportunities for mentoring and peer-to-peer sharing of best practices for sustainable people law practices, and consider how the recommendations of the CBA's Legal Futures Initiative can be used to support lawyers in the creation of alternative service delivery models*
- *The CBA coordinates a roster of experienced justice system participants, including law practice management consultants, to carry out awareness campaigns for law students, young lawyers and members of the profession (not just law firms) about alternative organizational models for delivering legal services*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Legal Expense Insurance

The holder of legal expense insurance (LEI) has a commitment from an insurer to pay some or all of the legal costs arising from certain legal situations. Insurers support legal services by both lawyers and paralegals and customers may include individuals, families and small to mid-size businesses.

LEI is popular in Europe and provides basic access to legal assistance for people who can afford to buy the insurance, often in conjunction with home insurance or tenant insurance policies. Approximately 40% of all Europeans have LEI, and in the UK 59% of families have some coverage under home insurance policies. In Sweden coverage has been mandatory since 1997 and its development ran parallel to decreases in the availability of legal aid.

LEI has not caught on in Canada to the same extent. In contrast to Europe, Canadians purchase only about $11-12 million of coverage per year. LEI has mainly taken hold in Québec, attributable in large part to efforts by the Barreau du Québec, which spent $2 million on a campaign to encourage Québecers to take advantage of LEI. Their ads are explicitly aimed at people who make too much for legal aid, but too little to comfortably afford counsel should a legal event occur. While the campaign saw the number of subscribers double, only about 10% of Québecers have coverage and only about 12 insurance companies provide the

product. In his 2008 report on legal aid in Ontario, Professor Michael Trebilcock concluded that the law society and Legal Aid Ontario should "accord a high priority to promoting the role of legal insurance."[168]

At the Summit, Barbara Haynes, the CEO of DAS Canada, summarized the current market for LEI in Canada outside Québec. DAS is a global leader of LEI operating in 18 countries including in Canada since 2010, marketing itself as providing affordable justice for the middle class. Haynes explained that LEI is not yet understood or accepted in Canada. Research is needed to understand why it is not currently purchased. This may be attributable to restrictions on the coverage provided by LEI. For example, family law matters are not included by most insurers at present. There is a perception that the premiums are high, but in fact the average annual stand alone premium for a family is $150-200 and a group purchase through a homeowner's policy is about $50. Some concerns have also been raised about the ability to retain choice of legal counsel and to clarify who instructs the lawyer in a given matter, the insurer or the individual client.

The CBA has endorsed LEI that is adapted for the Canadian market by including family law services as one mechanism to increase access to justice. LEI is not a panacea, but the evidence from jurisdictions where it is commonly used shows that it could help many people get much of the legal help they need. The Committee proposes that by 2030 the vast majority of Canadians should have legal insurance as one part of a seamless provision of legal services. Reaching this goal requires working to overcome current limitations on understanding and availability of LEI.

The low uptake of LEI in Canada outside Québec appears largely because many people are unaware of its value. Unlike health, people often don't expect to incur legal costs. They probably don't know anybody who has LEI. If they thought about it, they might believe LEI to be expensive. People with limited discretionary income tend not to buy insurance and policy limits can mean that coverage does not extend to the types of cases that arise most often. Lawyers also seem to lack awareness of LEI or question its value, and this disinterest or distrust may be compounded by apprehensions that LEI will be bad for business. On the other hand, le Barreau du Québec was primarily responsible for the success in spreading LEI in Québec.

> I would like to share my knowledge of the usefulness of what seems to be an almost universally covered legal insurance system in parts of Europe – in particular, Denmark. When my son, who lives there, was wrongfully dismissed, he was able to access enough legal insurance to obtain the services of a lawyer who negotiated a settlement on his behalf. He could not have done this on his own considering he was up against a large multinational corporation. Legal insurance is included in his house insurance and apparently is included in tenants' insurance. Since everyone contributes, the cost is small. Obviously there are ceilings on the amount covered but it helps both working poor and middle class access services that are not covered by legal aid because of issue and eligibility cut offs. Also, this is operated by the private sector (unusual for Scandinavia) rather than government. Administrative costs are likely low as they are piggy backed on to a larger insurance scheme.
>
> ***Anne Beveridge, comment during Committee consultations in British Columbia***

In August 2012, the CBA Council adopted a resolution directing the CBA:

- to collaborate with legal insurance providers to communicate to CBA members, government leaders and the public the potential for legal expense insurance to improve access to justice to the middle class in Canada and
- to ask insurance providers to adopt measures to safeguard and inform consumers, and adapt

[168] He noted that the Law Society of Upper Canada had considered and endorsed LEI as far back as 1993, but that it had not yet made its way into the mainstream.

policies to address the legal needs of the Canadian market, requiring family law services to be included at reasonable cost.

Following this resolution, the Committee has attempted to start a discussion about these issues with the insurance industry. The Committee is committed to encouraging the expansion of LEI both in terms of uptake and the scope of coverage provided, particularly for family law matters. At the same time, a growing acceptance of LEI is also a matter of public policy and there is a role for government on these issues. This is discussed further below in relation to universal legal aid coverage.

Target: ***By 2030, 75% of middle income Canadians have legal insurance.***

Milestones:

- *Insurance providers offer a range of LEI policies that assist in advancing meaningful access to justice to middle income Canadians, including on family law matters*
- *Options for mandatory legal expense insurance are being fully considered*

Actions:

- *The CBA communicates that making LEI more available contributes to access to justice and is compatible with the profession's interests*
- *The CBA develops a strategy, building on the Barreau du Québec initiative, to increase public awareness of the benefits and relatively low cost of LEI, through speeches, articles and testimonials*
- *The CBA continues to collaborate with insurance providers to encourage them to develop more LEI policies for Canadians, including for family law matters*
- *The CBA works with governments to explore the feasibility of mandatory legal insurance based on existing European models*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

Regulation and Access to Justice

The regulation of legal services has an impact on the availability and cost of legal services. This is a key point of intersection between CBA's Equal Justice and Legal Futures initiatives.

These issues were canvassed at the Summit in a workshop developed by the Canadian Association for Legal Ethics. Speakers emphasized how regulation is increasing the price of offering legal services and reducing innovation in the legal service marketplace, exacerbating access to justice problems. Noel Semple, from the University of Toronto Faculty of Law, described three primary legal regulation tools:

- Barriers to entry: to offer legal services, a series of hurdles must first be overcome (undergrad, LSAT, law school, articles, licensing exam, etc.)
- Market conduct regulations: what must be done on an ongoing basis to offer legal services (pay dues to law society, attend professional development classes, etc.)
- Business structure regulations: that forbids certain business structures from offering legal services to the public.

The main purpose of professional regulation is to protect the public by ensuring the quality of legal services, but regulation can also limit access by restricting options for the delivery of legal services. Conversely, scaling back on regulation is likely to increase access but the trade-off may be less public protection.

During the Summit workshop, Professor Richard Devlin of the Schulich School of Law advocated for a more active role for law societies and provided his list of things that law societies must do to support access to justice:

- Enhance paralegal services (so far Ontario, British Columbia and Alberta have taken steps to do so)
- Permit alterative business structures ABS (described more below)
- Become brokers of legal services (there is a pilot project in Manitoba where law society matches clients with family law lawyers, and lawyers accept a reduced fee. However, the law society guarantees payment.)
- Make pro bono mandatory
- Make ethical infrastructures mandatory
- Promote financial transparency through the publication of lawyer remuneration.

Devlin also noted that countries like the UK and Australia have liberalized their legal services regulation, and asked the question: What price have they paid?

Professor David Wiseman of the University of Ottawa Faculty of Law provided an overview of the issues in the move to permit alternative business structures (ABS). ABS are businesses that provide legal services not owned or managed under the control or direction of lawyers. The main advantages of ABS are that they supply more capital and business expertise (organizational management, product development, branding, market research etc.) compared to current law firm structures. ABS may assist in addressing unmet legal needs by investing time and resources to reach out to more people who lack legal services. ABS may also increase access through marketing to clients that need services and may be more user friendly, accessible and inviting.

Hesitancy over ABS arises from a concern that allowing corporate legal practice will create ethical dilemmas and conflicts. Wiseman called this concern "overblown" given the existing tension lawyers face now, between their duty to the court and the client, and their need to also make a living. Regulators can address these issues directly. For example, in Australia, the profession outlined a hierarchy of obligations for ABS – court, client, and then owners. A serious concern is the potential to exploit vulnerable persons through marketing.

From the Committee's perspective the central question is whether ABS will increase meaningful access to justice by those currently underserved by lawyers in private practice. Who will benefit from ABS? What 'pain' is addressed through this development? Wiseman stated that the supposed gains in equal justice are speculative at this point. There is an active and growing debate on ABS in Canada, and it is now under consideration by several law societies and the CBA Legal Futures Initiative, which acknowledges in its early research that ABS may migrate to Canada as markets become more closely connected. The initiative is examining ABSs from the perspective of increased access to legal services. Last year, ABA rejected a resolution permitting ABS in the US. More research and evaluation is needed on the access gains by ABS before it can be considered a priority for reaching equal justice.

Regenerating Public Legal Services

Public-funded legal services, generally referred to as legal aid programs, are an indispensable component of a fair, efficient, healthy and equal justice system. At present, Canada's legal aid system is inadequate and underfunded, and there are vast disparities between provinces and territories on who is eligible for legal aid, what types of matters are covered and the extent of the legal services provided. Legal aid alone will not cure all barriers to access and it is important not to conflate legal aid with access. At the same time, our justice system cannot operate fairly and efficiently without a healthy legal aid system.

> I found, first of all, that there is a huge consensus that the current system isn't working, that the disparities and gaps in legal aid are truly deeply troubling, challenging to our core shared values, democracy, our shared citizenship, our understanding of justice and fairness. There's a huge consensus that what we have isn't good, that the disparities are unsupportable.
>
> ***Alex Himelfarb***

At the Summit, Karen Hudson, Executive Director of Nova Scotia Legal Aid, proposed the REACH framework for regenerating legal aid: Research, Eligibility, Advocacy, Coverage and Holistic services. These vital elements are woven into the discussion in this section.

Three main components are needed to regenerate legal aid:

- national legal aid benchmarks with a commitment to their progressive implementation, monitored through an open, transparent process;
- reasonable eligibility policies that give priority to people of low and modest means but provide graduated access to all residents of Canada who are unable to retain private counsel (including through contributory schemes); and
- effective legal service delivery approaches and mechanisms designed to meet community needs and the meaningful access to justice standard.

National Benchmarks

At its inception over 40 years ago, the federal government envisioned "the establishment of a coast-to-coast federally funded legal aid system that would cover both civil and criminal cases", modeled on the Canadian medicare system. This vision was never met[169] and Canada is further away from this goal in 2013 than when the program was created. National benchmarks for legal aid are completely non-existent and there is an unacceptable disparity in service provision between jurisdictions.

The Committee proposes the development of national benchmarks as the basis for a principled framework for this key social program, to counterbalance the sole focus on reducing expenditure as the key driver of legal aid reforms. National benchmarks should be focused and concrete, but leave scope for local priority setting and innovation. Benchmarks should be aspirational rather than setting a minimum threshold and include targets for progressive implementation.

National benchmarks should be established on the basis of evidence about legal needs and legal assistance required to ensure meaningful access to justice. This is a rapidly growing body of knowledge that provides a platform for developing generic and more refined standards. Where evidence is lacking, steps must be taken to fill the knowledge gaps.

The central feature of national benchmarks would be agreement on a definition of essential public legal services, based on a shared understanding of the legal issues or problems that involve fundamental interests. Responses to the Committee's discussion paper on National Legal Aid Standards suggest that it would not be difficult to achieve a broad consensus. Essential public legal services include situations where basic human needs are at stake. These include: criminal law; child protection; family law; domestic violence; landlord tenant matters where an individual faces eviction; employment law where an individual is not represented by a union; refugee and immigration; and social benefit cases. Within this overall category of essential public legal services, cross-cutting issues would have to be addressed by national benchmarks, including the complexity and consequences of the issues; priority characteristics of individuals; the type of legal assistance from the continuum of available services required by the various factors at play; and assistance in addressing non-legal factors with a significant impact on the legal matter.

Several US initiatives have been established to empirically demonstrate where a right to publicly funded counsel is in fact essential. The Boston Bar Association's Civil Gideon Project and the California legislature's Access to Justice Statute, known as the Shriver Pilot[170], are models that could be considered as we work together to frame national legal aid benchmarks in Canada.

[169] National Health and Welfare did indeed propose a combined criminal and civil program at that time, but the Department of Justice opposed it and the criminal cost sharing program emerged. Health and Welfare developed civil legal aid funding under the Canada Assistance Plan as a default. See Dieter Hoehne, Legal Aid in Canada (Lewiston, NY: Edwin Mellen Press, 1989); Ab Currie, "Down the Wrong Road" (2006) 13:1 International Journal of the Legal Profession 99.

[170] See: www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf; www.courts.ca.gov/documents/20110429itemp-revt.pdf

In addition to defining legal aid coverage based on essential public legal services, national benchmarks should also address eligibility and quality of legal aid services by employing services according to the continuum of legal services described above, in a manner consistent with the meaningful access to justice standard.[171] Eligibility and delivery of legal services are discussed in the next two sections.

Rather than a minimum threshold, national benchmarks should be aspirational and include targets for progressive implementation. Benchmarks will supply a principled basis for legal aid funding decisions, be focused and concrete, while still leaving scope for local priority setting and innovation.

Target: *By 2020, national benchmarks for legal aid coverage, eligibility and quality of legal services are in place with a commitment and plan for their progressive realization across Canada.*

Milestones:

- *Federal, provincial and territorial governments establish a national working group with representation from all stakeholders including recipients of legal aid, to develop national benchmarks*

Actions:

- *The CBA works with all interested justice sector, service providers and community-based organizations to increase public awareness about the importance of legal aid and the costly personal and social consequences of inadequate legal aid*
- *The CBA works with all interested justice sector, service providers and community-based organizations to develop a broad alliance of individuals and groups to support and champion the regeneration of legal aid and the development of national benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice system stakeholders, prepare draft national benchmarks as a means of engaging stakeholders and fostering dialogue and action*
- *The Association of Legal Aid Plans consults with the Federal-Provincial-Territorial Permanent Working Group on Legal Aid on an action plan to initiate work on national legal aid benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice system stakeholders, carry out research to develop and refine the empirical basis* for understanding 'essential legal needs' and 'meaningful and effective access to justice'

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Eligibility

The process described above for developing national legal aid benchmarks should also consider eligibility for publicly funded legal services. At present, some legal aid services such as public legal information are available to all, but most forms of legal assistance and representation from legal aid are available on the basis of a means test. Generally, an individual or family must receive social assistance or earn just above this threshold to qualify for legal aid. In many regions, people working full time for minimum wage do not qualify. In Alberta, even recipients of Assured Income for the Severely Handicapped are ineligible. The Barreau du Québec has implemented an advocacy campaign to raise eligibility to include those earning minimum wage. Québec has very recently announced a significant change to its eligibility standards so that more people will qualify for help[172].

[171] The continuum is discussed *infra* at 93 and the standard *infra* at 61.

[172] www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm.

At the Summit, Nye Thomas from Legal Aid Ontario (LAO) noted that LAO offers a range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada's Low income Measure (LIM) – a commonly used measure of poverty. The LIM is an income threshold below which a family is likely to spend a larger share of household income on the necessities of food, shelter and clothing than the average family.

As discussed in Part 1, LAO has itself noted a growing gap between its financial eligibility criteria and the LIM in Ontario. Since 1996, all demographic groups have lost ground. Without corrective action, things will get worse, meaning more hardship, less access to justice, more court delays, more court ordered counsel, and more unrepresented litigants.

Thomas emphasized that expanding financial eligibility does not have a linear or automatic correlation to legal aid costs: "There are a lot of ways to improve accessibility which doesn't mean you need to double costs. The money discussion is more nuanced than it is often portrayed."[173] This highlights the critical relationship between coverage, eligibility and the type and extent of legal services provided by legal aid, and the strategic policy choices required to ensure meaningful access to justice.

There is a clear consensus that legal aid should be available to a wider range of people than at present. The stumbling block is not that this is a bad idea, but that it is impractical and unaffordable. A more difficult question is, if eligibility should be extended, how far should it go: To everyone living below the LIM? To those earning a minimum wage? To people of modest means? To all Canadians?

At the Summit, the Committee invited Alex Himelfarb, former Clerk of the Privy Council, and Sharon Matthews, a lawyer at Camp Fiorante Matthews Mogerman in Vancouver, to debate the question: should there be a national justice care program in Canada? This was an opportunity to explore whether legal aid should be a universal or targeted social program, a question raised frequently during the Summit.

Both speakers based their positions on an understanding that a national justice care system, similar to the universal healthcare system, is a noble idea and reflects good public policy. Himelfarb argued in favour of adopting a vision of a national justice care system and building it in increments. Research has demonstrated that "if you target your social program to those in need, sooner or later that program gets starved"[174], because the political commitment wavers when many people aren't benefiting from it. People need to see what their tax dollars are buying for them. The current dismal state of legal aid targeted only at the neediest of the needy reinforces his position. The more people have a stake in the quality of the system, the better it will be. Targeted social programs also tend to be ineffective in that they can unjustifiably exclude

> In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).
>
> This leads me to suggest that both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).
>
> ***Trebilcock 2008 (note 47)***

[173] Thomas, panel presentation at Summit, *supra* note 38.

[174] Alex Himelfarb, former Clerk of the Privy Council, Presentation at CBA *Envisioning Equal Justice* Summit (Vancouver: April 2013).

people who require services. Professor Michael Trebilcock of the University of Toronto Faculty of Law has made this same argument.[175]

For purposes of this debate, Matthews, a long time advocate for legal aid, argued that while a national justice care system should be the ultimate goal, Canadians are not ready for it. The CBA-BC Branch, as part of its legal aid advocacy campaign, highlighted how little most people know about legal aid and so, do not really understand its importance. Given the low public traction of legal aid, Matthews argued that it is better to focus limited resources on improving legal aid for those most in need, rather than providing justice care for people who can afford to pay. In her words, "without a foundation of public support we can't make real changes and we don't have the foundation of popular support." She suggested that it is best to meet the needs of the most vulnerable and build from that base in an incremental and affordable way.

Following the 'ambitious but possible' theme used to set its targets, the Committee proposes that eligibility for legal aid be increased gradually over time, so that by 2020 all Canadians living at and below poverty level are eligible for full legal aid coverage for essential legal services and by 2025 those services are available to low-income Canadians, defined as those with incomes less than two times poverty levels.

The Committee also proposes that we fully canvass, develop and encourage an informed public dialogue about options for a national justice care system.

Funding options include client contribution schemes (based on ability to pay) and public insurance schemes (whether mandatory or opt-out). Eligibility can be approached flexibly: it does not have to be uniform for different types of services.

Professors Sujit Choudry and Michael Trebilcock and James Wilson have developed a proposal for a non-profit legal expense insurance scheme for Ontario that would operate through the province's legal aid plan. The proposal would address shortfalls in access to justice, while remaining grounded in the public interest, in contrast to for-profit private market legal expense insurance plans discussed in an earlier section. Under their proposal, everyone would be assumed to subscribe to the insurance scheme, with allowance for people to opt out.[176]

Another option is offered by popular reforms enacted in Finland in 2002, which raised the proportion of households eligible for assistance with their legal costs to 75%, with cost sharing on a sliding scale. (The figure is below 30% in most English-speaking common-law countries.)[177] Coverage encompasses criminal and civil matters, ranging from simple estate inventories to complex litigation. The main criteria are the seriousness of the matter and how well the applicant can handle it alone, rather than the area of law.

Targets:

By 2030, options for a viable national justice care system have been fully developed and considered.

By 2025, all Canadians whose income is two times or less than the poverty line (Statistics Canada's Low Income Measure) are eligible for full coverage of essential public legal services.

By 2020, all Canadians living at and below the poverty line (Statistics Canada's Low Income Measure) are eligible for full coverage of essential public legal services.

Milestones:

- *The working group on national benchmarks (see Milestone for 'Regenerating Publicly funded Legal Services') develops a proposal for a gradual expansion of eligibility for legal aid*
- *A vigorous public policy dialogue about the value and feasibility of a national justice care system is underway*

[175] Trebilcock, *supra* note 47.

[176] S Choudry, M Trebilcock and J Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in *Middle Income Access to Justice*, *supra* note 32.

[177] www.lawyersweekly.ca/index.php?section=article&articleid=787.

- *Federal, provincial and territorial governments commit to continue increasing funding for legal aid to ensure progressive implementation of the national benchmarks (see Targets under 'Reinvigorated Federal Government Role')*

Actions:

- *The CBA works with the Association of Legal Aid Plans and other interested stakeholders to prepare draft national benchmarks on eligibility as a means of engaging stakeholders and fostering dialogue and action*
- *The CBA works with interested public policy institutes and think tanks to develop an options paper for a national justice care system building on existing research and considering universal legal aid models in Canada and abroad*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Legal Aid Services Delivery

Today legal aid plans offer an array of legal services that vary widely from jurisdiction to jurisdiction. In some places, services include the full continuum from legal information to representation, while in others legal aid provides a narrower range of services, such as duty counsel and representation. In addition to direct service, the continuum of services can include strategic advocacy and test case litigation on issues affecting low income people, so that problems can be addressed on a systemic basis instead of dealing repeatedly with individual cases. Strategic advocacy contributes to efficiency in courts and tribunals and the proper functioning of our legal system. Services are provided by a mix of employees, often operating through legal centres or clinics and by lawyers in private practice working for rates generally far below market rates.

Legal aid plans in Canada have spent many years making do with less, and have become adept at doing so. Although many provincial and territorial governments have increased legal aid funding in the past 5 to 10 years, demand continues to far exceed the capacity of most legal aid plans. This approach is unsustainable. Changes to legal aid services should be driven by the legal needs of the communities served, not by a drive to decrease expenditures in every way possible.

There is a gap between the information available to legal aid providers and the perspectives of the broader community as to how well current services address the public's legal needs. While legal aid program evaluations including client satisfaction components are generally strong, the Committee's community consultations and other recent public forums have provided less positive feedback. Complaints are heard about the inadequacy of and lack in flexibility in legal aid, but also the quality of service offered (for example, delays in getting service, service providers not caring, not doing thorough work, not fighting hard enough for clients, or not listening to or respecting clients). Many felt the underlying cause of these problems is that legal aid lawyers are overworked and underpaid. Related to this observation, many of those consulted believed that people with low incomes are given second-class service relative to private legal services.

> "Unless you have lots of money, you cannot access justice." ***Single mother, Moncton***
>
> "Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything." ***Single mother, Moncton***
>
> "To me, legal rights are an unfulfilled promise." ***Person with Disability, Toronto.***
>
> "If you don't know what your rights are, how can you have them protected?" ***Single mother, Kentville***
>
> "Their (legal aid lawyers) case load is so big that they cannot go through every detail of the case. It's hard when you are trying to prove your innocence and they are not willing to fight for you." ***Aboriginal person, Saskatoon***

> "Legal aid lawyers burn out, so justice isn't served. They need to open it up more; the lawyers lose passion when they are overworked and underpaid, which is unfair to lower class society." ***Aboriginal person, Saskatoon***

The Committee also surveyed legal aid lawyers, paralegals and community legal workers across Canada and received over 700 responses. Respondents expressed a widespread belief that legal aid services are not meeting the ever-increasing demand for services and basic needs of the community:

> "Many clients are left with the prospect of no legal assistance with their divorce or spousal support claims and with their criminal charge, and so on."
>
> "Why do we even talk about "clients" if they aren't getting services? And these are in the two chief areas where legal aid actually does provide service, family and criminal. Confused."
>
> "Current Legal Aid Services are inadequate to meet the needs of today's clients and communities, let alone those of the future."
>
> "Even though Legal Aid is supposed to fund family and criminal law matters, very limited matters in each are actually covered."
>
> "Those not able to get spousal or child support or a fair divorce settlement can end up in poverty."

Service deliverers also expressed serious concerns about their ability to meet their professional obligations given the demands and constraints they face in their work:

> "Duty counsel are overworked and fewer private counsel are accepting certificates."
>
> "The danger is that the quality of legal services provided do not live up to professional standards expected of lawyers."

Quite a few lawyers expressed a lack of trust between legal aid management and providers of legal aid:

> "Proper planning for the future must recognize increasing demand for services but also that services must respond to wider community needs and a more comprehensive view of the costs of inadequate legal aid."

None of this should be taken as a critique of legal aid plans or of the lawyers doing legal aid work: both are doing their best in difficult circumstances. In some cases, positive innovations have resulted from efforts of plans to keep within budgetary targets. Many Canadian legal aid plans have developed and implemented innovative and cost-effective service delivery models, working closely with communities, pro bono organizations, and other justice service providers.

Overall, legal aid innovation is characterized by a greater mix of legal services designed to reduce the divide between full legal representation and no representation, in a situation of scarce resources. The predominant trend is to provide information and limited assistance, putting the onus on the litigant (or accused) to "self-help" with various levels of support.

Learn More: about Emerging Best Practices for Holistic, Coordinated, Comprehensive Delivery

- Involve multiple service providers on the same team
- Get all service providers on the "same page"
- Encourage dialogue between service providers, e.g. through case conferences
- Ensure everyone understand each other's roles

See various examples in Committee discussion paper on Future Directions for Legal Aid Delivery: http://www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery .pdf

See also, specific Canadian examples:

Nova Scotia focus on holistic, coordinated service delivery: www.nslegalaid.ca/resources.php

Connecting Ottawa: a social worker and lawyer offer consulting services to frontline workers: http://connectingottawa.com/about

Pro Bono Law Alberta, with Calgary Legal Guidance and Legal Aid Alberta collaborate to provide legal services in a northeastern community of Calgary. The partners provide intake, assessment, advice, referral and follow up in a community centre to a population that would otherwise be underserved.

BC's integrates legal services with community partnerships: www.lss.bc.ca/assets/legalAid/CPOManualSept2013.pdf

Nova Scotia, Alberta, Saskatchewan and Manitoba now have expanded duty counsel models for criminal matters, and most plans offer duty counsel for family matters. In Nova Scotia, legal aid funds family duty counsel in two locations full time, and part time in other locations, without means testing.

Alberta's Legal Services Centres and Family Settlement Services focus on front end dispute resolution: www.informalberta.ca/public/service/serviceProfileStyled.do?serviceQueryId=1228

In 2012, LAO announced a new mental health strategy to provide criminal lawyers whose clients have mental health needs with funding to support their clients' specialized needs: www.legalaid.ab.ca/AnnualReport2013/Strategy/Pages/FamilySettlementServices.aspx

Multi disciplinary approach in Alberta (family resource faciliators) and Nova Scotia (family support assistants).

Alberta's Family Settlement Services (FSS) offers financially eligible clients in Edmonton, Calgary and Lethbridge up to five hours of dispute resolution services for family law issues except child protection matters. Participants are screened to ensure they are capable of effective participation.

Yukon: www.yukoncourts.ca/courts/territorial/cwc.html

LAO: www.legalaid.on.ca/en/getting/type_civil-mentalhealth.asp

At the Summit, Nova Scotia Legal Aid Executive Director Karen Hudson listed examples of recent innovations by legal aid plans in the child welfare area:

- in British Columbia, Aboriginal community legal workers are targeted specifically for child welfare matters
- in Ontario and Newfoundland and Labrador, enhanced duty counsel determines legal aid eligibility prior to or at the first appearance, and provides post docket negotiation, social worker assistance, representation at pre-trial conferences and even at hearings
- in Newfoundland and Labrador, legal aid teams are comprised of lawyers, paralegals and social workers
- Nova Scotia offers specialized professional development
- Ontario has partnered with law schools to develop a clinical course in child welfare
- the Territories are using ADR approaches to get the parties together with counsel early on (even before a protection application is brought), coupled with ongoing and timely disclosure

Another important trend is to become more inclusive by incorporating services that meet the unique needs of particular disadvantaged communities. For example, legal aid plans are using court support workers familiar to local communities to respond to clients with mental health needs. LAO recently launched a mental health strategy that includes improved access to advocacy, enhanced training, increased capacity of service providers, and developing a research agenda. The strategy also provides criminal lawyers whose clients have mental health needs with funding to support those special needs.

Alberta has launched a Cultural Liaison Specialist project, to provide language and other services to newcomers to Canada.

British Columbia's Legal Services Society has launched an Aboriginal section on its website[178], with information about different available options specifically intended to address the needs of Aboriginal people, including Gladue reports, Gladue courts, aboriginal community legal workers, aboriginal child protection, mediation and circuit courts, and expanded duty counsel.

As noted earlier in this report, the community legal clinic movement, which has operated both separate from and in some cases in conjunction with legal aid, involved a more holistic approach at its inception. Evidence is clear that holistic services are what people want and what is best able to supply just, lasting outcomes. Our central objective must be to move away from piecemeal self-serve models and toward comprehensive holistic approaches which value the client as an engaged participant. When we think of justice access centres or multi-disciplinary, multi-function centres, and outreach, we should be thinking about them in the context of legal aid.

National benchmarks should set out criteria determining the type, quantity and quality of services. To the greatest extent possible, criteria should be based on evidence-based practices. Criteria should take into account whether the individual can take some initial steps, perhaps with some advice, and whether or when the individual would require in person service. Where appropriate because of the complexity of the case, or the challenges facing the individual, full representation should be provided. The standards should assist in identifying the point at which the individual requires on-going assistance, including from the outset. Assistance with mediation or other settlement processes should be included, when appropriate for the case.

National benchmarks should encourage innovative and collaborative legal aid services. Consideration should be given to mandating specific legal services, like duty counsel, to provide summary advice at an early stage in proceedings and to facilitate dispute resolution.
What can be done to support legal aid innovation to improve meaningful and inclusive access to justice?

1. Enhance outcome-based evaluation of programs and monitoring of developments and sharing of knowledge gained
2. Dedicate resources to establish and maintain mechanisms to share best practices between legal aid plans
3. Increase opportunities for legal aid providers to come together to share and learn – perhaps through an annual or biennial conference.
4. Online learning opportunities – webinars.

The Association of Legal Aid Plans (ALAP) plays an important role in fostering innovation but is not resourced to fully meet this need. Many legal aid lawyers participated in the Summit and voiced a strong need for a regular forum.

Target: *By 2025, all legal aid programs provide meaningful access to justice for essential legal needs through inclusive and holistic services that respond to individual and community needs and integrate evidence-based best practices.*

Milestones:

- *Legal aid providers develop an increased capacity for outcome-based evaluation and research, as well as monitoring and sharing information about developments to facilitate*

[178] www.lss.bc.ca/aboriginal/index.php

evidence-based best practices

- *Prototypes of innovative holistic legal aid service delivery models have been developed and tested. Results are integrated into practice and broadly shared to encourage learning, further innovation and best practices.*

Actions:

- *Legal aid providers build and strengthen relationships with other social service organizations to develop more holistic service delivery*
- *The Association of Legal Aid Plans is resourced to play a national leadership role in support of strong, innovative legal aid service delivery including through research, monitoring and sharing developments*
- *The Association of Legal Aid Plans develops measures of inclusivity to integrate into evaluation frameworks*
- *The Association of Legal Aid Plans completes its work on a common framework for data collection for all legal aid providers*
- *The Association of Legal Aid Plans increases opportunities for legal aid providers to come together to share and learn (e.g. regular webinars, an annual or biennial conference)*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Bridging the Public-Private Divide

As innovations in private service delivery and an increased commitment to publicly funded legal services build up the ends of the spectrum of meeting legal needs, gaps in service that remain can be addressed through public-private collaborations. Pro bono efforts have been an important aspect of these collaborations, and the profession has demonstrated its commitment to offering those services as an aspect of professional responsibility. At the same time, there is a growing need to clarify the relationship between legal aid and pro bono, to ensure that they work well together into the future. According to Access Pro Bono Executive Director, Jamie Maclaren, "we view it as high time that legal aid and pro bono be genuinely treated as mutually supportive systems."[179]

In addition, law schools are enhancing practical opportunities for law students, through clinical education, experiential learning and more, not only better equipping students with applied skills once they graduate but also developing awareness of social justice and the public's unmet legal needs and instilling a pro bono 'culture' in young lawyers.

The Place for Pro Bono

The combination of private market and public legal services currently available in Canada cannot meet the demand for access. One of the main mechanisms to bridge the divide between public and private legal services is organized pro bono services. The Committee defines pro bono work as providing legal services without fee to people or organizations that can't otherwise afford them and which have a direct connection to filling unmet legal needs.

There has traditionally been some debate in the profession about the extent to which expanding pro bono services is likely to undercut public commitment to legal aid. The Committee's consultations revealed a strong division in views about the profession's responsibility to provide pro bono and the extent to which a tension between pro bono and legal aid exists.[180] Some individuals and organizations objected to the suggestion that there is a tension at all, but most of the feedback supported the idea that while there does not *need to be* tension, it does indeed exist. Further,

[179] Legal Services Society, *Submission to Public Commission on Legal Aid* (Vancouver: 1 September 2010) http://www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToPublicCommissionLegalAid2010.pdf.

[180] For more discussion, see the Access to Justice Committee's discussion paper, *"Tension at the Border": Pro Bono and Legal Aid* (Ottawa: CBA, 2012) www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf.

it is exacerbated by the serious underfunding of public legal services and competition for those scarce funds. Law firms may prefer to focus on pro bono contributions rather than taking on legal aid files or advocating for better legal aid services. At the same time, there is a remarkable degree of effective collaboration between legal aid and pro bono services, and this collaboration should be encouraged and supported.

Perhaps more fundamentally, there is a strong division in views on whether it is acceptable that the volunteer efforts of lawyers be considered a formal part of the justice system. This also raises questions about the sustainability of a system increasingly dependent on volunteer efforts. At one end of the debate are those that believe pro bono contributions, either in cash or kind, should be mandatory. At the other end are those who believe an increased emphasis on pro bono is problematic, in that it accepts that a fundamental aspect of citizenship and democracy is not an entitlement to justice but that access to justice may depend on the charitable impulses of others. Concerns are also expressed about how organized pro bono, no matter how well-motivated, simply reproduces power imbalances and injustice experienced by vulnerable clients, and unfairly distributes responsibility for filling the void created by an underfunded justice system to the least powerful or most 'socially committed' members of the profession.

> In creating these pro bono organizations, the well-off in the profession, whether judges with generous salaries and pensions, tenured law professors, or secure practitioners who have the wherewithal to serve as governors of the profession, are essentially organizing and deploying the labour of the legal proletariat: students, those struggling to become established in practice, and so on. These volunteers join the ranks of the low-paid legal aid lawyers, and the practitioners who eke out a living serving the disadvantaged, in delivering needed services.
>
> ***Mary Eberts, "Lawyers feed the Hungry" (note 52)***

The predominant view is a pragmatic one: lawyers do pro bono because they see a great, unmet need and they are able to help. Lawyers who normally practice outside the personal legal services field may enjoy volunteering as a complement to their regular, business-oriented practices. In addition, some see the profession's pro bono contributions as a kind of bargaining chip to deflect criticism when it calls for increased legal aid funding.

Others emphasize the importance of pro bono in maintaining a legal profession committed to public service. Indeed, the CBA has long promoted the legal profession's engagement in pro bono services. Twenty years ago, the CBA Wilson *Task Force on Gender Equality in the Legal Profession* recommended that students be required to engage in some pro bono work before they are granted their law degrees to "send a very clear message to students about the importance of such work and … help connect students to the community" and "reverse the trend toward commercialization of the practice of law and restore the professionalism and virtues of public service." In 1997, the CBA *Systems of Civil Justice Task Force* recommended that the CBA develop a program to "monitor, promote and publicize pro bono work carried out by lawyers and notaries." Emphasis was placed on the value of law firms setting targets and creating incentives for lawyers to provide pro bono services and for the profession as a whole to recognize the importance of these efforts.

Learn more: about Pro Bono Developments

Jamie Hartman and Jane Park, Making Pro Bono Work: 8 proven models for community and business impact (with case studies) (San Francisco: Taproot Foundation): http://www.taprootfoundation.org/docs/8_Models_Whitepaper.pdf

The Judges' Toolkit on Pro Bono Legal Assistance (Missouri): http://www.courts.mo.gov/page.jsp?id=3933

US - ABA Rural Pro Bono Project: http://www.americanbar.org/groups/probono_public_service/projects_awards/rural_pro_bono_project.html

Australia, National Pro Bono Resource Centre, "Pro Bono Partnerships and Models: A Practical Guide to WHAT WORKS" (2013): https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20and%20Models%20-%20A%20Practical%20Guide%20to%20WHAT%20WORKS.pdf

Australia: The State of Pro Bono Service Delivery in Australia (Speech delivered by John Corker, Director, National Pro Bono Resource Centre): https://wic041u.serversecure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20-20The%20State%20of%20Pro%20Bono%20Service%20Delivery%20in%20Australia%20-%20Brisbane%20May%202013.pdf

Australia - National Law Firm Pro Bono Survey - Australian Firms with More than Fifty Lawyers: https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%20Final%20Report%20Dec%202010.pdf

Pro Bono Institute: http://www.probonoinst.org/projects/global-pro-bono/

Pro Bono Net: a national nonprofit organization based in New York City and San Francisco working in partnership with nonprofit legal organizations across the US and Canada to increase access to justice for poor people who face legal problems every year without help from a lawyer.

Pro Bono Net offers 4 technology products:

- Advocate website tool (probono.net)
- Public legal help tool (lawhelp.org)
- Document assembly national server (npado.org)
- Law firm pro bono management tool (probono.net/pbm)

PBLO (Pro Bono Law Ontario) and PBLA (Pro Bono Law Alberta) have built web sites on the Pro Bono Net platform. PBLO also participates in the document assembly project that builds online forms using HotDocs and A2J.

Pro bono clinics in both Alberta and BC are using Skype, video conferencing and other Internet services to provide legal advice to remote communities.

Access Pro Bono, Pro Bono Law Alberta and Pro Bono Law Ontario worked with the federal Department of Justice to develop three pilot projects in their respective provinces which engaged public sector lawyers in the provision of pro Bono legal services.

Access Pro Bono, Pro Bono Law Alberta and Pro Bono Law Ontario are working with the federal Department of Justice on pilot projects in the respective provinces to engage public sector lawyers in providing pro bono services.

Pro bono organizations in several provinces and the national Pro Bono Students Canada have made great strides in increasing access to justice. Biennial conferences have contributed to information sharing and development of best practices among pro bono lawyers. Pro bono organizations are an important part of the justice system in the communities and provinces where they exist. Pro bono organizations have developed innovative programs to better serve client needs. For example:

- as of May 2013, Access Pro Bono in British Columbia is actively seeking lawyers to staff 2 hour clinics once or twice a month, by speaking to pre-screened clients by phone or Skype for half hour interviews. This allows the client to be matched to a lawyer experienced in the required area of law, and lawyers to contribute pro bono help from their offices. It also addresses the lack of legal help available in many rural and remote locations.
- In 2009, Pro Bono Law Alberta announced a partnership with a law firm and an Edmonton Health Centre's Housing program, with the goal of ending homelessness.
- Pro Bono Law Ontario has established a medical/legal partnership providing legal services to families of critically or chronically ill children being treated at Sick Kids in Toronto or the Children's Hospital in London.

Pro bono programs can also assist young lawyers in their professional development through specialized training and mentorship, and opportunities to enhance practice skills through experience.

Despite these advances, pro bono services vary greatly from one jurisdiction to another, and even within provinces and territories. An international scan shows that pro bono developments also vary dramatically from one country to another. In the US, pro bono services are fully accepted as the main mechanism to promote access to justice.[181]

However, in Australia pro bono plays a limited role in meeting peoples' legal needs. A recent survey revealed that over 60% of the pro bono work undertaken there by large law firms is for organisations rather than individuals.[182]

The Committee's long term vision of equal justice is one in which all essential legal needs are met by public and private legal service providers (supported by legal expense insurance as appropriate). A justice system permanently based on volunteer efforts is too ad hoc and unsustainable to provide effective and durable access. Regardless of how extensive the legal profession's efforts, pro bono cannot possibly fill the current gap created by public-private legal service providers. According to Maclaren, "although we have the highest level of pro bono engagement in the country, we simply cannot meet the overwhelming demand for legal representation in this province."[183]

The late Alan Parker, QC, a recognized pro bono leader in British Columbia, said it this way:

> Wherever I have been associated with new service delivery initiatives, the latent demand surfaces. This is true every time Access Pro Bono opens a new clinic around the province. A recent example was our yearly Advice-a-Thon public clinics that we hold in open area-settings in Vancouver, Victoria and Kelowna. When we put up legal advice tents in Victory Square one day last month, we were, literally, swamped by walk-in clients. In short, if you build it, they come in.[184]

Where does this leave pro bono and public-private partnerships? As these service providers are neither designed nor equipped to provide a predictable and secure response to essential legal needs, their energies are more appropriately streamed toward

[181] This is clear from the extent of coverage of pro bono related topics at the American Bar Association's Equal Justice Conference, its emphasis in the Presidential initiative on Access to Justice, many access to justice commission mandates, and more. See www.americanbar.org/content/dam/aba/events/probono_public_service/2013/05/equal_justice_conference/equal_just_conf2013_programbookWEB.authcheckdam.pdf.

[182] National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian Firms with Fifty of More Lawyer: Final Report* (January 2013) at 29 www.wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf.

[183] Legal Services Society, *Submission to Public Commission on Legal Aid* (Vancouver: 1 September 2010) www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToPublicCommissionLegalAid2010.pdf.

[184] *Ibid*.

important but non-essential legal needs, such as resolving disputes that have a significant impact on the individuals involved but may not put their security or ability to meet basic needs at risk. Consumer protection issues could fall within this category, for example. Test case and public interest litigation are essential aspects of publicly funded legal services. In addition to the litigation carried out or funded by legal aid plans and other public interest advocacy clinics, this is also a good area for pro bono contributions and a great opportunity for partnerships between legal aid and pro bono.

Lawyers acting pro bono and pro bono organizations should continue to work in collaboration with legal aid organizations to provide seamless delivery, but with greater clarity on the line between their responsibilities. Pro bono programs are nimble, flexible and can marshal resources quickly, and so are also arguably well suited to emergent and emergency situations as a stop-gap measure.

Lawyers should continue to consider pro bono as a professional obligation and pro bono organizations should continue to play an important role in encouraging and facilitating these volunteer efforts. The focus should be on encouraging pro bono contributions by lawyers who do not regularly provide people law services, such as lawyers in large law firms, corporate counsel and government lawyers. Until the targets proposed by this report are met, it can be expected that the level of unmet legal needs in Canada will continue to be a serious concern, one that pro bono efforts by the profession contributes in significant ways to alleviate. It is important to view the many targets in this Report as a whole, in terms of how they fit together. The Committee is not suggesting that there will be no place for pro bono in its vision of equal justice – but rather a refocused place that better dovetails with what legal aid and the private market provide.

This transition in pro bono priorities and participation should be tracked through a survey of the legal profession. In Australia, the National Pro Bono Resource Centre conducts an annual survey of national law firms that could serve as a model.

Targets: ***By 2025, the justice system does not rely on volunteer legal services to meet people's essential legal needs.***

By 2020, all lawyers volunteer legal services at some point in their career.

Milestones:

- *Pro bono programs work with legal aid and other service providers to phase out dependence on volunteer legal services to meet people's essential legal needs and reprioritize their work to meet other gaps in the availability of legal assistance*

Actions:

- *All law societies and legal employers remove barriers to participation in pro bono programs*
- *The CBA Pro Bono Committee collaborates with pro bono organizations to develop and carry out a national survey of pro bono contributions in Canada*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

Law Schools, Legal Education and Law Students

Law schools support both private and public delivery of legal services and have a direct role in providing legal services through legal clinics. An important avenue for advancing access to justice is by engaging the legal academy to a greater extent than at present. One promising development is that the Council of Canadian Law Deans has established an access to justice committee to review the role of law schools in this area.

> Students need opportunities to learn about, reflect on, and practice the all encompassing responsibilities of legal professionals. The other professions employ well-elaborated case studies of professional work while law schools, which pioneered the use of case teaching, only occasionally do so. Lack of attention to practice and the weakness of concern with professional responsibility are the unintended consequences on a single, heavily academic pedagogy to provide the crucial initiation into legal education.
>
> ***Doug Ferguson, 2010, speaking about Educating Lawyers: Preparation for the Practice of Law (Sanford: Carnegie Foundation, 2007)***

Overview of Law School Involvement

The Big Picture

In preparation for their review, the Council of Canadian Law Deans prepared a summary of current law school access to justice initiatives. Many schools have initiatives to encourage and support students from communities that are under-represented within the legal profession.

The Federation of Law Societies' list of 'competency' requirements[185] does not include an access to justice component, or a requirement for experiential legal education. Some law schools have attempted to address access to justice by weaving relevant issues into mandatory basic courses, optional seminars and clinic courses.

Examples from Law School Courses

The University of Windsor Law School offers a mandatory full year course in access to justice for first year law students. The signature aspect of this course is collaborative projects for justice (P4J). Students must research a real life barrier to justice, prepare a background paper, and propose a solution. Some creative innovations have been proposed, including a public awareness campaign, a business plan, a software application, a policy paper, a public service announcement, a series of brochures and a guided interview 'app' for a particular legal document.

Osgoode Hall Law School requires its graduates to take part in an experiential legal education course, and provide 40 hours of community service.

Student Legal Clinics

All but three of Canada's law schools operate some form of legal clinic. Western University clinic director Doug Ferguson[186] has categorized these legal clinics into five types: representational; informational; placement; advocacy and simulations. Representational clinics are the most common and fill a gap in providing legal services. Hundreds of law students assist thousands of low income persons who don't qualify for legal aid and have no place to turn. Representational clinics are in every Canadian law school except those in Québec (where students are not allowed to appear in court) and New Brunswick.

All clinics provide some form of experiential learning for law students and assist individuals and non-governmental organizations in various ways. However, some argue that despite some progress, Canadian law schools are still not doing enough to integrate practice and ethics into legal studies. The Association for Canadian Clinical Legal Education (ACCLE) is a group of individuals and clinics who

[185] See: www.flsc.ca/en/a-profession-with-high-admission-standards/.

[186] Also a member of the CBA Access to Justice Committee since August 2013, and member of the CBA Legal Futures Initiative's Education and Training Team.

came together to improve experiential education and to facilitate connection and collaboration between clinics across Canada. More recently a parallel student organization (ACCLES) with similar objectives was established.

Pro Bono Students Canada

Pro Bono Students Canada has chapters in 21 law schools, providing additional practical training and opportunities to increase access to justice. Executive Director Nikki Gershbain, reports that 90% of volunteers plan to offer pro bono services once they graduate from law school, and 55% said their participation in pro bono had an impact on that decision. No longitudinal studies have been carried out to demonstrate this impact.

US Developments

Some US law schools require students to take experiential learning courses as a graduation requirement. For example, Washington and Lee University has transformed their third year into experiential learning. As noted earlier, many law schools sponsor 'incubator programs' to assist recent graduates in developing accessible legal practices. Some law schools have similar programs that involve law students, such the Justice Bridge program at Northeastern University.

Learn more: about Law School Initiatives

Pro Bono students Canada: http://www.probonostudents.ca

Canadian summary of law school experiential learning initiatives: www.cba.org/pdf/Experiential-Learning-Programs.pdf

Association for Canadian Clinical Legal Education: http://accle.ca/

Initiatives by Canadian law school clinics: http://accle.ca/links/

US summary of law schools access to justice initiatives: http://www.justice.gov/atj/atj-campus.html

Street Law – "a nonprofit organization that creates classroom and community programs that teach people about law, democracy, and human rights worldwide":www.streetlaw.org

Link for P4J at UWindsor: http://www1.uwindsor.ca/law/p4j/registrar/

Legal Help Centre of Winnipeg - "a not-for-profit organization that was set up by community volunteers working together with faculty and students from both the University of Winnipeg and University of Manitoba. Our vision is to assist disadvantaged members of our community to access and exercise their legal and social rights":http://www.legalhelpcentre.ca/

Law Practice Program in Ontario:http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848

Alternative clinical legal education programs, such as Street Law in Washington, DC engages students to work with community members to develop self-help tools and capabilities, as well as systemic and preventive solutions to recurring justice issues.

The Family Law Education Reform Report[187] from the Association of Family and Conciliation Court Services, William Mitchell College of Law and Hoffstra University Faculty of Law emphasizes the

[187] www.flerproject.org/?q=node/1.

need for students to learn about their place as a lawyer in the range of service providers. This approach could be generalized to other subject areas that particularly impact low and moderate income people.

The ABA *Recodification of Accreditation Standards* requires that: "A law school shall offer substantial opportunities for student participation in pro bono activities." Schools are also `encouraged to address "the obligations of faculty to the public, including participation in pro bono activities."

Access to Justice Research

Research on access to justice is not a priority in all Canadian law faculties. Civil justice research often lags behind research on criminal justice issues, where departments such as criminology and sociology have made great strides. There are reasons to be optimistic that civil justice research is on the rise, including through collaborative research alliances. This issue is discussed further in Part III.

Future Directions

The Summit included a rich discussion on the role of law schools, law students and legal education in fostering greater access to justice. Some ideas discussed include:

- Law students can do more to address unmet need if given the opportunity and support by law schools.
- Law schools have a critical role in shaping professional identity to highlight public service as a component of ethical lawyering.
- Rewarding research on access to justice.
- Law societies and law regulators should consider changing the monolithic entry structure for the legal profession (the UK or England and Wales) has 8 different legal licensed occupations).
- Criteria for promotion, tenure, and renewal could be adjusted to give appropriate weight to experiential learning in courses, service to the profession, service to the community, and encouraging pro bono activities.

Professor Bruce Elman advocates for law schools to take a leadership role in modeling the lawyer of the future by formulating an aspirational statement for every law student. That statement includes a community service component and integrates this approach in all aspects of law school life. Elman has developed detailed proposals to this end and sees this as making a substantial contribution to equal justice.

Law students are a vigorous force for change and many law faculties are also keen to increase experiential learning opportunities and make stronger contributions to access to justice. At the same time, education and training goals do not always coincide with access goals. Students can make an important contribution, but cannot be expected to address the vast range of unmet needs.

At the Summit, there were discussions about how law schools could become more engaged in contributing to equal access to justice. The CBA, law societies, and members of the legal profession have an important role to play in advocating for and supporting these changes. The new Law Practice Program in Ontario will also support more experiential learning to enhance access to justice.

To the extent they are not already doing so, law schools should take a dual focus to integrating access to justice into education, by establishing requirements for all students and supporting opportunities for those particularly interested in access to justice. All graduating law students must have a basic understanding of issues relating to access to justice and know that fostering access to justice is an integral part of their professional responsibility (i.e. think systemically, act locally). Steps could be taken to encourage students who want to contribute more in this area, such as special internships, supporting innovations and research paper prizes.

Targets: ***By 2030, three Canadian law schools will establish centres of excellence for access to justice research.***

By 2030 substantial experiential learning experience is a requirement for all law students.

By 2020, all graduating law students:

- ***have a basic understanding of the issues relating to access to justice in Canada***
- ***know that fostering access to justice is an integral part of their professional responsibility.***
- ***have taken at least one course or volunteer activity that involves experiential learning providing access to justice.***

By 2020, all law schools in Canada have at least one student legal clinic that provides representation to low income persons.

Milestones:

- *Law school curricula examined and adjusted as needed to meet the targets*

Actions:

- *The CBA adopts a statement on the 'Model Lawyer of Tomorrow' to encourage and foster dialogue on the role of lawyers in promoting access to justice*
- *The CBA adopts a resolution encouraging law schools to offer substantial opportunities for experiential learning in the access to justice context. This ties into the Legal Futures Initiative, which is considering legal education and training of the next generation of lawyers*
- *The Federation of Law Societies includes an access to justice component in its competency requirements*
- *Law schools expand the access to justice content of their curricula*
- *Law schools expand the availability of experiential learning to their law students*
- *The Council of Canadian Law Deans supports development of access to justice curricula*
- *Each law school appoints a staff member to serve as champion/leader for engaging discussion between the school and justice system stakeholders, including the public, about the role of law schools in supporting equal access to justice*
- *Law students have opportunities to become involved in CBA access to justice initiatives, including discussions of this report*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

PART 3

making the equal justice vision real

Making the equal justice vision real

Shared responsibility.
Change the conversation.
Bring the cheque book.

This report is an invitation to act, or as one person attending the Summit put it, to "just(ice) do it". A fundamental step to reaching equal justice is laying the foundation for ambitious but possible targets for an equal, inclusive justice system by 2030. At the same time, the Committee recognizes the barriers to even modest improvements to access to justice, let alone the type of change the Committee advocates.[188]

The Equal Justice initiative was designed to consider four systemic barriers that have hindered substantive progress on access to justice reform and to propose means to overcome them. The barriers are:

- Lack of public profile of access to justice
- Inadequate strategy and coordination between those seeking improvements
- No effective mechanisms for measuring change
- Gaps in our knowledge about what works and how to achieve substantive change.

In this part, the Committee examines these barriers more closely to consider how best to overcome them, so we can move from the current situation of unequal justice to the vision of equal justice. Here the focus shifts to the three structural supports in our conceptual bridge to equal justice:

- increased public engagement, participation and ownership of the justice system;
- improved collaboration with effective leadership; and
- enhanced capacity for justice innovation.

Two perspectives frame this discussion. First, access to justice is a 'wicked problem', meaning it is a complex policy problem that defies quick fixes and simple solutions. A second and related point is that given the scale of change required, we need to go beyond conventional approaches. One could say a 'superhero' is required, but certainly, effective leadership is fundamental.

Access to Justice is a 'Wicked Problem'

Decision making theory refers to very complex problems as 'wicked' problems, not in the sense that they are actually 'evil', but because they are highly resistant to resolution. In its 2007 report, *Tackling Wicked Problems: A Public Policy Perspective*, the Australian Public Service Commission outlines characteristics of these problems:

- They are difficult to clearly define: the nature and extent of the problem depends on who is asked as different stakeholders have different views of what the problem is.
- They are often interdependent or co-exist with other problems and there are multiple causal factors.
- They go beyond the capacity of any one organization to understand and respond to.
- There is often disagreement about the causes of the problems and the best way to tackle them.
- Usually, part of the solution to wicked problems involves changing the behaviour of groups of people or all members of society.[189]

All these characteristics apply to the access to justice problem in Canada today. Further, like many

[188] As in Part 2, when the Committee refers to "courts" in the general or conceptual sense in this Part, it views this term as potentially encompassing court-like tribunals that adjudicate disputes for individuals.

[189] Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Commonwealth of Australia, 2008) at 3-5 http://www.apsc.gov.au/__data/assets/pdf_file/0005/6386/wickedproblems.pdf.

wicked problems, attempts to solve the access to justice problem have generally been unsuccessful or have met with partial but disappointing levels of success, and even to unforeseen negative consequences. These chronic policy failures give access to justice problems an appearance of being intractable and diminish support for change. It is easy to see equal, inclusive justice as simply too hard a goal to achieve and to give up or set our sights on minimal reform objectives. Rather than depressing action, however understanding the nature of the challenge can empower us to bolder solutions.

Tackling wicked problems requires a bold approach founded on a shared recognition and understanding that there are no quick fixes and simple solutions. The Australian Public Service Commission report discusses key ingredients in solving or at least managing wicked problems:

- Holistic rather than partial or linear thinking – need to grasp the big picture including the interrelationships between the range of causal factors and policy objectives;
- Innovative and flexible approaches;
- Successfully working across both internal and external organizational boundaries;
- Engaging citizens and stakeholders in policy making and implementation;
- A principle-based rather than a rule-based approach;
- Iterative processes involving continuous learning, adaptation and improvement; and
- Developing innovative, comprehensive strategies or solutions that can be modified in the light of experience and on-the-ground feedback.[190]

The Australian report concludes that wicked problems require governmental and non-governmental agencies to work together in new ways and through novel processes. This shift must be facilitated through:

- supportive structures and processes;
- a supportive culture and skills base;
- facilitative information management and infrastructure;
- appropriate budget and accountability frameworks; and
- ongoing forums of exchange.[191]

The Committee has integrated the Australian framework and suggested approaches into the targets, milestones and actions for the structural supports to our bridge. Together, they suggest that collaboration and coordination will be required to reach equal justice.

Is a 'Superhero' Required?

The Committee has concluded that partial solutions are incapable of addressing the current access to justice gap and effectively contributing to equal justice. This conclusion is supported by the wicked problems literature[192], which emphasizes the importance of holistic thinking and the need to confront the big picture and deal with the interrelationships between a range of causal factors and policy objectives. This report rejects the status quo and calls for action on a more fundamental scale as required by the depth, breadth and urgency of the problem.

At the Summit, there was a consensus that we need access to justice champions. The role of those champions is discussed in the sections that follow. Justice innovation literature[193] suggests that access champions come forward organically, often from a grassroots perspective, armed with a keen understanding of a specific access problem, a creative solution and an unwillingness to take 'no' for an answer.

The question remains though whether champions will be enough, as those people do emerge from time to time. It seems that instead something truly extraordinary may be required to achieve our ambitious shared objectives. The Committee found

[190] *Ibid* at 9-12.

[191] *Ibid* at 21.

[192] See, for example, Richard H Beinecke, "Leadership for Wicked Problems" (2009) 14:1 The Public Sector Innovation Journal www.innovation.cc/scholarly-style/beinecke1.pdf.

[193] See, for example, the work at HiiL, *supra* notes 132, 134 and 143.

itself asking: is a superhero required? This image is hard to avoid, as a special champion would need extraordinary powers and be fervently dedicated to protecting the public. Rather than a comic book hero, however, the Committee is suggesting someone more like a Tommy Douglas and his heroic efforts to build a universal healthcare system in Canada. He is the iconic social policy superhero.

In posing the question this way, the Committee does not mean to trivialize the efforts required. The Committee believes it is important to encourage the latent champion in each of us and reiterate the invocation that we all need to think systemically and act locally. At the same time, the notion of superpowers is appropriate to describe the effort required to reach equal justice. In particular, the Committee is concerned that change efforts will continue to flounder as no one individual or entity is responsible for ensuring access to justice in Canada. And so, our targets include a typically Canadian proposal for an additional function in the justice system: an access to justice commissioner in each jurisdiction with modest but novel 'super' powers.

Building Public Engagement and Participation

Civil justice is a low priority for the Canadian public, and so has low political priority. Polling shows broad public support in principle for legal aid, but still there is no public outrage at the current deficiencies, or any broad movement urging change. Criminal justice issues tend to dominate the media and have more public profile. The lack of awareness of the importance of a functioning justice system for non-criminal matters means civil justice issues receive little attention. Overall, justice concerns have lower priority than other parts of our social safety net, notably education and healthcare.

> On average, healthcare takes over 40 cents of every dollar of public spending. The whole civil justice system is less than one cent of the same dollar. How can we possibly be doing that? The answer is because the public demands healthcare and so far, they are not demanding access to justice.

Those who most need publicly funded legal services often have no voice in determining priorities, because poor people have little political capital, as do other vulnerable groups affected by inadequate access, including, for example, children.

In addition, many people believe that legal problems happen to other people, not them. Another common misperception is that most people's justice needs are already met. There is a widespread disconnect between Canadians and their justice system: there is no sense of ownership. The public feels disenfranchised and helpless to change the system. Our elected representatives broadly reflect the population, and are unlikely to act on issues that they know are unimportant to their constituents.

As the statistics in Part I vividly illustrate, justice has lost ground relative to other important social programs. Political attention to equal justice is unlikely given the current lack of public recognition or support. So, increased public engagement is a necessary condition for reaching equal justice. This engagement could be fostered by governments regularly using community roundtables, town hall meetings, or other public gatherings to engage in dialogue with the public about justice. Governments should be able to demonstrate that the public perspective has informed the foundations of the justice system.

Changing the Conversation

The long-term strategy for increasing public engagement with the justice system and building a public commitment to equal justice is linked to improving individual legal capability, beginning with early education to build law as a life skill. The objective is for Canadians to have a greater sense that they own the justice system, that it's a system intended to serve them, rather than a system for lawyers and judges to exert power over them. In the shorter term, a comprehensive public engagement campaign is required. We need a convincing answer when people ask: "why should I care about equal justice?" While each justice stakeholder group has a role, the legal profession and the CBA have a leadership role in developing this campaign.

Lack of public interest in justice system reform is further harmed by conflicting messages about access to justice. When justice leaders speak out they are often accused of acting out of self-interest. Messages that emphasize or reinforce a negative or jaundiced view of legal and court processes, the legal profession and the judiciary have great currency. Genn has noted with dismay this "damaging justice rhetoric" that "presents court proceedings as an unnecessary drain on public resources, and public funding for civil and family disputes through legal aid as an incitement to litigate rather than a means of facilitating access to justice."[194] Justice system stakeholders can contribute to this negativity and confusion in a dialogue marked by finger-pointing and attributing fault to others.

The Envisioning Equal Justice initiative focused on changing the conversation among justice system stakeholders to move beyond damaging rhetoric arising from competition over scarce resources and protecting turf. The next stage is to change the conversation further by expanding it to include more members of the public in more meaningful ways.

> The point is not to challenge and resist in order to preserve the status quo, but to engage in the debate, to argue for the benefits of public justice while recognizing where and how the public justice system and legal practice needs to change and to offer a realistic program for improvement in order to meet the needs of disputing parties seeking justice through the legal system.
>
> ***Dame Hazel Genn***

Increased public engagement is a necessary condition for reaching equal justice, but politicians are unlikely to embrace the issue given the lack of public recognition or support. The importance of strategies that bring the public into conversations about equal justice featured prominently in the Summit discussions about obstacles to change and how to overcome them.

Summit participants also emphasized the need to stop "singing to the choir" and develop mechanisms to engage the public more directly and open the discussion up significantly. People need to know that:

- They are not immune from legal problems: "it" can happen to "you"
- Everyone will likely be touched by the justice system at some point
- The value of legal help when people have serious legal problems
- The benefits to society as a whole when we provide equal justice
- That justice needs can be as important as health care needs
- The economic and social cost of doing nothing.

Another key message is the strong interconnection between health, education and justice; understanding that spending on justice will save money elsewhere (in addition to avoiding suffering). Also, equal justice is interrelated to other more accepted social goals, such as alleviating child poverty, improving the GDP and dealing properly with mental health issues.

Summit participants were also clear that the goal must be community ownership of the justice system, and that can only be achieved through active engagement. The public is very much a part of the justice community. Justice system stakeholders are not instigating dialogue with the public but rather tapping into a justice dialogue that is already going on. The problem is that the two conversations – the justice system dialogue and the community justice dialogue – are disconnected. We need to replace the weak links between the two conversations with a strong connection.

As noted above, wicked problems must be widely discussed by all relevant stakeholders to get to a full understanding of their complexity. The Australian Public Service Commission Report confirms that changes cannot be imposed on people: "Behaviours are more conducive to change if issues are widely understood, discussed and owned by the people whose behaviour is being

[194] Genn, *supra* note 22.

targeted for change."[195] At a Summit workshop, Mary Ellen Hodgins, an entrepreneur and a public representative involved in several access to justice initiatives, emphasized practical reasons for engaging the public *as partners* in justice dialogue. Public engagement builds trust, reduces the potential for unintended consequences, builds capacity and contributes to innovation because the public offers valuable contributions. In addition, it is the right thing to do because people are part of the justice community.

Increasing Public Participation

Initiatives to build general public understanding of, support for, and ownership in the justice system is one key strategy. A second is to develop effective means for public engagement and participation as active justice system stakeholders.

HiiL's *Innovating Justice* handbook emphasizes the importance of involving users early on and throughout the process. While acknowledging that this takes time, it is essential because it is only by listening to the people involved in a judicial process that we will be able to understand the problems from the perspective of users. People using justice system services "are not always able to clearly articulate their deepest needs".[196] The main mechanism employed today is user satisfaction surveys but these only scratch the surface. Actual conversations may be required to explore past and present experiences, attitudes and emotions surrounding these topics. The justice system has much to learn from market research and other more sophisticated tools and approaches.

> Pain is a mere signal. It is crucial to diagnose exactly what hurts most and what the needs are. So involving users from the outset, and throughout the process, is not just 'a good idea' or something 'to be aimed for', it is essential to the development of an efficient effective, innovation.
>
> ***HiiL, Innovating Justice, note 134***

[195] Australian Public Service Commission, *supra* note 189.

[196] *Innovating Justice*, *supra* note 134.

The broader question is how to fully engage the public in a way that will build the sense of ownership required for fundamental change. This challenge seems particularly daunting given the paucity of policy dialogue in Canada. Those working for improvements are not an organized national movement, but advocates who are already often overworked and underpaid.

In *A Voice for All: Engaging Canadians for Change,* the Institute on Governance has developed a framework to facilitate active participation and citizen engagement.[197] Principles include shared agenda-setting by all participants, a relaxed timeframe for deliberation, an emphasis on value-sharing rather than debate, and consultative practices based on inclusiveness, courtesy and respect. In her remarks at the Summit, Maria Campbell advocated for steps to recognize and transcend the power differentials between institutional and professional voices and community voices. Conversations based on reciprocity, where the contribution of all perspectives and forms of knowledge is equally recognized and valued is key. Steps must be taken to ensure the dialogue is culturally appropriate and addresses barriers to communication. As Campbell pointed out: "Our language is different. Because I speak English doesn't mean that I understand or comprehend what you're talking about."

For its community consultations, the Committee developed a consultative framework integrating the principles outlined in this section. The framework is appended to this report.

In facing the difficult challenge of beginning to build greater public engagement and ownership of the justice system, successful existing models can serve as the foundation for concerted, widespread efforts. We can also learn from successful campaigns to change public policy and public behaviour in other fields, such as changing the cultural acceptability of drinking and driving, and smoking in public places.

Smaller scale successes have been made in justice

[197] Institute on Governance, *A Voice for All: Engaging Canadians for Change Conference on Citizen Engagement October 27-28, 1998* (Ottawa: 1998) http://iog.ca/wp-content/uploads/2012/12/1998_October_cereport.pdf.

> Reciprocity has to be the essence of the work… that we do. If you're always giving and I'm always taking there's no way that empowers me and there's no respect that's gained between the two of us. We can teach each other all sorts of things… We can do that if we can have even one or two classes a month in the community where we can bring in different kinds of community people and we share. You're able to give us the kinds of information instead of in a handbook but also they can teach you and that becomes a reciprocal thing. It empowers both of us and it's the empowering and the process that makes the change.
>
> ***Maria Campbell, Metis Elder, Envisioning Equal Justice Summit, April 2013***

system public engagement strategies. In her post-Summit reflections, Anne Beveridge, a long time legal aid lawyer in British Columbia, attributed the decline in public support for legal aid to the removal of local community law offices, which had carried out regular extensive consultations with local community members. As a result, the community felt they "owned" the province's legal aid plan and successfully went to bat for it when the government sought to cut services in 1997. Community law offices are essential to community engagement.

More recently, the CBA British Columbia Branch successfully raised the profile of legal aid and other access to justice issues through a concerted public engagement campaign. At the Summit, Matthews said that an important and promising insight gained through the campaign is that the highest support for legal aid comes from those with the most knowledge. After a 25-minute phone conversation, with the interviewer mainly asking questions, the interviewees' favourability rating, their personal commitment to having tax dollars support legal aid, went way up. This was true across all demographics.

As members of the justice community, we need to change the way we talk and how we act. Our goal is an equal, inclusive justice system that everyone can take part in. To start, we need to listen to the public perspective and create inclusive forums for dialogue and accountability structures. True public ownership of the justice system will require more than enhanced consultation and dialogue though. We must also transform accountability structures to include public representatives. **Right now, Canadians think of the justice system as belonging to judges, lawyers and the government – this has to change. Canadians must perceive the justice system, including the courts, as belonging to them.**

Targets: ***By 2025, all provincial and territorial governments engage in dialogues with the public (e.g. community roundtables, town hall meetings) on a regular basis and demonstrate how the public perspective informs justice system policies and processes, innovations and reforms.***

By 2020, Canadians have a greater sense of public ownership of the justice system.

Milestones:

- *All governments hold dialogue sessions with the public (e.g. community roundtables, town hall meetings), in partnership with community groups, at least three to five times per year*
- *A principled framework for community dialogue (e.g. inclusion, respect, reciprocity) integrating evidence-based best practices is in place*
- *Justice reform captures the public perspective which informs policy and process development, innovation and reform to the justice system*
- *A suggestion from a member of the public is championed by an appropriate justice system participant and is successfully implemented*

Actions:

- *The CBA works with other justice system stakeholders to develop a public engagement strategy, including an interactive "My Justice System" campaign to learn more about public expectations of the justice system and to seek out concrete proposals for access to justice reforms*

- *Provincial and territorial governments build on the consultative practices of legal aid providers and legal clinics to identify justice system user groups who should be included in consultation processes*
- *All justice system governing boards and advisory committees include more than one public representative and operate according to inclusive guidelines for communication and consultation*
- *Justice system stakeholders collaborate to increase the number and types of mechanisms to receive feedback from people accessing the justice system, including online discussion forums and surveys of people denied services; feedback is taken into account in reform strategies*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

Building a Coherent Civil Justice System: Collaboration and Effective Leadership

There is effectively no coherent civil justice system in Canada. Fragmentation is to some degree a necessary consequence of institutional and individual independence of the parts of our justice system – the courts and judges, the legal profession and lawyers and the legislative and executive branches of government. Independence of the judiciary and of the bar and the separation of powers between branches of government are foundational principles of Canadian democracy that must be steadfastly preserved. At the same time, a rigid application of these principles can act as a shield against justice innovation and prevent necessary collaboration and coordination.

This overall lack of coherence is replicated on a practical level. The diffuse and complex nature of delivery of civil justice services is exacerbated by the lack of effective mechanisms for coordination and collaboration. These conditions also exist in the criminal justice system, but it has achieved a higher degree of coherence through focused collaboration.

During the Summit closing plenary session, Colleen Cattell Q.C., a Vancouver mediator, asked participants to consider the unseen or unspoken interests that inhibit collaboration in the justice system. She used the image of an iceberg, with the tip above the water representing expressed positions, and the bulk hidden under the surface to suggest possibly unarticulated interests or fears at stake. A number of common themes emerged from these small group discussions at the closing plenary, shown in the "Iceberg of Hidden Hurdles to Justice Innovation" diagram below.

Acknowledging these barriers is an important first step in working together to overcome them.

> This need for collaboration and cooperation is pervasive. None of us can meet these challenges alone. Many conversations begin with issues about authority and independence. I say let's start with the problems and the solutions. Of course we have to be careful about roles and responsibilities and about the independence of the bar, the bench and the administration. But let us not start the conversation there. Let's identify the problems together and try to solve them together, respecting our roles and responsibilities but never forgetting our shared responsibility to the administration of justice.
>
> ***Justice Thomas Cromwell, Keynote Speech at Envisioning Equal Justice Summit, April 2013***

Hidden Hurdles to Justice Innovation

What's below the surface?

- Fear of innovation
- No reward for taking risks
- Unwillingness to expose failures and inefficiencies
- No one has/takes responsibility (or joint responsibility), so everyone expects someone else will "do something"
- Finger pointing, blaming
- Fear of losing turf - institutional self-interest
- Overwhelmed by complexity and extent of the problem
- Self-preservation, fear of loss of control, status and work (e.g. fear of becoming a discount store lawyer)
- Sense of entitlement – we know more/better than people asking for change
- Belief that some issues are untouchable/ shouldn't be questioned (eg. judicial independence, role of law schools, self-regulation of profession, necessity of lawyers being sole providers of legal representation)

In addition to justice stakeholders' fears and interests, the current situation is exacerbated by our underdeveloped capacity for collaboration despite the clear human, social and economic costs of unequal justice. Summit participants noted that justice system players too often act in 'silos' and the lack of clear common goals or visions act as inhibitors to effective collaboration. We must acknowledge that we in the legal profession are better at competing than collaborating or recognizing our interdependencies. This competition reinforces inefficiencies and leaves out the broader community. Inertia and lethargy are natural responses to these conditions and active steps are required to overcome these tendencies and complexities to facilitate collaboration.

However, collaboration alone will not create a coherent civil justice system. Effective leadership is also essential. At the Summit, participants considered the question, 'how can we go *forward* when we don't know where we're going' because;

- The justice system is a body without a brain.[198]
- We lack management capacity: there is no CEO of the justice system making coherent decisions.
- We need leaders, champions for change.
- There is plenty of diagnosis, but little attention to how to translate it into change/action.

If the justice system is a body without a brain or an organization without a CEO, then genuine leadership in the access to justice field must be developed to fill this void.

The Committee proposes that we build our capacity for collaboration and effective leadership in the civil justice system through two main avenues:

- establishing permanent and ongoing national, provincial, territorial and local collaborative structures; and
- the appointment of access to justice commissioners.

The expectation is that by 2020 these collaborative structures and commissioners would be functioning at a high level. A committee or commission can be set up quickly, but time is needed to develop the skills and processes necessary to work together effectively, cultivate membership, refine mandates, and gather resources and so on. The following discussions bring together the Committee's insights on what is required to meet this target of effective collaboration and leadership.

Equal justice will also be advanced through networking, sharing information and communication between collaborative forums. This is addressed in the next section on building the capacity for justice innovation. Here, the focus is on the skills, processes and structures needed to facilitate collaboration in the justice system.

[198] Rebecca Sandefur and Aaron Smith, "Access Across America: First Report of the Civil Justice Infrastructure Mapping Project" (American Bar Foundation, 2011).

Collaborative Skills, Processes and Structures

The National Action Committee is an important forum for bringing together justice system stakeholders, including a member of the public. Other collaborative forums are needed at the provincial, territorial and local levels. During the Summit, this requirement was expressed as the need for "a neutral umbrella leadership body to oversee justice system reform and bring together stakeholders". Some jurisdictions have had access to justice committees for a specified period or for specific initiatives. These include two Alberta initiatives; the Justice Policy Advisory Committee and the Safe Communities Initiative. Lessons can be learned from the successes and the failures of these types of initiatives. At the Summit, Kurt Sandstorm, Q.C., Assistant Deputy Minister, Alberta Justice and Solicitor General, highlighted three specific lessons: establish separate forums for civil and criminal justice issues, keep collaborative structures small and develop a focused mandate and action plan.

Collaboration requires more than setting up committees. Certainly to reach equal justice we must develop collaborative skills, processes and structures. But, we also need to fundamentally change the way we work and carry out the business of justice. We need to build equal justice communities from the ground up, breaking down siloes and replacing them with effective means of communication, coordination and cooperation within and across sectors of the justice system.

> We desperately need a more cooperative and collaborative approach - within sectors (eg among PLE providers, pro bono groups, etc); across sectors (judges, lawyers, court administrators, legal aid, etc); and across jurisdictions (eg. why develop essentially the same materials for self represented litigants 13 times?)
>
> ***Justice Thomas Cromwell***
> ***Keynote Speech at Envisioning Equal***
> ***Justice Summit, April 2013***

The first step to facilitate working across organizational boundaries includes inter-organization mapping on a given issue, strategic reviews and creating a shared understanding of problems across organizations.

The Australian Report on tackling wicked problems states the social complexity that accompanies nearly all such problems means "a lack of understanding of the problem can result in different stakeholders being certain that their version of the problem is correct". Achieving a shared understanding of the dimensions of the problem and different perspectives among external stakeholders who can contribute to a full understanding and comprehensive response to the issue is crucial. The report goes on to say that, "... the Holy Grail of effective collaboration—is in creating shared understanding about the problem, and shared commitment to the possible solutions." From this perspective, solving a wicked problem is fundamentally a social process: "Having a few brilliant people or the latest project management technology is no longer sufficient."[199]

Lessons from the US Access to Justice Commission Experience

In the US, Chief Justices are considered the 'stewards' of the entire justice system. Many Chief Justices have established access to justice commissions (ATJC) to enable them to work with other stakeholders to advance equal justice. In 2010, the US Conference of Chief Justices adopted a resolution supporting the "aspirational goal that every state and United States territory have an active access to justice commission or comparable body." The resolution was in large measure a response to the remarks of Professor Laurence H. Tribe, Senior Counselor for Access to Justice, US Department of Justice. Tribe championed access to justice commissions as having achieved remarkable results and referred to them "as one of the most important justice-related developments in the past decade."

In January 2011, the US Conference of Chief Justices adopted a resolution entitled "Leadership to Promote Equal Justice". The resolution

[199] Australian Public Service Commission, *supra* note 189 at 28.

acknowledges that under the US constitutional structure, the judicial branch "shoulders primary leadership responsibility to preserve and protect equal justice and take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own." Given the importance of judicial leadership and commitment, the resolution urges Chief Justices to establish partnerships with state and local bar organizations, legal service providers and others to:

1. Remove impediments to access to the justice system, including physical, economic, psychological and language barriers;
2. Develop viable and effective plans to establish or increase public funding and support for civil legal services for individuals and families who have no meaningful access to the justice system; and
3. Expand the types of assistance available to self-represented litigants, including exploring the role of non-attorneys.

At the Summit, Steven Grumm, Director of the ABA Resource Centre for Access to Justice Initiatives provided an overview and analysis of the US experience with ATJCs to date. The ABA defines ATJCs as:

- A blue ribbon commission or similar formal entity comprised of leaders representing, at minimum, the state courts, the organized bar and legal aid providers. Its membership may also include representatives of law schools, legal aid funders, the legislature, the executive branch, and federal and tribal courts, as well as stakeholders from outside the legal and government communities.
- Its core charge is to expand access to civil justice at all levels for low-income and disadvantaged people in the state (or equivalent jurisdiction) by assessing their civil legal needs, developing strategies to meet them, and evaluating progress. Its charge may also include expanding access for moderate-income people.
- Its charge is from or recognized by the highest court of the state or equivalent jurisdiction; the highest court and the highest levels of the organized bar are engaged with the ATJC's efforts and the ATJC reports regularly to them.
- Its primary activities relate to planning, education, resource development, coordination, delivery system enhancement, and oversight. It is not primarily a funder or direct provider of legal assistance.
- It meets on a regular basis and has ongoing responsibility for carrying out its charge.[200]

In some cases, ATJCs have been established by statute; more frequently they are created by state Supreme Court rule or order in response to a petition or request by the state bar, sometimes with formal support from other key stakeholder entities.

ATJCs have focused on a range of activities:

- Increasing public awareness of the civil legal needs of low-income people and the importance of civil legal assistance—through legal needs studies and other reports, hearings, evaluation reports and public awareness campaigns;
- Expanding efforts to educate federal legislators about the need for increased LSC funding and state policymakers about the need to augment state-level funding— through state appropriations, filing-fee surcharges, voluntary or mandatory bar-dues contributions, improvements in IOLTA (Interest on Lawyers Trust Accounts), and other means;
- Increasing pro bono participation among private attorneys—through pro bono initiatives such as mandatory reporting, rule changes, pro bono attorney—recruitment campaigns, websites, conferences, and state-wide data collection;
- Creating and expanding loan-repayment assistance programs for young attorneys with substantial student-loan debt, which serves as a barrier to taking lower-paid jobs in civil legal aid organizations;
- Assisting efforts to bring together the bar, courts, legal aid providers, and others to make

[200] www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf

the courts more accessible and user friendly and to address the challenges posed by the self-represented—through comprehensive plans, reports and evaluations, training and education, simplification of rules and forms, courthouse support, web- and technology-based tools, and other activities; and

- Developing new programs and state-wide collaborations to ensure effective coordination among providers, implement innovative technology-based systems and ensure systemic advocacy and services to special populations, such as immigrants and prisoners.

In Grumm's opinion, the main function and virtue of ATJCs "has to do with the fact that they sit at altitude and can break down some of the silos that other actors in legal system might be living in and not realizing that they're not communicating as well with their counterparts." The effectiveness of ATJCs comes down to a question of leadership, the personality and dedication of the Chief Justice. Another key to ATCJ's success is increased accountability. In almost all cases, ATCJs have to report annually, whether to legislature, the Supreme Court, and/or the bar association. This reporting feature pressures ATJCs to show concrete results. The greatest successes of ATJCs have been in advocating for additional funds for access to justice initiatives and services, particularly legal aid.

Grumm also outlined pitfalls and challenges experienced by some ATJCs, which tended to reflect the flipside of the advantages. For example, because ATJCs are blue ribbon committees operating at 'altitude', they can be removed from day to day problems and may therefore be better at creating strategic plans than carrying them out. Similarly, ATJCs focus on breaking down silos but can themselves project an air of elitism and may be perceived as exclusionary. Further, direct service providers have expressed concerns that an ATJC is just another player consuming time and funds and taking finite resources away from meeting the public's legal needs. This concern has been overcome where ATJCs have been successful in generating additional resources.

The ABA provides support to ATJCs through its Resource Centre for Access to Justice Initiatives,[201] which serves as a hub for the exchange of information, and facilitates an annual meeting of heads of ATJCs in conjunction with the Equal Justice Conference. The Access to Justice Commission Expansion Project[202] has established a fund from monies from private foundations to strengthen the ATJC movement nationally, facilitating the development of new ATJCs and enabling existing ATJCs to develop and test innovative projects. The fund makes grants to commissions for this purpose.

As part of the Access to Justice Support Project, the ABA has developed a number of access to justice tools, including a checklist and best practice guide. The checklist sets out common strategies employed to increase equal justice on several fronts: funding for civil legal assistance; pro bono; education, research, awareness; student loan repayment assistance; court access and pro se (SRLs); state agency administrative fairness; and program delivery and collaboration. The best practices guide recognizes that while no two states are alike, and every state's access to justice efforts must be geared to local circumstances, some basic lessons can be discerned and shared. The guide's twelve lessons from successful state access to justice efforts are set out below.

Several state ATJCs have prepared detailed handbooks for building access to justice communities. For example, leaders of the Washington Access to Justice Board have published a "roadmap for building an equal justice community", providing step-by-step advice on building an access to justice structure at the state level.[203]

[201] www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

[202] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_2013_innovation_grant.authcheckdam.pdf

[203] Washington Access to Justice Board, *Equal Justice... The Noblest Common Denominator: A Road Map for Building an Equal Justice Community* (Washington: Jim Bamberger, 2001) www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~/media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/roadmap%20Part%20I.ashx.

12 Lessons for Effective Collaboration

1. Successful Access to Justice efforts are founded upon a strong partnership among the bar, the judiciary, and legal aid providers. Law schools can also be key partners, while representatives from outside the legal community can bring new perspectives and help broaden support.
2. Formal structures that are accountable to more than one partner can be more secure than informal structures or structures accountable to only one partner.
3. Judicial leadership – especially at the state Supreme Court level – greatly increases the effectiveness of Access to Justice initiatives.
4. Individual leadership is critically important for a successful Access to Justice effort.
5. New and emerging Access to Justice leaders should be cultivated.
6. Institutional commitment is necessary on the part of each of the key partners.
7. Assessing and publicizing accomplishments is a key task.
8. Access to Justice leaders should chart a compelling vision but avoid creating unreasonable expectations.
9. An effective staff capacity is essential for a successful Access to Justice effort.
10. Access to Justice structures should carefully consider how best to obtain meaningful input from client communities.
11. Access to Justice structures should be open and inclusive and place a priority on developing trust among the partners.
12. Partners should place a priority on promoting cooperation and consensus within their own community and strive to speak with one voice in public.

ABA Access to Justice Support:
www.nlada.org/DMS/Documents/1018712627.59/12%20Lessons.pdf

Access to Justice Commissioners

The US experience with ATJCs is not directly transferable to Canada, particularly given the differences in the role of the judiciary and the Chief Justices on either side of the border.

Blue ribbon committees may not be the best model to drive substantive access to justice reform in Canada. The willingness and ability to exert genuine leadership is built on passion and commitment, not on status and position. As the ABA has stated: "many of the most effective leaders have been volunteers with no formal responsibility in this area, who simply developed an Access to Justice vision and brought others along. An individual's institutional role is far less important than the willingness to make a commitment to do what is necessary to further Access to Justice goals."[204] As the ATJC experience shows, not all Chief Justices are cut out to be the champion for change. Further, most senior leaders of the bench and bar are very busy and unable to free up the time required by this endeavor.

Champions for change are likely to emerge at a local level in connection with specific reforms – that is why the Committee's target includes not only system-wide collaborative structures but also collaboration at the local level on specific initiatives. HiiL has created an awards program to recognize innovation leaders, saying that "[i]nnovators are motivated to improve and to implement their innovations across borders. Nominees and applicants for the Innovating Justice Awards will be able to share their setbacks, successes and best practices."[205] Access to justice commissions or committees can cultivate and celebrate equal justice champions, but it is rare for a collective body to actually carry out this role.

Given these realities, the Committee has concluded that while federal, provincial and territorial committees along the lines of the US ATJCs are necessary to reach equal justice, they are not a

[204] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf

[205] *Innovating Justice*, *supra* note 134. See also, J.M.Howell and C.A. Higgens, "Champions of Technological Innovation" (1990) 35:2 Administrative Science Quarterly 317.

sufficient measure. They are required to improve communication and coordination of efforts but do not guarantee the leadership and champions required for consistent, substantive change. As Muller pointed out at the Summit, current leaders of justice system organizations should not take the lead as it will likely result in "more of the same and no true collaboration." Every member of an ATJC participates in her or his representative capacity bringing a unique and important perspective, but no one, including representatives of the public, represents the system as a whole.

> First, unlike Apple, there really isn't a CEO of the justice sector. There's not one owner. I mean, who owns justice? Who's the CEO, who directs the justice system? If there is a very clear CEO, I think it almost, by definition, would not be a justice system but a dictatorship.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

The Committee is also concerned that ATJC would not be adequately resourced to carry out this important reform work. It is time to stop trying to bring about equal justice from the corner of our desks. Something new and distinctive is required to ensure progress on equal justice: the Committee suggests access to justice commissioners at the federal, provincial and territorial levels. Access to justice commissioners would be an individual and office dedicated to justice sector reform to ensure equal justice as their sole focus. They would have the advantage of an independent perspective and a full-time, resourced position focused on this objective alone. This proposal is not for a CEO of the justice system – that model is incompatible with Canada's constitutional and legal order. No one person can dictate how independent branches of government and the profession carry out their responsibilities. In the Canadian tradition, commissioners, like auditor generals, would have other types of 'super powers' to use their individual reputation, office, persuasion and other skills to facilitate change. Important to the success of these positions is reporting to the public on progress on achieving reform goals, through regular communications and annual reports. It is not envisioned that access to justice commissioners would have a grievance or complaints function. Rather, the office would operate in a proactive fashion. Equal justice requires many champions and collaboration among equal justice communities, but also desperately needs concentrated, effective leadership that can only be offered through independent offices of access to justice commissioners in each jurisdiction.

Learn more: about Resources for Building Equal Justice Communities

Access to Justice Commissions in the US: www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html

Washington Access to Justice Board, "EQUAL JUSTICE…The Noblest Common Denominator: A Road Map for Building an Equal Justice Community" (Washington: Jim Bamberger, 2001): www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~/media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/roadmap%20Part%20I.ashx

For a complete list, see: www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html

Some websites:
(North Carolina): www.ncequalaccesstojustice.com/

(Massachusetts): http://www.massaccesstojustice.org/

(Illnois) : www.isba.org/probono/illinoissupremecourtaccesstojustice

Conference of Chief Justices. "Resolution 8: In Support of Access to Justice Commissions." 28 July 2010: www.ccj.ncsc.dni.us/AccesstoJusticeResolutions/resol8Access.html

Target: ***By 2020, effective, ongoing collaborative structures with effective leadership are well-established at the national, provincial, territorial and local levels, including through the appointment of access to justice commissioners.***

Milestones:

- *Access to justice commissioners are in place in every province and territory and at the federal level*
- *The performance of collaborative structures is reviewed every two years, with lessons and improvements integrated into their operations. Evidence about collaborative best practices is widely-shared.*

Actions:

- *The National Action Committee, its successor or another national organization is properly resourced as a national collaborative structure with a mandate to support and coordinate provincial and territorial efforts*
- *The National Action Committee, its successor or another national organization works with other justice system stakeholders, including provincial and territorial committees, to organize an annual or biennial national conference*
- *Provincial and territorial governments establish collaborative structures to bring together stakeholders and establish networks between local equal justice communities and task-based collaborative initiatives*
- *Access to justice leaders create local equal justice communities including pathways for communication and collaboration with other communities and initiatives*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Building the Capacity for Justice Innovation

Our greatest challenge in reaching equal justice is addressing what the National Action Committee has identified as 'the implementation gap'. The justice system's capacity for innovation is underdeveloped and undernourished. For the most part we know what needs to happen, but we are not as clear on how to do it.

At the Summit, there was considerable discussion as to how we acknowledge that justice reform is hard, while facilitating dialogue about building capacity and creating an environment conducive to innovation. The centrepiece of this dialogue was a conversation between two international experts on justice innovation, Geoff Mulherin, Director of the Law and Justice Foundation of New South Wales (LFNSW) and Sam Muller, Director of the Hague Institute for the Internationalisation of Law (HiiL). This section builds on that conversation and the published contributions of these two leading access to justice organizations, notably *Innovating Justice* and *Legal Australia-Wide Survey*.[206]

Keys to Justice Innovation

Being Clear on Success Criteria

Among the most essential lessons learned about justice innovation is the necessity of being clear on what will constitute success. Muller used the example of the Millennium Development Goals as a clear set of success criteria for a complex policy problem: eradicating poverty. Progress has been made because the clear goals and sub-goals have become the focus of many organizations' work. This initial stage is crucial: understanding the problem, understanding what you're trying to innovate, and developing terms of reference as to what your innovation must achieve.

Mulherin also highlighted the importance of this step by comparing it to the first principle of war: selection and maintenance of the aim. He cautioned

[206] Note that the many quotations and references in the following section of the Report are not individually footnoted, but refer back to these two sources and conversations at the Summit. *Innovating Justice*, *supra* note 134; LAW Study, *supra* note 23.

that it is rare to actually have a shared, agreed aim: "It's actually harder than you think. We think we have concepts that we share. We don't. People have conversations without ever agreeing exactly what the purpose of this is actually about."

> What is success when you're trying to put innovations into place in the justice system? What does it look like? How do we know we're going to get there and how do we have the vision of where we want to end up?

Our vision of what we're trying to achieve is often constrained by what we do: publishers publish, judges judge, advocates advocate, and so on. It is hard to move beyond these perspectives to really collaborate and agree on success criteria. Success criteria must be clear, unambiguous and measurable.

Connecting Macro and Micro Approaches

Justice innovation requires a balance between macro (top-down) and micro (bottom-up) approaches: again, we need to think systemically, act locally. Mulherin reports that most innovations are generated by the people working on the front line. For example, this might be the people working at a community legal centre, seeing the same problems day in and day out. Increased access to justice can mainly be characterized as: "a tentative, iterative buildup of micro-level changes in a general direction, preferably engaged or led by a group at the lower level, the community level, but supported by sufficient people at the top end to sort of bring that change through."

Muller concurred with this description of the dynamic between micro and macro approaches to justice innovation. Change emanates from the bottom up: "The best innovations come from the people that face the same issue every single day and are so sick of it that they want to change it, so that's where the innovators are." At the same time, support is needed from the top to connect small scale innovations into broader change. Changes in one part of the justice system may be beneficial but incompatible with changes in other parts. We have to consider the inter-operability of technical systems. The challenge is to connect the macro and the micro: "the innovators need somehow to be clever to link to the top and … the top needs to be clever to empower those guys down below."

Creating a Nurturing Ecosystem

HiiL's *Innovating Justice* succinctly offers the key to success: *Innovation requires an extensive ecosystem nurturing the process.* Justice innovation experts have identified components of this ecosystem, including:

- Adopt a 'Yes AND', not a 'Yes, BUT' mentality
- Forget about the rules
- Treat "failure" as an entrée to adaptation and eventual success
- Be clear on who benefits: an innovation is not just an idea
- Nurture a champion
- Ensure the time is ripe
- Engage a critical mass
- Provide incentives and resources
- Cultivate a diversity of skills and knowledge and partnerships.

Innovation begins with a mindset and belief that change is possible. For many, this glimmer of possibility has been eroded by past failures or the sense that change is realistically impossible. HiiL refers to this as a "Yes, BUT" attitude, and suggests a "Yes, AND" approach is needed to generate ideas, build on those ideas, and establish and maintain a safe and creative environment.

> The first lesson in innovation, whether you're designing iPods or new procedures, is forget about the rules to start with. Real innovators, when they start, they don't give a toss about the rules. They have something they want to achieve and the rules can be changed if you need that at one point. So don't start with the rules.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

Conditions that allow experimentation and create a safe environment are key. Innovation processes are not linear: sometimes a prototype will fail, but the reaction should be to adapt and make it a success, rather than give up. Rules have the opposite effect: they act as inhibitors of innovation. Rules are the centrepiece of the justice system, so it is a natural reflex for lawyers and judges to respond to change by saying 'that's against this rule or that principle'. But the HiiL work emphasizes that getting rid of rules is key: "Don't think about those rules when you're working on innovation and keep the end in mind. Always start with the end in mind – that should be our frame of reference."

Muller pointed out that "a successful innovation is not the same as a good idea." Innovations are always connected to "a very clear problem, a very clear need, or as we negatively say, huge pain somewhere. If there's no huge pain, then it generally remains a great idea." We need to be clear on who will benefit from the measure, what 'pain' it is going to assuage. Mulherin made the flipside of this point even more emphatically: it is imperative not to change only for the sake of change. Change is disruptive and disruption can have a disproportionate impact on members of society living in disadvantaged conditions. The bottom line here is 'first do no harm'.

In HiiL's analysis of successful justice innovations, a common factor was that each effort had what they call an 'innovation champion': "Somebody who does not stop against all odds. And it usually is a person or two or three people. A committee is never an innovator." The *Innovating Justice* handbook contains numerous examples of such champions. At the Summit, Muller highlighted a Kenyan example of innovation to tackle delays in the criminal courts. The courts and legal profession developed many complex delay-reduction strategies, but the successful innovator was a young woman who championed a prison paralegal program, where prisoners were taught to offer assistance to other prisoners. He described her story: "she fought and fought and fought and fought and went on and on and on and you could imagine the resistance she had. It's now being rolled out in more prisons. But it comes down to a person."

Mulherin emphasized that timeliness is a factor. The time has to be ripe for a given innovation, and a critical mass from the broader community has to be engaged. In his view, "mere sympathy is not enough", a specific innovation has to be moving in the same direction as a broader movement. This critical mass is needed to influence decision makers so that an environment at the top supports the innovation. The top does not have to be the champions, but the top does have to be supportive. The HiiL report points out that innovation comes in waves or patterns and describes the importance of "surfing the innovation wave."

In the private sector, innovation is fostered through incentives and resourced through a research and development budget, data about the subject area, knowledge about the market and users, good research capacity, a vision with lots of diverse perspectives and teams with a variety of skills and smart partnerships. Muller contrasted this with the justice sector, where innovation is starved. We have no time for innovation. Regular overload of work, constant pressure to deliver services and meet deadlines and heavy administrative burdens are all obstacles to innovation. Further, a valid concern expressed during the Summit closing plenary was that resources to facilitate change likely mean cuts elsewhere.

Our knowledge base is very thin. We don't know enough about what people want from the justice system and we have limited capacity to measure public satisfaction with service delivery in the justice sector. We know even less about how to effectively meet needs. In Mulherin's summary of what it takes

to innovate he said: "I'd like to say also, 'driven by research' but I'm afraid it's too often not the case for me to actually say that."

Both within and across justice institutions, our skills tend to be homogeneous, while creativity requires diversity. Muller pointed out the justice system also lacks partnerships, for example, with academia and research bodies. In contrast, he noted that innovation in the IT sector includes endless, very creative partnerships between public and private sectors. Mulherin reinforced this point noting that: "Law is an opinion-based discipline. You are inculcated with … opinions when in actual fact we should be talking much more social science." And it rarely happens that justice innovation is something one person can do alone.

HiiL's Innovating Justice Model

HiiL offers advice on getting our "justice innovation act together" in *Innovating Justice*, a collection of best practices based on research, years of experience and interviews with leading justice innovators.[207] The handbook breaks the innovation process into six phases and provides advice and examples for each phase. An overview of the HiiL model is presented in the form of the central questions to be posed and answered in each phase. This handbook should be at the top of our collective reading list. [208]

'Incubation', bringing people with innovation expertise together in one environment, has proven an effective approach. HiiL has developed an incubator in the form of a 'justice innovation lab', with three main features. First, the lab provides a physical space where people can be away from their daily work to concentrate on developing an innovation. Second, it contains a 'neutral lab chief' responsible for facilitating the process, keeping the work focused and moving forward, and generally characterized by HiiL as a 'process pitbull'. The third ingredient is a variety of clever processes and techniques to ensure diversity of participants in the session, to understand the problem, to assist in setting the terms of reference (success criteria) and evaluation framework, and so on.

> Now, if I go to the average ministry of justice, you have rules, hierarchy, rigid budgets, you don't know the users, you have lots of compartments, changing visions or no visions, homogeneity in general, excessive workload--all things that are very, very bad for innovation. So… I really think there are a number of fundamental things that we could change and should change if we want innovation in courts, if we want innovation in ministries of justice.
>
> And you don't need to be Einstein to know what has to change. How many courts in the world have an innovation budget or an R&D budget? How many judges have 5% of their time to experiment? How many courts have a real safe environment in which we can just try something out? How many ministries allow that? I don't know very many and I think there's a lot you could change in that sense.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

At the Summit, Muller described one of these processes: moving quickly from discussions to creating a prototype using techniques from the IT sector called 'scrums'. Scrums involve blocking off a short period of time and creating a high pressure environment, with the goal of generating a prototype quickly.

Dedicated time in the lab is key. While the HiiL justice innovation lab is a physical lab, the same approach can be taken in a 'metaphorical justice lab'.

Filling the Justice Innovation Gap

The Canadian justice system has dedicated few resources to, and has limited capacity for justice innovation. An efficient way to fill the remaining gap is to establish a dedicated centre for justice innovation with a mandate to foster and support initiatives across Canada. In addition, all justice

[207] *Innovating Justice, ibid.*

[208] *Ibid.*

HiiL's *Innovating Justice* model: Six phases of the innovation process

1. FOCUS ON CITIZENS' NEEDS

- Who will benefit from your innovation?
- How many beneficiaries are there now and how many more can you scale up to?
- What are the pressing needs?
- What causes citizens most pain?
- Who can be the lead customer (group)?
- Who is willing to pay or take action for this innovation?

2. RELEASE THE MIND

- Which ways of thinking and which rules constrain the best solution?
- Is there sufficient time and space? Think about the physical and environmental settings.
- Which skills, knowledge, backgrounds, personalities and cultures are involved already?
- And how could you involve more?

3. SHAPE SOLUTIONS

- What are goals and terms of reference?
- What are the characteristics of the innovation that are most essential to success?
- Do you have a prototype or model? Does it work? How was it tested?
- What makes the solution new and unique?
- Why is it better than what is already out there?

4. REFRAME THE CONSTITUTION

- What are the essential partners in the justice supply chain to make this innovation work?
- What do they need to do and why will they do it?
- What is the vision behind your innovation?
- Who are the champions for that vision?
- Who stands to lose from the innovation? What reaction can be expected and how should you respond?

5. JUDGE THE BUSINESS

- What is the value proposition?
- Can you quantify the benefits?
  What is the early stage investment needed? In time, money and other resources?
- How are you going to make you innovation financially viable? How can you make it sustainable, even after you stop working on it?

6. GET IT DONE

- What are your metrics for success and how do you measure them?
- How is the innovation organized in order to stay focused and to manage by results?
- How do you ensure that there is continuous learning and adjustment?

> So for almost all the innovation processes that we're involved in, we spend a lot of time on terms of references and goals, and then it's locked down and sweat and pain to get to some kind of prototype fairly quickly, which you can then slowly improve and roll out.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

system stakeholders, including law firms, need to increase their research and development capacities to explore ongoing innovations for the practice of law. Some service providers are beginning to offer assistance to law firms and other justice sector institutions.[209] The CBA Legal Futures Initiative has initiated a conversation about prospects for innovation in legal practice, and is consulting widely to obtain a broad diversity of perspectives about better ways to serve the public. Two mechanisms that have been employed to facilitate innovation in other sectors and have begun to be employed in the justice community are dedicated funding for research and development, and through competitions such as the US Legal Services Corporation competitive challenge grants.[210]

[209] See, for example: www.reinventlaw.com/main.html.

[210] www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf.

Targets: ***By 2025, justice system stakeholders have substantially increased their innovation capacities by committing 10% of time and budgets to research and development.***

By 2020, Canada has a Canadian Centre for Justice Innovation.

Milestones:

- *Justice innovation leaders are recognized and share their best practices with others*
- *Regular environmental scans of justice innovations in Canada and abroad are carried out*
- *All justice system stakeholders, including law offices, develop innovation plans, with definite interim targets to increase their research and development functions in line with a 10 year goal of 10%*

Actions:

- *The CBA Legal Futures initiative use the results of its work to facilitate enhanced networking and exchanges of information on practice innovation*
- *The CBA works with other justice system stakeholders to develop a partnership with the Hague Institute for the Internationalisation of Law*
- *The CBA works with other justice system stakeholders to develop options for establishing a Canadian Centre for Justice Innovation to support local initiatives*
- *Law firms adopt models of compensation for lawyers that reward innovation*
- *Law schools establish innovation think tanks and involve a broad range of justice system stakeholders, including members of the public, consultants and experts on justice innovation*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

Access to Justice Metrics

Access to justice metrics are critical to support justice innovation. In Part I, the Committee underscored the limited ability to give definitive answers to even the most basic inquiries about barriers to access. We have only fragmentary data and no capacity to pull it together to get a complete picture of access to justice in Canada. The absence of an evidentiary base for action, and shared views on what to measure and how to measure it are serious obstacles to achieving equal justice.

We all know the maxim 'you can only manage what you can measure'. We are far from having access to justice metrics to measure justice system performance. The development of metrics is an important pillar supporting justice innovation. Metrics serve a range of purposes, from informing the public about the justice system and grounding the day to day decision making of justice system participants, to supporting policy making processes and change processes. Metrics enhance people's choices, enable comparison and learning, increase transparency and create incentives for improving access to justice.

As emphasized in the section on keys to justice innovation, we need success criteria, but we also need to be able to measure progress in attaining those criteria. In addition to citing the Millennium Development Goals, Muller also highlighted the sustainable living plan developed by Unilever as a potential model for justice innovation. Unilever is a multinational consumer goods company with a clear environmental sustainability plan. The company tracks progress towards their detailed goals on their website using red, yellow and green lights. Metrics of this kind are a powerful information tool that can contribute significantly to transparency and public confidence.

As noted earlier, in its 1996 report, the CBA Systems of Justice Task Force decried the lack of basic management information, concluding that the paucity of information was both indicative of and related to one of the five main identified barriers to access: inadequate management tools and resources. Some progress has been made in improving court-based data collection. Most notable are the 'Justice Dashboards' in British Columbia, which report basic criminal justice statistics.[211] Plans are underway to expand these dashboards to the civil justice realm.

Many organizations collect some data, but their approach and methods reflect their own business practices and the data is diffuse. There are ongoing initiatives to gather more sophisticated data, particularly in costing aspects of the justice system through the Canadian Forum on Civil Justice's Cost of Justice initiative.[212] Yet, we are far from a shared framework for gathering data, much less a sound knowledge base for justice system decision making. The Canadian Association of Provincial Court Judges and Association of Legal Aid Plans have committed to developing a common management information collection framework.

Canada is not alone with underdeveloped justice system data and evidence, but a concrete action plan to remedy this situation is past due. These issues are canvassed more thoroughly in the Committee's Discussion Paper on Access to Justice Metrics.[213] There is a growing consensus that we need to invest time and money to address the shortcomings on this front, although with some remaining uneasiness over how these goals can be met.

The Law and Justice Foundation of New South Wales has carried out pioneering work in this area in their "Data Digest" initiative, which collects, collates and analyzes data from the main public legal service providers (legal aid, community legal centres and so on). This initiative attracted the attention of the Australian government's Access to Justice Task Force in 2009 paving the way for a more comprehensive initiative.

The Australian Attorney-General's Department has embarked on a multi-year collaborative initiative to build a robust evidence base for the civil justice system, described as "a long-term project that aims to remedy the current lack of consistent and comparable data across the civil justice system." This promising approach could serve as a model for a Canadian initiative. The Australian Attorney-General's Department has stated that the project would need the commitment of all, or at least the key stakeholders in the civil justice system. The project will be a long-term one that will require stakeholders to engage and commit some resources, if only in terms of time. In May 2011, the Department hosted a symposium to discuss with stakeholders how to move forward with this initiative, and a further forum was held in May 2012. A working group of all civil justice system stakeholders and data experts is developing a framework to guide the collection of consistent data to create an evidence base for the civil justice system. A research team was commissioned to scan recent empirical research and develop draft objectives for the civil justice system. The working group has assessed the quality and coverage of existing data in the civil justice system, paving the way for further refinement of the data collection framework. At the Summit, Mulherin reported that while the project recognized the importance of state participation (since people's legal problems and pathways do not neatly align with the federal division of powers), state governments have yet to fully come onboard with this initiative.

The Committee proposes that the federal government take the lead but work closely with all justice system stakeholders, with the goal of publishing a first report on Canadian access to justice metrics by 2020 and a comprehensive report by 2030.

Substantial feedback was received on the Committee's *Access to Justice Metrics* discussion paper, both in writing and in a Summit workshop. These insights are summarized here and should be taken into account in structuring a Canadian initiative to develop performance measurements and an evidence base for the civil justice system:

[211] http://www.ag.gov.bc.ca/justice-data/index.htm

[212] http://www.cfcj-fcjc.org/cost-of-justice.

[213] CBA Access to Justice Committee, *Access to Justice Metrics: A Discussion Paper* (Ottawa: CBA, 2013) http://www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf.

- Community voices should be integrated into framing of access to justice metrics. The Committee integrated the perspectives of members of communities living in marginalized conditions into its vision of equal justice in Part II and throughout this report.
- Inclusivity should be a measure of access to justice. Hughes paper for the Summit provides details for a framework for measuring inclusivity in the civil justice system.[214]
- It is critical to "not to just go where the light is brightest", for example, by focusing on court data. Mulherin warned of the "temptation to count what we can. And the problem is that what you count becomes what's important." In particular, court data does not tell the whole access to justice story.
- The development of access to justice data and metrics is clearly a government responsibility, but the approach, framework and data collection methods have to be developed collaboratively with the commitment of key stakeholders, including the public. There is some tension between government and the judiciary about data collection that needs to be resolved.
- The framework should be developed on a national basis, with room for provincial and territorial adjustments as needed.
- The variety of metrics required includes needs measurements, efficiency metrics, outcome measurements, and inclusivity measures. Efforts must include a measure of low-income persons who *do not* proceed through the justice system. Client satisfaction measures are insufficient as measurements need to incorporate broader background and context.
- If we are going to measure access to justice, the *tools* must be good – poor measurement is worse than no measurement at all.
- Data collection can be time-consuming and we should avoid adding too much burden on individuals and small organizations that provide services.
- Data collection should be forward-looking. The development of protocols to commit to moving to common data collection over time, as systems are upgraded, is key.
- Privacy issues have to be taken into account; data sharing agreements must include agreements to conceal private data. The idea of "justice identifiers" like health insurance numbers that help to ensure privacy while satisfying the need for robust information base is under discussion.
- A phased approach is most practical, given concerns over the resources required and to overcome other barriers to moving forward.

[214] Hughes, *supra* note 27.

Learn more: about Metrics

CBA Committee Access to Justice Metrics Building Block Paper: www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf

CBA Committee Access to Justice Community Voices Paper: www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf

Patricia Hughes, "Inclusivity as a Measure of Access to Justice" (paper presented at the CBA Summit on Envisioning Equal Justice)

Link to LJFNSW website Data Digest: www.lawfoundation.net.au/ljf/site/articleIDs/3D3EE18A9E1E9970CA257060007D4F9E/$file/data_digest.pdf

Martin Gramatikov, Maurits Barendrecht, and Jin Ho Verdonschot. "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 Hague Journal on the Rule of Law 349: www.measuringaccesstojustice.com/

Australian Government, Attorney-General's Department, Symposium Paper: Building An Evidence Base for the Civil Justice System (May 2011): http://www.ag.gov.au/LegalSystem/Documents/Consultation%20paper%20for%20symposium%20May%202011.pdf

Dr. Robyn Sheen and Dr. Penny Gregory, *Building An Evidence Base for the Civil Justice System – Civil Justice System Framework and Literature Review Report* (Australia Attorney-General's Department, September 3, 2012): www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx

Target: ***By 2020, the first annual access to justice metrics report is released; by 2030, this report is comprehensive.***

Milestones:

- *The federal government establishes a working group to develop a framework and action plan for the development of access to justice metrics*

Actions:

- *The CBA works with other justice system stakeholders to develop a proposal for assessment of the quality and coverage of existing data*
- *Building on initiatives of the Canadian Association of Provincial Courts and the Association of Legal Aid Plans, justice system stakeholders develop a protocol for the collection of a common standard data set*
- *The CBA encourages the courts and other key agencies in the justice sector to see the value of access to justice metrics and to commit to work to attain these targets*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

Strategic Framework for Access to Justice Research

Canada is plagued by a paucity of access to justice research. This gap exists in tandem with the poor state of justice data collection and evidence. The lack of high quality, publicly available data detracts from scholarship and the lack of scholarship contributes to the poor state of data, since empirical research will help to determine which types of data should be collected. Other barriers

to research include: fragmentation of access to justice research across disciplines and under-development of interdisciplinary studies; lack of integration of recent methodological developments such as internet-based tools; and lack of connection between academics and practitioners.

At the Summit, Wayne Robertson, Executive Director of the Law Foundation of British Columbia, facilitated a roundtable discussion on a national access to justice research agenda. There, Mulherin summed up the current situation: past research, particularly the civil legal needs literature, has told us quite a bit about promising directions for reform. Now the focus should be on establishing evidence about *what works* and *what works at what cost*. The Law and Justice Foundation of New South Wales has a ten year research plan to provide answers to these central questions. Preliminary literature reviews of international research concluded there is very little quality evaluative research that can offer a sound basis for identifying effective reform to address specific needs.

A national research strategy is needed, not in the sense of a centralized master plan but rather to ensure coordination, avoid duplication and enable researchers to build on each other's efforts. Workshop participants affirmed the importance of quantitative, qualitative, empirical and anecdotal research, the latter being particularly powerful in motivating reform. The overarching priority is for research on what works to improve access to justice. More research should be carried out on a longitudinal and latitudinal basis.

Workshop participants also recognized that the research agenda engages numerous organizations and institutions: law schools and social science departments; law commissions and other agencies such as the Official Languages Commission, legal service providers, bar associations and so on. Attention is needed to build stronger bridges between academia and practitioners as the perception is that there is a "big gulf" between the two.

An ongoing American Bar Foundation initiative serves as a potential model for fostering access to justice research in Canada. In December 2012, the American Bar Foundation launched a multi-year initiative to "kick start a sustainable access to justice research capacity." The workshop had three components: a poster session, a town-hall meeting; and a small by-invitation working session. The poster session and town-hall meeting were designed to bring together researchers and field professionals to discuss research needs and research findings. The workshop focused on three topics:

- The most important research questions, research needs, and/or knowledge gaps that exist today in access to justice research, services delivery, administration, and policy;
- Concrete research projects, including data sources, sites, partnerships, methods and funding; and
- Possible models for building a sustainable access to justice research program.

Workshop outcomes include a discussion paper on an access to justice research program, including research priorities and the development of a web-based network amongst researchers to facilitate ongoing discussion.

The Committee proposes that efforts be taken to double access to justice research by 2020, with a view to building to a sustainable national access to justice research agenda by 2025. Integral to this proposal is establishing a central independent research organization that assumes responsibility for developing and coordinating the required data sources and research activities. These proposals work in conjunction with the targets for increased research in law schools and for government-led initiatives to build an evidence base on the civil justice system.

A national access to justice research framework to contribute to equal justice should encompass three main objectives:

- generate new high quality research activity;
- ensure the coordination of research efforts; and
- improve the communication of research results, including aggregating and synthesizing research findings and program evaluations to make this information more accessible to decision makers and in policy-making processes and forums for public dialogue.

Targets:

By 2025, Canada has a sustainable access to justice research agenda with four minimum components:

a) available, high quality data that supports empirical study of effectiveness of measures to ensure access to justice

b) a central independent research organization that assumes responsibility for developing and coordinating the required data sources and research activities

c) effective mechanisms through which researchers and people in the field collaborate and coordinate research activities, and

d) ongoing commitment to and adoption of best practices in access to justice research.

By 2020, the amount of access to justice research conducted in Canada has doubled.

Milestones:

- *A central research organization continues to conduct – or support and coordinate – initiatives that synthesize and coordinate existing, and generate new research activity, including research that can inform policy*
- *A central research organization establishes – or supports the establishment of – a mechanism and methods for amassing quality data to support empirical access to justice research*

Actions:

- *The CBA, law foundations and other justice system stakeholders hold a workshop that provides an inventory of current and planned access to justice research initiatives, facilitates a dialogue between researchers and practitioners and considers potential mechanisms to coordinate existing and generate new research activity*
- *The CBA, law foundations, law faculties and other justice system stakeholders identify or develop a central organization that is able and willing to coordinate efforts to develop a national research agenda on an initial basis*
- *The central research organization establishes international collaboration networks with access to justice research institutes including the Law and Justice Foundation of New South Wales and the American Bar Foundation*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

Reinvigorated National/Federal Government Role

This report sets targets and actions that depend on strong national leadership on access to justice reform. While provincial and territorial governments have primary responsibility for the day to day functioning of the justice system, the federal government also has a critical role. Like healthcare, justice is a shared governmental responsibility. A reinvigorated federal role is imperative if we are to reach equal justice.

This needed shift is clearly reflected in declining financial contributions to the legal aid system across Canada in real terms. The federal government has primary or major jurisdictional responsibilities in criminal law, family law, immigration law, and assisting in ensuring basic needs are met through social security programs such as employment benefits and the Canada Pension Plan. Yet over the past two decades, the federal government has taken an increasingly limited view of its responsibility for ensuring access to justice in these or any areas of law. The federal government has fostered some access to justice initiatives through time-limited investment in justice innovations through the legal aid renewal fund and the existing justice innovation fund. Limited project or 'pilot project' funding, while helpful, does not come close to mitigating the damage to the justice system by

federal withdrawal from access to justice. The last time the federal government was actually an equal 50/50 partner was 1990/1991.[215]

The CBA, provincial and territorial governments and other organizations have pressed the federal government to meet its responsibilities and to shoulder a significant share of the additional fiscal commitments required to ensure that the Canadian justice system is equally accessible to all. For example in June 2007, all provincial and territorial justice ministers united to call for increased federal funding for legal aid, calling on the federal government "to pay its fair share as a partner in the justice system."[216] At that time, several of the provinces and territories estimated that their contribution to legal aid was four times that of the federal government. Importantly, this position was adopted by provincial and territorial ministers representing governments led by all major political parties.

Additional support for a renewed federal government role is based on the constitutional commitment to essential public services of reasonable quality across Canada, a commitment that can only be ensured through a robust national access to justice policy. Further, as discussed throughout this report, we now have a strong and growing understanding of the detrimental impact of unresolved legal problems on people's well-being, an impact particularly profound on people living in marginalized conditions or who are otherwise vulnerable. Renewed funding for legal aid is critical, but federal leadership and support is required on other facets of justice innovation. Specifically, change can be achieved or supported through national initiatives such as the development of access to justice metrics and a centre for justice innovation.

National governments in other federal states have taken a stronger and more visible role in ensuring equal justice, despite sharing responsibility for these matters with state governments. Notably, the Australian and US national governments are much more active on the access to justice front compared to Canada. In March 2010, the US Department of Justice established the Access to Justice Initiative (ATJ) to address the access to justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, regardless of wealth and status. ATJ staff works in the Department of Justice, across federal agencies, and with state, local and tribal justice system stakeholders to increase access to lawyers and legal assistance, and to improve the justice delivery systems that serve people unable to afford lawyers. The initiative is led by Laurence Tribe, who reports to President Obama, underscoring the importance of these issues.

Learn more: about other Federal Governments' efforts for Access to Justice

US Initiative:
www.justice.gov/atj/

Australia Attorney General's Department:
A guide for future action – 2009:
www.ag.gov.au/LegalSystem/Documents/A%20guide%20for%20future%20action.pdf
www.ag.gov.au/LegalSystem/Pages/Accesstojustice.aspx

Australian Government A2J website:
www.accesstojustice.gov.au/Pages/default.aspx

New Zealand Justice System Improvements:
www.justice.govt.nz/policy/justice-system-improvements

The Australian Attorney-General's Department has been even more proactive, working steadily to increase equal justice since a landmark 1996 report on access to justice. For example, the Department has adopted a strategic framework for access to justice and has embarked upon a number of major initiatives, including a national partnership agreement on legal aid and building an evidence-based civil justice system, described above.

[215] Currie, *supra* note 39.

[216] See: www.scics.gc.ca/english/conferences.asp?x=1&a=viewdocument&id=92.

The Committee suggests that this target is achievable by 2025, with an interim target of reinstating federal funding for legal aid to 1994 levels by 2020. Equal justice is about more than only the administration of justice in a province or territory: it is about the health, safety and security of all residents of Canada and ensuring good governance through a fair and effective legal system. These are national concerns, both as a matter of constitutional division of powers and good public policy. There is a growing consensus that re-engagement of the federal government in this field is imperative. The federal government can, should and must be a full partner in ensuring an equal inclusive justice system.

Targets:
By 2025, the federal government is fully engaged in ensuring an equal, inclusive justice system.

By 2020, the federal government reinstates legal aid funding to 1994 levels and commits to increases in line with national legal aid benchmarks.

Milestones:

- *The federal government commits to steady increases in contributions to legal aid funding including returning to 50% cost-sharing in criminal matters and establishing a dedicated civil legal aid contribution*
- *The federal government is a leader in supporting access to justice innovation*

Actions:

- *The federal government commits to supporting justice innovation by taking a leadership role in building the evidence base necessary to develop access to justice metrics, appointing an access to justice commissioner, supporting the creation of a centre for justice innovation and funding access to justice research*
- *The federal government makes funding for civil legal aid transparent and works with provincial and territorial governments and justice system stakeholders to regenerate legal aid*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

CBA as an Access to Justice Leader

The CBA has contributed to access to justice in Canada since its inception, and improving access to justice is a core to the Association's mandate. CBA contributions over the years have included task force reports leading to the adoption of policy statements on court reform, civil justice reform, administrative justice reform, equality in the legal profession and the administration of justice. Advocacy efforts have been based on these policies. In particular, the CBA has been active in lobbying for the establishment, protection and promotion of a national legal aid system for both criminal and civil matters. Efforts on this front have included numerous reports and resolutions, advocacy campaigns in collaboration with other organizations and test case litigation and various interventions. The consistent focus has always been on ensuring access to justice for low income people through effective legal aid services. For example, the CBA adopted a *Charter of Public Legal Services* in 1993 founded on the premise that for certain matters; legal aid is an essential public service akin to healthcare. More recently, the CBA has taken steps to foster pro bono work within the profession. CBA Branches are also active on these fronts.

The CBA established this Access to Justice Committee in 2011 with a view to consolidating and enlarging its work on these issues. The CBA fills an important role in national access to justice reform efforts but a stronger organizational commitment is required for the CBA to become an access to justice leader.

The Committee is committed to take action on six fronts, working in conjunction with other CBA entities, committed members and outside organizations:

- Encourage greater collaboration between

justice system stakeholders, including the public and coordinate of initiatives in a strategic framework;

- Develop and revise CBA policies to support improvements in the public and private delivery of legal services;
- Partner with the CBA Legal Futures Initiative on elements of its work that relate to education, practice and regulatory innovations that could have an impact on access to justice;
- Foster greater public ownership of access to justice issues;
- Develop tools for advocacy geared to improving publicly funded access to justice, including legal aid; and
- Support and encourage CBA members to enhance the legal profession's contributions to equal justice through the practice of law.

The priority given to access to justice issues has waxed and waned over the years – a natural cycle in the life of a professional association with a broad mandate, operating on member-driven initiatives. The Committee proposes that the CBA takes the necessary steps to ensure that it is in a position to be an access to justice leader, by increasing its capacity to support initiatives in this field.

Targets: *By 2020, the CBA has increased its capacity to provide support to access to justice initiatives*

Milestones:

- *The CBA provides support to its members so they can participate actively in increasing equal access to justice*
- *The CBA takes a leadership role in encouraging public engagement with the justice system and changing the conversation in support of achieving equal justice*
- *The CBA continues and expands its collaboration with other justice system stakeholders, including members of the public, in support of inclusive access initiatives*
- *The CBA substantially increases resources provided to access to justice initiatives*

Actions:

- *The CBA Access to Justice Committee develops a multi-year workplan to implement the actions in this report*
- *The CBA Access to Justice Committee develops resolutions to update CBA policies consistent with this report for consideration by CBA Council at the 2014 Mid Winter Meeting*
- *The CBA Access to Justice Committee provides many avenues for interested members and others to participate in the development of its initiatives and to share their ideas and experiences*
- *The CBA Access to Justice Committee seeks out and cultivates access to justice champions in the legal profession*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

EPILOGUE: Imagining 2030

This report has set out the Committee's vision for reaching equal justice, framed as 31 concrete, measurable targets to be achieved between 2020 and 2030. This vision is ambitious, but possible. The road to achieving these targets may appear long and difficult to navigate, but it can be travelled one step at a time, each of us doing our part, thinking systemically and acting locally. The Committee has initiated a description of this journey through some examples of actions intended to get us started and by setting out a few milestones we can aim to achieve along the way. There is no question that action must be initiated right away to join ongoing efforts – if not, we are likely to face a situation in 2030 that is dramatically worse for access to justice.

Despite the Committee's best attempt to offer concrete vision of equal justice, it still remains difficult to fully picture the transformation required to move from the dire state of access to justice in Canada today to the envisioned world of 2030, where the justice system is equally accessible to all, regardless of means, capacity or social situation. What does 100% accessibility look like?

To take this envisioning process one step further, the Committee will return to the stories of the nine people denied equal access to justice in Part I, to illustrate the impact of transformed paths and outcomes following our successful efforts toward equal justice.

So, imagine the year is 2030, and the justice system takes into consideration different legal needs, providing timely, holistic and personalized assistance to achieve lasting and just outcomes. People are empowered to manage their own legal matters, with a strong emphasis on prevention where feasible and public participation in overseeing the justice system. As a result, people feel a strong connection to the justice system, and a strong sense of ownership. Practices are evidence-based and the justice system is a nurturing environment for innovation. It consists of learning organizations committed to continual improvement.

Remember Winsome?

The 75 year old housecleaner who co-signed for her grandson's car loan? She didn't understand what she signed and when her grandson fell behind in his payments she could not access legal information or advice so she panicked and paid $2500 from her meagre savings to pay the debt.

Imagine instead that Winsome saw a notice for legal capability training at the local library. She signed up, for two hour classes on four Saturdays. When her grandson asks her to co-sign for a car loan, she wants to help, but remembers what she learned. She insists on taking the documents home to read them carefully before she signs. She stops at the library and uses the legal information website that she'd learned about in her training course, to find out what would be involved in signing the papers. When she gets frustrated because she isn't used to working on a computer, someone at the library is available to help. Then, she stops by the courthouse, and is referred to a consumer advocacy centre staffed by pro bono lawyers. She calls them, and they make a suggestion. Winsome and her grandson return to the local dealership and she agrees to sign if the dealership removes the clause that gives it a mortgage on her home and adds a clause agreeing to give her two weeks' notice of any problems before they begin their usual process. The salesperson knows Winsome and her grandson and agrees.

Later, when she receives notice that her grandson is behind by $2500 in his payments, she talks to him. Her grandson explains that he was waiting for his income tax return and he didn't think the car dealership would act so quickly. Winsome writes the cheque for $2500 and mails it to the company, but her grandson pays her back two weeks later. He promises it will not happen again.

Remember Phuong?

She inadvertently left a drugstore without paying for prescriptions she had picked up. Then she pled guilty to a charge of shoplifting when she couldn't get legal aid. As a result she lost her job as a personal care worker.

Imagine instead that Phoung's call to legal aid goes differently. Rather than being told that they can't help her because her charge won't result in jail time, they consider Phoung's application by phone, looking at the whole situation. Legal aid has done recent outcomes-based research. The representative says that because of her immigration status and that English is not her first language, she should go to a community centre in Canora for help from a court support worker. The centre is welcoming, and the support worker listens to what happened. He sends a report to a duty counsel lawyer at the courthouse.

On the day Phoung goes to the courthouse, she meets with the duty counsel lawyer who again reviews what has happened. The lawyer speaks with the crown prosecutor and explains that Phoung had no intention of stealing, but was exhausted after dealing with a sick child all night and simply overlooked the prescriptions. She is employed and always pays her way. When the judge appears, the lawyers jointly recommend to the judge that the charges be withdrawn, and the judge agrees.

Remember Monique?

The 66 year old accounting clerk who didn't return to the lawyer's office after the first consultation? She slipped into a depression and her debt mounted and bills went unpaid. The bank started foreclosure proceedings.

Imagine instead that Monique's first consultation with the lawyer went differently. Monique's lawyer had attended a CBA legal education course many years ago and had been inspired to offer legal health checkups to his clients. He was also an avid reader of the many access to justice research papers generated by governments and law schools. After hearing Monique's story, the lawyer realized that more was going on than simply legal issues. He suggested that Monique take advantage of the "legal health check" program offered by paralegals in his office, and talk to one of the social worker members of the team. As a result of the meeting with the social worker, Monique was referred for counseling. The paraleglal uncovered further details and did some research on Monique's legal health. She advised Monique and the lawyer that the title to the home was vulnerable, and that Monique needed credit counseling. With the support of the social worker, Monique spoke to a credit counselor who helped consolidate her debt, and she stopped using her credit cards. She retained the lawyer to draft a separation agreement and her legal affairs were in order in a few months. Monique's children paid the lawyer, and she repays them a bit each month. She also manages to put a bit of money away each month.

Remember Anna?

Anna came from Mexico to Ottawa with her daughters seeking asylum as she was fleeing a violent husband. She lost her bid for asylum due to the late delivery of necessary documents from Mexico and lack of legal aid funding for an appeal.

Imagine instead that the Canadian Centre for Justice Innovation has recently completed a comprehensive review of policies and priorities, and through its evidence based research activities, has identified barriers for refugees seeking justice and the legal needs they generally experience as "essential". The lawyer refers Anna to a community centre that assists refugees in various ways, including with their legal proceedings.

The centre's staff writes to the local police force in Mexico explaining the urgency of the situation, and asking for help. They make several follow up requests by phone but are unable to secure the paperwork in time for the hearing. They then provide Anna bus fare to go to the hearing in Montreal.

After Anna's claim for refugee status is refused, she applies for more legal aid for the appeal. Due to increased federal government funding for legal aid for immigration matters, the plan has reinstated funding for lawyers to write an opinion about the merits of the case to legal aid. The lawyer's opinion letter is successful and Anna gets a lawyer for the judicial review and stay of proceedings. Anna's appeal is granted and she and her children are allowed to remain in Canada.

Remember Jill?

She was refused legal aid and had to borrow a lot of money to have representation when the judge refused to allow her to represent herself. Her ex-husband was suing her for custody as their three daughters refused to see him. Jill had an unsatisfactory child support award as she could not prove her ex-husband's cash income.

Imagine instead that Jill qualifies financially for legal aid and does not have to borrow a lot of money. She then spends some of her own money on a private investigator who is able to confirm that Jill's ex-husband makes additional income that he has not reported on his tax return.

Jill's province has been recording their access to justice metrics and realizes that the wait for court appearances in Fredericton is much longer than in other parts of the province. Resources are provided to decrease the delays.

At the first court appearance, the Judge refers the custody issue to mediation. In mediation, Jill and her husband can discuss the issues surrounding the breakdown in the relationship between father and daughters. They are referred to an external agency for counseling and resolve the custody issue provided the counseling occurs.

The support issue went forward in court. Jill got an order for arrears of support and for increased child support going forward that reflected her ex's actual income. The judge told her ex that there were methods of enforcing child support orders that could be used in future if necessary. Jill never had to return to court.

Jill was pleased with the outcome for her children on the custody issue. She volunteered as a subject in the local law school's access to justice research centre. In doing so, she gave the researchers her perspective on the options available to working poor parents dealing with custody and support issues.

Remember Glynnis?

She trafficked in marijuana to make ends meet for herself and her daughter. She pled guilty to possession of marijuana for purposes of trafficking and went to jail, and her daughter went into a group home hundreds of kilometres away from her.

Imagine instead that the NWT government is part of a collaborative FPT initiative considering how to provide better legal services for citizens in smaller towns underserviced by lawyers. The First Nations of NWT have engaged in community roundtables with the territorial government on options for aboriginal people charged with drug offences. Through both initiatives, research tools and funding have been provided to a local law office. Glynnis' lawyer was able to present detailed "Gladue" arguments at sentencing, stressing Glynnis' background and the obstacles she had overcome, and her success as a parent in spite of her own upbringing. Court services were sufficiently resourced to arrange a referral for treatment through her band, and helped Glynnis find suitable care for Destiny while she got treatment. The two were reunited a few months later, and Glynnis was able to find employment, while supported by ongoing narcotics counseling.

Remember Eugene?

He is schizophrenic and waiting to be evicted from his apartment. No one can help him.

Imagine instead that BC has an access to justice commissioner who has been reviewing the Access to Justice metrics report released last year. He is concerned about the lack of access to legal services for citizens with mental health issues. The commissioner has engaged the health sector and the justice sector to create collaborative services. Now when Eugene calls his income assistance worker, she tells him about a new community help centre in his town, staffed by a social worker, nurse and paralegal. The paralegal helps Eugene negotiate an arrangement to repay the landlord what he owes over the next three months. The social worker helps him to manage his money better, and use the food bank regularly until he's out of trouble. The nurse helps with his medication, and together the nurse and social worker realize that Eugene isn't taking advantage of subsidies available for medication. With the additional support that he now receives, Eugene is more secure financially, and doesn't worry about money all the time.

Remember Dave?

Dave couldn't afford legal services related to custody matters and a no-contact order placed on him by his spouse. As a result, he does not have dependable access to his young children and he is aware that his wife has a substance abuse problem.

Imagine instead that Dave called a number he saw at the bus shelter, for a clinic run by law students. The student said that with the help of his supervising lawyer, they would represent him on the no-contact order. They suggested that Dave contact the courthouse to enroll in a diversion program that included six hours of counseling for each parent in a custody dispute. There was a cost for this, related to your income, but Dave was willing to pay, as he was anxious to get counseling instead of going to court. After individual counseling, Dave and Mona were seen together. They agreed on a shared custody arrangement with each of them having the children a week at a time.

Dave agreed to pay child support after he accessed a free computer at the local law library where he could look up the Child Support Guidelines. He went back to the student law clinic to have his custody and support terms reviewed before he signed the final agreement.

Remember Arthur?

He was the businessman who represented himself in family court proceedings. He had difficulty navigating the court forms and the clerk's office would not help him. Exhausted and overwhelmed, he settled with his wife's lawyer, but had no idea if the deal was fair.

Imagine instead that when Arthur started in business for himself, he took a basic legal information course from the local community college. He also signed up for legal expense insurance, which provided some capped services for family law.

When he was served with his wife's request for university expenses, he contacted the insurance company. The lawyer provided by the insurance plan said she would prepare all the paperwork for his defence, and after that, he could represent himself or he could retain a private lawyer on a limited scope retainer.

Arthur then researched the legal issues online. He had an elementary idea of the issues, but knew he needed more assistance. He called a family law firm and asked for help on a limited scope retainer. He met with a family law lawyer who simplified the legal concepts for him and advised him of the appropriate range of support that he should pay based on the facts. With this knowledge, Arthur went to court alone. His ex wife's lawyer arrived and spoke to him about a possible settlement. Arthur was able to negotiate a more equitable deal than was first proposed.

PART IV

project description, acknowledgements and conclusion

Project description, acknowledgements and reflections

The CBA's Access to Justice Committee was created in September 2011. The Committee members were:

Melina Buckley, Ph.D., Chair

John Sims, QC, Vice-Chair

Sheila Cameron, QC

Amanda Dodge

Patricia Hebert

Sarah Lugtig

Gillian Marriott, QC

Gaylene Schellenberg, Project Director

Each member came to this work with different personal and professional backgrounds and perspectives. Rather than being a hurdle, these differences have enriched our discussions, and our efforts to tackle the wicked problem of reaching equal justice.

The Committee would like to acknowledge the help and encouragement it has received throughout the Equal Justice Initiative.[217] The Committee is deeply indebted to Gaylene Schellenberg for her hard work and dedication to this initiative. She had the difficult job of turning our ambitious goals into the reality and her invaluable assistance did in fact make this vision possible.

In launching the Equal Justice Initiative, the Committee took note of the significant efforts and resources currently devoted to improving access to justice, from so many different and influential factions of the legal profession and justice system.

Given the scope of these efforts, more substantial progress on the issue nationally could be expected at this point, but instead they seem plagued by a lack of coordination, strategic framework or common vision. The willingness to embrace change without leadership or coordination of the various efforts has sometimes resulted in moving ahead on promising ideas, without always considering fully the ramifications and the underlying tough questions that they might suggest.

The Committee first identified four major barriers in the way of substantive progress:

- shortfalls in information;
- lack of political will and public awareness of the issues;
- insufficient coordination and collaboration; and
- absence of tools to measure progress or define what we mean by equal justice.

The Committee then developed three main strategies to address what we perceived as those main barriers to progress.

- First, we planned a consultation and research strategy, to create the knowledge foundation for our initiative.
- Second, we planned to use what we found in the first strategy to change the conversion about equal justice – to ask the hard questions and pull people out of acting in silos toward a more common goal.
- Finally, we would find ways to build ongoing collaboration and coordination, to enable those who are committed to equal justice to work together more effectively and productively.

The Committee began by informing the legal profession and justice system participants describing the initiative. Judges, government officials and politicians, law societies and law foundations, legal aid leaders and many more offered help and support. They provided ongoing feedback as work progressed. The Committee also consulted with justice system participants through conferences, and meetings of CBA Council. This engagement from all justice sectors bodes well for achieving an ambitious but possible innovation agenda.

[217] The CBA Equal Justice initiative has occurred in two phases. The first phase, called Envisioning Equal Justice, involved research and consultations to develop a common vision of equal justice, one that includes the perspective of people living in marginalized conditions. The second phase is called Reaching Equal Justice, where a strategic framework for action to lead to that vision was developed.

Different forms of consultation were used for other specific purposes. To inform thinking about how to define 'access to justice', and what 'equal justice' means for the people who need justice services, community consultations took place in Nova Scotia, New Brunswick, Québec, Ontario, Saskatchewan and Alberta, with different communities living in marginalized conditions. Local lawyers and community partners were instrumental in helping to organize and facilitate these consultations, and linking the Committee to community members who attended and shared their often painful experiences.

The Committee is grateful for the many individuals and organizations who arranged and participated in these community consultations including:

Calgary

- Eileen Bell and Barbara Poole, Discovery House Family Violence Prevention Society
- Gillian Marriott and Cecilia Frohlick, Pro Bono Law Alberta

Maritimes

- Michelle Poirrier, Phoenix Youth Programs (Halifax)
- Rhonda Fraser and Betty Kalt, Chrysalis House (Kentville)
- Karen Hudson, Kai Glasgow, Megan Longley and Linda Rankin, Nova Scotia Legal Aid Commission
- Sheila Cameron, Actus Law Droit, Moncton
- Chantal Landry, YWCA Moncton

Montreal

- Garage a musique, Centre de pédiatrie sociale en communauté de Hochelaga-Maisonneuve
- Hélène (Sioui) Trudel, Alliance droit santé fondation du Dr Julien

Saskatoon

- Alison Robertson and Nicole Braun, Saskatoon Food Bank and Learning Centre
- Candice Kloeble and Brenda Warnke, SIAST
- Deidrie Lavallee, Saskatoon Tribal Council Justice Program
- Amanda Dodge, Community Legal Assistance Services for Saskatoon Inner City (CLASSIC)

Toronto

- Beverley Dooley, Canadian Hearing Society
- Lucy Costa, Empowerment Council
- Ayshia Musleh, Ethno-Racial People with Disabilities Coalition of Ontario
- Edgar-Andre Montigny, Ivana Petricone and Yedida Zalik, ARCH Disability Law Centre

In addition to the Community Consultations, Pro Bono Students' Canada identified a group of committed law students, and they conducted video interviews with people 'on the street' from across Canada. We combined this footage with more offered by the Canadian Forum on Civil Justice. Town hall consultations have been held in recent years in British Columbia, Manitoba and Ontario, and the results were also used by the Committee. Legal aid lawyers, community legal workers, and paralegals were surveyed for their views on current issues, and legal aid plans were very helpful in this effort, both in commenting on the survey and in ensuring its broad dissemination.

Five research and discussion papers were prepared and circulated broadly to justice system participants for comment. Each paper addresses a "building block" of reform, an area that the Committee identified as requiring further exploration and debate:

- access to justice metrics;
- national standards for legal aid;
- legal aid service delivery innovations;
- the tension between pro bono and legal aid and
- underexplored options for ensuring access to justice for the middle class.

(see: www.cba.org/cba/equaljustice/about/project.aspx)

Throughout the preparation of the discussion papers and the consultations, several law students, social science students and young lawyers helped by developing background reports or conducting interviews. The Committee acknowledges these contributions by Shahdin Farsai, Elena Haba, Stefanie Carsley, Mieka Buckley-Pearson and David Parry (research and writing) and Alexis Chernish, Christina

Kwok, Elina Nakhimova, Faiza Hassan, Irene Fatehi, Theresa Kennedy, Lindsey Cybulskie, Chris Clarke, Marie-Christine, Gariépy-Assal, Samantha Clarke, and Will Goldbloom (interviewers). We received useful feedback on the discussion papers both through written comments and at workshops at the National Pro Bono Conference in Montreal in November 2012 and the Summit.

These various strategies came together at the Envisioning Equal Justice Summit in Vancouver on April 25-27, 2013. The event brought together about 250 lawyers, community advocates, judges, paralegals, law foundation and law societies, and members of the public. As we hoped, it marked a turning point to start a different more productive and coordinated conversation about access to justice, where justice system participants work together to solve the challenge of equal justice.

The Summit asked participants to leave their "day jobs" at the door, and tackle the big challenges in a new, more collaborative and collegial way. At the closing plenary, all participants worked in small groups to offer their best advice for going forward. The Summit was the focal point of the Committee's strategy to change the conversation about access to justice.

The Summit would not have been possible without the generous contributions of more than 90 plenary and workshop speakers, including international guests from Australia, the Hague and the US, and the Summit sponsors: Law Foundation of British Columbia; Law Foundation of British Columbia/ Legal Services Society Research Fund; DAS Canada; CBA BC; Alberta Justice; Law Society of British Columbia; Law Society of Upper Canada; and Actus Law Droit. Special thanks are due to Heather Block and Hillary Gair, and a raft of volunteers for facilitating the opening night poverty simulation, and to the Board of the United Way of Winnipeg for supporting this initiative.

We would like to express our gratitude to all Summit participants who came together to have a different, renewed conversation about equal justice at this unorthodox event. From the simulation on the opening night, where those present were asked to "live" a simulated month in poverty (in an hour), requiring them to provide for their families and negotiate a maze of social services with limited resources, through to the closing plenary, people engaged. Here are some comments following the event:

> "I was blown away by the level of engagement and the 'buzz' of meaningful conversations in every corner of the meeting, eating and even washroom spaces! You attracted people from so many different jurisdictions, with such interesting perspectives and openness to hearing others. It was an injection of much-needed energy into the ongoing fight for equal access to justice, and I know it will have an ongoing impact for years to come. " ***Caroline***
>
> "Congratulations on bringing it all together. It has momentum, optimism, ideas for action, engagement - everything you need to carry on with renewed hope." ***Vicki***
>
> "Right from the opening simulation through the few days until the dinner last night I thought it was a wonderful event. It was very motivating to see such a proportion of the profession (and those associated with it) devoting so much time and effort to trying to achieve what you are trying to." ***Geoff***
>
> "I don't think I've ever been in a place and surrounded by so many people where I felt like everyone was thinking on the same page, open to ideas, and willing to work together." ***Danielle***

The final strategy is to consider how to encourage greater collaboration and coordination of efforts moving forward. In addition to integrating a collaborative approach throughout its work, the Committee has participated in three ongoing national projects: as a member of the National Action Committee on Access to Justice in Civil and Family Matters as well its Steering Committee and several working groups; the Canadian Forum on Civil Justice Costs of Justice Project; and Professor Julie Macfarlane's National Study of Self-Represented Litigants.

In preparing this report, the Committee again

reached out to the broader justice community for assistance. We asked ten external reviewers to read a draft of this report and again were immensely rewarded by the encouragement and support offered by these busy individuals. We thank Dr. Ab Currie, Justice Thomas Cromwell, Professor Doug Ferguson, Allan Fineblit Q.C., Karen Hudson Q.C., Sharon Matthews Q.C., Professor Mary Jane Mossman, Danielle Rondeau, Allan Seckel, Q.C. and Erin Shaw. Their comments were instrumental in assisting us to clarify and fully develop this strategic framework.

The Committee is also grateful for the editorial assistance provided by Tamra L. Thomson, and administrative and technical support, particularly from Lorraine Prezeau and Denise Poulin, all at the CBA National Office. Finally, the Committee wants to acknowledge, with appreciation, the financial support it has received throughout the Equal Justice Initiative from the CBA and the Law for the Future Fund.

Going forward, the Committee will continue with its main strategies of working with others to build the knowledge base as a foundation for effective change, changing the conversation by engaging more directly with the public about their justice system, and seeking ways to support collaborations at the national and local levels. This report calls for the CBA to be an access to justice leader and we are preparing an action plan to make this goal a reality.

The Committee has styled this report as an invitation to envision and act and it is therefore fitting to end it with personal reflections on how this initiative has changed our perspectives and commitment to "think systemically, act locally".

Changing the conversation: this emerged as our overarching theme at our very first Committee meeting. Our two-year journey of reflection, hard work and reaching out to the justice community has me more convinced than ever about the absolute need for novel and creative approaches to generating dialogue, enlarging conversations and finding ways to build bridges between conversations and connecting thoughtful communication to thoughtful action to achieve equal justice. What I treasure most about the Summit was the way that we, all of the participants, created an energized space where the commitment to equality and positive change reverberated in intimate conversations between participants, around the tables, and in the larger workshop and plenary groups, in formal sessions and in the nooks and crannies in between. I came away thinking – what steps can we take to facilitate this conversation on a larger, more inclusive scale? I am committed to thinking systemically about a national conversation on reaching equal justice and to facilitating local dialogue within it. I am hopeful that this report is a first step, but mindful of the reality that reports don't make change, people make change.

Melina Buckley

In 2013, the New Brunswick family court system had become increasingly mired in delays, leaving us with a system where a date for a first appearance for custody, child support and spousal support could take 7-8 months. As I watched the system fail to respond to the needs of its clients, my faith in the process diminished.

After the Summit, I returned to New Brunswick with a renewed hope for real change. The feeling from the 200+ people in the room at the closing of the summit was overwhelming; there was a palpable desire for a paradigm shift in the way we resolve legal problems in Canada. But I was still left with the 'what now?' question – how do I help my clients right now, while the bigger change issues get worked on for the next number of years.

I recalled the "think systemically, act locally" mantra from the summit. I then set in motion a series of meetings that ultimately resulted in a local pilot project for September 2013 so simplified motions for custody, child support and spousal support will be heard within 6-8 weeks of filing. The project has been announced to the local bar and we are waiting with anticipation for its commencement.

Sheila Cameron

Sometimes the amount of work to be done to effect change seems overwhelming. After the Summit, though, it felt as if we were all speaking with one voice and that much more seemed possible. The change, for me, was keeping my eyes open for every opportunity to improve access and seeing how every community member was a potential agent of change. At a recent meeting with Queens' Bench Justices on another issue, we discussed our court's triage project and found we could open discussions that could better coordinate these developments with other parties in the process. At a charity lunch, an executive of a large local business was telling me about an initiative they were doing to promote services for mental health. After a short discussion, we found that I could introduce them to partners so they could expand their project to assist in accessing justice for more members of the community with mental health issues. The opportunities are there, the partners are there and they are willing. It may take only a few moments and some knowledge (thinking systemically!) to create more champions in our local communities.

Patricia Hebert

I came away from the Summit - and from our work on this Report - thinking about partnerships. I am convinced we can work together to achieve equal access once we have a common vision of where we want to go and how we can get there. Just last week, our Law Society's CEO had a great suggestion for a public-private partnership to deal with the family law cases our student legal clinic must turn away due to conflict of interest. The clinic is now exploring this option. If we continue to think creatively about potential partnerships and opportunities for mutual support, within a common vision, there is so much we can do.

Sarah Lugtig

My, "take away" both from the committee's work and the Summit echoes Sarah's to a certain extent in that I agree that it is through partnerships and collaborative efforts that we will be able to move forward to addressing the access to justice issues that we face. However, as someone involved in the "local" action, I also was reminded that it is crucial that we look to the bigger picture and that we encourage and reinforce the necessity of the "system" changing to address the changing needs and requirements of our society. The Summit was a crucial piece to this as it brought together individuals who I don't believe had ever put it together that they "all" need to be at the table. The energy and enthusiasm of the Summit moved people in a way I don't think they expected and that was very exciting and encouraging. I came away from the Summit thinking that we could "actually" achieve our goals and that we could positively impact the access issues. It was inspiring and to see that it has already led others to look at opportunities demonstrates that we can move forward and effect change. Thank you to all of you for including me on this journey!

Gillian Marriott

The main thing that I will take with me from our committee's work and the dialogue at the Summit is the primacy of inclusivity. It's absurd, really, to think that we could develop and run an effective system without consulting the system's users. More than just enhancing our effectiveness, listening and responding to the voices of the people we are attempting to serve is about authentic relationship building. As our Elder taught us, maintaining power imbalances through one-way service provision is unsustainable; there must be recalibration to incorporate reciprocity. I think this is an important, redemptive message for all of us in the justice system; I hope our Committee's report stimulates thinking and action toward inclusivity.

In terms of "acting locally", CLASSIC has made a commitment to host community conversations each year, multiple times throughout the year if possible, to hear the community's voices: identifying their priorities for justice initiatives and their recommendations to improve our service delivery. In my Masters studies this fall, I will be focussing on authentic partnership with marginalized communities toward meeting their social justice goals.

Amanda Dodge

I feel I left the Summit with new eyes. The optimism and renewed energy of those at that conference helped me see that change actually is possible. We don't have to accept – we shouldn't accept – the barriers that for too long have denied effective justice to so many people. I am more confident than ever that, together, we can make real progress in improving access to justice.

John Sims

This Committee may have arrived at our first meeting expecting that this would be 'just another project', 'another report', but I think we soon shared a feeling that we had a special opportunity - to imagine how our civil justice system in Canada might work to be truly available to everyone. I've come to recognize the importance of taking the time to develop that vision, and a solid plan for achieving it, so people have a sense that their work is contributing in a coordinated way toward a common goal. The Summit was a major test – could we encourage others, many worn down from years of trying, to join us in this optimistic exercise? It worked, people came and joined in the spirit of the event – it was amazing and energizing. Whether our suggestions here are right or wrong, more likely partially right, partially not, I hope they will be received as a sincere attempt to offer our ideas on how we can move forward differently to see real progress toward equal justice.

Gaylene Schellenberg

PLEASE LET US KNOW WHAT YOU WILL DO TO CONTRIBUTE TO EQUAL JUSTICE!

Resources

All material developed as part of the Envisioning Equal Justice initiative is available on the CBA website. For ease of reference these documents are listed here:

"Building Blocks" – five research and consultation projects:

- *Access to Justice Metrics* (www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf) looks at the potential of measurement and evaluation tools, and more precise definitions, to improve access to justice.
- *National Standards for Publicly Funded Legal Services* (www.cba.org/CBA/Access/PDF/TowardNationalStandards.pdf) and *Future Directions for Legal Aid Delivery* (link) deal with different challenges to providing publicly funded legal services. National Standards looks at principles and a sound policy underpinning to ration those services.
- Future Directions for Legal Aid Delivery (www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery.pdf) emphasizes the need to use existing knowledge about people living in poverty and their legal needs when innovating legal aid delivery.
- "Tension at the Border": Pro Bono and Legal Aid (www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf) considers reasonable parameters for the profession's voluntary efforts, and proposes a continuum of responsibility between public funders, pro bono efforts and private market forces to ensure essential legal services are provided to everyone. A summary of feedback can be found at (www.cba.org/CBA/Access/PDF/Summary_Feedback.pdf).
- Underexplored Alternatives for the Middle Class (www.cba.org/CBA/Access/PDF/MidClassEng.pdf) proposes a broader range of legal services at different price points, giving the middle class a greater range of options for legal help.

Envisioning Equal Justice Project Description

- **Introductory letter to Justice Community, with project description** http://www.cba.org/CBA/equaljustice/pdf/Access%20to%20Justice%20public%20letter%20Generic.pdf

Background research reports

- Shahdin Farsai, "Pro Bono Annotated Bibliography"
- Elena Haba, "Selected Inventory of Initiatives to Improve Access to Justice for the Middle Class"
- Stefanie Carsley, "Innovations in Legal Aid Delivery"
- Mieka Buckley Pearson "Annotated Bibliography"
- Amanda Dodge, Envisioning Equal Justice *Community Consultation* report (See also, Community Engagement Framework below)
- David Parry, Legal Aid Survey Results http://www.cba.org/cba/equaljustice/PDF/CBA_Survey_Results.pdf
- Summit agenda
- Summit summary

Appendix A

Community Engagement Framework: Practical guidance for initiating dialogue with community members about the justice system.

This framework was developed by representatives of the Committee through a collaborative process in Saskatoon in 2012. It was pilot tested in several sites and then employed in 13 consultation sessions held in 2012 and early 2013.

Ethical Framework

We recommend implementing the following ethical principles in community engagement:

- **Honour the values of inclusion and collaboration, affirming the diversity of the community**

  o Design and execute the community engagement by involving community members themselves. Ensure that the conversation is framed by them.

- **Honour the values of reciprocity and empowerment**

  - Recognize and compensate participants for their time and contributions in genuine and meaningful ways.

  - Look for ways to empower and equip the participants and their communities through this process.

- **Honour the value of humility**

  - Acknowledge that the participants have knowledge and a voice.

  - We are seeking to hear it because it has value.

- **Honour the value of equity**

  - Maintain an awareness of, and take steps to avoid as much as possible the imbalances of power between facilitators and participants.

- **Respect the dignity, rights and interests of the participants**

  - Ensure free, informed and ongoing consent of participants.

  - Be non-judgmental, accepting and respectful of the participants.

Practical Steps

A first step will involve partnering with community-based organizations, such as food banks or open door societies. Look for organizations that are trusted by, and provide a safe space for community members.

Generally, engagement will simply involve conversations with community members. One-on-one conversations are possible, but group discussions are likely more effective and efficient.

Community discussions should not be solely facilitated by a member of the established legal community (e.g. lawyer, judge, government representative), as that may inhibit or prevent candid responses from the participants. To elicit the most authentic feedback from community members, the discussions should be facilitated by, or at least co-facilitated by, a community representative. Ideally, the community representative will be someone whose identity and experience reflects that of the group being engaged. Alternatively, the community representative will be someone who works closely with the community and is known and trusted by the community members. This could be someone who works at the community-based organization being partnered with, and/or is a respected leader in the community.

To promote participation, it is best if the discussions are informal, round-table style, and the groups are relatively small (10-12 members maximum). Larger, town-hall meetings can also elicit authentic feedback, however with a large group many attendees will be too shy to participate.

Prior to the discussions, consult with community leaders about cultural norms and attitudes within the group, and any relevant protocol and spiritual practices followed by the group.

At the outset of the discussions, informed consent will need to be obtained, ideally in writing with a plain language form. The informed consent should include:

- A statement as to:
  - the purpose of the discussion
  - who is conducting the discussion
  - its expected duration
  - the nature of anticipated participation
  - how the participants' feedback will be used
- A comment as to any mutually beneficial goals, including and in particular:
  - how it may help participants and their communities
  - how it may enhance the capacity of the participants' communities
  - how it may address long-term community needs

- Assurance of anonymity:
- Assurance of participants' ability to withdraw from the consultation at any time without prejudice to their entitlements

It is best to read and explain the provisions of the informed consent form orally, so to address any literacy challenges. At the time consent is considered, the co-facilitators should speak to how these consultations may benefit the community members and how they can access data recorded from the discussion.

During the discussion, the facilitators should focus on listening, not talking. They should be mindful of the group's protocol and practices, and be alive to ongoing dynamics in the group. Feedback may be captured through note-taking or recording the session. Ensure that the participants are aware of, and consent to how their feedback is being captured, and whether their identity will be anonymous.

There are practical ways to incorporate the principle of reciprocity. It is important to provide refreshments for participants during the discussion, as well as providing honoraria of some kind (e.g. cash, gift card) to the participants, to reflect the value of the time and feedback they are providing.

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INFLUENCE. LEADERSHIP. PROTECTION.

The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants

Final Report

May 2013

Dr Julie Macfarlane

Supported by grants from the Law Foundation of Ontario, the Law Foundation of Alberta, and the Law Foundation of British Columbia/ Legal Services Society of British Columbia

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Thanks and acknowledgements

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Special thanks are owed to the Project Advisory Board – Professor John Manwaring (Chair), Justice John Rooke, Mary Anne Docherty, Mary Butterfield, Melina Buckley, Dr Noel Semple and Sherry MacLennan – as well as John Greacen, Perry Dunmore, Gillian Dunmore and Bernie Mayer, for their thoughtful input to the draft report and recommendations.

I appreciated the time and expertise provided by the justice ministries in the three participating provinces who worked with me to identify the study field sites (Anne-Marie Predko and Maretta Miranda in Ontario, Edie Delanghe in Alberta, and Irene Robertson and Lisa Nakamura in British Columbia.)

To the more than one hundred court staff and service providers who sat down to be interviewed for this sudy, and the 259 self-represented litigants who participated in interviews and/or focus groups interviews – I sincerely hope that I have been able to accurately capture your perspectives here.

I am extremely grateful to my Project team – Raman Pandher, Lois Li, Kyla Fair and Cynthia Eagan – for all their hard work and dedication to this undertaking. Thuy Bin-Shiu dealt with many aspects of the Project finances, and fielded innumerable calls from people looking for “that Ontario professor doing the study.” Finally, Sue Rice, the Project Co-ordinator, has been absolutely pivotal in creating the conditions for this research and providing organizational and creative support throughout. This really was a team effort - thank you all.

Julie Macfarlane, Kingsville, April 2013

EXECUTIVE SUMMARY

Part 1: The study

1. Methodology

The goal of this qualitative study was to develop data on the experience of self-represented litigants in three Canadian provinces: Alberta, British Columbia and Ontario. Field sites in each province were used as primary data collection points, but SRL respondents also came via social media and from all over each province. In addition, service providers (court staff, duty counsel, pro bono lawyers, staff in community agencies working with SRL's) were included in the sample. Most respondents (almost 90% of SRL's and 100% of service providers) participated in an in-depth personal interview; the remaining 10% of SRL's participated in a focus group.

2. Data sample

259 SRL's from the three provinces participated in either an in-depth personal interview or a focus group. Including follow-up interviews, a total of 283 interviews were conducted with SRL's. In addition 107 interviews were conducted with service providers (defined above).

3. SRL demographics

The characteristics of the SRL sample are broadly representative of the general Canadian population. 50% were men and 50% were women. 50% had a university degree. 57% reported income of less than $50,000 a year and 40% (the largest single group) reported incomes of less than $30,000 a year.

60% of the SRL were family litigants and 31% were litigants in civil court (13% in small claims and 18% in general civil). 4% were appearing in tribunals (the remainder were unassigned). The majority of family SRL's were filed in the divorce court (Supreme Court, Queen's Bench or Superior Court) and a smaller number in provincial family court.

Part 2: Decisions over self-representation

4. Motivations

By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel.
In addition, some SRL respondents were dissatisfied with the legal services that they had received earlier in this case when they were represented by counsel. Their complaints (in their own words) included: counsel "doing nothing"; counsel not interested in settling the

case; difficulty finding counsel to take their case; counsel not listening or explaining; counsel made mistakes/ was not competent.

53% of the sample had been represented by counsel earlier in their action. Three quarters of these had retained a private lawyer, and the remainder had been legally aided, but this was now discontinued. These respondents had exhausted their available resources and were often resentful that despite significant expenditures on private legal services, they were still not at the end of their action. Past experience with legal counsel in an *earlier* case or legal transaction was not dispositive in their decision to self-represent.

Around one in five SRL respondents expressed a personal determination to take their matter forward themselves, as well as acknowledging financial reasons to self-represent. A small number – around than 10% of the sample - expressed confidence from the outset that they could handle their case themselves and saw retaining legal counsel as a poor use of resources when relatively little money was at stake.

5. The expectations / experience disconnect

Some SRL's began with a reasonable sense of confidence; others began with trepidation. However within a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.

Part 3: How SRL's engage with the justice system

6. SRL's and court forms

While on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRL's often find they have made mistakes and omissions. The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/ judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress. These widespread difficulties result in frustration for SRL's and additional burdens on court personnel, including registry staff and judges.

There has been some progress made towards developing user-friendly and simplified court forms, but it is far too little. A number of court staff commented that they (and some lawyers) also had difficulty completing complex and lengthy court forms and keeping up with constant changes. In her assignment to apply for a divorce in the three provinces (The Divorce Applications Project), Kyla Fair also found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.

Court guides are an important step towards assisting SRL's complete forms and understand court procedure but these too are often written in a confusing and complex

manner. In her "audit" of three sample Court Guides, Cynthia Eagan found problems very similar to those highlighted above by SRL's regarding court forms (see (7) below).

7. On-line resources for SRL's

A large amount of the assistance presently made available to SRL's by the courts (and some service providers) is in the form of on-line information and related technologies (on-line forms, informational websites, and some video material). New initiatives in programming and support for SRL's in both Canada and the United States are largely based on the premise that access to the Internet can promote access to justice for SRL's. While many of these initiatives are in relatively early stages of development, this study suggests there are significant limitations and deficiencies to this material. On-line resources often require some level of understanding and knowledge in order to be able to make best use of them.

SRL's who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they began to try to work with what is presently available on-line. In particular, they identified the following weaknesses: an emphasis on substantive legal information and an absence of information on practical tasks like filing or serving, advice on negotiation or a strategy for talking to the other side, presentation techniques, or even legal procedure; often directed them to other sites (sometimes with broken links) with inconsistent information; and multiplicity of sites with no means of differentiating which is the most "legitimate". Cynthia Eagan found many of the same problems when she audited a selection of on-line Court Guides (The Court Guides Assessment project). Cynthia also highlighted the reading levels of some of this material (as high as 13.5), and the heavy use of jargon and unexplained legal terms.

The study data also shows that no matter how complete, comprehensive and user-friendly (standards we are still far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced on-line technologies can be an important component of SRL programming – for example the development of sites developed specifically for SRL's making use of interactive technology - but cannot provide a complete service.

8. Legal information for SRL's

It is clear that many SRL's are eager to access further and better sources of legal information. SRL's in the study frequently described themselves as seeking "guidance" rather than "direction". This suggests that the expansion of legal information services (along with the clarification of the legal information/ legal advice distinction, below) has the potential to relieve pressure on more costly public legal services such as duty counsel.

The most common source of legal information for SRL's are court staff, primarily those working at the registry counters but also staff working in court programs such as Pro Bono Ontario, FLIC & LinC in Alberta, and the Justice Access Centres in British Columbia. These excellent services are not always clearly "signposted" in the courthouse or on the

courthouse website; as a consequence some SRL's appeared to have missed the opportunity to use these programs (this was also a problem for mediation services; see below at (9)). SRL's consistently described staff working in these locations as the "most helpful" person they encountered during their SRL experience. However they also complained about the restrictions on the time and scope of information that these staff can offer, because of the limitation on their providing "legal advice" (which results in substantial personal discretion, which some SRL's are better at exploiting than others) or because of the sheer volume of people they are dealing with.

The distinction between legal information/ legal advice which lies at the heart of the job descriptions of staff working on the court counters and in information services is consistently complained about by both SRL's and staff, as at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff who are required to make constant determinations of how much information they can provide to frustrated SRL's. This leads to inconsistent applications and creates a barrier between SRL's and certain basic information that may be construed as "legal advice".

Court and agency staff providing legal information to SRL's described an almost identical set of frustrations and challenges to SRL respondents. They also accurately identified the primary frustrations and challenges of the SRL's. Court and agency staff are working under enormous pressure in dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they are often poorly trained and remunerated.

9. Other support & resources for SRL's

Service providers universally recognized the frustrations of SRL's as a source of pressure on the justice system in general, and on court staff and judicial officers in particular. Improving the experience for SRL's by developing low cost support services for them has the potential to both improve the efficiency and enhance the morale of the entire justice system. SRL's talked about a variety of "non-legal" services that they needed but either were not currently available to them, or did not meet their needs.

SRL's particularly identified the need for orientation and education (aside from legal training) to enable them to better anticipate and plan for what is involved in self-representation. While this study did not evaluate the effectiveness of existing mandatory education programs (eg Parenting After Separation, MIPS), it is clear that many SRL's are looking for different forms of educational workshops to prepare them for the SRL experience. In particular, they are asking for practical tools and skills that they can apply in practice.

SRL's also described a need for one-on-one assistance in the form of "coaching" (eg document review, answering questions) which support them in handling their own case but also provide checks, as well as moral support. For many SRL's who wish to remain in control of their own case, coaching would be an important resource.

A significant number of SRL's say that they were never offered mediation, and/or do not know what it is. This is a clear gap that needs to be urgently addressed (for example in educational workshops and better publicity). Some SRL's were nervous about participating in mediation, and especially where there was a lawyer representing the other side. Some SRL's who were eager to resolve their case expressed frustration that the Bench did not exercise greater pressure on a recalcitrant opposing side to come to mediation.

At present many SRL's bring friends and/or family members with them to the courthouse for moral support, especially on appearance days. There is a great deal of confusion and inconsistency surrounding the role of friends or supporters of SRL's, as well as the potential for an unrepresented person to being a McKenzie friend into the courtroom. This lack of clarity and the wide exercise of discretion by some judges is creating resentment and confusion

Finally, many SRL's do not have access to the types of office facilities that they require in order to represent themselves, including printing services, photocopying facilities and even computers. Some services are presently provided by counter staff (informally) or overburdened court-based programming.

Part 4: SRL's, Lawyers and Judges

10. Delivering legal services to SRL's

This study shows clearly (and consistent with other recent studies) that the primary reason for self-representation is financial. Many SRL's find that the legal services that they can realistically afford to pay for, and/ or prioritize as an area in which they want assistance, are simply not available to them other than in a traditional legal services model. Financial retainers and services billed at a rate of $350-400 an hour are beyond the means of many Canadians. 53% of the SRL sample who were willing to pay for counsel at first later ran out of funds and/or exhausted their willingness to continue to pay for legal services.

86% of the SRL sample sought legal counsel, either in the form of private legal services of legally aided/ *pro bono* assistance. SRL's are not saying that they do not want lawyers to help them – but that the way in which lawyers are currently offering their services does not fit within their budget. Some are also saying that they prefer to have more control over the progression of their case and resist the traditional assumption of professional control by their lawyer.

Other complaints made consistently by some SRL's who had previously been represented in this action included: counsel "doing nothing", and no progress being made; counsel being disinterested in settlement possibilities and processes (including mediation); counsel not listening to them or consulting them in decision-making; and a sense that their lawyer was insufficiently familiar in the relevant area of law to be effective as counsel. A further complaint was that lawyers were not truly accountable to the public, and that

efforts to question their competence were often not taken seriously by the courts or the regulators.

When asked in interviews what they would ask a lawyer to do for them now, assuming that they could be provided with an affordable and competent counsel, some SRL's said that they were no longer interested in working with a lawyer. This was usually the result of a negative experience with a legal representative earlier in this action, and their determination now to manage their case themselves. Many more SRL's responded that they would prefer to have legal counsel, if this was affordable, offered them tangible value-for-money as they understood this (ie expertise they lacked and the prospect of a better outcome), and would allow them to remain in control of major decisions about the direction and conclusion of their case.

While many SRL's appreciated the assistance they received from duty counsel or other *pro bono* legal services, the study also found dissatisfaction with the most common model of delivery ie the summary legal advice model. While this model works well for some SRL's, others find a time limited opportunity to speak with legal counsel leaves them more confused, and even panicked, than before. At the same time, court duty counsel models are in serious overload. For both reasons, there is a need for reassessment of how to offer the maximum value to the maximum number of SRL's via the summary advice model.

Respondents frequently questioned the limitations placed on the provision of assistance by para-legals, especially in relation to family matters.

Finally, many SRL's sought some type of "unbundled" legal services from legal counsel; for example, assistance with document review, writing a letter, or appearing in court. Relatively few were successful in accessing legal services on this basis despite a sustained effort. This was perplexing to many respondents, who could not afford to pay a traditional retainer and envisaged that they could undertake some parts of the necessary work themselves, with assistance.

11. Court appearances and interactions with judges

The influx of SRL's into the family and civil courts has dramatically altered the judicial role. Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients. This is a huge sea change that some members of the judiciary are clearly adjusting to better than others. The study data is replete with SRL descriptions of negative experiences with judges, some of which suggest basic incivility and rudeness. There are also some examples of judicial interventions such as providing advice regarding court procedure, coaching on presentation, and progress towards settlement, which attract positive comments from SRL's. Other studies show that judges are concerned about showing "favour" towards SRL's and find themselves in a difficult position when one side is represented by counsel, and the other is not.

Most SRL's saw numerous judges during the progress of their case, and many complained that this created inconsistencies and required them to re-establish their credibility at each

appearance. Very few SRL's experienced single judge case management but those who did were far more satisfied with their overall experience.

There was a very widespread sentiment amoung SRL's that judges are not truly accountable and that the current mechanism for bringing forward a complaint against a judge is highly protective of the judiciary.

12. Social impact and consequences

The study data illustrates a range of negative consequences experienced by SRL's as a result of representing themselves. These include depletion of personal funds and savings for other purposes; instability or loss of employment caused by the amount of time required to manage their legal case; social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming; and a myriad of health issues both physical and emotionally.

The scale and frequency of these individually experienced consequences represent a social problem on a scale that requires our recognition and attention. The costs are as yet unknown.

Preliminary Recommendations based on these findings are included at the end of this Report.

Part One: The Study and the Sample

1. Study Methodology

a. Background

There have been dramatic increases in the numbers of people representing (self-represented litigants or SRL's) themselves in family and civil court over the past decade, across North America. In some family courts this number now reaches to 80% and is consistently 60-65% at the time of filing.[1]

The impetus for this study came from these startling statistics. It also came from two other realizations following review of the existing literature and research on SRL's in North America and elsewhere. The first was that the majority of this literature documented the perspectives and views of judges and lawyers (ie system insiders and experts). Judges and lawyers were not included in this study not because their perspectives are not important and valuable, but because they have already been the subject of several other major studies[2]. In contrast, the perspective of SRL's themselves and their actual experiences is mostly absent from other studies. Those studies that have gathered information about SRL's are either closed-question surveys (often focusing on demographics) and/or small samples[3]. As a result, the SRL experience to date has been largely a subject of speculation rather than empirical data.

A second realization was that policy is being made on the basis of very little empirical information from SRL's about their needs and challenges in navigating court processes. An initial review of SRL programming revealed that the focus of most new initiatives being developed across North America is to offer SRL's more on-line resources – forms that can be completed on-line, on-line websites and information. While these initiatives are an important part of responding to the phenomenonal growth in the number of SRL's, it seemed questionable that such a heavy and singular emphasis should be placed on these types of resources, particularly in the absence of SRL input on what services and resources they actually needed and wanted. It seemed to be time to focus our attention on SRL's themselves, and their own accounts of their experiences, on the basis that "(P)ublic views…are one factor that needs to be considered when thinking about policy change." [4]

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[1] For further details, see (3)(a)&(b) below

[2] For example, Bertrand, L. Paetsch, J. Bala, N. & Birbaum, R. "Self-Represented Litigants in Family Disputes; Views of Alberta Lawyers" Canadian Research Institute for Law and the Family, Calgary, Alberta. http://people.ucalgary.ca/~crilf/publications/Self-reps_Report_Final_Dec2012.pdf; Birnbaum, R. & Bala, N.. "Views of Ontario Lawyers on Family Litigants without Representation" 65, University of New Brunswick Law Journal (2013) 99. Bala and Birbaum also surveyed 54 Canadian judges.,

[3] For example, Self-Represented Litigants in Nova Scotia: Needs Assessment Study March 2004, Paton A. & Withrop Y.; The Alberta Legal Services Mapping Project,: An Overview of Findings from the Eleven Judicial Districts Mary Strachan for the Canadian Civil Justice Forum, 2011; Birnbaum R. & Bala N. "Experiences of Ontario Family Litigants with Self-Representation") available at www.probonostudents.ca (the latter contains the most diverse data previously gathered about Canadian SRL's using a survey methodology).

[4] Tyler, T. with Zimerman N. "Between Access to Justice and Access to Counsel: A Psychological Perspective" 37 Fordham Urban Law Journal (2010) 473 at 474

a. A note on terminology

The use of the term "self-represented litigant" or SRL is used throughout this Report and is preferred to "unrepresented" or the more traditional "litigant in person". The term "unrepresented" suggests a level of intention and choice to appear without a lawyer that mischaracterizes the motives of the vast majority of the respondents in this study[5]. The decision to adopt the term "self-represented" as a generic term throughout this Report reflects the conclusions of the Lord Chancellor's Civil Justice Council Working Group in the United Kingdom which rejected the use of the term "unrepresented", saying that it assumes that the norm is representation by lawyers[6]. This assumption can no longer be made.

c. Study objectives

The purpose of this study was to enter the world of the SRL's, and understand the experience of self-representation through their eyes. This meant collecting extremely detailed narratives directly from SRL's about all aspects of their experience from beginning to end (or, to date).

The study aimed to collect data to answer the following questions from individuals representing themselves in either family or civil[7] court[8]:

i. Why are they representing themselves?
ii. What were their initial expectations and how far are these realized by their experience?
iii. Have they explored alternatives to court?
iv. What resources (on-line, paper, people, other) do they use and how helpful are they?
v. What is their experience of their reception and treatment by judges, lawyers, and court staff?
vi. What course does their progress through the legal process take? (eg filing, service, settlement conferences, mediation, hearings, trial)
vii. What is the (financial, emotional, practical) impact on them of self-representing?
viii. What, in their view, needs to change about the system in order to improve their experience as a SRL?

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[5] See further detail below at (4)
[6] Lord Chancellor's Civil Justice Council Working Group, Access to Justice for Litigants in Person, 2011 at chapter 3 paras 23-25
[7] Including but not limited to small claims court, where the upper limit is now $25,000 in all three participating provinces
[8] While there are growing numbers of SRL's in criminal court (see for example "Court Side Study of Adult Unrepresented Accused in the Provincial Criminal Courts" Robert G. Hann, R. Meredith, C. Nuffield J. and Svoboda M. available at http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la2-rr03_aj2/p1.html) , the very different narrative of a criminal defendant from a family or civil litigant suggested the importance of excluding this group from the sample. A few criminal SRL's contacted the Project, but we declined to interview them.

While this study was not designed as a program evaluation of services available to family and civil SRL's in either the courts or the community, a related objective was to develop a picture of the types of services and support that SRL's found valuable. To meet this objective, interviews were also conducted with those offering assistance in a variety of capacities and from various skill sets to SRL's (for example, registry staff, mediators, staff providing legal information, duty counsel, lawyers providing legal advice via community clinics and other programs, para-legals). The study sought out individuals working on the "front lines" of the SRL explosion, such as the staff of services like the Justice Access Centres in British Columbia, the LinC centres in Alberta and the Pro Bono centres in Ontario. These individuals are often not legally trained and qualified and work in fairly low status and poorly remunerated positions.

In this Report these individuals are called "service providers". While these interviews were a secondary focus (more than two thirds of interviews were conducted with SRL's) they offer important insights into working "in the trenches" with SRL's and are integrated into the study findings below.

259 SRL's from the three provinces participated in the study. This includes individuals who participated in a focus group, as well as those who were interviewed in person and by telephone. 230 SRL's provided complete demographic data (below).

Most respondents (almost 90% of SRL's and 100% of service providers) participated in an in-depth personal interview, and the remaining 10% of SRL's participated in a focus group.

When follow-up interviews are included, a total of 283 interviews were conducted with SRL's. A further 107 interviews were conducted with service providers (see **Appendix A**)

d. Research design

i. Selection of the field sites

The first step in research design was the identification of courthouse sites in the three participating provinces. Three sites were selected in each province[9] to reflect a range of prospective respondent demographics, to include at least one rural and one urban site and to capture some racial and ethnic diversity. Justice ministry staff in each province played an active role in identifying potential sites and facilitating introductions to the courthouse managers. The final list of all sites in all provinces is included at **Appendix B**.

Unfortunately we encountered some difficulties with accessing the selected courthouse sites in Ontario. One of the sites initially selected in consultation with the

[9] In Alberta we were asked by the Law Foundation of Alberta to add Lethbridge as an additional field site. In British Columbia, Vancouver effectively functioned as a fourth field site, with the Project material was displayed at the Robson Street courthouse Justice Access Centre.

Ontario MAG was apparently unable to facilitate our access following an initial field site visit and so no SRL focus groups were conducted there (although some court staff interviews were conducted on the first visit). Three other courthouses approached by the ministry were reluctant to display the project information on their counters. Finally we were able to work very successfully with two of the busiest courthouses in Toronto, and held focus groups there in the Fall of 2012.

The courthouse sites were intended to serve as the primary means of developing the sample group (of both SRL's and service providers) in each province. It was also anticipated that over time, respondents in other locations would hear about the Project and contact us. This is exactly what happened. The Project received considerable media attention in each province and as a result, SRL respondents came forward from towns and cities all over each province.

ii. Establishing the field sites

Once each field site was identified and initial contact established between the Principal Investigator[10] and the courthouse manager, Project materials (flyers and posters explaining the Project and giving the Project website and toll-free line for contact) were mailed to the courthouse for display at the registry counters. The managers at each field site were extremely supportive in ensuring that the Project material was prominently displayed, and asking their staff to facilitate access to these materials. A French and a Punjabi version of the Project poster was also printed for display at some field sites on their request.

At each site, contact was also established with local programs and services for SRL's – from specialized programs such as the local LinC or Family Mediation program, to other social programming that would likely see SRL's such as the local library, food bank, services for new immigrants, women's groups and men's groups. These contacts lead to both increased publicity for the Project (when the agency displayed our material in their facilities) and also introduced us to other service providers.

Following this initial contact, two visits were paid to each field site (with the exception of the later added Ontario sites and the later added Alberta site, where the work described below was compacted into one longer visit).

1. First site visit

On the first visit to each field site, the Principal Investigator (and in some cases the Project Co-ordinator[11]) met with the courthouse manager(s) in order to introduce ourselves in person. We described and answered questions about the Project. The managers were then interviewed using the interview template for service providers (**Appendix C**). This is a semi-structured interview template that focuses on a few key

[10] Dr Julie Macfarlane
[11] Sue Rice

questions for this group including the pace and impact of change within the SRL population, the impact on their services, and their frustrations and challenges in working with SRL's.

Following these meetings and interviews with managers, we then (by prior arrangement with the managers) interviewed registry staff, as well as (where possible) service providers located in the courthouse (for example staff at Family Law Information Centres in Alberta, Justice Access Centres in British Columbia, or Pro Bono Ontario in Ontario, as well as with court duty counsel). Where possible on this first visit, we also met with and interviewed service providers outside the courthouse who deal regularly with SRL's (for example staff at Family Justice Centres in British Columbia, citizens advocacy and advice services, Native Friendship Centres, domestic violence support services etc).

2. Second site visit

Prior to the second visit to each site, we used local media and publicity in the courthouses to advertise SRL focus groups. The focus groups aimed to generate an initial conversation about participants' experiences as family or civil SRL's, and to encourage them to participate further in the study via a personal interview.

Up to four focus groups were held on the second field site visit. Focus group discussions were structured around five key questions (**Appendix D**). Contemporaneous notes were taken. Participants were asked to complete a short sheet of demographics[12] and the focus group transcript could then link a speaker to these details for inclusion in the Project database.

All focus group participants were offered the opportunity to complete a more detailed SRL personal interview. Many of the focus groups were small enough for us to conduct these more detailed personal interviews on-the-spot using the full SRL interview template (**Appendix E**), either one-on-one, or in very small groups where participants were comfortable speaking about their experiences in more detail in front of others.

Further service provider interviews (especially off-site in the local community) were conducted during the second site visit.

iii. Building the sample

We were fortunate to receive a great deal of local media attention in almost every field site and following both the first and second visits, the Project heard from many more SRL's (as well as some service providers) wishing to participate in the study. Many of these participants came via the Project website, with the remainder via the Project toll-free line (see data collection strategies, below at (e)). The level of interest in participating in the study was very high – some weeks it felt almost overwhelming. We undertook to respond to everyone who contacted us via either the website and the toll-free line and scheduled up

[12] The same information captured in interviews from SRL's – see Appendix E. This captured potentially significant respondent variables including gender, income levels, education, prior experience of legal representation

to four telephone interviews (almost all conducted by the Principal Investigator) a day during the busiest periods.

Interviews lasted between 45 minutes and one hour but sometimes ran as long as 90 minutes. 90% of the personal one-on-one interviews were conducted by the Principal Investigator, Dr Macfarlane. The remaining 10% were conducted by Sue Rice, the Project Co-ordinator and Kyla Fair, the Project Research Assistant while Dr Macfarlane was on vacation for three weeks. Both were first trained and supervised by Dr Macfarlane to ensure consistency. Dr Macfarlane (with the assistance of Sue Rice) also conducted almost all the focus groups[13].

Some respondents whose cases were ongoing were re-contacted six to eight weeks after their initial interview and offered the chance to update their file by email communication or to take part in another personal interview. Both follow-up interviews and email communications were added to their file in the Project database.

iv. Other sampling questions

A decision was made at an early stage not to develop a control group as part of the sample design. In a qualitative study of this kind it is extremely difficult to establish a truly comparative sample (for example holding constant variables such as dispute type, money at stake, individual parties etc).

It is extremely challenging to ensure a "pure" randomized sample, given the reliance on voluntary participation. Instead the research sample was developed via a range of communication strategies including social media. In a qualitative study of this kind, which demands a considerable investment of time by respondents, voluntary opt-in is the only feasible design.

Given this constraint, the way in which the sample was collected supports the assertion that the study sample was effectively randomized as a result of the myriad points of entry. Whereas five years ago we might have used a targeted mail out (eg to named individuals who filed as SRL's) to ensure a more traditionally solicited sample, the pervasiveness of Internet access in Canada[14] plus the use of widely displayed print materials and the Project toll-free line allowed very widespread access to the study. This was evidenced in the enormous number of enquiries that we received throughout the data collection phase and continue to receive on a daily basis and to date.

[13] One additional focus group was conducted by Bernie Mayer and Michael Dwyer in Victoria on September 19th, 2012

[14] In 2010 Statistics Canada estimated that 79% of Canadian households had Internet access. These figures are somewhat higher in urban centres than more rural and isolated communities, borne out by our experience in the course of this research. It is also notable that this figure drops to 54% for households with an annual income of less than $30,000 (40% of the SRL sample see below at). See http://www.statcan.gc.ca/daily-quotidien/110525/dq110525b-eng.htm. Further, almost 90% of the SRL sample reported in interviews that they were comfortable using the Internet to conduct research for their case.

e. Further data collection strategies

Flyers and posters describing the Project to SRL's in family and civil court and soliciting their participation were created and printed (in a different color and listing the field sites for each province). This material made it clear that a SRL in family or civil court from anywhere in the province might also participate. The Project website and toll-free line were provided on the flyers and posters.

A Webmaster (Lois Li) was hired to build and maintain the Project website (www.representing-yourself.org) which was to become a critical element in outreach to SRL's. 43% of SRL respondents came through the Project website. The site email linked directly to the personal email of the Principal Investigator and the Project Co-ordinator and enabled the Project Co-ordinator to then schedule) interviews.

The website also carried details of the field sites in each province and included a listing of local resources for SRL's. In this way we could offer some practical assistance to the SRL's who visited the website as well as solicit their participation in the study. The website has also enabled us to post links to media coverage of the Project.

Initial discussions with court staff in some of the more remote field sites resulted in a realization that the Project also needed to provide a toll-free line for those without Internet access. A toll-free line was set up in March 2012 with a message asking people to leave their details so that we could respond to them. The toll-free line was in place until January 4, 2013, and checked daily for new messages, which were then returned and an interview scheduled. 27% of SRL respondents came via the toll –free line.

In May 2012 we launched a Facebook page (Representing-Yourself-in-a-Legal-Process) in order to build an on-line community for SRL's and enable us to communicate with and reach out to SRL's. It was made clear that comments and debate would be captured (and anonymized) for the Project database. The Facebook page now has more than 160 members, and has become very significant in the development of the Project. Every couple of weeks we have posted a "Question of the Week" for discussion - for example, a link to an article about self-representation, or a question about people's experiences both positive and negative, or a question about future reforms. This has produced a lively dialogue.

Finally, a project blog (www.wordpress/drjuliemacfarlane) was luanched in August 2012. This is linked to Twitter and has attracted a number of followers and many comments

f. The Project database

All interviews and focus groups were contemporaneously noted, with an emphasis on collecting as many complete verbatim quotes as possible. These Word files were then

entered into the NVivo program for coding and analysis. NVivo (produced by QSR International) is coding software used widely by qualitative researchers which has become an "industry standard" over rhe past decade.

A file was created for each SRL and each service provider whom we interviewed or spoke to in a focus group. These files initially comprised the (contemporaneously noted) transcript of that discussion. SRL files were frequently electronically updated with subsequent email communications and in some cases, a full follow-up interview. Where a previously interviewed SRL contributed to a Facebook page discussion, this was also added into their file. Comments made by a SRL who had not been interviewed via Facebook, were held in a separate section of the database. Interviews were then anonymized and are identified in this Report by either these numeric/alphabetic codes or by a specially created pseudonym (in this Report).

The resulting database is very large. The SRL interviews and focus group transcripts, Facebook commentary, and service provider interviews were separated into different source sections in the database allowing us to manipulate the data across and within these sections. This work was managed by Raman Pandher, under the supervision of the Principal Investigator.

An initial set of codes (described in the NVivo program as "nodes") were created by the Principal Investigator for the SRL interviews and another set of codes for the service provider interviews. Raman began the detailed process of adding these codes to selected text in the files, line-by-line. After the first 20 files had been coded in each section, we reviewed the codes and added some new ones while merging others. The same process was repeated after Raman had coded another 20 files. This brought us to a settled set of codes for each section – SRL's and service providers. The complete list of final codes is provided at **Appendix F** (SRL Interview Codes) and **Appendix G** (Service Provider Interview Codes). Raman then went back to the beginning and coded all files in each section using these codes.

In addition NVivo allows each file to have a number of variables attached, allowing for sorting and correlations among these, and among variables and codes. This is where the demographics collected for the SRL's were entered and enable the demographic analysis of the SRL sample presented at (2) below.

g. Methodological and sampling strengths and limitations

Qualitative research has much to recommend it when exploring a topic that implicates personal, subjective experiences (here the experience of self representation), including being able to remain open-minded about what one will discover without *a priori* assumptions. The depth and complexity of data collected in interviews and focus groups has many advantages over information collected via quantitative methods such as closed question surveys. In-depth interviewing with subjects about their experiences can quickly produce patterns and consistent themes. Many important and influential qualitative

studies rely on sample sizes of a few dozen. This study has a very large sample (a total of almost 400 interviews) for a qualitative study.

Moreover, the consistency with which the themes emerge from coding both the SRL and the service provider data is extremely high. In addition and interestingly, service provider data (for example, how service providers describe the expectations and frustration of SRL's) mirrors SRL responses to these same questions in interviews, providing important triangulation.

The demographic data collected from SRL's is described in detail at (2) below. The results are consistent among the three provinces with no significant differences. The study reached a wide range of individuals in both urban and more rural communities who are representing themselves in court. The sample broke down almost exactly 50/50 male/female, and contains a reasonable range of socio-economic and educational variables (subject to the caveat that research studies tend to attract a more educated demographic, see below). The breakdown between family and civil litigants also reflects the general trend.

The sample did not record race or ethnicity. It is not possible therefore to estimate how much or little representation the SRL sample includes of people of color and First Nations people. In several sites extensive efforts were made to connect to the First Nations community, by talking with Native Court Workers, displaying information at Native Friendship Centres and other First Nations agencies. In one case, a field site court worker took Project materials on to local reservations where she spoke about the Project. Nonetheless, we believe the representation of First Nations people is very small in the sample. This is regrettable since many First Nations people find themselves self-representing – in fact the best way we found to connect to these individuals was always by meeting them in the courthouses. Judging by the compoisiton of the focus groups, racial diversity may also be limited.

Qualitative research of this kind does not aim to produce statistically significant findings (the purview of a high volume quantitative study). This means that the findings that are presented below are only occasionally presented in terms of raw numbers or proportions. Many of the themes that the interviews reveal are multi-layered and interwoven, and attaching numbers or percentages to the study findings would be misleading. Instead, in common with practice for the presentation of qualitative research, the term "many" denotes a finding that emerges from more than half the interviews, "most" denotes a finding that emerges from more than three quarters of the interviews, and "some" denotes a finding that, although a common theme, emerges from less than half but more than one quarter of the interviews. Where the Report refers only to "a few" this references a group smaller than one quarter of the sample, but may contain an important and strongly expressed perspective.

Given the context of this research in exploring (in the case of more than 50% of the SRL sample) professional relationships between lawyers and clients, and in almost all cases the interaction of SRL's with members of the judiciary, another important

qualification is appropriate. Clearly, the descriptions that SRL's provide in interviews of their experiences with both legal counsel and judges reflect their subjective perceptions and understanding of what occurred in that relationship or interaction. It is not presented here as "fact" or "reality".

How individuals make sense of their experience is at the heart of the qualitative endeavor. It is important not to dismiss qualitative findings as "only" the subjective "misperceptions and misunderstandings" of lay litigants. That would miss the point. What is more important here is the volume of the study data, the rigor of the data analysis and the consistency of the findings that emerges from this study of the complex and changing relationship between the users of the Canadian justice system and the system insiders (lawyers, judges, court staff).

2. SRL Sample Analysis

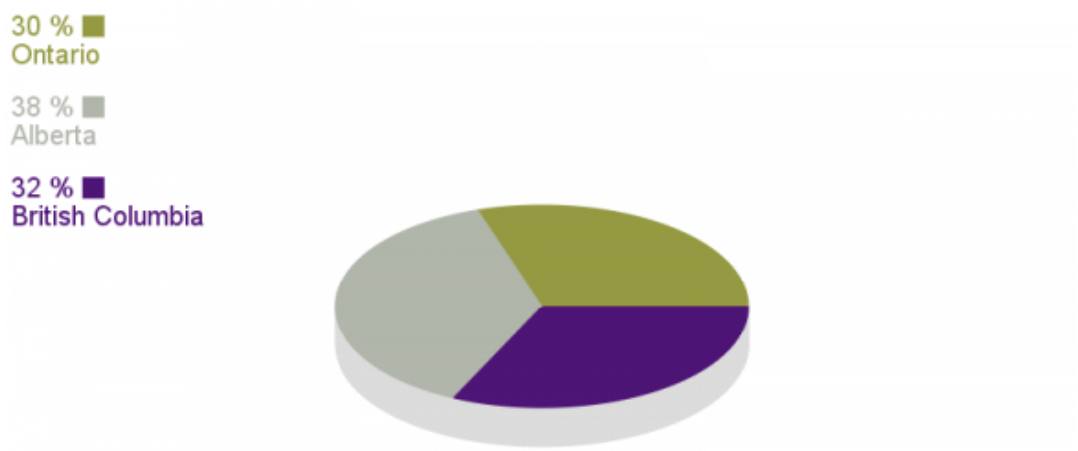
259 SRL's from the three provinces participated in the study. This includes individuals who participated in a focus group, as well as those who were interviewed in person or by telephone. 230 SRL's provided complete demographic data (below). A total of 283 interviews were conducted with SRL's. This number includes follow up and secondary interviews (including follow up interviews with focus group participants), but does not include other forms of informal subsequent communication (eg email). The total interview numbers are provided at **Appendix A.**

27% of the SRL respondents came through the toll free line, and 43% via the project email/ website. The remaining 30% of the sample either attended focus groups at the courthouses, joined the Facebook group and then participated in an interview, or contacted us directly following local publicity.

a. SRL's by province

The number of SRL respondents in British Columbia and Alberta was slightly higher than in Ontario, probably a result of the difficulty accessing courthouse sites in Ontario and the shorter data collection period. Nonetheless, Ontario respondents still constitute almost a third of the total SRL data collected (Fig 1 below). In addition, a slightly higher number of service providers were interviewed in Ontario than in the other two provinces (below).

Fig 1: SRL's by province



By the end of the study, the field sites in British Columbia and Alberta had provided the majority of SRL's respondents in each of these provinces, with a smaller but significant group from "other" provincial locations. These were SRL's who had heard an item on the radio about the Project, or read about it in the newspaper, or who had happened upon the Project website.

In Ontario, SRL respondents from courthouses "other" than the primary three were close in number to those from the field sites. This was probably the result of the time spent trying to secure a third site in Ontario (above) while publicity and media interest reached people in other parts of the province[15]. A complete breakdown of SRL respondents by field site and province is included at Appendix A.

b. SRL's by court

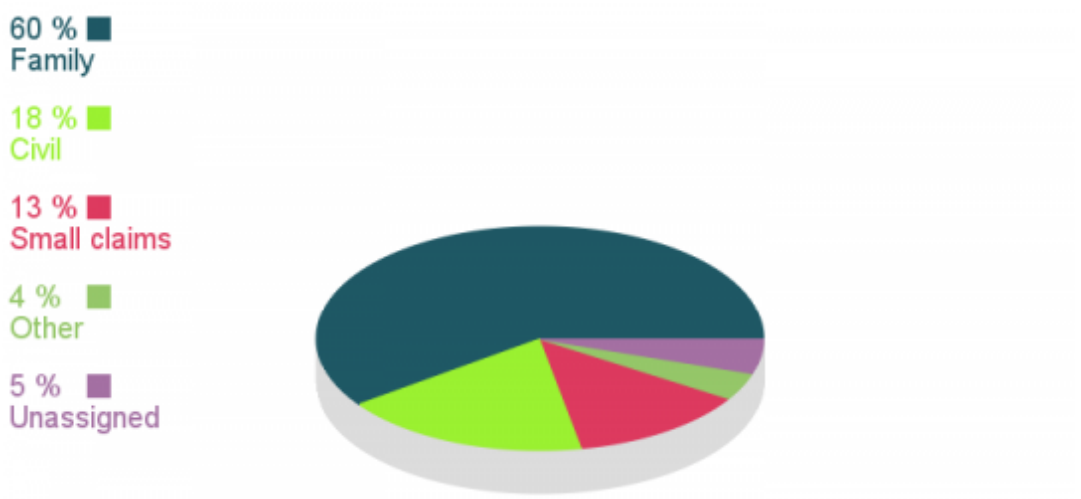
60% of the sample were in family court, either provincial or divorce court. Of this group, a clear majority in each province were filed in the divorce court (65% of BC family SRL's in Supreme, 85% of Alberta family SRL's in Queen's Bench, and 77% of Ontario family SRL's in Superior Court) and a smaller group in provincial family court. The proportions of family / civil/ small claims litigants in each provincial sample group was consistent to within one or two percentage points.

[15] For a complete breakdown of respondents by province and field site, see Appendix A.

The fact that 60% of our sample was appearing in family courts is most likely a reflection of the higher numbers of SRL's in family court compared to other civil courts (above small claims) throughout Canada. For example, in British Columbia 57% of litigants appearing in provincial court under the Family Relations Act (2011 figures) were self-represented, compared with 35% of family litigants in Supreme Court and 21% of general civil litigants in Supreme Court[16]. In Calgary Alberta, 39% of litigants in divorce hearings and 46% of litigants in family proceedings were representing themselves on the day of the hearing, compared with 18% of general civil litigants (also 2011 figures)[17].

18% of the SRL sample was appearing in the first instance civil court in their jurisdiction (Supreme, Superior, Queens Bench). 13% were appearing in small claims courts (up to $25,000) where historically there have been higher numbers of SRL's. A further 9% reported acting as SRL's in tribunals (for example, before provincial Labor Relations Board, provincial Residential Tenancies Tribunals, provincial Human Rights Commissions).

Fig 2: SRL's by court



[16] Figures made available to the author by the Ministry of Justice, British Columbia in October 2012
[17] Figures made available to the author by Alberta Justice in October 2012

c. SRL's by gender

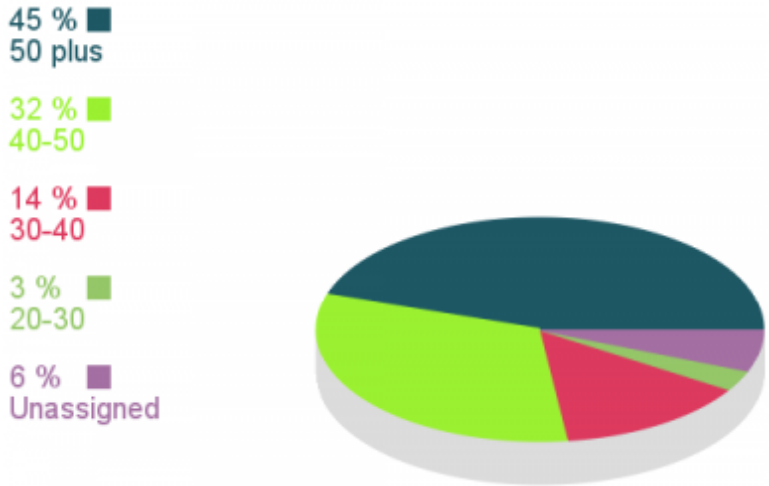
The SRL sample was almost exactly half men and half women (52% and 48% respectively). This was consistent across the three provinces. 63% were acting as plaintiffs or petitioners, and 37% as defendants or respondents. 25% of the cases were concluded at the time of interview, usually fairly recently although a few went back several years. The remaining cases were ongoing and many of these were updated via email, or a secondary interview.

In family court, more men than women were respondents (64% of the men versus 38% of the women) and more women were applicants than men (62% of the women versus 36% of the men). Gender differences also showed up among family court respondents in relation to income (and to a lesser extent in relation to age). 75% of women litigants reported an annual income of under $50,000 compared to 42% of men.

d. SRL's by age

The largest single group of SRL's by age were the over 50's (45% of the sample). The next largest group was 40-50 (32%). Only 4% of the sample was under 30 year of age. This is consistent with other studies that suggest that SRL's are more often middle aged than young people[18]. The Ontario sample was slightly (but marginally) older than the other two provinces.

Fig 3: SRL's by age



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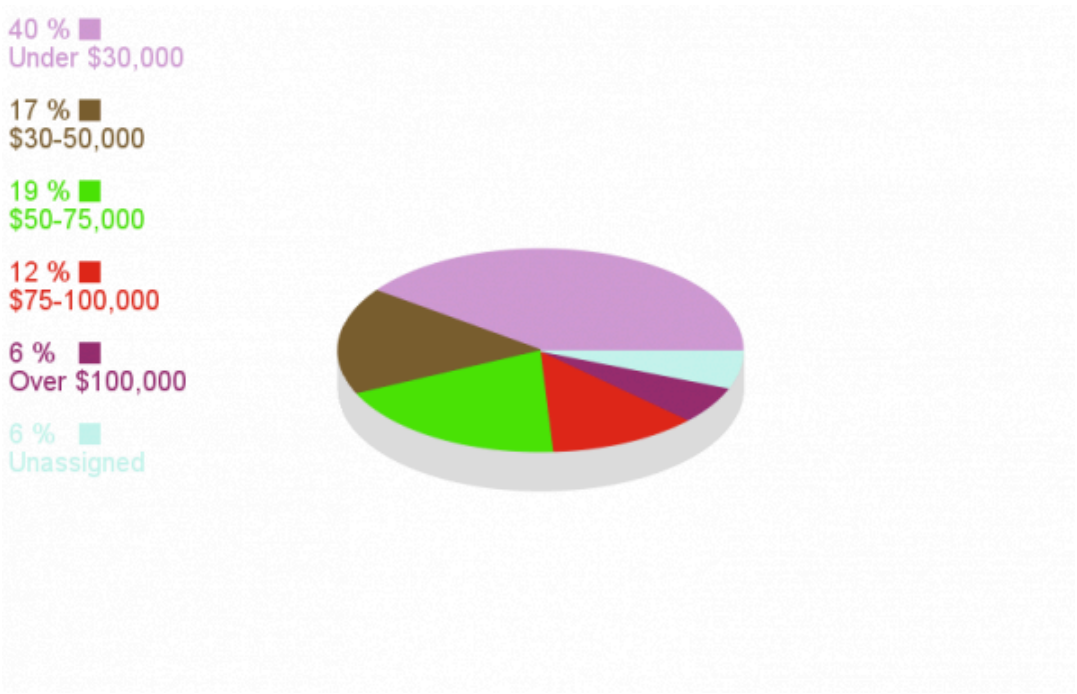
e. SRL's by income

When it came to income, the most significant cluster (57%) in the SRL sample reported income of less than $50,000 a year and 40% (the largest single group) reported incomes of less than $30,000 a year.

Fig 4: SRL's by income



This breakdown of income level was highly consistent among the three provinces.

This data is consistent with other studies that have collected survey type data on SRL income. First, most studies concur that SRL's are more likely to be individuals with lower incomes (below $30-35,000). For example, the British Columbia Supreme Court Self-Help Information Centre Final Evaluation Report (henceforth BC evaluation) reported that 60% of their SRL users had incomes of $2000 a month and under[19]. In a 2004 Nova Scotia study conducted by the Court Services division of the Nova Scotia Department of Justice (henceforth Nova Scotia study), 60% of SRL's had incomes below $30,000[20]. The same study reported that 28% of SRL's that responded to a survey had incomes of between $30-60,000. An early and comprehensive survey of SRL's in the United States, conducted by Bruce Sales, Connie Beck and Richard Haan, for the American Bar Association in 1993 found that half the respondents had incomes under $30,000 and that SRL's in this income

[19] British Columbia Supreme Court Self-Help Information Centre Final Evaluation Report Malcolmson J. & Reid, G., 2006,
[20] Self-Represented Litigants in Nova Scotia: Needs Assessment Study (Department of Justice Court Services Nova Scotia, 2004) at pages 25 -26

range were significantly more likely to self-represent than those in higher income brackets.[21]

However it is also noteworthy that almost 20% of our SRL sample placed their income between $50-75,000 and 12% between $75-100,000. 6% reported that their annual income was more than $100,000. It is noteworthy that many of those in the higher income bands reported spending significant sums on legal fees before becoming self - represented (discussed further below at). The percentage of SRL's falling into a somewhat higher income bracket appears to be larger in this study than in many others (for example, a New York study in 2005 found just 4% of SRL's in family and housing court in New York City earned above $50,000 [22]; the Nova Scotia study found just 10% reporting an income above $60,000[23]), but this might be explained by adjustment for inflation/ regional differences in income. The inclusion of more higher income earners in this study may be a sign of the times, as the overall numbers of SRL's in the justice system grows each year[24].

The number of SRL's in a higher income bracket reported here reflects the growing gap between the means of middle income earners and the affordability of legal services, as well as the phenomenon of "expended resources" – 53% of the SRL sample in this study had previously retained a lawyer to represent them, but had run out of funds to continue to pay them.

f. SRL's by highest educational level

50% of the SRL sample report having a university degree.

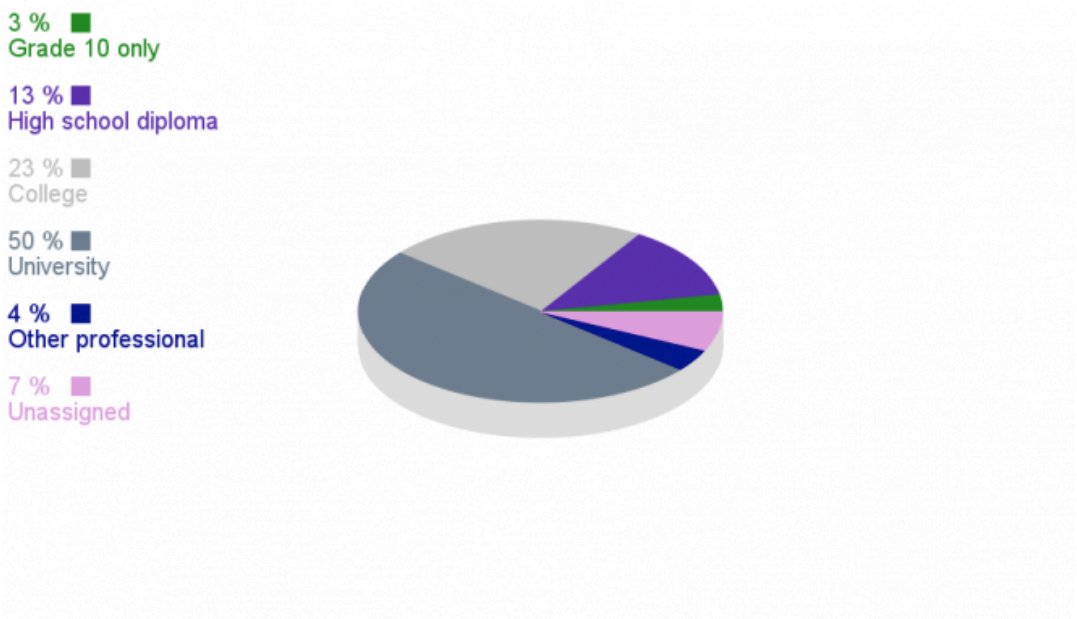
[21] Self-Representation in Divorce Cases: A Report for the ABA Standing Committee on the Delivery of Legal Services, Sales, B., Beck C. and Hann, R. American Bar Association (1993). Note that adjusted for inflation, $30,000 in 1993 would become $43,300 in 2013 (Bank of Canada inflation adjustor)

[22] Self-Represented Litigants: Characteristics Needs and Services – Self-Represented Litigants in the New York City Family Court and the New York City Housing Court, Office of the Deputy Chief Administrative Judge for Justice Initiatives December 2005 at page 4. However note that the New York City Family Court is equivalent to a provincial family jurisdiction ie this court does not grant divorces, so this comparison may be most direct in relation to the (minority) SRL respondents proceeding in provincial court.

[23] See note 20 above at page 26. However note that incomes are generally lower in Nova Scotia than everywhere in Canada aside from PEI (see for example The Chronicle Herald, "Nova Scotians losing the wage race" May 31, 2012)

[24] See further details at (3) below.

Fig 5: SRL's by highest education level



This level of respondent education was fairly consistent across the provinces, although the Ontario sample reported a slightly lower level of university education than the other two provinces – at 45% - whereas in Alberta 66% of SRL's reported having a university degree and in BC, 62%. If those with either a college or a university education are combined, 78% fell into this group in Ontario, 76% in Alberta and 83% in BC.

The high level of education reported by the SRL sample may be explained in part by the tendency of voluntary opt-in research studies such as this one to attract participants with a higher level of education and comfort with the idea of a research study[25]. In other Canadian studies, educational levels vary considerably depending on geography. The Nova Scotia study[26] found that 17% of SRL respondents had a university degree, 7% at the graduate level[27]. In the British Columbia study[28], 60% had some form of completed post-secondary education (sub-categories are not provided).

There is also evidence to suggest that the educational demographics of the SRL sample are roughly similar to the general Canadian population. Statistics Canada reported in 2008 that 58% of 25-34 year old across Canada had a tertiary education, and 40% of 55-

[25] Regardless of the study topic or method, participation has been shown to be generally higher among those with higher education than the general population. This is attributed in part to greater faith in research, no matter what the topic, and a greater level of volunteerism in general. See Galea S. & Tracy, M. "Participation Rates in Epidemiologic Studies" 17 Annuals of Epidemiology (9) (2007) 643 at 647

[26] Note 20 above

[27] However tertiary education levels in Nova Scotia are slightly lower than the general Canadian population. See Education Indicators in Canada: An International Perspective (2010) Statistics Canada at page 30.

[28] Note 19 above

64 year olds[29].

The tertiary level education of so many SRL's in the sample may be reflected in their widespread expectation *at the outset* that they would be able to navigate the justice system without legal representation, even though they might have preferred to have counsel. The reality for many however is that despite their prior education and knowledge they still find the system difficult to understand, and far more intellectually and practically challenging than they had initially expected.

Many SRL's commented that if it were so difficult for them, how much more so would it be for others without a similar level of education? Or for an individual for whom English or French is not their first language? 83% of the sample had English or French as a first language. 13 other first languages were represented amongst the sample.

g. Previous legal representation in this action

At the time of their interview, all the SRL respondents were representing themselves. However more than half – 53% - had retained a lawyer at some point in their case. Three quarters of these had retained a private lawyer (the remainder had been legally aided, but this was now discontinued[30]). A few respondents had gone back and forth with representation, retaining them when they could afford to or were especially anxious about going forward without representation, but became self-represented once again when their funds ran out. This is a significant finding and its implications are discussed further below.

h. Legal representation of the other party to the action

75% of the SRL's in the sample reported that the other party in their family or civil case was represented by counsel – in other words, that this was a matter in which one side was represented by counsel and the other was not. It was not always clear whether representation by counsel on the other side continued throughout the case – sometimes it seemed that the other side, like the respondent, had counsel make some appearances for them and in other instances they represented themselves. Of the remaining cases, 15% reported that both sides were self -represented (10% were unassigned). Like the other variables reported in this section, this variable is manipulated in the data analysis below to ascertain if it is a significant factor in shaping the particular experience of the SLR.

[29] Education Indicators in Canada: An International Perspective (2010) Statistics Canada at page 30. Note that tertiary education includes college education; 26% of Canadian adults had a college level tertiary education (reported 2006) and 34% of Canadian adults had a university level tertiary education (reported 2007) (at page 16).
[30] See further detail at (4)(a)(ii)

i. Mental health issues

Researchers elsewehere have found a causal relationship between mental health issues and legal problems[31]. Without the necessary clinical and diagnostic expertise, any reflection on the extent to which mental health issues existed among the SRL sample is, of course, speculative only. That said, the widespread assumption that many SRL's are mentally ill makes it seem important to present a "lay" impression of how many of the respondents in the SRL sample may have been suffering from a mental illness.

A minimum of 45 minutes was spent with each person interviewed – sometimes by phone, sometimes in person – and some interviews lasted much longer (up to 90 minutes). In some cases, there were follow-up interviews and other contacts over email. From this time a sense of the individual's (e.g., stability, consistency, accuracy and emotional lability could be broadly gleaned). It is important to emphasize that this is *not* a diagnostic effort, but a reflection on the part of the interviewer on the stability of the interview subjects.

Of the 259 SRL respondents, just eight individuals stand out as demonstrating enough emotional instability to indicate that they possibly suffered from a mental illness of some kind. None of these respondents are quoted in this Report, although it is interesting to note that many of their insights were fully consistent with other accounts. This figure does not include individuals who were distressed (many were) or depressed (another smaller group) as a result of their experiences as a SRL, including the circumstances that brought them to the courts.

This unscientific assessment suggests that just over 3% of the sample may have been suffering from a mental illness. This is consistent with estimates of the prevalence of mental health problems in the general population that suggests, for example, that 1% of the population suffer from bi-polar disorder and a further 1% from schizopehrenia[32].

The SRL respondents in this study were sometimes distressed and angry about their experiences, but with very few exceptions they were not, insofar as it could be ascertained from limited contact with them, mentally ill. It does not appear, therefore, that the SRL sample in this study was characterized by a higher prevalence of mental illness than the population at large.

3. The SRL explosion: how many people are representing themselves in family and civil court?

The numbers are extraordinary.

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[31] See for example Pleasance P and Balmer NJ "Mental Health and the Experience of Social Problems Involving Rights" 16(1) Psychiatry, Psychology and Law (2009). The same article points out the causal connection between experiences of the courts and legal issues and deteriorating mental health. See the further discussion below at (12)(b)

[32] See for example http://www.cmha.ca/media/fast-facts-about-mental-illness

a. Family court

Figures provided by the provincial ministries of justice show that the proportion of litigants appearing *pro se* in provincial family court is consistently at or above 40%, and in some cases far higher. In proceedings under the Divorce Act, the figures are lower but still significant.

For example,

- In Alberta in 2011, 40% of hearings in provincial court on family matters included one or more SRL's. In the Queen's Bench, the figure was 32%.[33]
- In British Columbia in 2011, 57% of hearings held under the British Columbia Family Relations Act included one or both SRL's. In the British Columbia Supreme Court, self-representation was running at 35%.[34]

In both Alberta and British Columbia the actual number of SRL's is probably yet higher, because this data only reflects whether or not an individual is represented at the time of a hearing – we know from interviews with SRL's and court staff that some SRL's will bring an agent to represent them in a hearing, but otherwise handle their case on their own behalf.

In Ontario, data on representation is recorded at the time of filing. Also unlike the other provinces, the Ontario data combines filings in the Ontario Court of Justice and the Superior Court (ie both family and divorce matters).

- Figures from Ontario show that throughout the whole province in 2011/12, 64% of individuals involved in applications under either the Family Law Act, the Childrens Law Reform Act or the Divorce Act were self-represented at the time of filing. In two of Toronto's busy downtown courthouses, Jarvis Avenue and Sheppard Avenue, the figures were 73% and 74% respectively. These numbers are likely to be an under-estimate since both the SRL sample and court staff attested to the significant number of individuals who begin the legal process with a lawyer, but then become self-represented after expending all their resources and/or becoming dissatisfied with their legal counsel[35].

Data recording strategies in relation to self-representation are just emerging, and the inconsistency among the provinces in the way in which this information is recorded requires immediate attention. This also makes it difficult to accurately pinpoint the timing of the rise in the percentage of SRL's, but many court staff stated in interviews that they believed that the steepest increases occurred up to ten years ago, reflecting the decline in provincial family Legal Aid budgets. What data does exist seems to be largely anecdotal and collected piecemeal by particular judges or lawyers who were concerned at what they were seeing in the courts. For example, Lynne Cohen writing in Canadian Lawyer in 2001

[33] Figures made available to the author by Alberta Justice in October 2012
[34] Figures made available to the author by the British Columbia Ministry of Justice in October 2012
[35] Figures pmade available to the author by the Ontario Ministry of the Attorney-General in October 2012

[36] claims that the number of SRL's in Ontario's Unified Family Court rose by 500 percent between 1995 and 1999. David Tavender, a leading Alberta practitioner, stated at a 2012 conference that the number of parties appearing in Alberta Family Law Chambers who are self-represented has increased 160% since 2006.[37] The precise basis for these claims is not clear but presumably draws on data provided by the courts to these researchers.

In order to get a more detailed picture of the increase in the numbers of SRL's, it is instructive to draw on figures from the California family court system (North America's highest volume jurisdiction) that go back to the 1970's. In 1971, self-represented litigants constituted 1% of all litigants in California family court. By 1992 this had risen to 46% and to 77% by 2000[38]. By 2004, 80% of all cases included at least one SRL by the time of judgment.[39]

b. Civil court

The same trend is spreading to civil courts, with some lower level civil courts reporting more than 70% of litigants as self represented. This goes much further than small claims courts, which are designed to facilitate simple, speedy and inexpensive resolution and in which litigants have traditionally often represented themselves. However, the rise in the small claims court upper limit to $25,000 in all three participating provinces means that increasingly SRL's in small claims court are managing cases that have previously been handled by legal counsel or para-legals. In British Columbia in 2011, 80% of litigants in small claims court were self-represented at the time of their court appearance.[40]

Self-representation is also growing in the courts of first instance, that is, above the $25,000 boundary[41]. For example in the Ontario Superior Court, figures collected in 1999[42] found SRL's outnumbering represented litigants by 1.6 to 1. That gap will certainly be far larger 12 years on. In the British Columbia Supreme Court, 2011 figures report that 21% of general civil litigants are unrepresented in their appearance before the court, 19% in foreclosure hearings, and perhaps less surprising, 34% of bankruptcy petitions. This can be compared to figures produced by the British Columbia Justice Review Task Force covering two-week periods in 1999-2001 that showed that the number of self-represented

[36] Cohen, L. "Unrepresented Justice" Canadian Lawyer 25:8 (August 2001))
[37] E. David D. Tavender, Q.C. Fraser Milner Casgrain LLP at Pro Bono Law's Meeting with Managing Partners, Calgary, Alberta, March 29, 2012
[38] For a review of this data see Hough, B. "Self-Represented Litigants in Family Law: the Response of California's Courts" 1 California Law Review Circuit (2010). An exhaustive and extensive source of data on SRL levels in US courts is Graecen J. Self-Represented Litigants and Court and Legal Services Response to their Needs: What We Know Center for Children, Families and Court, California Administrative Office of the Courts available at http://www.docstoc.com/do/48509096/Self-Represented-Litigants-and-Court-and-Legal-Services-Responses cs
[39] Judicial Council of California, Statewide Action Plan for Serving Self-Represented Litigants 2 (2004), available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report_comment_chart.pdf.
[40] Figures made available to the author by the Ministry of Justice British Columbia in October 2012
[41] Note that the possibility of raising the small claims limit to $50,000 is under discussion in some provinces.
[42] Lynn Hartwell, "A Profile of the Self-Represented Litigant: Highlights of Some of the Relevant Research" (paper presented to the ACCA Symposium in Winnipeg, April 19 2001 [unpublished]

litigants in the Supreme Court varied from 5.5% to 14.2%[43]. In the Alberta Court of Queen's Bench, 19% of those appearing at civil hearings were representing themselves[44]. A similar trend is spreading to the civil appeal courts, highlighted recently by thr Chief Justice of the Federal Court of Canada[45].

c. Predispositions towards lawyers and other sources of professional advice

Concern is sometimes expressed that the drop in the number of parties with legal representation reflects a general public malaise towards the legal profession – in short, that SRL's are predisposed to mistrust and even dislike lawyers. There is evidence of general public dissatisfaction and skepticism about the value of *all* professional advice (affected no doubt by the access to information provided by the Internet for which professionals have historically acted as gatekeepers[46]), as well as a general decline in deference towards professional advisors.

Alternatively or as well, the trend away from professional services and towards a "DIY" approach may be more closely related to the availability of information on the Internet, and the growing assumption that this allows for self-help in areas that have previously required professional advice and support, than any particular dislike or mistrust of lawyers. The trend towards "DIY" and cutting out professional advisors has been noted by sociologists (who have dubbed "disintermediation") as operating in a variety of arenas formerly dominated by professional advisors including financial planning[47], real estate and property transactions[48], and law. The result is fewer gatekeepers or "middle men", displaced by the availability of information on the World Wide Web. Some SRL respondents mentioned that they were initially encouraged to believe that they could handle representing themselves because so much information was available on-line; as one put it, "Google is my lawyer."[49] This reinforces the trend towards self-representation because it provides an increasingly normative argument to reject the use of legal counsel.

It seemed important, therefore, to establish what, if any, previous experience and pre-disposition SRL respondents had towards lawyers and legal services. We asked all SRL

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[43] Reported in Unrepresented Litigants Access to Justice Committee Final Report Ministry of Justice and Attorney-General Saskatchewan Final Report at page 26

[44] Figures made available to the author by Justice Alberta in October 2012

[45] Chief Justice Paul Cramopton was quoted describing …"thousands of self-represented litigants flooding his court." See "National Pro Se Network being Weighed" Lawyers Weekly March 01 2013, available at http://www.lawyersweekly.ca/index.php?section=article&articleid=1846&rssid=4Figures from the US show the same trend, for example data from the Administrative Office of the U.S. Courts show that between 1991 and 1993 the number of pro se litigants in the Court of Appeals (Federal Circuit) increased by 49%.

[46] See the analysis and discussion in Macfarlane, J. The New Lawyer: How Settlement is Transforming the Practice of Law University of British Columbia Press 2008 at 59-60, and 126-129

[47] Walker, E. "DIisinternediation and its Effect on the Stability of Savings Capital at Financial Institutions ", Studies in Economics and Finance, Vol. 3 (1979) 63 - 75

[48] Zwiefelhofer D. "Disintermediation - Removing the Real Estate Agent from your Real Estate Sale" available at http://www.realestatereference.com/real_estate_article.php?id=1&real-estate

[49] AB57. The experience of many SRL's as they spent more time exploring on-line resources was often disappointing (see further detail below at (7)(b)).

respondents whether they had retained a lawyer in any *previous matter* (prompting them with, for example, writing your will, or a real estate matter?"[50]). 73% said that they had used a lawyer for a previous dispute or transaction. We then asked these same individuals if they could rank their experience as "mostly positive" ""acceptable, OK" or "mostly negative". Fully one third did not provide this assessment or found it difficult to generalize in this way[51]. Of those who, the largest group (39%) said that their experience had been good or mostly good. A further 25% said that the experience had been "OK", with nothing significant to complain about. 35% said that their experience had been bad or mostly bad.

The results for each SRL respondent were then correlated with whether or not they had originally retained legal counsel in *this* matter. 53% of the SRL sample had previously had legal representation (for the most part a private lawyer; see detail at 4(a)) but by the time they were interviewed, no longer had counsel representing them.

Of the group who had previously worked with a lawyer on a different matter or transaction, two thirds or 66% retained counsel for this action, working with them until the relationship ended and they became self-represented. Of those stating that "mistrust" of a lawyer or lawyers in general was a significant factor in their decision to self-represent[52], only one in five had had prior experience of legal representation.

75 SRL's had worked with legal counsel on a previous matter and provided their assessment ("good", "bad" or "OK") of their previous experience *and* initially retained counsel for this action. The prior experiences of this group with counsel were very mixed. Almost half of of this group (47%) said that their prior experience was "good", but a further 31% who assessed their prior experience as "bad" also began with a lawyer in the action in which they were now self-representing. Another group (n=39) who provided an assessment of their previous experience with legal counsel *and* who did not retain counsel at any stage in this matter were a similarly mixed bag. 26% assessed their prior experience as "good", 44% who assessed their prior experience as "bad" and 31% assessed their prior experience as "OK".

This analysis suggests that where a SRL respondent emphasized factors relating to their experience with a lawyer or lawyers in their decision to represent themselves, they are more likely to be referencing their (earlier) experience with legal counsel in the present matter, than a pre-disposition.

[50] See the SRL Interiew Template at Appendix E

[51] The somewhat primitive scale of "good" "bad" and "OK" was used here to avoid getting into further detail about previous experiences of legal representation; however this made the questions somewhat crude and difficult to answer for some respondents, especially if they had had more than one experience of prior legal representation, with mixed results.

[52] 20% of the sample described their mistrust of lawyers as a factor in their decision to self-represent (although in most of these cases, money was also an issue: see further detail below at (4)).

When correlated with their decision to retain counsel in the present case it appears that that a prior experience with legal counsel may have had some influence, but was not dispositive in their decision to self-represent. Further, this past experience appears to have had only a limited impact on their initial decision to retain counsel, which was more directly related to what they felt they could afford. Where a SRL respondent emphasized factors relating to their experience with a lawyer or lawyers in their decision to represent themselves, they are more likely to be referencing their (earlier) experience with legal counsel in the present matter, than a pre-disposition.

Where factors other than affordability come into play, the most significant influence on the decision to self represent appears to be negative experiences with lawyers in the present matter, rather than prior experience and pre-disposition. Bob's story is typical.

When Bob[53] faced an acrimonious divorce, it was natural for him to retain a lawyer. He earned a good salary – in excess of $100,000 – and hoped to use mediation to resolve the issues between himself and his wife. One year later, Bob had spent $80,000 on legal fees and was no closer to resolving a dispute over their assets. He now faced a trial, and with the proceeds from the sale of the matrimonial home in trust, could not afford to pay counsel. Instead he hired a lawyer (at half the regular hourly rate) to sit at the back of the courtroom and advise him while he represented himself in his trial.

d. Considering alternatives to legal process

All respondents were asked what they did prior to commencing or becoming involved in legal action to resolve their dispute. Some clearly felt they were left with no choice because they were named as defendants/ respondents. Those who initiated the case themselves (63% of the sample) could sometimes point to efforts they made – via direct personal communication such as phone calls or letters or emails – to resolve the issue short of court. Some had made these efforts – unsuccessfully – for a significant period of time (up to a year or 18 months) before commencing action.

27% of SRL respondents (the vast majority of them plaintiffs) were coded as having given consideration to alternatives before litigation, including mediation, private arbitration and counseling, and other efforts at settlement with the other side (meetings, letters etc). A somewhat higher level of education appeared to correlate with

[53] BC21

consideration of alternatives to litigation. 64% of those who considered alternatives were university-educated, higher than the general level of the whole sample (50%). Similarly 28% were college educated, slightly higher than the level in the whole sample (23%).

We also asked service providers what they knew or believed about the extent to which clients had previously attempted to resolve their dispute short of commencing or becoming involved in ongoing legal action. This question is rarely explicitly asked by a service provider, and even less often at the court registry, so their comments are based on tangential discussions about alternatives with SRL's and their knowledge of individual cases. The almost universal perception, however, is that SRL's often do very little before coming to the court, preferring to turn the problem "over" to the justice system.

> "The justice system is the first place that they turn to for help…I think that people are so quick to litigate – but if they knew what it actually was, what would happen, they might look at other options."[54]

> "People keep coming to the courthouse because they believe in the system and want to be heard. They still have regard for the authority of the system – who else do you go to for authority? When they get a result, they attribute it to the system, not to the individual or individuals who made it happen. The system begins to substitute for having to deal directly with the other side."[55]

> "Very few understand that there are really alternatives – and few have thought about trying to have a conversation."[56]

Part Two: Decision-Making over Self-Representation

4. Why are so many people representing themselves in family and civil court?

What is not in dispute is that the number of individuals representing themselves in both family and civil court has risen sharply. More complex is unraveling the reasons why.

Many of the SRL respondents spoke of more than one reason why they were representing themselves (although some said that it was just about money, and nothing else). It is clear that once a decision has been taken to move forward without legal representation, the experiences of that individual will also shape how they respond to a question about why they are self-representing (for example, with more or less self-confidence, with more or less emphasis on their disappointment with earlier legal services). Responses to the question "why are you self-representing" also reflected a personal sense of just what was possible and manageable for that individual. For example, some were despondent and overwhelmed, a smaller number were defiant and bullish, and

[54]ASP8
[55]BSP13
[56]BSP7

this emotional response also affected the way in which they would describe the reasons for self-representing.

a. Financial reasons

By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel.

Almost every respondent (more than 90% of the sample) – across all three provinces and whether in family or civil court – referred in some way to financial reasons for representing themselves[57]. This is consistent with other studies, although reported at a higher level here. The reason for this may lie in the research methodology adopted and the way the question is asked. Some people are uncomfortable acknowledging a lack of financial resources, for obvious reasons. In this study, respondents participated in extended (up to 90 minute) interviews which ranged across many aspects of their self-representation experience and the interviewees frequently returned, over and over, to the question of cost and affordability. While cost was clearly a major factor in self-representation for almost every respondent, many SRL's were explicit about their inability to pay for legal counsel, while others were more circumspect and advanced a range of blended reasons for self representation of which money was just one. Sometimes respondents became more open and frank about the impact of cost as the interview went on. This is a different way of collecting this data – and arguable more accurate – than asking individuals to complete a closed question survey.

More than half the interviews, however, contain detailed descriptions of lack of or exhaustion of financial resources.

"I have no choice. Its not that I think that I can do this better than a lawyer, I have no choice.
I don't have $350 an hour to pay a lawyer"[58].

[57] For example, in Nicolas Bala and Rachel Birbaum's recent survey of family SRL's in Ontario, they report that 49% of survey respondents stated that financial considerations were the primary factor in their decision to self-represent. See Bala N & Birnbaum R. "The Rise of Self-Representation in Canada's Family Courts" paper prepared for the National Family Law Program, Halifax Nova Scotia 2012 at 10. See also Langan A-M, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" 30 Queens's Law Journal (2005) 825 reports that 83% of the unrepresented lawyers in Kingston family court reported that they were unable to afford a lawyer. See also similar conclusions reached by Gayla Reid, Donna Senniw, and John Malcolmson, Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs Law Courts Education Society of BC, 2004, available at http://www.lawcourtsed.ca/documents/research/srl_mapping_repo.pdf.)

[58] AB37. This respondent and a number of others referred to their expectation or experience that private legal services would cost in the region of $300-400 an hour. Some have speculated that individuals who do not retain lawyers because they are concerned

> "I can't feed my children –
> and the judge is telling me to hire a lawyer.[59]"

i. SRL's who have self-represented throughout the process

Circumstances under which the costs of legal representation became a primary motivation for self-representation vary from case to case. Some respondents said that they had *never* had the means to engage a lawyer; many of these said that the initial retainer was simply out of their reach, while others said that they realzed how quickly the hourly costs would mount up and that they simply could not afford to pay this. Many of these respondents spoke with resentment about the number of times they were told that they "ought to" hire a lawyer to represent them – by a judge, the lawyer on the other side, or by a counter clerk. The same message is repeated throughout many court forms that SRL's try to complete by themselves. These admonishments suggest that a person representing themselves could afford to hire a lawyer, but chooses not to.

An objective assessment of whether or not legal services are in fact "affordable" by individual clients is of course not possible. Most court administrators and service providers agree that Legal Aid eligibility is now set so low for family and civil clients that many people genuinely cannot afford a lawyer, yet do not qualify for Legal Aid. At the same time a few service providers pointed out that those who came to the court asserting that they could not afford the services of a lawyer nonetheless drove expensive cars or took foreign holidays[60]. Far more service providers however emphasized that if they needed to retain counsel they would be in the same position as the SRL's they saw – unable to afford legal counsel. Moreover several of the (n=4) lawyer SRL's in the sample made the observation that they could not afford themselves[61].

Any assessment of what people can "afford" is complexified by the fact that contemporary consumers – and many SRL's - have expectations of a relationship between service and cost that means that they do not accept that the work performed by legal counsel should be as costly as it is. There is a reluctance to pay rates of $350-400 an hour for work that the client often feels that they have little control over, and no real means of scrutinizing whether they are receiving value-for-money.

Changes in attitudes towards the role of professional advisors – including the so-called "death of deference" towards professionals and a growing disinclination to pay for "middle man" services such as financial, legal, real estate or other advice (described by

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about the cost do not in fact have a clear idea of what that cost would be. This sample seemed fairly well-informed about legal costs (and more than half had previously retained counsel and so knew precisely what that had cost them).

[59] ON64

[60] ASP20

[61] ON3

sociologists as "dis-intermediation"[62]) results in significant skepticism among would-be consumers about paying counsel at this level that over a period of weeks, months or even years. The resulting costs would, at best, be high if not very high and would probably require other sacrifices that individuals may not be prepared to make. For many low and middle-income families, the eventual costs of legal counsel may be simply beyond the reach of their income. As some of the higher income earners in the sample illustrated, even those earning more than $100,000 may eventually see expenditures in excess of $50,000 as a poor use of their resources. One high-income professional described a social gathering at her home in which the guests compared their expenditures on their divorces:

> "Of the ten adults (at the party) six had been divorced. The combined spending on legal costs of those six adults - $1.2 million."[63]

It is important to realize that these individuals do not see themselves as more competent than legal counsel – on the contrary, they knew that they were taking on a huge challenge and many were overwhelmed at the prospect ("scared to death", "absolutely terrified" were common comments about the task ahead). What has changed is that however hard, that self-representation is now at least a theoretical possibility given the widespread access to information on the World Wide Web. Lawyers are no longer the "gatekeepers" for this information.

Some of these SRL's are making a simple cost/benefit assessment and concluded that by saving legal costs they will still come out ahead, even if they recover less in dollars than they might with legal representation.

> "Even if I could not get as much spousal or child support as with a lawyer, if I factored in the legal fees I would be worse off by hiring the lawyers….I did not consider myself as skilled as a competent lawyer, but at the end I figured I would still end up ahead if I represented myself."[64]

Some of these respondents described trying to find a lawyer who would represent them on an "unbundled" basis[65] ie without paying a retainer, which they could not afford, and instead working on a task-by-task, hourly basis. Very few SRL's who had never hired

[62] Above note 47 and the further discussion at (3)(c)
[63] ON60
[64] AB50
[65] Unbundling" has been debated for more than 30 years and has been pioneered by Woody (Forest) Mosten. See Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte , Mosten F.S., American Bar Association 2000. For a Canadian analysis, see Doug Munro Limited Retainers: Professionalism and Practice (Report of the Unbundling of Legal Services Task Force) Vancouver 2008.

legal counsel at any stage in their case were able to access legal services this way in the first instance and therefore felt they had no alternative but to represent themselves[66].

ii. SRL's who had received Legal Aid

13% of the SRL sample had been represented by a Legal Aid funded lawyer earlier in their case, but their Legal Aid entitlement had run out and/or their financial circumstances had changed and they had been told they were no longer eligible for Legal Aid. They were now self-representing because they were unable to afford to pay for private legal counsel. Some still owed money to Legal Aid (where their representation was in the form of a "loan"[67]).

Some respondents had applied for and had been turned down for Legal Aid[68]. Others had not even attempted to apply, assuming that they would not qualify and discomforted at the idea of being turned away (similar anxieties seem to affect some individual willingness to approach free legal clinics or duty counsel, see below).[69].

iii. SRL's who cannot afford to continue with counsel

More than half – 53% - of the SRL sample had retained a lawyer at some point in their case. Three quarters of these had retained a private lawyer (the remainder had been legally aided, but this was now discontinued). These respondents had exhausted their available resources and were often resentful that despite significant expenditures, they were still not at the end of their matter.

It is evidently very common for a litigant to begin with private representation (for example at the time of filing an application) but to lose representation later on[70]. These

[66] See the further discussion below at (10)(g)(iii)

[67] For example, from the Alberta Legal Aid website "Legal aid in the province of Alberta is not free. LAA expects clients to repay the costs of their legal representation. Any services requiring full representation by a lawyer are not free. However, it is important to know that legal services provided by a lawyer through LAA are significantly less costly than hiring that same lawyer privately." www.legalaid.ab.ca. In Ontario this is called a "contribution agreement" which requires the repayment of some or all of the legal fees. See www.legalaid.on.ca. There does not appear to be a similar policy in BC.

[68] See further detail below at (10) (b)

[69] For example, a small number of BC respondents had been legally aided in their original application (eg for a divorce) but could not be legally aided in seeking a variation. The British Columbia Legal Services Society website states that an individual will only qualify for legal representation for a serious family matter once. It also appears that a variation would only be covered for legal representation if it involves a "serious situation involving a child." (www.lss.bc.ca).

[70] Note that this suggests that Ontario court recorded data on numbers of family SRL's is an under-estimate, since this is recorded only at the time of filing (see above at (3)(a)). This trend raises important questions about the circumstances in which lawyers "get off the record". Professional Codes of Conduct have traditionally dealt with this issue by requiring that a lawyer give reasonable notice to the client (obviously not at issue if it is the client who decides to end the relationship) and a general admonition that withdrawal of representation should not seriously prejudice the client. See for example, Law Society of Alberta, Code of Professional Conduct, Rule 2.07(3) Law Society of British Columbia, Professional Conduct Handbook, Rule 2.07(3). In light of this growing trend, these provisions need re-consideration and clarification. Note that a recent Supreme Court of Canada decision (R v Cunningham (2010) SCC 10) considered the

respondents said that they were no longer able to find the necessary funds to continue with legal representation – it was not unusual for them to still owe money to their lawyers and to be paying this back in instalments. Others who had borrowed money from family members or friends to pay for legal services had reached the point at which they could not bring themselves to go back and ask for a further loan.

Others ended their relationship with their legal representative when they found that they had reached the point that they would have to dip into other savings to pay for legal services – for example, a college fund for one of their children – and were unwilling to do so.

> "I don't feel like dropping $12,000 that could be used for my child's education down the road. Instead to use it on something as meaningless as this – it would not be a good use of money."[71]
>
> "I have some savings to put to good use or I could use it for more litigation."[72]

35 interviews record the dollar amount of expenditures on legal services. These numbers range from as much as $300,000 to $4000 [73] with eight describing legal costs of over $100,000 and another ten spending between $30-100,000.

A smaller group (n=12) were mostly representing themselves but would hire legal assistance at particularly crucial or difficult moments moments in their case. Perhaps they were offered financial assistance by a family member or friend, or were panicked followed a particularly traumatic court appearance, or perhaps they simply made a judgement that they needed help on a particular aspect of their case (document review, a court appearance). It was rare for SRL respondents to find counsel who would work on a task-by-task basis or "unbundle"[74] services, despite considerable efforts sometimes made to find a lawyer who would work on this basis. Most of the SRL's who did manage to find a lawyer who would help them on this basis were returning to their former counsel for these services.

Just like the SRL's who could not afford a lawyer at any stage in their case, the majority of represented clients who become SRL's did not make this move to represent themselves because they believed that they would do a better job than a competent client or because they felt confident that they could cope alone. Fred's story is typical.

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question of self-representation in *criminal* cases (see www.lawtimesnews.com/200911235858/Headline-News/When-can-counsel-withdraw-from-a-case)

[71] BC69

[72] AB15

[73] In some cases it felt intrusive to ask about this dollar amount and not every SRL was asked for this number in the earlier interviews; the significance of this issue only began to become apparent partway through the Project.

[74] Above note 67

Fred[75] was in dispute with his ex-wife over access to their young daughter. The Childrens' Aid Society had become involved and for a period Fred co-operated with supervised access. When supervision was removed, his ex-wife refused him access under an interim order. After expending $80,000 in legal fees, Fred was out of funds.

Despite being well-educated and in a professional job Fred was not at all confident that he was going to be able to represent himself effectively – and the stakes were really high.

"I was scared out of my mind. But I had a hard choice – either learning to do this for myself, or letting my daughter go, forever. I didn't know that even if I learned how to do this, anyone would believe me. But I could not give up without trying." A year later Fred won access to his daughter after a five-day trial.

One important difference between interview data collected from SRL's who had had counsel at an earlier stage in their case and those who self-represented throughoutn was that the former group frequently advanced detailed critiques of the legal services they had previously paid for and received.

b. Dissatisfaction with their legal representative

Many SRL's were moderately or very dissatisfied with their legal representation earlier in this action. The overarching theme of these comments is that the legal services they paid for did not, in their view, represent value-for-money. This reflection was sometimes woven into their description of being unable to afford to continue with their lawyer. In these cases, respondent resentment at how much they had already spent, combined with a lack of belief that further engaging their lawyer would actually improve their situation, was an aspect of how they now rationaised their decision to self-represent. The majority of these respondents also made it clear that they could no longer afford to retain counsel.

These respondents made a wide range of complaints about their former legal representatives. These deserve to be set out here in some detail because this data is prominent in many of the interview transcripts. Presenting this data does not assume that it is objectively "true". Whatever the full story of these individual lawyer/client relationships – which we cannot know - what is clear is that many SRL's felt that their lawyers did a poor job of explaining their role to them, why they were doing (or not doing)

[75] ON20

particular things, and generally, just why clients were being charged the amount they were for counsel's services.

i. Counsel "doing nothing"

There is an extraordinarily widespread sentiment among many respondents that their former legal counsel did "nothing" to advance their case towards a realistic outcome. The word "nothing" appears repeatedly throughout the interview transcripts – for example, "nothing happened"; "my lawyer did nothing"; "nothing had been done"; "nothing was resolved". Many SRL's described difficulty getting updates from their lawyer as the weeks and months ticked by, despite repeated efforts to contact them[76].

Sometimes the grievance about "nothing" being done was framed around a related complaint that their former counsel had been unwilling to "stand up to" the lawyer on the other side. This was especially a problem in smaller communities, where clients were often keenly aware of the relationships among members of the local Bar - "we live in a small town and the lawyers all know each other"[77] - and the inevitable "pecking order" which some believed disadvantaged them if they had a less experienced, junior lawyer representing them. A more extreme version of this same complaint was the assertion made by SRL's that they could not find anyone to represent them in their town because of the power and prestige of the lawyer on the other side.

ii. Counsel not interested in settling the case

Others went further to complain that their counsel had intentionally "dragged things out", reflecting a common perception that lawyers deliberately slowed the process down in order to make more money from their clients[78]. Connected to this perception that their case was becoming unnecessarily protracted, there was a widespread feeling that some lawyers were less interested than they should be in resolution. Instead, there were frequent observations of aggressive and adversarial behavior by counsel; "the two lawyers were just saber rattling, seeing who could piss the other off the most."[79]. Many SRL's bemoaned the general lack of settlement orientation among the lawyers they encountered. "A lawyer should have the wisdom and skill to modify their approach to resolve matters for all parties as opposed to putting fuel in the fire."[80]

There were numerous references to antipathy towards mediation by counsel (back). The following comment is typical: "He (this respondents's former counsel) was not working to resolve the issues, but working for his payment."[81] Several respondents described commencing their divorce application with a tentative agreement between

[76] For example, AB14, AB46,
[77] BC13
[78] For example AB34
[79] AB37
[80] ON61
[81] AB12

themselves and their spouse, which then fell apart once each retained counsel[82]. Again, while it is not possible to independently verify these accounts, they contain many common elements (the lawyer not listening to the client, the lawyer ignoring the priorities of the client in favor of pursuing an outcome that the client was less interested in, and the lack of a plan for moving settlement forward).

iii. Difficulty finding counsel to take their case

A significant number of SRL's describe "shopping around" for a lawyer but with no success. Some SRL's complained that while they were willing to pay for legal services, they could not find a lawyer willing and competent to take their case on. These respondents described placing numerous phone calls to lawyer's offices – sometimes as many as 15 or 20 – and sought recommendations from friends and from the court, but found that their calls were not returned or that counsel was not interested in taking their case. The reasons they said that they were given varied from "too complicated" to "too sensitive" - in other cases, the unspoken assumption was that the case was too small/ a losing proposition.[83].

iv. Counsel not listening or explaining

"My lawyer never asked me what my goals or my expectations were." [84]

There was a general feeling among many SRL's that their former lawyers did not listen to them, either disregarding their specific instructions or, more commonly, not paying attention to what was really important to them. At minimum the narratives of these respondents suggest that their lawyers were not effective (perhaps did not give sufficient time to) explaining and evaluating different strategies with the client as a full partner in that discussion. Instead the lawyer appeared to the client to disregard their views and focus on taking charge. This may reflect an old fashioned perspective on the professional relationship as one between "expert: and "novice" that no longer works for many 21st century client. One respondent noted dryly that when she first "interviewed" prospective legal counsel (a new experience for some lawyers) "A lot of lawyers told me what they wanted to do as if it was *them* making the decision."[85] (my italics)

Some SRL's struggled with the uncertainty of the legal process. Whereas lawyers are familiar with the difficulty of offering certain results, many clients find it hard to understand how speculative the outcomes might be. At best, their legal counsel appear to have done a poor job of explaining the reasons why they cannot guarantee an outcome, and may exacerbate this by appearing unwilling to work with the client as a partner.

[82] BC23, BC2
[83] BC57, AB56, ON23
[84] BC42
[85] BC46

Jacob shopped around for a lawyer to represent him in his claim against his former employer. When he did find some with experience they wanted a very large retainer – $15-25,000 – and "they did not want me involved in the case." "They wanted to ensure that they would do it their way, and my input would be not a significant part of the case."

This left Jacob feeling "Why should I give you $15,000 without knowing if you can do any good or not?"[86]

v. Counsel made mistakes/ was not competent

There were numerous complaints of "sloppy" work by lawyers. Some respondents acknowledged that while they were unable to determine the quality of counsel's legal arguments, however:

> "I am not in a position to judge someone's legal work, but I can tell if someone had put in careful work, and the affidavits were not even proofed or edited."[87]

Other SRL's went further, complaining that the lawyer they retained proved to be unfamiliar with the law and procedure relevant to their case, or even, in their view, "incompetent". If there were mistakes or failings by counsel, the stress and immediacy of many family cases, and in particular those involving domestic violence, makes mismanagement or error by legal counsel even harder for the client to accept. One respondent described errors made by her legal counsel in making an application for a restraining order, which was subsequently set aside. "This was a very, very difficult time and I don't appreciate that my safety was jeopardized but also that of my children."[88] Inevitably, perception of effectiveness is part of the cost/ benefit assessment made by those who have worked with a lawyer, in contrast to those who have not (above), and exemplified by the following statement: "I was dissatisfied that there wasn't enough performance, and she was dissatisfied that there wasn't enough money - so we split."[89]

These types of negative experience with costly professional services lead to a kind of fatalist despondency amoung some SRL's, and provide them with a rationale for taking over their own case.

[86] AB24
[87] BC37
[88] BC2
[89] ON19

> "I don't mind lawyers being in charge but none of my lawyers ever had an action plan… Lawyers have poor organizational and customer skills and they charge ten times my hourly wage. Why would I pay (her lawyer) another $1,500 when she had no plan, no suggestions as to what would work? At this point I decided that I should represent myself."[90]
>
> "After $12,000 I was still exactly where I started. I couldn't keep on paying this kind of cost. It's a big money grab. So I went back to representing myself"[91]

The attitude of many SRL's who described negative experiences with legal counsel was "how could it be any worse than this if I do this alone?" At least if they were representing themselves they would not be continuing to pay for a service that they believed was not advancing their interests. When asked "what difference would it make now to you to have a lawyer representing you?" some in this group expressed skepticism that it would in fact make any difference at all, once they had come this far on their own. Their belief was that the only difference between their position now as a SRL and their position if they had a lawyer still would be the amount of money they would have expended on legal costs.

c. A preference for handling the matter themselves

Around one in five SRL respondents expressed a personal determination to take their matter forward themselves, in addition to financial constraints that motivated them to self-represent. Typical of this view are sentiments such as "(I)t's my story and no one knows it better than me – I lived it and breathed it[92]" and "I wanted to be in control of my own destiny."[93]

A small number – around 10% of the SRL sample - expressed confidence from the outset that they could handle their case themselves and saw retaining legal counsel as a poor use of resources when relatively little money was at stake. This view was often associated with prior experiences that the individual believed equipped them well for tackling a court procedure. Sometimes this was direct experience with the legal system – for example as a para-legal or even a lawyer[94] – as well as previous experience as a SRL.

[90] AB65
[91] BC90
[92] BC46
[93] AB2
[94] There were four lawyer SRL's in the sample

David[95] felt "completely comfortable" with his decision to represent himself. He had had a number of previous experiences representing himself, and he had worked as a collections agent and as a bailiff. "It didn't even cross my mind to have a lawyer represent me."

He was encouraged to represent himself by the wealth of available resources, both on-line and in the law libraries. "You can fall over information just walking down the street in (his city)." In addition the staff at the courthouse were helpful and tried hard to help SRL's. "In any case in my case (he was suing a landlord for the return of his deposit after a job offer fell through) I did not need much help or explanation as I was familiar with the process."

In contrast to David, most of those who expressed a preference for handling their case themselves did not reach this conclusion immediately or even in the first few months or years of their experience. Many worked with legal counsel for some time before reaching the conclusion that they preferred to handle their case themselves. Many felt that they were not being listened to by their lawyer (above), and almost all also expressed concern about legal costs.

Despite these other elements, the sense that they were best placed to handle their own matter became an important element in their explanation of why they were self-representing. A common rationalization was that no lawyer could possibly understand the case, and what it meant to them, as well as they did themselves.

> "I don't regret not having a lawyer. This would introduce a new person who doesn't know about our situation. Why have two people (lawyers on each side) who don't know or understand them?"[96]

There is an internal tension in some of these SRL narratives. The importance of staying in charge of one's own case is genuinely important to many SRL's, perhaps becoming more important as time goes by (in a sense it is the "silver lining" of handling the matter themselves). Yet these same respondents also describe the stress and anxiety they suffer as a consequence of representing themselves – including speculation about the disadvantage they are at when facing counsel on the other side[97] - and many continue to make reference to the costs of legal representation.

[95] BC40
[96] BC18
[97] Research on the impact of legal representation on outcomes is limited to date and the results inconsistent. See for example The Importance of Representation in Eviction Cases and Homelessness Prevention Boston Bar Association Task Force on the Right to Civil Counsel, 2012. For a reviewof current research, see Rhode D. "Access to Justice: An Agenda for

When asked, "would you like to have a lawyer now if you could afford one and assuming you could find someone competent?"[98] some SRL's say that they now find it difficult to imagine that these conditions could be met and are dismissive about the assistance of a lawyer (although note that many more said that they would welcome the assistance of a competent lawyer if they could afford one[99].) There is a feeling of defiance in some of these respondent interviews, with these SRL's determined to manage without assistance now, despite the impact on their health and well-being.

5. How do SRL experiences match up to their expectations?

Some SRL's began with a sense of confidence, which usually drained away quickly when faced with the reality of the court process, often triggered by difficulties completing application forms and understanding the service process. For those who began with fears about their ability to represent themselves, their story just got worse and worse.

a. First steps: initial confidence

Among some SRL's, there was an initial sense of optimism that they would be able to handle representing themselves, and even, occasionally, a sense that it might be an interesting adventure. To the extent that SRL's expressed confidence at the outset (17%) this was somewhat correlated with a higher educational level; the largest group expressing initial confidence had university degrees, and the second largest group had a college qualification.

Some rationalized their confidence on the basis of prior experiences (for example, as a workplace grievance officer[100], or as a para-legal[101]) that allowed them to feel some familiarity with the justice system. Others pointed out that they appreciated that getting into the business of self-representation would take a great deal of time, but that they had this time available to them: "I was retired so I had lots of time to learn this game[102]."

Others talked about how they assumed that their education (especially those with university degrees) and their general life and work experience would enable them to undertake self-representation successfully

> "I decided, 'I can do this. It will be a learning experience – but I am an intelligent person, I can figure this out.'"[103]

Legal Education and Research" forthcoming Journal of Legal Education. This study did not analyze the outcomes achieved by SRL's against a control group. In almost two thirds of the SRL sample, the case was not yet concluded

[98] SRL Interview Template Appendix E

[99] See the further discussion at (10)(a)

[100] BC44

[101] BC52

[102] AB2

[103] ON18

When asked about what they typically observed as SRL expectations at the outset, service providers observed this same initial optimism among some SRL's, describing it as an unrealistic assessment that they would be able to cope with the process. Some blamed the "overselling" of access to justice.

> "I think they can do it because we claim this access to justice bullshit."[104]

Service providers describe SRL naivety in relation to both the complexity of the process, and the resources that the court could provide to assist them.

> "It's not a fast food service – (SRL's) expect that they will make one or two court appearances. But in reality this will require multiple court attendances, summonses and a great deal of their time."[105]

Some SRL's talked about being "seduced" by the mantra of "access to justice", held out via public statements by the justice system. A similar point was widely made by service providers that "over-sell" of the access to justice theme created unrealistic expectations.

> "People get information from the website and show up at court with expectations of "Access to Justice". They imagine they will have everything done for them, including going into court."[106]

> "I think they think they can do it because we claim this access to justice b..s..t."[107]

Their actual experience usually turned out quite differently (below). "No more fairy tale about having access to a justice system"[108]. Even the few SRL's who remained "on top" of their case had many critiques of the complexity of the process and the elusiveness of "access to justice".[109]

Some service providers reflected on this issue of "over-sell" at a deeper level, describing what they understood as a fundamental disconnect between the expectations of the public and the reality of self representation which saw the justice system as a "service" facility, no different from other government offices. This lead them to expect that their own part would be relatively minimal – equivalent to applying for a passport or a vehicle licence – and that the court staff would take care of the rest for them. One duty counsel described this as follows:

[104] ASP20
[105] OSP16
[106] ASP21
[107] ASP14
[108] ON18
[109] BC30, ON54, JBC40

"They think of this as coming to get a service and a benefit….(they) believe that you go to courts to get justice services just like you to the motor vehicle office to get a license."[110]

b. First steps: initial fears

Some SRL's told us that from the very beginning they were afraid of what they would face in representing themselves. As a result many of those who could not afford legal counsel, or had to end their relationship with counsel because they had run out of funds, expressed fears rather than confidence about representing themselves.

Janice[111] is a single mother. Her toddler daughter's father did not play a large role in their lives; Janice and her daughter had never lived with him. One day – "like a thunderbolt" – she was served with an application from him seeking joint custody.

A bitter court fight ensued "Once those papers were served, it was like a runaway train. There was no opportunity for us to talk reason."

Janice was very fearful about what she was facing and retained a lawyer right away. After six weeks she had used up her $5000 retainer and had received a bill for a further $24,000. She borrowed money from her family and paid this bill "I desperately needed (her lawyer). She told me 'if you represent yourself you will be eaten alive.'"

But now Janice was becoming equally scared about the prospect of what continuing legal work was going to cost her. She didn't qualify for Legal Aid – she earned more than $75,000 – but could not afford to keep paying at this rate. And the process had scarcely begun – she had had just one hearing so far.

Before the next hearing, Janice reluctantly told her lawyer that she was going to have to represent herself. "This was a no choice situation: I just could not afford to pay anymore. I was really scared."

Janice did eventually find a lawyer who would give her unbundled advice. She would see him every couple of weeks with a list of questions. Janice says that this was the only thing that got her through her nine-day trial.

[110] ASP7
[111] BC37

"I was preparing for it all summer (the trial took place in July). I stayed up until 3 or 4am most nights trying to put everything together." None of her friends and family could be with her in the courtroom with her because they were witnesses. "No one could understand the fear that was in me and how hard the work was. I remember thinking to myself – do these people (the court clerks, the judge, the lawyer on the other side) imagine that I am enjoying this? I am here because I have no other option. I am just a mom, trying to figure this out… it was so complex, daunting, intimidating."

Janice lost her trial.

Janice is not alone in starting with fears about the process. As one service provider put it, by the time that a SRL first presents themselves to the court, "their anxiety levels are already very high"[112]. SRL's described their fears as follows:

> "I'm scared because I doubt myself and there is a lawyer sitting on the other side."[113]

> "I felt scared – there was too much stuff to deal with. I'm really good if I can put a wrench on it, but I couldn't put a wrench anywhere on this problem.[114]

Or simply

> "I'm scared because I have no idea what to expect."[115]

c. Becoming overwhelmed

For a few SRL's, their initial sense of confidence survived the bumps and bruises of the process, but they still had many critiques of the complexity and difficulty of the process, as well as they way they were treated by the courts. Two SRL's who found their way successfully to the end of their process and appeared to have retained their sense of composure throughout nonetheless made the following comments:

> "I expect to experience prejudice and discrimination as a SRL. But at my age, I'm damned if I am going to back off something that is reasonable and let the system add to the injury I have already received….(E)ven in small claims court, judges and lawyers regard SRL's as a nuisance – they are no more welcome than they are in criminal court."[116]

[112] ASP14
[113] ON2
[114] AB46
[115] B31
[116] ON54

> "My biggest disappointment – and surprise – is the overwhelming amount of prejudice I have encountered. I have not been taken seriously by both lawyers and judges."[117]

Only a small number of SRL's spoke with any confidence about returning to the courts another time. The majority were, quite simply, overwhelmed**.** Some said that the process was nothing like what they had expected, and far more demanding of both their skills[118] and their time ("all of which involved taking time off work."[119]). Even those who began apprehensive told us that their experience turned out to be even worse than they had ever imagined.

> "My expectations were that I would have to be sharp but I didn't think that it would come down like a deck of cards. It's an extremely sharp game. I had to begin to make my own filing systems – I became a bundle of nerves. "[120]

> "The procedure as I read it sounded easy. I thought it as going to be easy - but it was anything but."[121]

Four particular stages/ tasks within the legal process featured consistently in stories of feeling overwhelmed. These were: completing, filing and serving paperwork and forms; participating in the discovery process as a SRL ("I was eaten alive"[122]); and conducting one's case at a hearing. Finally there were also many disappointed and frustrated expectations regarding the post-trial process, especially regarding collections. Many SRL's assumed that having secured an order (this was particularly the case was the order was for the payment of monies) that the court would take responsibility for ensuring the money was paid. Instead, they were often appalled to learn that they now had to take further steps to collect the money themselves[123]. "What's the point of the judge giving orders if no one is going to enforce them?" [124]

Another frequently voiced complaint – and surprise - was about the length of time it took to complete each stage of the legal process. Few SRL's had any idea of just how much time representing themselves would consume, or how long the process would take. To many, the legal process seems (and with unresolved issues, perhaps is) interminable. Many SRL's expressed disbelief that the process could not be faster, or at least clearer guidelines provided to them about timelines. "It isn't like this when you buy any other service."[125] There was little or no understanding that litigation moves at the pace of the slowest party.

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[117] BC30
[118] AB23
[119] AB21
[120] AB11
[121] BC11
[122] AB2
[123] For example, BC84
[124] ON6
[125] AB16

Some service providers suggested that some SRL complaints about hearings go back to the erroneous belief that having filed an application, they would quickly be brought in front of a judge[126]. But other SRL's had researched and prepared carefully - and were still confounded by what happened when they got to court.

> Mustafa[127] became involved in legal action over the custody of his sister-in-law's young children, after he and his wife learned that she was being assaulted by the children's father. What began as a "good Samaritan" effort (Mustafa and his wife offered to take the children after CAS became involved) turned into a nightmare of litigation and self-representation.
>
> By the time Mustafa was interviewed, he had appeared in court on his own behalf (they did not qualify for Legal Aid) on 14 occasions.
>
> Mustafa tried to research what he needed to do to prepare for court but "(T)he typical procedure in court is not what the books describe—an opening, questioning, and closing. Instead it is just rambling on and on without a clear structure…I still was thinking the judge would ask for my information – I was ready to talk about case law and precedents. I thought the judge would read all the things you have to pay for (in advance), but in fact he doesn't get (the file) until that day. How can you judge something you haven't read? "
>
> Mustafa reflects that he and his wife did the right thing and they have no regrets about that, but "(T)his is not what we expected when we first took this on"

This final quote in this section effectively summarizes both the substantive and emotional content of what many SRL's said when asked about the relationship between their initial expectations of being a SRL, and their actual experience.

> "My expectations? I can't even remember my expectations anymore. My life just fell apart."[128]

The bottom line here is that most SRL's simply have no idea what to expect, or that their expectations are inaccurate.

[126] BSP21
[127] AB4
[128] BC28

Part Three: Getting Started: How SRL's Engage with the Justice System

6. SRL's and court forms

a. Overview

A central component of courts administration strategy in dealing with the growth in the volume of SRL's has to be provide an increasing amount of information – forms, procedural guides and other information – on-line. A review of publications and Internet reports on SRL resources reveals that the majority of resources being developed for SRL's in both Canada and the Unites States are on-line.[129] For this reason alone, an evaluation of this material deserves close attention in this Report. The experiences of SRL's are often dominated by their experience with the user-friendly quality of these on-line resources.

All the SRL's interviewed spoke about their experience with completing court forms, and often numerous subsequent procedural aspects of their case. In many cases, these process issues dominated their experience and thus the interview; in most interviews, the process dimensions of the SRL experience - both negative and positive, but often negative – were talked about a great deal more and at greater length than their outcomes. In the 25% of cases which were concluded by the time of the interview, it was evident that the procdural aspects of the experience - – including the completion of court forms, which was often the first time a SRL realized the scale of the challenge they faced - were at least as important to the individual, as they recalled their experience, as the actual outcome.

This section (6) considers the information gathered by the study on the efficacy and accessibility of court forms, both on-line and hard copy. The next section (7) describes what SRL's told us about their experience with other types of on-line resources, including court guides, legal overviews and primers, and other substantive resources - some of which are offered by the courts and some by other service providers.

In addition to questions asked in interviews and focus groups with SRL's, two secondary projects were conducted to explore the accessibility of court forms and procedural guides. The first of these relates to court forms. The second relates to court guides (see (7)(c) below).

b. The Divorce Applications Project (Kyla Fair)

Kyla Fair is a research assistant to the SRL project who will graduate from the University of Windsor Faculty of Law in 2013.

[129] See for example the programs reviewed in Innovations for Self-Represented Litigants Hough B. and Pamela Cardullo Ortiz P. (eds) Association of Family Conciliation Courts 2012

In the summer of 2012, Kyla – who had just taken Family Law and Civil Procedure at law school – was assigned to complete the forms to file for divorce in the three provinces in which we are interviewing self represented litigants (Alberta, BC and Ontario). She was asked to keep a log of her time spent and to record any other comments about her experience as she went through the relevant courts forms, which she could access on-line.

Kyla began her summer assignment with enthusiasm and confidence. She anticipated that this would be a relatively straightforward assignment, and expected to learn a great deal from the real-life experience of completing the court forms. In fact, she found the assignment extremely difficult and very frustrating.

i. Language and terminology

Kyla noted that a significant amount of the language and terminology in the forms was accessible to her only because she had taken Civil Procedure in law school. However there were still many examples in all the forms of terms and vocabulary that she did not recognize[130]. Kyla commented "I saw a number of terms that I did not understand, and many more that a person without legal training would have no idea what they meant."

ii. Picking the "right" form(s)

Kyla's second major observation was that in each province, the length and number of the forms quickly became overwhelming. "I was quickly losing track of all the forms I needed to fill out." This challenge was exacerbated by the fact that it was sometimes difficult to know which form was the correct form to complete, with many possible choices. In one case Kyla described how she spent considerable time completing a British Columbia Supreme Court form which turned out to be only appropriate for an uncontested divorce.

> "After reading through steps 1-5 for over 30 minutes, I have learned that this information package is only for an uncontested divorce ie. When you do not need to appear in front of a judge. This was frustrating because I wasted time reading a lot of information that does not apply to me, and I had already filled out forms that do not apply to me."[131]

iii. Complexity of forms and information required

Kyla noted that all the forms she completed were complex and time-consuming – and singled out a few examples that were especially daunting, even for someone with legal training. For example, after spending 30 minutes attempting to fill out Ontario's Form 13.1 (application for spousal support) "…I am completely overwhelmed; the amount of detail required about the value of everything you own/ all of your monthly/yearly expenses is

[130] For example from the Alberta forms, "Praecipe to note in default"
[131] Time log of Kyla Fair, July 2012

extreme. I am only about halfway through the form but I am ready to give up…(for example), I am required to provide a valuation of every item I owned on the date of my marriage, the valuation date… in reality, this form would take days to complete. At the end of the form, you are required to provide a complete calculation of net family property derived from all of the valuations previously entered. The math alone is complicated, and I feel as though many errors would be made without some legal assistance."[132]

iv. Commonplace and unhelpful notations

Kyla noted some particularly unhelpful notations which she found in virtually all the forms she worked with. For example, there was a frequent mention of "supporting documentation", without explaining what type of documentation was needed (and what would be inadequate). Similarly there were frequent references to "service" and "serving" of documents, without any explanation for a lay-person about what this meant. Some forms did provide a link to another website where these terms would be explained.[133]

Kyla made the further observation – heard independently from many SRL respondents in interviews - that each form included multiple references (sometimes on each page) to the need to retain a lawyer. While this is a perfectly reasonable suggestion – especially in light of the difficulties experienced by so many SRL's with completing court forms and procedures – it is not terribly practical when the individual has no (further) resources for a lawyer, and does not qualify for Legal Aid. Some SRL's complained that it was irritating rather than helpful to be constantly reminded in this way of a resource that they could not afford.

v. What happens next?

Kyla noted in relation to each form, from each province, that there was little or no information about the next steps in the process or what to expect. For example,

> "I am not sure what court I am supposed to bring these forms to, or what the process is after I have filed the forms and served them ie. Does the court contact me? How long will it be until trial? What will the process be at trial? What documentation will I need to bring to trial? After trial, am I legally divorced? What happens if my husband contests the information I provided? Do I get copies of his statements before trial? "[134]

While it may be difficult for all this additional information to be contained in one place (eg on the court forms), it is important to note that without some guidance as to "next steps" many SRL's are confused about what to do. Most will simply bring the forms back to the courthouse, where they once again wait in line and absorb a great deal of registry staff time.

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[132] Time log of Kyla Fair, July 2012. See Report of the Divorce Applications Project, Appendix H
[133] For example, http://www.servicebc.gov.bc.ca/life_events/divorce/index.html
[134] Time log of Kyla Fair, July 2012. See Report of the Divorce Applications Project, Appendix H

Kyla's complete time log is contained below at Appendix H.

c. SRL experiences with court forms

Many SRL respondents described how difficult they found court forms to complete. The problem is exacerbated by the fact that, as one court clerk put it, "there a million forms out there."[135] Sometimes the clerk as well as the SRL is also seeing a particular form for the first time. As Crystal described,

> "When I took the forms in to the court, the clerks told me that I had filled the forms in wrongly. I burst into tears. The journey from my home to the courthouse was a 150 mile drive and a ferry ride. In fact the forms were fine – the clerks did not actually know the procedure and it turned out the forms were OK." [136]

Crystal's story was repeated in various ways over and over again by SRL respondents. It seemed that everyone had a story about a disaster (or multiple disasters) with completing and filing court forms, and many of these included a claim that they were given misinformation or information that they thought that they had followed, only to be corrected by another justice officer.

The most consistent complaints from SRL's about court forms and guides were as follows.

i. Difficulty knowing which form(s) to use

Many SRL's talked about the difficulty of ascertaining which court forms they needed to complete.

> "I have the choice of three forms – but I don't know which form I need? How would I know? It's so overwhelming. Then you read the question and think, what does this mean? I would pay a lawyer to tell me what I need to do."[137]

[135] BSP21
[136] BC53
[137] ON49

> Marie was sent forms to complete by her provincial support enforcement agency. She took three days off work to complete the forms (Marie is a university educated professional). However when she brought the forms into the agency, she was told that she had completed the wrong forms. Marie said "The agency is still giving these packages out to people – even though they are, in fact, the wrong forms."[138]

Like Marie, some SRL's complained that they had expended substantial time completing forms that turned out to be irrelevant or inappropriate to their matter.[139]

ii. Difficulty with language used on forms

Virtually every SRL in the sample complained that they found the language in the court forms confusing, complex and, and some cases, simply incomprehensible – referring to terms and concepts with which they were unfamiliar. This reaction was the same across all types of litigant no matter what court or province they filed in (although there were somewhat fewer complaints about small claims court forms and procedures, these were not devoid of criticism either).

In every case, significant time and effort is required to complete court forms. When Kyla Fair the project Research Assistant, was assigned to complete the forms to file for divorce in each province, she approached the task with her knowledge of family law and civil procedure. Nonetheless Kyla's timelog reveals just how difficult the forms were to complete - frequently containing terms that even as an upper year law student, Kyla was unfamiliar with – and how long each step took her (see also above at (c)).

iii. Complaints about inconsistent information

While many SRL's were appreciative of the assistance they were provided by court staff and especially counter staff at the court registry, a number complained that they were given contradictory information by different clerks.

"Two people look at your forms, one accepts it and one says this is wrong"[140].

One SRL said that she had got into the habit of leaving parts of her forms blank until she went to the counter, because of the likelihood if being told by the clerk she saw that day that her previous information had been incorrect.[141] There were also complaints that information about completing court forms was sometimes inconsistent between

[138] AB14
[139] This was also a challenge for the Project Research Assistant Kyla Fair, see above at (c)
[140] ON2
[141] BC58

judges and court staff. This was a complaint echoed by court staff in interviews who told us that sometimes a SRL would come to the counter and ask for a form that "the judge said I should get" – but which did not exist.[142] This further adds to the pressure that counter staff are experiencing, and sometimes results in expressions of frustration directed at them by SRL's.

iv. Consequences of difficulties completing forms

When a form is incorrectly or inadequately completed, the consequences can be significant.

> "The judge said that she saw no safety issues preventing me seeing my son – but that I had filed the wrong application. It should have been a application to vary, not an application for access. So she made no order. I lost not because of what I said about my son, but because of a technical thing about law."[143]

Some SRL's tell stories of working on their papers, and then submitting what they had thought were the right documents, correctly completed, to the court – but when they took a day off work to appear at a hearing, being told that they could not be heard because their paperwork was incorrectly completed. Service providers note that this causes a great deal of aggravation and frustration[144], and suggests that a procedure for checking forms and alerting SRL's to evident errors or omissions beforehand would save considerable judicial as well as SRL time. Along these lines, one court program is considering establishing a position of "SRL Navigator" in order to review forms with SRL's and prepare them for next steps[145]. A similar approach is taken by using a First Appearance Master at Jarvis Street[146] where SRL's appear before a special master who reviews their paperwork before their first OCJ appearance. ""I don't ready anyone for their appearance before me, I ready them for afterwards. I can also offer them more resources to help them self represent after their first appearance."[147]

The final story in this section comes from a university-educated SRL with a physical disability, who represented herself in (first instance) civil court because she could not afford to hire a lawyer.

[142] OSP31. Also BSP16
[143] BC59
[144] OSP16
[145] ASP16
[146] OSP26
[147] OSP26

"I have to say that as a person with a chronic illness it has been challenging to learn about court procedures and laws. I chose to represent myself because I am on a fixed income (disability) and can no longer afford counsel. I have spent all my life savings and more on a five-year divorce process...

The saddest part is that it is difficult to get accurate directions that allow me to get relevant information to help me make educated decisions. Forms are available on line if you know which ones you need. Filling them in properly is another issue. I know I am not the only one feeling this way." [148]

d. Service providers comments on court forms

It is not just SRL's who are affected by the complexity of court forms. One veteran courthouse manager told us, "The forms are ridiculous. The lawyers can't do it either. It creates more work for the counter staff. In Queens Bench it got so bad that we gave up using the four different forms and instead created our own single affidavit system."[149] Moreover, court staff talked at length in interviews of the tension between the overwhelming difficulty some SRL's had with completing the forms, and constraints on them assisting them to do so. Many court staff said that SRL's often came in expecting that the counter staff would complete the forms for them[150], and were disappointed and sometimes angry when they discovered that this was not a part of their job. Some SRL's appeared hopeless in the face of the requirement that they complete their own forms in order to file.

> "I can see in their face that if I have given them information, but they still have to complete their forms, they are completely at a loss."[151]

Many counter staff at the court registries spoke about how upsetting it was to be constantly faced with SRL's who were unable to complete their forms. They often feel very sympathetic towards them, but at the same time have clear instructions not to complete forms for litigants. Some counter staff told us that they wished that their job description could be changed to reflect the reality that many SRL's needed more assistance with their forms[152]. A few courthouses are experimenting with a station at the registry that offers assistance with form filling to SRL's.

[148] ON62
[149] AS2P0
[150] ASP15
[151] ASP7
[152] BSP1

Working under their current constraints, however, is often stressful for counter staff. They are often looking at a long line stretching out behind a SRL who is begging them for help that they cannot give. One courthouse manager told a story of an effort she made personally to try to alleviate the difficulty for one elderly couple.

> "I see the greatest problems for the older litigants – I think it's generational....I also see all the time that the way that a self rep handles their preparation has a lot to do with their perception of the court and the justice system – so we have an interest in making that a positive experience, when we can. The other day, I was driving back to X from Y, and I stopped at Z to meet an elderly man who is representing himself in a dispute over a line fence. He said to me "I don't even know if I will still be alive by the court date." So I stopped at the side of the road and met him and his wife and helped them with the forms."[153]

7. On-line self-help resources for SRL's

There is a huge amount of information available on the World Wide Web that is either designed for, or used by, SRL's in preparing their case. Some of this takes the form of resources prepared by the courts as procedural guides for SRL's (see (d) below). Some is provided by private law firms. Other websites are maintained by individuals and yet others are archives of specific resources, for example Canadian caselaw.

a. What on-line resources do SRL's identify as most helpful?

Each SRL respondent was asked to identify any especially useful or helpful on-line resource that they used. By far the most frequently mentioned site by SRL's in all three provinces was Can Lii[154]. The next most frequently mentioned sites were all from British Columbia: they were the Justice Education Society of British Columbia's video collection[155]; the British Columbia Legal Services Society family law website[156]; and JP Boyd's family law website (a privately maintained website)[157]. In Alberta, a number of SRL's said that they had found the Alberta Court Services (and especially Family Justice Services/Family Legal Information Centre) on-line resources to be very helpful[158]In Ontario, some respondents mentioned the Ministry of the Attorney General website[159], but not always positively ("adequate" was a typical description) and various private law firm sites that provide basic information.

Respondents found that these favorably mentioned websites were helpful, invaluable even, to them because they did not have the deficiencies and limitations described below.

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[153] ASP20
[154] A site devoted to Canadian caselaw
[155] See www. SupremeCourtBC.ca.
[156] See http://www.familylaw.lss.bc.ca
[157] See http://www.bcfamilylawresource.com
[158] See http://www.albertacourts.ab.ca
[159] See www.attorneygeneral.jus.gov.on.ca

b. Website deficiencies and limitations

The sheer volume of information available on the Internet is problematic. It is often difficult for SRL's to know which site to use and how to move from one to another without finding apparent contradictions or gaps. Another problem is that it is clear from interviews that SRL's ability to navigate and utilize information and forms provided on-line is affected by their emotional condition as they proceed through a contentious matter. In addition, a small number have no access to the Internet outside public facilities and/or are not comfortable using the Internet. This underscores the problem of over-reliance on on-line resources without also offering SRL's face-to- assistance and support.

In addition to these general themes, there were many detailed complaints about websites. SRL's consistently complained that on-line resources:

(i) Emphasized substantive legal information but did not include information on practical tasks, for example how to serve a document, or presentation and procedure, for example how to present your case in court, how to address the judge, what to bring to court and how to prepare[160];

"I have read many different family law books and have been on lots of family websites, but I am still not clear about the procedure. These resources don't tell you how to write a motion, or the wording to use."[161]

A related problem is understanding how to apply substantive information in the absence of FAQ's or other question-and–answer formats which would anticipate common questions and misunderstandings from the perspective of a SRL.

(ii) Did not include strategic coaching and or advice on how to talk to the other side, how to approach settlement, and whether and how to use mediation;

(iii) Often directed users to other sites, giving rise to inconsistent information and difficulties navigating between sites;

"When you read information on the Internet and then it refers you to something else – which refers you to something else – by this time you are overwhelmed. It is endless mayhem."[162]

"We need to develop a website to put all the resources into one place, one site. The information is too disparate."[163]

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[160] The Justice Education Society of British Columbia's website videos were the one resource that SRL's mentioned that was helpful in this respect (procedural information and tips). See www.justiceeducation.ca. Further and better resources are being added all the time; see for example http://www.justiceeducation.ca/resources/administrative-law-bc

[161] ON62

[162] BC45

[163] ON10

(iv) URL links were frequently broken or not working (including on government sites);

(v) Generally, on-line resources often required some level of understanding and knowledge in order to be able to make best use of them.

"What about someone without my research capabilities? I did all this research and I still had just questions – it was scary."

c. The Court Guides Assessment project

This project was conducted by Cynthia Eagan, an information technology specialist residing in Windsor, Ontario who works in the Detroit Public Library system. Cynthia contacted the Project after reading a local media article about the study in July 2012 and graciously offered her expertise and assistance on a voluntary basis. After a series of discussions, we decided that she could utilize her considerable experience with reviewing the accessibility of information as an information technology specialist to assist us in evaluating a selection of (on-line) procedural guides provided by the courts.

Together Cynthia and the Principal Investigator developed a template of questions that she would apply to a Court Guide from each provincial ministry. The questions used for Cynthia's evaluation were:

1. Does the material use accessible and easily understood language?
2. Does the material avoid technical and legal jargon?
3. Is the use of language and terms consistent throughout the guide?
4. Do there seem to be any important unanswered questions?
5. Is there a reference point for further questions?
6. What is the material's "reading level"?[164]
7. What is the experience of navigating amongst URL's cited in order to complete the form?

The three court guides that Cynthia evaluated using these criteria were:

1. From British Columbia, "Applications to Court" page 9 "Get Help with Your Case" at http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf

[164] For this assessment, Cynthia used the Flesch-Kincaid Grade Level test. This test rates text on a U.S. school grade level. For example, a score of 8.0 means that an eighth grader can understand the document. The formula for the Flesch-Kincaid Grade Level score is: (.39 x ASL) + (11.8 x ASW) – 15.59 where: ASL = average sentence length (the number of words divided by the number of sentences) ASW = average number of syllables per word (the number of syllables divided by the number of words

2. From Alberta, Alberta's Family Law Act: An Overview at http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf and Child Support Order kit (for both the applicant and the respondent). It can be downloaded at http://www.albertacourts.ab.ca/forms/Kit-Directory-CTS3854.pdf
3. From Ontario, the guide to making a claim in small claims court available at http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Making_a_Claim_EN.pdf

Cynthia's assessment turned up many of the same issues that SRL's complained about. In auditing the Court Guides for jargon and difficult and inconsistent language (questions 1-3 above), Cynthia found many problems ranging from unclear grammatical expression through to numerous technical terms that are not explained (for example, "adult interdependent partner"[165]; "endorsement record" [166].

Cynthia's assessment also turned up many "important unanswered questions" (question 4 above). On some occasions a description given in the Court Guide was too vague to be helpful to a lay-person (for example, "Remember that preparing for and attending at a chambers application will cost you time and money". In other instances it was incomplete (for example, "You should request costs in the event that your application succeeds" but no information on how[167], or instruction to have a 'sworn affidavit" without information on how to go about this process[168]) begging the question of how a SRL would put this information into practice. Occasionally (but by no means always) a further reference point was provided (question 5 above), but in some cases these URL's were broken or not working (question 7).

Cynthia found that the reading level of some of these on-line guides (question 6 above) varied widely and in the worst cases was probably set too high for some users. For example, she found that the reading level of an excerpt from the overview of the family law system provided by the Alberta courts[169] is 13.6 (meaning that it could be only read and understood by a reader reading at a Grade 13 level); in the Ontario Ministry of the Attorney-General guide to serving documents it is 8.9[170]; and in British Columbia's Guidebook for Representing Yourself in Supreme Court Civil Matters[171]it is 5.1 (easily the most accessible on this measure).

Cynthia's complete report (Report of the Court Guides Assessment Project) is contained below at Appendix I.

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[165] Example from http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf
[166] Example from http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf
[167] Example from http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf
[168] Example from http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf
[169] Example from http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf
[170] Example from http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf
[171] http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf

d. Conclusions

On-line information and resources for SRL's clearly have great potential as a means of delivering information. Creative use of on-line technologies including videos and interactive websites offer further promise.

However there are currently many deficiencies in the substantive quality of the material available to SRL's. Moreover on-line material is being developed in a piecemeal fashion – even within particular courts or ministries – and SRL's complain that it is difficult to know just what to read and what to prioritize. There is duplication in some cases and important information missing – especially on "how to" and procedural matters – in others[172].

While doing everything we can to enhance the accessibility and utility of on-line information, it is important to recognize the limitations of even the very best of these resources. One SRL made the important observation that in order to operate competently in a new "culture" (ie the courts) she needed more than simply information.

> "It's the unspoken protocols that you can't read about. These are the kinds of things that are so critical. If it's not your culture, it can reflect badly on you." [173]

This type of orientation is not easily provided on-line. Instead, "I needed somewhere to go and ask questions – and she (an individual in court information service) answered them. She told me to go into the court and watch. I learned things like, the judge does not like to be interrupted, and when it was my turn to speak."[174]

Many other SRL's expressed the need for more than on-line resources, however good – a need for human contact and support as they navigate the justice system and prepare their case to the best of their ability. This reality was continually recognized by service providers.

> "You can set up all the websites you want, but often sitting face-to-face with someone is what people really need." [175]

8. Legal information for SRL's

a. Overview

The most frequently accessed source of face-to-face "legal information" for SRL's are the staff who work at the registry counters, and to a lesser extent (that is, more informally) the court clerks. In addition to these longstanding roles inside the courthouse

[172] AB73
[173] AB58. Also ON32
[174] AB39
[175] ASP14

positions, there are now a number of "non-lawyer" staff positions in in-court and community programs who interface continuously with SRL's. These include Family Justice Services (offering and Justice Access Centres (offering both family and civil assistance) operated by the Ministry of Justice in British Columbia; Alberta Family Justice Services, which includes the Family Legal Information Centres , and Law Information Centres (providing advice on civil matters), all operated by Alberta Justice and staffed by the Alberta courts; and Pro Bono Ontario (operating Law Help Ontario), Family Legal Information Centres (operated by the Ontario Ministry of the Attorney-General) and Family Law Service Centres (operated by Legal Aid Ontario). In addition, some especially busy courthouses (for example, Brampton Ontario, Jarvis Street Ontario) operate a "triage" / information desk positioned immediately after entry security screening. One or more staff are located at this desk and deal all day with an endless line of confused and anxious people, acting as "traffic cops" who direct them to the right counter/ service.

Relative to other justice system actors such as lawyers and judges, all these positions are poorly remunerated and staff receive minimal training to prepare them to interface on a daily basis with SRL's. The impact of the growth in numbers of SRL's is having at least as significant an impact on the work of court and program staff as on members of the Bar and Bench. Day after day they are facing a deluge of anxious, upset and often increasingly frustrated people. Registry and program staff were eager to be interviewed by the Project – in part to describe the difficulties they faced, and in part, one felt, just to get a break from the stress and pressure of the counters for thirty or forty minutes. Interviews with registry staff in all three provinces exposed the pressure and stress of these positions; there was frequently a feeling of siege and even desperation in these interviews.

It was striking how directly the experiences and perspectives described by SRL's and by registry and program staff in interviews and focus groups were mirror images of one another – for the SRL's from one side of the counter, and for the registry staff/ legal information centre staff from the other. When asked to describe what they saw as the major frustrations of the SRL's, counter staff were always able to accurately describe the same issues that SRL's talked about, in particular difficulty completing court forms; false expectations that the counter staff could do more to assist them in this and other respects; bruising experiences with judges; and general despair over how to navigate the court process with so little knowledge and understanding. Their own frustrations stemmed from trying to do the best job they could to assist upset and anxious SRL's who expected a great deal more from them than they could offer, both in terms of time and in relation to legal advice/ information.

Staff working at the registry and in other parts of the courthouse with SRL's often experience an emotional toll that is also a mirror of the stress and upset experienced by some SRL's. Many talked about taking work "home", where they continued to worry about individuals whom they encountered in various stages of desperation. Some further complained that they receive insufficient support following particularly upsetting incidents.

> "I had been working here for six months and a woman got dragged out by knifepoint by her husband. We got no debriefing or support. It was the most traumatic thing I've seen….*The emotional baggage that they (SRL's) come in with is only matched by our own*". (my italics)[176]

Managers described in interviews how registry staff positions have historically been very stable, with many court workers serving for ten, twenty or even thirty years. Some of these long-term workers were interviewed by the Project (below). However managers also observed that these positions were becoming increasingly transitional as a result of the very high stress of the job. This means that it is commonplace for staff to be away on stress-related leaves, leaving the counters short-staffed. As staff turnover increases, courts and programs are constantly training new workers who inevitably begin with a more shallow knowledge than more experienced staff – and may then leave after a short time only to be replaced with others.

b. The legal information/ legal advice distinction

At the heart of the job description for each "non-lawyer" staff person is the dubious distinction between "legal information" and "legal advice". This constraint operates for registry staff and court clerks as well as for non-lawyer staff at a variety of court and community programs serving serve SRL's (see above at (a)[177]).

Many registry and program staff complained in interviews – some of them in dropped voices, aware that they were questioning an important orthodoxy of their role – that there was no clear or meaningful distinction between what they were allowed to dispense ("legal information") and what they were not permitted to talk to SRL's about ("legal advice:"). The SRL Survey conducted by Trevor Farrow et al for the Association of Canadian Court Administrators found that 55% of court workers found the distinction they were provided with between these two activities either inadequate or non-existent[178].

Many court staff said in interviews that they felt hamstrung in their dealings with SRL's at the registry counter and under pressure to refuse simple yet critical "advice", for example about which form to complete or how to complete the form. Others complained that in the absence of clear directions that determined how much assistance of this type they should give SRL's, they had little choice but to err on the side of withholding, especially given the volume of SRL's standing in line each day. One family justice worker described this pressure as follows:

> "Everyone's kids are a priority to them, and they think that they should have special treatment. We understand, but they don't realize that everyone else in line has kids

[176] APS20
[177] Note that this is not an exhaustive list but includes the most significant programs in the three provinces in terms of service provision
[178] See Addressing the Needs of Self-Represented Litigants in the Canadian Justice System" A White Paper prepared for the Association of Canadian Court Administrators, Trevor Farrow et al 2010

too."[179]

If registry and program staff experience difficulty with the legal information/ legal advice distinction, this is even less meaningful for SRL's. Many are frustrated by what they see as the unwillingness of the counter staff to assist them – whereas the counter staff feels that to give further advice would go beyond their constraints imposed on them. One SRL who appreciated this tension described it as follows:

> "I understand that the counter staff cannot give legal advice but most people do not. Instead, they think that what they are asking is a simple question and that the counter staff are just passing the buck."[180]

A further consequence of the ambiguity and uncertainty of the legal information/ legal advice distinction is that in effect court staff are constantly exercising personal discretion in their dealings with SRL's[181]. How much help should they give Mr A who is elderly and has already stood in line for an hour? How much should they say to Ms B who is confused about which forms she needs to complete and what information she needs to provide, and is having difficulty concentrating as she has a cranky two year old in tow? A constant problem is how far registry staff should go to review documentation before it is filed. If they do not, it may be rejected and the SRL will be back in line again in a few weeks time, more frustrated than ever. If they do, are they providing legal advice? And what about all the others in the line who want the same help?

A number of SRL's pointed out that whether or not they reached someone who was willing to go a little further in assisting them was "…a matter of luck – whether you get a helpful person or not is a lottery"[182] Again, the comments of the registry staff themselves bear this out. Some SRL's – usually those who can present themselves sympathetically, and may be higher functioning and with better social skills - will get more help and attention than others. This is borne out by the stories of SRL's who managed to get a little extra help from counter staff by establishing personal relationships with them; for example presenting themselves as "a pleasant person"[183] in an effort to gain more help.

c. Interaction between SRL's and court staff

When asked in interviews "who was the most helpful person you encountered as a SRL?" the majority of SRL's described someone who worked at a courthouse registry, in a courthouse information program, or as a court clerk. While some SRL's complained that staff were not sufficiently patient or friendly (below), the majority appear to understand the pressure that court staff are working under and appreciated their kindness.

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[179] ASP6
[180] AB24
[181] A problem pointed out by John Graecen. See John M. Greacen, "No Legal Advice from Court Personnel: What Does that Mean?" (1995) 34 Judges' J. 10, online: American Judicature Society <http://www.ajs.org/prose/pro_greacen.asp>; John M. Greacen, "Legal Information vs. Legal Advice: Developments During the Last Five Years" (2001) 84 Judicature 198
[182] BC11
[183] BC72

"People working at the court counter are completely overwhelmed. At the beginning you think you have the right to help, and don't understand why no one is offering it – but then you see how overwhelmed they are and understand how they could not possibly help everyone."[184]

Some SRL's talked about relationships they developed with particular staff who they came to rely on for help but also for moral support. One man described the counter staff at his courthouse as "the angels."[185], another woman as "the little fairies"[186]. A few SRL's recognized that as they returned over and over, the patience and resources of the court staff to help them began to run out. Similarly courthouse staff talked in interviews about SRL's who would come to the counter over and over and whom they began to wish to avoid.

Some SRL's are also very aware that the people who help them the most are those on the lower end of the courthouse hierarchy.

> "It is the grade 12 girls – the clerks – that really have the brains and the compassion to make things happen. They knew how to short cut certain things, and if they could see that you wee getting a dirty deal, they would sort it out for you."

There were some noticeable differences between data collected that relates to registry staff (who may have begun their careers at a time when SRL's were the exception rather than the rule), and staff working in court-based legal information program directed at helping SRL's, such as the Justice Access Centres or the Family Legal Information Centres. Those in the latter group understand their job as helping SRL's, and by and large accept the trials and stresses of the job. For example, "It can be very rewarding to help people. I …deal directly with people and although it's always challenging, I am always learning new things. Most people are very happy when we help…It's like we are all at war together – it's tough, but we have fun."[187]

Like this young woman, staff who have been hired specifically to work with SLR clients tend to be more engaged and willing to interact with this client group (compared to some staff who have worked at the registry counter for several decades and are now required to adjust their expectations). This relates to establishing clear expectations in a job description but may make an important difference to the quality of customer service. This difference was suggested by SRL comments about the assistance they received from legal information programs. SRL's were for the most part very positive about these programs, and especially the JAC's, FLIC's and LinC's. A few were frustrated by the constraints on how much assistance these programs could give them (the same tension around legal information/ legal advice described above) but most SRL's appreciated the kindness and professionalism shown to them by the staff in these programs.

[184] BC48
[185] BC44
[186] BC45
[187] BSP14

Similarly, offices that have been designed to serve the SRL population tend to be differently laid out and organized than traditional courthouse facilities and may be more hospitable and practical for SRL's. For example, the Vancouver Justice Access Centre has a check-in counter, but there is no glass between the client and the staff person, whose job is to refer each client to the appropriate resources / person within the Centre. There are two rooms containing computers and printers which can be used by SRL's where professional staff circulate, offering assistance and answering questions. This set-up is both more conducive to SRL's working for themselves and more welcoming in terms of offering help than a traditional line up in front of a desk.

There may be some generational differences in expectations that are reflected in different styles of dealing with SRL's. One fascinating discussion among a group of courthouse and agency staff in a smaller centre illustrated this well. One older and senior agency staff (also a lawyer) suggested that SRL's "should make affording a lawyer a priority. So maybe you have to sell your four wheeler?"[188] A younger registry clerk shifted uncomfortably in her seat. "I couldn't afford a lawyer. And I'm not sure you can tell people what to spend their money on."[189]

At the same time, many long-serving court staff have clearly adapted to the new SRL reality. Virtually all courthouse staff came across as compassionate and empathetic towards SRL's in their interviews. What they are able to offer in practice, however, may vary from day to day and reflect both their workload and their personal stamina. A few SRL's complained that the counter staff were only interested in helping "people in suits" [190] (ie lawyers) and that they were treated without interest or compassion. There was a sense from some SRL's that the counter staff were unwilling to try to understand their position.

> "Some clerks, if you don't phrase the question correctly, they will not rephrase it to help you out."[191]

One SRL proposed that the counter staff "should be like crossing guards and be helping us cross the street."[192] Some accept this role, while others may be less willing to do so. One SRL who effectively summed up what many SRL's say they are really looking for from courthouse staff, whether or not this includes "legal advice" or "legal information".

> "More kindness is needed in the system. Its OK to give guidance, and not all guidance is legal advice." [193]

[188] APS20
[189] APS20
[190] BC40, BC25
[191] AB24
[192] ON2
[193] AB31

d. Other stresses for court staff

Court staff frequently complained about the difficulty of keeping up with the ever-changing law and procedure in their area, and especially in family law. These personnel are required to be familiar with an enormous amount of information, with little formal training and supervision. It is hardly surprising that SRL's complain that they are sometimes given inconsistent information by different counter staff, as well as inconsistent information between a judge or master and the counter staff.

9. Other resources for SRL's

a. Mediation services

Court-based mediation services are also seeing increasing numbers of SRL's. One mediation program manager commented that she was seeing more and more clients who did not have lawyers, and that the primary factor was "…legal costs. They say that fees are astronomical and by the time they are through with legal costs, there are not many assets left….(and) more recently there is this huge mistrust of lawyers, because they've spoken with people with bad experiences or have themselves have had a previous bad experience."[194]

Many service providers talked about the value of offering mediation once legal action begins. There was a widespread sense that mediation was often very effective, but that there was still limited knowledge among SRL's about how they might use mediation: "some are not open to mediation because they …don't understand the purpose of know that it may help – people don't realise what mediators actually do."[195] This means that cases that could be settled tend to get "stuck" in the system because the SRL does not have the skills and tools to effect a settlement (see also below). A master at a busy urban courthouse pointed out,

> "If people could afford a lawyer, the lawyer could work out a consent for them so two weeks later they aren't back in court again – but they don't know how to do this and just keep coming back over and over again."[196]

Amoung some SRL's there is a sense that mediation is more intimidating than going to court – "they are mistrustful of the mediation process."[197] "It's human nature to want to avoid confrontation and it seems easier to go to court."[198]

All SRL's were asked in interviews whether they had either considered or had been offered a chance to mediate. Many said that they did not know about mediation, and/or

[194] OSP1
[195] OSP21
[196] OSP26
[197] OSP20
[198] ASP5

said that it had not been offered to them. From field trips to courthouses it was evident that there is an uneven provision of on-site mediation services, with larger centres such as Jarvis and Sheppard offering mediation services all day, five days a week, and other more rural centres such as Wetaskiwin only able to offer mediation on one day a week.

Even among those who were aware of mediation and in some cases eager to use this as a possible means of resolution, many problems were noted. Most frequently SRL's said that they wanted to try mediation but the other side would not co-operate. This is a familiar refrain in other mediation studies and of course cannot be objectively verified. What is clear is that "Mediation means nothing if the other person doesn't want to mediate or is not willing to settle."[199]

Other comments by SRL's about mediation that came up fairly consistently suggest different challenges. A number described what they saw as a culture of opposition to mediation among the legal profession, either discouraged from mediation by their own lawyer or rebuffed by the lawyer on the other side. Some complained that even when they asked about mediation, their legal counsel (if they were represented at the time) or counsel on the other side did not take it seriously. Some complained that mediation was simply used as an opportunity to stall by experienced parties[200] or counsel[201]. Even when mediation did take place, in some cases the parties did not participate, as this woman describes:

> "The lawyers are making a farce out of mediation….The present mediation system does not work. Lawyers are treating it as a silly game and thinking of ways to beat the system. They are making a mockery of what should have been a good solution. Litigation lawyers do not want it to work. …What is the advantage to them?... I think if I had been allowed in the mediation I would have been able to settle at that time."[202]

Others complained that mediation was costly (several SRL's[203] spent a significant amount on mediation but the case did not settle – obviously this is always a risk) and some had specific complaints about mediator competency. A few made the perennial complaint that mediation agreements "had no teeth" and that the other side was able to default without consequence[204]. The overall sense of all comments made about mediation programs and the work of mediators is that these services are still not offered at a consistently professional and credible level, and are only just beginning to gain public trust.

[199] ON48
[200] BC48
[201] ON65, BC63
[202] ON55
[203] BC21, AB13
[204] AB14, AB58

A few SRL's spoke about how helpful they found mediation to be. One businessman who used mediation to resolve his case commented

> "(T)his is my second experience with mandatory mediation, and in each case the process was very fair. The ability to be heard without restrictions is so helpful, and healing. The positive outcomes for my side are a bonus."[205]

A larger number of SRL's who had not been able to use mediation – because the other side refused or because they were not offered mediation – spoke about their belief that mediation should be mandatory – in order to bring the other side to the table and at least try to settle – or at least pressed much harder by judges and court staff.[206] The sentiment expressed by this frustrated SRL was reiterated by others:

> "Mediation needs to be pushed by the court. Give me a good reason why you can't do mediation. Domestic violence? Do shuttle mediation. You are wasting the court's time, (and that means) taxpayers dollars." [207]

These comments suggested a future in which mediation would be normative and even assumed. As one SRL who had had a number of experiences in the courts for small claims matters over several decades put it,

> " (Mediation is) a star glowing on the horizon - but it never gets any closer.[208]"

Obviously mediation will not resolve all matters, but many SRL's were of the view that at least it would be tried. Many also understood that this will take a stronger push from the court services and the Bench. With increasing recourse, one might also expect the standard of professional services to rise.

b. Community-based support for SRL's

This study engaged some of the community agencies that operate in the locale of the courthouse sites, among them advocacy centres for both men and women (including domestic violence programs and men's groups), Native Friendship Centres, the Elizabeth Fry Society, and public libraries. The support of domestic violence support groups was especially critical to some female SRL respondents[209], and a few male SRL's spoke about the importance of the support provided by a men's group[210]. We also interviewed staff at some unique agencies offering resources to SRL's such as the Justice Education Society of British Columbia, and others that did not have a brief for assisting SRL's but nonetheless frequently encountered clients who were pursing legal action without representation (usually family matters), foe example Prince George Action Against Poverty, Nanaimo

[205] AB75
[206] BC67, ON11, ON62, AB48
[207] BC69
[208] ON54
[209] ON6, ON64, BC8
[210] AB29, ON14

Citizen Advocacy, Peel Poverty Action Group. The project materials were distributed to many of these agencies, and some interviews conducted with staff.

Every individual interviewed from a community agency attested to the rapid growth in the numbers of SRL's they were seeing, and the "downloading" of some areas formerly served by public legal services to their agencies. . One domestic violence worker described how they had formerly referred women to Legal Aid lawyers, but as the program was cut, so her role changed.

> "Our previous role was supportive – to go with women clients to see their lawyers. Now women don't get lawyers – now we are the "lawyers"!"[211]

While welcoming the introduction of "legal advocate" (advocates who accompany women to court, not qualified lawyers) programs for women who suffer domestic violence, another domestic violence worker emphasized the need for women facing abusive partners to have legal representation.

> "They need lawyers. Everyone in family court does but domestic violence victims absolutely need lawyers. They need a family court process that understands that their situation is not the same as those who have not experienced domestic violence." [212]

As the numbers of SRL's continue to rise, we may see some community agencies starting to develop new resources to assist this population. In addition, public libraries are frequently used by SRL's and anecdotally librarians report many more queries related to legal procedures[213]. Future research could consider ways in which the library system might meet some SRL needs, for example by providing Internet access to on-line resources, specialist librarians, and access to other "office" facilities such as printing and photocopying.

c. Access to law libraries

A significant group of SRL respondents used their local law library for research. Several singled out the law librarian for especial praise.[214] Some SRL's clearly became regulars at their local law library.

A law librarian who contacted the Project asking to be interviewed had some interesting observations about the SRL's whom he regularly assists at his court library.

> "The ones that come to the library and make an attempt (to research) - they clearly have some sense that there is a gap in their knowledge and they are there because they recognize they need help….. Money is far and away the primary motivation. (to

[211] BSP16
[212] OSP25
[213] Conversations with librarians in public libraries at the field sites.
[214] AB12, ON24, AB39, AB37

self-represent). From what I see, only a small fraction of SRL's think that they are smarter than the lawyers, or think they don't need a lawyer, or have an ideological axe to grind that a lawyer may not buy into….(the rest) are so desperate for assistance that they trust their fate to a stranger (ie a law librarian) who they think will help them".[215]

d. Support person

All SRL's were asked if they customarily took a support person with them when they went to the courthouse, either for an appearance or to file documents or any other appointment (for example at a help service). We were interested to know how often a family member or a friend who was there for emotional or psychological support rather than to offer expert advice was a part of process. An anecdotal observation from spending time in the courthouses was that there were many people in the hallways and waiting rooms who were not litigants themselves, but were there to give support to litigants. Whereas friends and supporters might also attend a hearing where a person is represented by legal counsel, the role of a friend for a SRL is somewhat different and may present different needs and challenges for court services staff. We were curious about the role played by the "friends of the SRL's".

Only 37% of SRL's reported that they regularly took a support person with them to court. This was sometimes a friend, sometimes a family member, or sometimes members of a wider support group (for example, a father's rights group, or a women's support group). One SRL said that she took along a friend "who dresses and looks like a lawyer."[216]

Many other SRL's said that they had initially taken along a family member or a friend, but the process was taking so much time and was so stressful that they felt that they could not keep on asking for this type of time and support[217]. Several commented that the only person who could possibly have the time to attend all the hearings with them would be someone who was retired or unemployed[218]. Among the 55% who answered "no" therefore were a significant number who had previously had a support person accompany them, but no longer had this resource. Instead, they made do with a sense of solidarity with the SRL's around them: "The other people in the line – they are your buddies." [219]Interviews with court staff confirmed that many informal friendships get struck up amoung SRL's as they wait in line or for a hearing[220].

Where they did have a dedicated support person with them, SRL's reported the assistance in a variety of ways, including helping them to figure out forms and procedures, keeping them company, helping them to stay calm and focused, having another person listen to instructions to ensure that they got them right, or assisting them with language

[215] ASP11
[216] BC84
[217] AB74
[218] BC76
[219] AB14
[220] ASP5

issues. One described the benefit of having friends or family in the hearing room: "You need someone in the crowd to focus on."[221]

For the court staff on the other side of the counter, or the clerk in the hearing room, the presence of a support person can be both positive and negative. Some counter staff commented that it can be difficult to deal with two people at once, especially when the support person "wants to do all the talking".[222] As another put it, "some of them want to be lawyers" and "you find that you can't get a word in edgewise – people bring their moms, their new girlfriends, their cousins etc."[223] Where the support person is "egging them on" this can be a problem[224] – but in most cases, court staff and service providers see the presence of a support person is a positive development. The SRL "buddy" usually has the "cooler head"[225] and their primary role is to keep the SRL calm and centred.

The next most common function for a support person is to provide translation services for SRL's whose English (or French) is weak[226]. In the absence of clear rules and parameters for the intervention of a support person, especially in initial interviews with duty counsel or in hearings, there is a sense that a person whose role is to translate will generally be allowed more latitude and greater access. A few service providers told us that unless the buddy is there to provide language assistance they will generally not allow a support person to accompany a SRL into an interview[227].

A few SRL's described the benefit to them of bringing along a friend or family member who has had some legal training:

> "My friend is my "technician" who makes sure that my paperwork is "spot on" – I could not have done this without him."[228]
>
> "I did the desk order with my dad, who is a lawyer – this saved me $20,000. I did all the research and made the major decisions about what would be included in my affidavit and what was the right thing to do. I was vey privileged…how people do this without money or resources I do not know…it would have made me sick from the very beginning.[229]"

[221] AB71
[222] BSP22
[223] OSP2
[224] BSP7
[225] OSP4
[226] ASP10, BSP8, OSP6
[227] OSP26, BSP11
[228] AB19. Also ON37, BC59
[229] AB48

A small number of SRL's reported that they brought their support person into a hearing with them in order to act as a "McKenzie friend"[230]. There was some confusion about the role and limits of the input of a McKenzie friend (for example, most judges will not allow them to speak in court but they may whisper advice and provide moral support[231]). A discussion on the Facebook page in February 2013 illustrated the lack of widespread knowledge about the concept and the confusion over what they could and could not do. Some SRL's reported in interviews that they asked for a friend to be able to sit at the front table at their hearing but were told that their friend must instead sit at the back of the courtroom.

> "I tried to go into help my friend who's case I have been helping her with and I wasn't allowed to sit beside her in court or help her find something. If an attorney can have their assistant help them find something, why can't a self rep have someone beside them to assist with the paperwork or to take notes?"[232]

It may be very helpful for court services and service provider staff to contemplate a more complete research study aimed at collecting more data about the role of support persons, and how they might be educated to be constructive in the process. The relationship between a "friend" or support person and a McKenzie friend also requires clarification.[233]

e. What other resources are SRL's asking for?

i. SRL orientation and education

Some SRL's expressed an interest in receiving earlier orientation that would enable them to better anticipate what lay ahead of them.

> "The … government… should hold a no fee group information session (for SRL's) – talking about forms needed, time limits, what evidence is, etc. This would be an opportunity to learn about the system.".

These suggestions consistently emphasized orientation to the procedural and even cultural aspects of self-representation (for example, how to behave, what to wear, what to expect) rather than substantive learning "about" law. Others suggested workshops that helped family SRL's to prepare a parenting plan, or a budget, a proposal for creating child

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[230] A McKenzie friend is a lay person who stands with a person who is otherwise unrepresented and assists them in court. The expression derived from the English case of McKenzie v McKenzie (1970) 3 All ER 1340. The original McKenzie friend was an Australian barrister who was not entitled to practice in the English courts. The principle has developed into a general right of assistance for SRL's but substantial discretion is exercised by individual judges. In Canada see Children's Aid Society of Niagara v P(D) (2002) 62 O.R. 3d 668 and Moss v NN Life Insurance Co. of Canada (2004) 180 Man R. 2d 253.

[231] . See the guide created for Pro Bono BC by David Mossop, available at www.clasbc.net/publications/stream

[232] BC2

[233] See the remarks on this subject by the Alberta Rules of Court Project, Self-Represented Litigants, Alberta Law Reform Institite 2005 available at www.law.ualberta.ca/alri/docs/cm12-18.pdf

support, or a proposal on property distribution, that would be offered by financial planners, psychologists and other appropriate professionals rather than by lawyers.[234]

This type of early orientation could provide some "realty-checking" before individuals begin to self-represent.

> "We have marriage courses, pre-planning for funerals but no one knows what will happen when you go into the courts. If they did know, they may not choose to go though it. [235]"

Even where they have no choice but to continue to self-represent, early orientation and information would at least allow them to begin the process with more and better information than they have at present (SRL's frequently told us that they really had no idea what to expect[236]).

> "We need more services to prime or prepare you, before you dive in to the court process."[237]

One speculated that SRL orientation might save the system time and money.

> "If resources were redistributed to SRL education and support in the beginning then you would spend less money later. This would make a difference to the entire process."[238]

A Facebook discussion on the idea of an orientation program drew many favorable comments but some resistance to the idea that it should be mandatory[239].

ii. Office facilities

Some SRL's describe struggles with accessing computers and more describe not having access to a printer or a photocopier. Office facilities inside the courthouse that would enable SRL's, perhaps at cost, to access the Internet, print out documents, make copies etc would be extremely useful and would reduce the stress of trying to independently utlise commercial facilities outside the courthouse.

iii. Coaching/ mentoring

Another type of assistance described by some SRL's emphasized one-on-one contact but was focused less on legal advice or even information, and more on "coaching" ie helping them to make their own decisions about procedure and strategy, review of their

[234] AB14
[235] ON2
[236] See the further discussion above at (5)
[237] BC42
[238] B48
[239] As in one Maryland courts: see http://www.selfrepresent.mo.gov/page.jsp?id=37293

work to date. For example, "person to person assistance with walking through my paperwork" and checks on "my lawyer homework"[240]. The important distinction here from a traditional advisor is that this person would "coach me to do it myself. Someone …who knows what questions I should expect, who can give really practical advice on what to say and what not to say…"[241]

A similar idea - of assistance provided by a person who is not a lawyer and does not take control of the case, but instead guides and supports the SRL - is described by some SRL respondents as "mentoring".

> "There should be a mentor program available, not so much for the legal expertise, but more of a hand to guide you on the path through the process." [242]

A related idea described by other respondents would be for SRL's (at their request) to be assigned a "buddy" offering moral support rather than advice or information, for example accompanying them into the courtroom for a hearing. Some SRL's bring supporters or friends with them to court (see above at XXX) and others meet and make friends in the registry line-up. A more formalized protocol for including friends or assigning a volunteer SRL "buddy" – perhaps using the model of victims services – would add value for some SRL's and would enable consistent expectations and practice (a problem in some courthouses).

Part 4: SRL's, Lawyers and Judges

10. Delivering legal services to SRL's

a. SRL recourse to legal services

More than half the respondents in the SRL sample (53%) had a lawyer who acted for them at an earlier stage in their case. One quarter of these were Legal Aid clients. Private clients typically ran out of funds to continue to retain their counsel, and Legal Aid clients had reached the end of their Legal Aid entitlement and/or their financial circumstances had now changed and they could no longer access Legal Aid.

In a small number of cases where they were privately represented, SRL's continued to refer to this counsel for occasional advice as they proceeded on their own. Most of these previously represented individuals sought free legal advice in some form once they became SRL's (64%) although 35% said that they did not (some of these may have been using private "unbundling" instead, below). The reason most commonly given for not seeking *pro bono* legal services was that the respondent assumed that they would not be eligible. Some SRL's expressed embarrassment at the idea of applying, and then being rejected for, free legal assistance.

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[240] ON2
[241] BC50
[242] BC44

While 37% of the whole sample did not retain counsel at any stage in this matter (primarily because of the cost; see back at (4)) many of these individuals sought legal advice in a variety of ways. Some tried (for the most part unsuccessfully in the absence of a prior relationship) to persuade a private lawyer to give them "unbundled" advice. 60% of this group sought free legal advice via in-court programming, duty counsel or some other agency. Again, among those who did not seek free legal assistance the most common reason was an assumption that they would not qualify.

This data establishes that most respondents (86% of the sample) attempted to access legal advice services in some form, depending on their means. 53% had counsel representing them at some stage; a further 33% sought *pro bono* assistance. Those who neither retained a lawyer to represent them at any stage in their case (usually for financial reasons) nor sought free legal advice (usually because of concerns over eligibility) – represented just 14% of the sample.

A closer examination of the 33 files that comprise this 14% is very revealing. Virtually every respondent in this group said that the reason they did not have a lawyer was because of financial restrictions. Of the 33, about one in five added that the amount at stake in their case made it appear not worthwhile to hire counsel and have to pay them out of anything they won. A further one in five added that could not find a lawyer to represent them with whom they felt comfortable (having tried to find a lawyer at an earlier stage) and/or preferred to handle the matter themselves.

Just one in five of this group (n=7) voiced a specific criticism of lawyers as factoring into their economic decision to self-represent (most commonly concerns about not knowing what they would have to pay/ lawyers "overcharging"; and concerns about lawyers being ineffectual around settlement and raising the "ante": for example, "having lawyers involved in cases escalates the matter and is detrimental"[243].)

This data shows that at the beginning of their SRL experience, most respondents were either positive or neutral towards the idea of lawyers acting for them. They were acting alone not because they disliked lawyers or rejected the idea of legal advice services, but for practical reasons – they could not afford to retain or continue to retain counsel. Many in this group then sought *pro bono* legal advice services, unless they believed that they did not qualify for such assistance.

SRL attitudes towards lawyers and legal services may change during the course of their SRL experience. When asked in interviews what they would ask a lawyer to do for

[243] AB75

them now, assuming that an affordable and competent counsel could be provided to them, some SRL's said that they would no longer be interested in working with a lawyer – usually reflecting a combination of a bad prior experience, and their own determination now to manage their case themselves.

Many more SRL respondents responded by talking about the ways in which a lawyer could help them. They stated that they would have preferred to be (or continued to be) represented by counsel.

"Oh my goodness yes, in a heartbeat." [244]

In summary, a majority of the SRL sample would have preferred to have legal representation, if they found this affordable, offered them tangible value-for-money as they understood this (ie offered them expertise which they lacked and which brought the prospect of a better outcome), and would allow them to remain in control of major decisions about the direction and conclusion of their case. Unfortunately, a smaller but significant group simply did not believe that these criteria would or could be met in legal representation.

b. Legal Aid

13% of the SRL sample (and one quarter of the 53% of the sample who said that they had previously retained counsel in this matter) said that their prior representation had been via Legal Aid. Their access to Legal Aid had been discontinued or had run out, and these individuals were now representing themselves. Typically they had been legally aided for their original divorce application, but were unable to receive public assistance for a subsequent variation[245], or their financial circumstances changed (for example they began to receive support, or went back to work) and they no longer qualified for Legal Aid[246].

A number of other SRL's in the sample (principally in family cases) described applying for Legal Aid but being refused because they owned a home, received a pension, or a disability benefit. Unsurprisingly, many in this group were dissatisfied with the criteria applied to them that excluded them from the provision of Legal Aid.

While some were very happy with their Legal Aid lawyer, and regretted very much that they no longer qualified for representation, a significant group expressed dissatisfaction with quality of legal services they had received from their Legal Aid lawyer. Some said that their assigned lawyer was not sufficiently experienced or knowledgeable in

[244] BC75

[245] For example, the website of the British Columbia Legal Services Society makes it clear that in most cases, an individual will only qualify for legal representation for a serious family matter once. It also appears that a variation that is not based on a serious situation involving a child would not be covered by legal representation, but rather legal advice. www.lss.ca

[246] Financial eligibility for legal aid advice and representation is set at under $2060 monthly income for a family of four in Ontario; $3340 for a family of four in Alberta; and $3230 for a family of four in British Columbia. All figures current from the 2012 websites of the Legal Aid Societies (www.lss.ca; www.legalaid.on.ca; www.legalaidab.ca)

the area of law required for their case. A few stated their belief that Legal Aid lawyers were generally of a lower quality than other private lawyers. The most frequent complaint was similar to the complaint made about private lawyers – that the lawyer was unresponsive, did not seem to care about their care, and did not "do" much.

An obviously highly intelligent young woman, Frances was perplexed by the difficulty she had in establishing any real communication with her lawyer.

> Frances was relieved when she was told that she qualified for Legal Aid in order apply for full custody of her two young children from a common law relationship. The relationship had been abusive and she was concerned about sharing custody with her ex. She wanted to have a woman lawyer represent her, and picked a name from the list provided by Legal Aid.
>
> However Frances found that her lawyer "really did not communicate with me, and I could not see what she was actually doing.". She wanted to know more about what was happening in her case, but instead found herself "shut out" from any information. "My lawyer just seemed really withdrawn from me. So I asked her "Do you want this case? If not, maybe I should find another lawyer."
>
> The lawyer responded that Frances' case was very demanding and required a lot of attention. Frances didn't understand – she could not see what attention the lawyer was giving her case.
>
> As the case progressed, Frances increasingly felt that she and her lawyer were not on the same page. Her lawyer told Frances that she should not be asking for sole custody - "you will lose" - but did not give her a clear explanation. In the end, Frances walked away from her Legal Aid lawyer and represented herself. "I wanted to be in charge of her case so that I, and not my lawyer, could decide what was right." She said "Even if I was offered anther Legal Aid lawyer now, I would try this on my own – I want to be in control of this. I am not confident – but I am determined."[247]

Some of these dissatisfied individuals said that they were no longer interested in working with a lawyer after their Legal Aid ran out, and that they had "lost faith in the legal system and lawyers."[248] Others went to a private lawyer when their Legal Aid ran out, before expending all their available resources and becoming self-represented.[249]

[247] BC43
[248] AB18
[249] For example AB16 and BC45

c. Duty counsel and summary advice services

During the time we spent in the courthouses during this project we met a number of duty counsel, and conducted formal interviews (usually by follow up phone call) with five. Much of the time duty counsel was simply too busy to speak with us at length. We also met and interviewed twelve personnel from in-court service providers[250] who offered summary advice services, usually a pre-booked appointment with a volunteer lawyer. Finally we conducted interviews with a further ten individuals who worked for outside programs that offered a summary advice model. Many of the comments made by SRL's about their experience with these forms of assistance – duty counsel and free summary advice inside or outside the courthouse – are relevant to assessing the future efficacy of these types of legal services, and so they have been combined below.

By far the most common model for delivering legal advice services to SRL's is a summary advice model, where a lawyer will spend a limited time (usually 30 minutes) one-on-one with a SRL providing guidance on how to progress their case. Most of these programs are by appointment only, and many will only permit one session (although some SRL's told us that they persuaded services to bend this rule). Some of these programs operate inside the courthouse (for example Pro Bono Ontario is located in some Ontario courthouses, and the Justice Access Centres that operate in some British Columbia courthouses). Other programs offering similar services are located outside the courthouse (such as Pro Bono Alberta, the Legal Guidance clinics in Alberta and community legal clinics in Ontario).

The most common "walk-in" summary advice model is family duty counsel, staffed by provincial Legal Aid lawyers and offered in most family courts, (although not on a daily basis in smaller courthouses; for example, family duty counsel is available just once a week in Wetaskiwn, Alberta).

33% of the SRL sample used of *pro bono* legal services, most of them (27%) by accessing duty counsel in the courthouse. A small number of respondents said that they had been told that they did not qualify for free advice from duty counsel because of their income level, although others told us that duty counsel was persuaded to talk to them in any case[251]. In two instances, a SRL said that they could not use duty counsel in their courthouse because the other side (their ex in a divorce case) had already used the same duty counsel[252]. This is likely to become an increasing problem as the proportion of SRL's in family court increases.

Some of those using duty counsel also used other *pro bono* services via in-court programming or in the local community. A further 6% described using these services but

[250]For example, the Family Legal Information Centres / Law Information Centres in Alberta, Pro Bono Ontario in Ontario and the Justice Access Centres and Family Justice Services in British Columbia
[251] For example, BC38
[252] ON32 and BC44

not duty counsel. These programs included university law school clinics and a variety of community legal guidance clinics. In Ontario, a few respondents had used the Lawyer Referral Service (now the Law Society Referral Service) to obtain a free half hour summary advice session. In-court programs – for example Pro Bon Ontario, the Family Law Information Centres in Alberta, or the Justice Access Centres in British Columbia - appeared to be more widely used by respondents than community based services (instead those described by SRL respondents were more typically domestic violence support services for women or men's support and advocacy groups (see below at (9)) rather than legal advice resources).

d. SRL evaluation of the summary advice model

Many SRL's had positive comments about duty counsel and their willingness to assist them in a time of stress and anxiety. Some individuals working in these positions are clearly very dedicated and their clients sense that commitment to them[253]. This SRL explained how duty counsel helped her. Interestingly, she frames this as a coaching experience for her, rather than duty counsel telling her what to do:

> "I went to duty counsel to try to present my case so I could properly follow procedure to try to get things settled. Talking with duty counsel helped me confirm that I was understanding what was going on. I have no previous knowledge of the procedure or the language. …The duty counsel was the best resource in helping me to know that I was doing this right."[254]

This positive view was not shared by all respondents. Some SRL's were evidently able to make much better use of limited advice sessions than others. Those respondents who were most satisfied with the value they got from the summary advice model spoke about preparing their questions in advance, anticipating additional information that they needed; being ready for the fact that duty counsel/ pro bono counsel would have limited time available for them; and going in for the meeting "with a resolution agenda, not an emotional agenda."[255]

Among those who seemed pleased with the assistance they received from duty counsel/ a limited time advice session with *pro bono* counsel were a number who made the important point that individuals with mental health issues and/or poor cognitive abilities would have great difficulty absorbing all the information that they would receive in a summary advice session[256]. They would likely also have difficulty planning how to use the session effectively to answer their questions.

Indeed, other SRL's the sample spoke about feeling "overwhelmed"[257] and confused"[258]" after talking with duty / *pro bono* counsel. These same respondents were

[253] For example, ON49, BC56
[254] BC27
[255] BC23
[256] BC69
[257] BC69

also more likely to complain about feeling rushed ("if you get ten seconds than you are lucky." [259]) and generally feeling poorly served. Some SRL's told us that they would often think of a pertinent question only after their session is over, and feel exasperated about how long it would take them to be able to get another appointment. This dynamic is corroborated by agency staff. "They call and say, I have just have one question and want an answer and don't want to make an appointment for just one question."[260]

Another factor in the usefulness of summary advice is the timing of the meeting in relation to key SRL tasks and actions. A number of SRL's described experiences in which they discovered mistakes only after they had completed and submitted court forms, or made assumptions about making their case which they were now told were erroneous. Earlier assistance would have enabled them to complete forms accurately[261], and/or reassess their evidence and arguments, saving both the SRL and the court considerable time and energy.

A discouraging number of SRL's complained that they believed that lawyers working in public legal services, either as volunteers or employees, were of a poorer quality than those in the private bar. Similar comments were made about lawyers assigned to respondents by Legal Aid. Some SRL's understand that these positions are not well compensated and they appear to believe that this affects the quality of counsel available to them via publicly funded services. This may be a very unfair criticism but it is reported here because it was made by a significant number of SRL's.

> "Duty counsel –I think they are punished by being there. ..the service they provide is dismal at best, confusing at worst, really no use at all."[262]

> "Duty counsel was rude and abrasive to me. (C)ourt services provide very little service…what is deemed a s service in the courthouse is very far from it in my opinion.""[263]

While these comments may be unfair given the stress that duty counsel and pro bono lawyers often work under, it is also the case that many in this group are relatively junior lawyers gaining experience – and managing a 30 minute interview with an anxious and often emotional SRL is a challenging task for even the most experienced lawyer.

Even SRL's who had good experiences with duty counsel often made the point that their services were too limited to be really helpful to them. For example, the high demand for duty counsel services means that in some courthouses, duty counsel will not appear with a SRL in court but provide advice before only. Others complained that duty counsel

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[258] BC84
[259] AB7
[260] BSP15
[261] This may not require a qualified lawyer: "There should be someone to review the paperwork and say "we need a, b and c. You don't need a lawyer but the courthouse needs someone to review the documents – it could be relatively simple – yet there is no one there to say "this is complete" or not." ON38
[262] ON27
[263] ON38

could only see them on the day of their appearance and they needed more assistance to prepare beforehand[264]. Others commented that duty counsel in their courthouse only provided one session and could not help them if they came back on another day. Some were upset that when they returned for more help duty counsel was less helpful than the first time. "Initially duty counsel very sympathetic and gave me priority…"I could not have got a restraining order without her – I could not have filled out all those papers. But the next time I had to appear she said "I don't have the time today". [265] The growing volume of SRL's makes this restriction is problematic for those who must return to the courthouse on numerous occasions, as this woman (who was seeking a restraining order against her spouse).

These comments raise the question of how much value duty counsel and summary advice models bring to SRL's - and whether this represents the best use of the available resources for SRL's. A more complete cost/benefit analysis would be necessary to answer this question conclusively. However this data suggests some modifications that might maximize the value of this model – which represents a significant volunteer contribution by some members of the Bar - and for more SRL's.

e. What might make the summary advice model more effective?

Duty counsel and *pro bono* summary advice are certainly "lifesavers" for a significant number of SRL's and the interviews contain many statements of appreciation and thanks for these services. However there is also a significant group for whom these types of services do not seem to be "working". The types of modifications suggested by both SRL's and service providers that might enhance the value of the duty counsel/ summary advice model of legal services include:

i. Preparing SRL's

SRL's who would like advice on how to prepare for a interview with counsel could be offered this assistance, either by other staff at the service provider or as part of courthouse orientation and education for SRL's.

ii. Specilaized training for counsel

Particular training and experience is necessary to undertake the considerable challenges of working with SRL's. Instead of regarding this work as the purview of younger, junior lawyers or law students, it is critical for this type of work to be seen as specialized, difficult and attracting additional educational and mentoring support. This might include developing training programs with the input of the clients themselves, in order to focus on their particular needs which may be quite different to traditional clients of private legal services.

[264] ON24
[265] BC35

For example, many SRL's have already conducted some of their own research and may not present as traditional deferential clients. Their research may be incomplete or even wrong – but the fact that the client has already acted on their own behalf means that the professional relationship is a different one. One para-legal working with SRL's observed "Many SRL's do not want the advice, they know what they want to do they just need to know how to do it."[266]. A similar comment is made by a courthouse service provider:

> "After a while, some SRL's don't want to listen as they no longer system so long some feel they "know" what they are doing."[267]

SRL's who have been working on their own for some time are also likely to be extremely invested and emotional regarding their case, and demand skilful and patient listening and careful explanations. They may also be looking for understanding and support, especially if they are being given "bad news" by counsel.

All these skills are less likely to be developed in younger and less experienced lawyers. Again, this suggests that the type of service offered by *pro bono* counsel requires specialized training and support.

iii. Building in flexibility

The timing of summary advice is clearly a problem in some cases, where it comes too late to avoid the filing of incomplete forms, or to deter an action that may have little merit. The sooner that an SR: can receive advice and assistance, the better able they are to assess the potential risks and rewards of their case. While this requires the type of listening and explaining skills described above at (ii), it is probably easier to deliver at an earlier stage before a SRL has already expended time and energy of working on their case**.**

The limit on advice sessions to one per client – a stricture clearly circumvented by the most persuasive SRL's who can talk their way into more sessions – is too rigid/ limited. Assessment on a case-by-case basis is time consuming and gives discretion to the "gatekeepers" who set appointments, but could be governed by guidelines that provide criteria for booking more than one appointments in some cases. At present the system seems to be *ad hoc*.

Most programming does not offer a lawyer to accompany a SRL to court (with the exception of court-based duty counsel models). Many SRL's said that this was what they most wanted help with, because they were extremely intimidated of standing up and speaking for themselves in court. When asked in interviews, "How would you use a lawyer now, if you could have one? What would you ask a lawyer to do for you?" a majority of respondents who specified a particular form of assistance replied that they would like a lawyer to come with them to court and speak for them. This suggests that more thought

[266] ASP4
[267] ASP10

should be given to the balance between offering in-court representation and the present model of summary legal advice.

Finally, it is noteworthy that community-based support services for the most vulnerable SRL's – often women facing domestic violence – operate a somewhat different service model that emphasizes ongoing advocacy and support rather than one-off technical advice. These srvices are often delivered primarily by counselors and domestic violence workers, who have access to lawyers for legal advice and in-court representation[268]. Some SRL's may need support and advocacy more than they need (or want) legal advice, and certainly more than they want a single limited legal advice session[269].

f. Private legal services

i. SRL critiques

There was a great deal of very negative comment in the SRL interviews about the conduct of both their own (previously retained) counsel, and counsel on the other side. The broad themes of criticisms made of legal counsel whom they had previously retained are described above at 4(b). The general tone of these comments was that respondents who were critical of their former legal counsel were extremely resentful that they had spent so much money (in a few cases more than $75,000, with a significant group expending more than $20,000) on legal services that they felt did not represent value-for-money. Looking back, they did not understand why they had paid so much and achieved, in their view, so little in return. This resentment was sometimes heightened by a complaint that their lawyer had not listened to them or taken their input seriously, but had instead behaved as if it were "their" decision(s) to make.

The highest response to any one of our regular Facebook "Question of the Week" came to a question we posed in October 2012 about the education of future lawyers who would encounter SRL's. The question read:

> "Law school does not teach prospective lawyers very much about the needs of clients, and nothing about working with a self represented litigant on the other side. What would you like a law student and prospective lawyer to be taught about working with self reps? If you were addressing a law school class, what information would you offer them that would help them to approach self reps with understanding and professionalism?"

The emphasis in the many comments posted by SRL's was on respect. For example,

> "I would like to tell future lawyers that when working with a self-represented litigant, that they should show them the same respect and courtesy that they would

[268] For example, in the fieldsite locations, South Fraser Legal Services, Luke's Place, Osahwa, Hiatus House, Windsor Ontario
[269] OSP25

> to another lawyer. I would encourage them to negotiate with a self-rep. and go forward with a focus on mediation as opposed to trial."[270]

> "Treat us with the same respect you want. Don't assume we are stupid just because we have not gone to law school… Be prepared to face a person who will not back down and wants this resolved quickly and soon. They are not in it to make money but to get their lives back in order."[271]

Despite these criticisms, most of those SRL's asked in their interview if they would want a lawyer to help them if they could now be provided with affordable, competent counsel responded in the affirmative[272].

ii. Comments about opposing counsel

In addition, there were many complaints by SRL's about the conduct of opposing counsel in the 75% of cases where there was a legal representative on the other side. A few spoke about the helpfulness and civility of the lawyer on the other side – but these were a minority group. Many others described behavior and tactics that they understood as intentionally designed to bully and intimidate a person who is representing themselves. For example,

"As soon as he knew I was representing myself, he went in for the kill."[273]

> "The lawyer for the plaintiff uses tactics such as harassment and bullying to try to confuse and intimidate me. It is very sad. "[274]

References abound in the transcripts to lawyers' using what SRL's describe as "tricks of the trade" such as "snowing" them in paperwork, last minute cancellations, threatening them with costs, and refusal or delays in providing information. These comments may be understood as "merely" reactions to the inherently adversarial nature of legal proceedings, but nevertheless SRL's response to this type of behavior lowers the reputation of the legal profession and raises public ire (see below, "complaints").

Some SRL's go further to claim that judges and lawyers see themselves as above the rules, whereas they are strictly imposed on a SRL.

> "My ex's lawyer treated me very poorly. When I pointed out to him that he needed to provide me with information and within a specified period, he responded "You're not a lawyer, we don't have to follow the rules."[275]

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[270] BC47
[271] ON22
[272] See above at (10)(a)
[273] BC2
[274] ON29
[275] BC46

The small group (n=four) of lawyer SRL's expressed the greatest shock - and sometimes disappointment - about the behavior of opposing counsel.

> "The lawyers strategize to marginalize you because you are a SRL. And in fact, destroy one's procedural rights by painting you as the angry stereotype SRL. I am shocked at the success of this stereotyping and how negative it is. Its unbelievable the contempt I am treated with.[276]"

From the perspective of some counsel, SRL's are given an unfair advantage because some judges will take more time with them and even "bend the rules" for them[277]. Unsurprisingly, lawyers generally see the problem from the perspective of difficulties faced by counsel when there is an individual without representation on the others side. For example, should they provide them with any information or guidance? How should they communicate with them? Can they negotiate on equal terms?

However this issue is framed – and both perspectives without doubt have validity – the obvious response is to engage the Professional Code of Conduct for lawyers in each province. The Code could provide clear guidance to lawyers and should also entrench a commitment to respectful behavior by counsel towards SRL's. Some excellent initial proposals have emerged over the last few years[278]; a sustained effort is now needed to bring this material into the provincial Codes.

iii. Unbundled legal services

Many SRL respondents described a fruitless search for a lawyer who would "just" help them with a [art of their case – for example, reviewing their documents, checking their forms or coming with them to a hearing or court appearance. None called this "unbundling", a term of art developed to describe the delivery of legal services on a task-by-task basis but that was exactly what they were describing. Respondents described seeking assistance with completing forms; reviewing completed forms and other documents; writing a letter to the other side; answering questions of law; preparing for a hearing; and representation in court for one hearing only (or someone to work with them in court, as one SRL called it "a switch-hitter" for his trial[279])

Those who were unable to find a lawyer who would provide services on this basis were both frustrated and perplexed. Part of their frustration related to not understanding why a lawyer could not give them some type of reasonable estimate of cost in advance.

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[276] ON60

[277] Carson G. & Stangarone M. "Self-Represented Litigants in the Family Courts: is Self-Representation an Unfair Tactic?' available at http://www.macdonaldpartners.com/articles/articles_georgina_carson.html

[278] See for example Wilding, K "Tips for Dealing with the Self-Represented Litigant" Ontario Bar Association Continuing Legal Education 2010, available at http://www.oba.org/oba/CDMarker/CDfiles/10INST2010/856110INST2010547123421538/PUBTab2B.pdf and "Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants" American College of Trial Lawyers, 2009. Note that among many promising provisions in the latter document, there is no mention of a duty to respect the SRL (just the court), which is one of the issues most frequently mentioned by SRL's.

[279] ON47

"A mechanic will tell you how long it will take and about how much it will cost – a lawyer won't do that."[280]

SRL's who had previously retained legal counsel were generally more successful in finding a lawyer (often their former legal counsel) who would assist them on an unbundled, task-by-task basis, for example, by making a one-off court appearance or reviewing documents. Even this group was small – just thirteen respondents in total. Each considered the input they received from a lawyer on an unbundled basis to be critical in enabling them to proceed effectively.

Janice[281] had previously retained legal counsel in her dispute over custody with her daughter's father with whom she had had a brief relationship. Having spent $29,000 on counsel within a few months, she could not longer afford him.

As the date of her trial (scheduled for nine days) approached, Janice (in the final trimester of a new pregnancy) searched for a lawyer who would give her unbundled advice. She knew she could not afford to pay for a lawyer to represent her at trial, but she needed at least to find someone who would help her to get ready and organized. One day she worked with her former lawyer's secretary, who helped her organize her binders (she paid her at a lower hourly rate than the lawyer for this assistance).

Finally Janice found a lawyer who would give her unbundled advice. "Before the trial, I saw him every couple of weeks with a list of questions. This was what got me through the trial ."

iv. Para-legal services

Para-legals usually work under the supervision of lawyers in Canada and the United States, typically undertaking tasks that focus on legal procedures and paperwork such as drafting, assessing and filing documents, preparing motions and other paperwork. In other jurisdictions (for example the United Kingdom[282]) the development of para-legal work outside the supervision of he profession has meant its expansion into areas that would traditionally be considered "legal work", such as providing legal advice and opinions.

In contrast, Law Societies in Canada have been diligent in prosecuting the "unauthorized practice of law" where notaries, consultants and other para-legals venture outside the narrow scopes of practice that presently restrict them. In Ontario, the Law Society offers a licensing process (creating "licensed para-legals"[283]) which is compulsory

[280] ON2
[281] BC37. Her story is also told above at page 71
[282] For information see www.nationalparalegals.co.uk and www.theiop.org
[283] http://www.lsuc.on.ca/licensingprocessparalegal/

for any paralegal wishing to act as an advocate in a court or before a tribunal. The licensing process enables the Society to have oversight of para-legals and explicitly prohibits them from taking on any family work, restricting their practice to small claims, traffic and tribunal work, along with some provincial offences.

Some SRL's complained that they did not understand why they needed to pay a lawyer's hourly rate for some tasks which they believed could be carried out by a para-legal. advance – and another part questioned the need for a person with the qualifications and hourly rate of a lawyer to undertake certain relatively simple tasks.

"Why can't I get a sworn affidavit for $60? Why does a lawyer have to do it?" [284]

A few SRL respondents talked about their interest in assisting other SRL's as a para-legal, and three told me that they were developing a small business assisting SRL's. One former SRL who is now assisting others commented that she was often shown lawyers correspondence by other SRL's who asked her to help them understand what was written, and that she often ended up advising people how to deal with their lawyers. She commented:

> "Many of my clients have lawyers, but they do not seem to understand them, or the clients feel they are not getting a straight answer to their questions. They end up asking me to coach them to deal with their lawyers. Some of these lawyers are charging $400-500 an hour and their clients ask me "Am I being duped?" [285]

Three SRL respondents were themselves para-legals. Each commented that this was somewhat helpful since they already had some familiarity with legal procedure. In addition the study interviewed three para-legals, one from each province. Each of these individuals felt that there was an urgent need to re-examine present restrictions on para-legal work in light of public need for less costly legal services. Further, they each pointed out that the type of assistance that they could provide without formal legal qualifications was often just what some SRL's actually wanted and needed in handling their own case; "(most people) do not want the advice, they know what they want to do and they just need to know how to do it."[286] Another pointed out the appearance of conflict if the determination of the parameters of para-legal activity remains solely in the hands of the profession:

> "I do not trust the Benchers to decide the appropriate role of para-legals in the public interest – there is too much conflict of interest."[287]

This study suggests that further study is needed of the extent to which para-legal assistance could be utilized by SRL's, the types of existing para-legal activity are seen as

[284] BC60. In some provinces (eg British Columbia) notaries do offer this service for a lower cost than a typical hourly rate for counsel. Presumably this respondent was unaware of this.
[285] BC52
[286] ASP4
[287] OSP35

most helpful by SRL's, as well as a re-examination of the public interest in setting parameters for para-legal assistance.

11. Court appearances and interactions with judges

This study did not interview judges[288]. This was not because their views on the topic of SRL's are not extremely important – but because the study focused on the experience from the perspective of the SRL (as well as the observations of court staff working with SRL's on a daily basis). The following section summarizes this data.

a. Negative experiences: overview

Whatever the stress and anxiety created by completing forms, filing and serving documents, and communicating with a lawyer on the other side, it is appearing in court – whether at a preliminary hearing or a full trial – that is always the most intensely anticipated and intimidating aspect of the SRL experience. Aside from a couple of individuals whose cases had only just commenced, almost all the SRL's in the sample experienced appearing before a judge – and in many cases, multiple judges.

Even the most self-confident SRL's experienced anxiety about speaking for themselves in front of a judge. Those who felt that they were well-prepared for the experience told us that they were surprised at how nervous they became as their court date approached, often losing sleep and sometimes becoming fixated on their case and arguments. This more confident and well-educated group also reflected that if they experienced this level of stress, how much harder it would be for others without their skills and advantages. One university-educated, confident and articulate SRL spent six years working on a case that required her to appear before a number of different administrative tribunals and judges.

> "It was tremendously, tremendously difficult. I am an educated individual – but I go to court all the time with other people who are just way over their heads...(H)ow can a person handling issues like this on their own figure this out?""[289]

Many SRL's described themselves as terrified about the prospect of appearing in court. Some broke into tears in our interviews just thinking about it[290]. Many recounted being unable to sleep for several or many nights before their appearance; shaking with nerves as they stood to speak; leaving court feeling upset, shaken and even humiliated; and experiencing stress-related symptoms for days afterwards.

[288] However for a view from the Bench see for example, The Honorable Madam Justice Jennifer Blishen "Self-Represented Litiagnts in Family and Civil Disputes" 25 CFLQ 117 (year?) and the Honorable Madam Justice Trussler "A Judicial View on Self-Represented Litigants" 19 CFLQ 547 (year)
[289] AB71
[290] For example, ON64

> "Everyday I went to court I was shivering and shaking all day. I was always concerned about what I would say – I just wanted to get it over with"[291]

Most tellingly, the small number of SRL's in the sample who also practice law described similar bouts of nerves. All these respondents described the difference they experienced between appearing as a professional on behalf of a client, and presenting an argument which had personal emotional and practical import. One lawyer-SRL, the applicant in a family dispute, described the impact of appearing on his own behalf – "even on uncontested motions, even for a case conference" – as follows.

> "Every hearing, the week before and the week after, I'm a wreck. After one appearance, I went back to my office and started to work on a file. I realized I couldn't focus and then that I couldn't remember anything about the file. In the end, feeling like an idiot, I went to the emergency room. I had temporary amnesia ….I lost my memory for 24 hours. Even coming in here today for this interview (this respondent was interviewed in a courthouse), I felt sick to my stomach"[292]

The impact of unpleasant experiences in court is recounted many times in SRL interviews. The following story, recounted by a well-educated businessman in his 50's, sets the scene. This respondent broke into tears as he spoke about his experience.

> Paul 's lawyer said he could no longer represent him because he did not want to continue with a case that appeared to be heading to trial. Paul asked for an adjournment – giving notice to the other lawyer – in order that he could find another lawyer.
>
> The experience of asking for an adjournment "was the worst experience of my whole life…it was embarrassing and humiliating. The judge blasted me as an incompetent father – I was shaking. I had never been treated like that in my whole life. He sent me out of the court and told me not to come back until I had a lawyer."[293]

It is clear from interviews that anxiety is a natural consequence of the fact that SRL's generally have less understanding of the hearings process than trained lawyers or judges. However, this anxiety has a very significant impact on the hearings process itself (including how a SRL feels when the hearing is over, a feeling that is often carried into subsequent hearings), as well as the overall SRL experience of "access to justice". SRL appearance anxiety needs to be carefully analyzed in order to explore its multiple causes to enable consideration of ways in which it might be reduced, in the interests of all parties (including members of the judiciary).

[291] BC35
[292] ON3
[293] ON65

SRL anxiety about court appearances was related to a number of common themes, described below.

i. Feeling like an outsider

The mildest expression of anxiety about appearing in court focuses on the feeling of being an outsider, unable to properly participate due to the unfamiliar language, procedures and customs of the courtroom. One SRL described this as "(L)ike going as agnostic to a religious court" [294] Some SRL's worried about appearing impolite to the Bench as a result of their lack of knowledge (see (b) below).

Many SRL's commented about the impact of legal language used by judges and lawyers which they felt distanced them from the proceedings and made it hard for them to be sure they were following what was happening in the courtroom. In contrast, they observe, "(T)he lawyers and the judges speak the same language."[295] While it is inevitable that lawyers and judges will use legal expressions that may not be familiar to SRL's, this unfortunately contributes to a feeling of exclusion and even (from a SRL perspective) "collusion"[296] between lawyers and judges. "There is the appearance that the lawyers get special treatment because they understand the language."[297] One SRL reflected this sense of disadvantage when he commented that going into court without counsel "(I)s like going into a gunfight armed only with a knife." [298]

Whereas some judges were complimented for going to some lengths to ensure that a SRL appearing in their court felt comfortable and understood the proceedings, others were described as behaving in ways that exacerbated the distance between the SRL and the court process. Sometimes the use of legal language appeared to be an intentional strategy to position the SRL outside the conversation.

> "The judge told me to go and look up "*res judicata"* in the library. The lawyer for the other side wrote it on a piece of paper and tore it off and gave it to me". [299]

Other examples of judicial behavior described to me which created distance / exclusion included the judge talking primarily with the lawyer on the other side[300], cutting off the SRL when they asked a question (many described being told to "sit down"[301] in an abrupt and discourteous manner), or simply remaining aloof and distant in a way that created a feeling of exclusion ("the judge stayed on his throne"[302]).

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[294] ON54
[295] BC44
[296] Add ref
[297] AB66
[298] AB46
[299] BC14
[300] For example, ON14, AB33
[301] For example, AB15, BC17
[302] BC37

One SRL respondent made the interesting comment that this sense of exclusion could be addressed by the Bench simply showing "more kindness and compassion"[303] towards SRL's appearing before them.

ii. Not knowing how to behave

Many SRL's told us that despite their best efforts, they did not know how they were expected to behave in court. Some worried about appearing impolite or discourteous. "I was so confused. I didn't know when to sit and stand – I didn't want to appear rude or disrespectful – I was so worried about that "[304] There were frequent complaints that this aspect of court procedure – for example, how to address the judge, when to stand and when to sit – was not covered in available on-line resources. "There's nothing that says, "This is what you are supposed to say at trial."[305]

The anticipation that they would not be able to properly manage their court appearance created further anxiety amoung SRL's, and sometimes resentment.

> "When I tell myself my story, it makes sense. So I think that when I stand up in front of a judge and tell my story, I can explain myself. But I am so worried that when I stand up, I shall be cut down and not be able to make myself clear and stand up for myself."[306]

iii. Emotional investment

Some SRL's spoke about the difficulty of managing their emotions when they were so personally invested in the outcome of their case. Most understood that if they presented their case with a great deal of emotion, they would almost certainly not succeed. Some described how they had trained themselves through a series of appearances to go to court with their emotions carefully checked.

> "It's hard but you have to wait your turn to speak and present yourself without emotion. When you do that, you can play on their field"[307]

A number of SRL's made this same point – "keep your emotions out of it. "[308]when asked what advice they had for other SRL's.

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[303] BC31
[304] BC13
[305] BC57
[306] ON65
[307] AB30
[308] ON8. Also AB3. A similar point is made in relation to all forms of communication with the other side. For example, "Remove emotion from your communication, state what you want, when you want it and when you want an answer." BC42

iv. Multiple judges

There were many complaints about the difficulty of appearing before multiple judges, especially in family matters. As one SRL put it, "Its like a box of chocolates – you never know what you are going to get."[309] Some family SRL's complained that they felt as if they had to begin afresh each time they saw a new judge – in part by reviewing the facts but also, crucially, in developing a relationship with the judge and establishing their own credibility.

Occasionally a SRL found themselves in a case management system that meant that they saw the same judge several times over. This was always highlighted and welcomed. Aside from the practical efficiency, this continuity was extremely important in creating a sense of confidence in the system and reducing anxiety.

v. Judge did not read materials

There were many complaints that the presiding judge had not read the materials the SRL had worked on in advance.[310] While this may sometimes be difficult given demands on judicial time, this left some SRL's feeling that their efforts in preparing materials were for naught.

> "The judge came into the courtroom and the first thing she said was "I haven't read anything". "I was shocked, I was naïve enough to believe that the judge would at least have an overview of why the parties were there."[311]

This problem becomes further exacerbated when multiple judges sitting at different points during a single case. In the most extreme example,

> "One time in court, the judges switched after a break and the new judge didn't even look at the file. She had no idea of what had happened previously, or what point we were at." [312]

A few SRL's told us that they believed that the judge only read the materials provided by legal counsel, and not by SRL's, and many believed that their materials were treated as less important by the judge than materials provided by a lawyer on the other side[313].

[309] BC71
[310] For example AB23
[311] BC52
[312] AB40
[313] Add refs. See also vii below

vi. Prejudged by the judge

> "I really don't think that judges like SRL's. The judge appeared annoyed with my attempt to self-represent and showed total (sic) bias and condescension in his tone. He had already subconsciously tagged me as an idiot. " [314]

Many SRL's told us that they were not taken seriously by the judge. This leads to a widespread belief among SRL's that since they are going to be really listened to, they cannot expect a positive result.

> "From my limited experience representing myself so far, I find that the judges sometimes go with the source that they perceive as "credible" – this means that big corporations or government with lawyers are always going to win"[315]

In one case this assumption was made explicit by the judge.

> "There was a settlement conference scheduled but the judge ordered that I must get a lawyer to represent me, or not take any further steps in the matter. The judge said 'All self represented litigants lose.' I did not reply - I was stunned."[316]

SRL's who had spent many hours preparing for their hearing felt disappointed and discouraged when they encountered this attitude from the Bench.

> "The judicial case conference was my first appearance…The master belittled me – he made a comment "just because you are a self rep, don't expect any leniency here." In fact I was well prepared. But he gave me a lecture instead."[317].

Some SRL's described particular non-verbal behaviors by the judges who heard their submissions that left them feeling, just like this woman, "belittled."[318] One described how "the judge rolled his eyes and played with his elastic band all the way through"[319] as she presented her case. Several talked about what they experienced as an inappropriate use of humor/ laughter, usually between the judge and the lawyer on the other side. Others felt offended by the disregard they saw conveyed by the judge's body language, for example; "He (the judge) sat back, swinging his chair, and eating candies, while he handed down his decision about where my children would live."[320] Another SRL described a similar experience as she watched another case involving two SRL's.

[314] AB2, also AB27
[315] BC44
[316] ON50
[317] BC46, also AB51
[318] For example BC88
[319] BC8
[320] AB44

> "At the Court of Queens Bench I observed two self representing parties. The judge had mentioned she had a 12:30 appointment and asked the people to 'make it quick'. The gentleman was seeking the court's help as his wife was taking his kids to Turkey. However, time was up and the Judge needed to move on. If I hadn't seen it for myself, I wouldn't have believed that a decision of this magnitude could be addressed with proper consideration."[321]

While there is often time pressure in the courts, there may be a failure in some instances to provide this explanation to the parties in a way that they can understand. In the absence of this clarity, some SRL's believe that this means that the court does not care about ordinary people and their problems.

vii. A "two-tiered system"

Many of the complaints about not being taken seriously were associated with the observation that the judge preferred to talk with a lawyer (the other side was represented in 75% of the sample).

> "Judges used to be lawyers, and they are biased in favour of the lawyers. The judges are only interested in talking to the lawyers. One judge actually said to me "I have no time for you."[322]

At best, as one SRL put it, "I was always going second".[323] Others complained that they were not permitted to speak at anything like the same length as the lawyer on the other side[324], and/or that they were cut short in their presentations, and/or that they were not consulted on procedural issues like adjournments or scheduling future events. Some complained that they believed that lawyers were given more leeway regarding procedural requirements while the SRL was held to a more rigid standard[325]. The following is a typical example of such a complaint:

> "On my last appearance the lawyer on the other side did not show up. The Master made me wait for four hours and then the lawyer rushed in at the last minute. If it had been the other way around this would not have happened."[326]

A practical example of the consequences of the more natural conversation and interaction between judge and counsel - which came up in several interviews[327] - relates to the drafting of consent orders. The usual procedure with both parties represented is for this document to be exchanged and approved by each prior to filing with the court. Where

[321] AB70
[322] ON50. Also ON54
[323] AB33
[324] BC61
[325] AB4, BC19
[326] AB51
[327] For example, BC91

only one side has legal counsel, the practice appears to be developing that that representative will draft the order and submit it to the court. In several cases, this meant that the order was then filed without any review by the SRL (who then raised issues about its content and accuracy). Inevitably, this led to further disputes[328]. This particular problem – and its possible solutions - is a good illustration of the interdependency of enhancements for SRL's and efficiencies for the court.

The sensitivities of the larger and larger numbers of public visitors to the courthouses challenge some of our previously uncontested assumptions about access and privilege. Some SRL's described the courthouse as having an embedded "apartheid" that privileged legal counsel. The examples they gave included: a registry counter system with lines for lawyers – shorter and faster – and lines for SRL's; different security lines to enter the courthouse (again, the longer lines are the public lines); and even access to a water cooler at the front of one courtroom deemed "lawyers only". Even the siting of the barristers lounge could raise hackles. For example, in Brampton, the comfortable couches and coffee machines inside the barristers lounge are clearly visible to members of the public through large plate windows as they wait in long security lines outside the courthouse.

viii. Experiencing hostility

> Fiona was owed almost $300,000 in support arrears - her ex-husband had stopped making any payments to her years before. After suffering a brain injury in an accident, Fiona was no longer able to work. She began an action to try to collect her support. She told me that she imagined at the outset that they would negotiate an agreement over the arrears; her main concern was to ensure that her ex-husband began to pay her support now that she no longer had an income.
>
> Fiona was represented by counsel for more than two years, but ran out of money to pay her lawyer. She said that in this period, "nothing had changed – there had been no proposals for settlement, no meetings, no negotiation". So she began to represent herself.
>
> Fiona asked for a settlement conference, but nervous about her ability to manage an appearance, she asked her former lawyer to come with her just for that day. "I just couldn't stop crying."

[328] For a different (and unusual approach), see AB4

> Fiona's fears of handling the settlement conference solo turned out to be well founded. As a person with a brain injury, she needed to take notes for her future recall, but the judge would not let her and told her, "Put your pen down." Fiona explained why she needed to take notes and asked if someone else might sit with her and take notes on her behalf. The judge refused this request as well. "You must respect the court and you should not take notes when I am talking."
>
> Fiona tried one more time to explain that she had a brain injury. "You look pretty good to me" said the judge. "Sit down".[329]

While stories that could be described as illustrating "hostile" attitudes towards SRL's were far less common than those that suggested irritation, impatience, or dismissive attitudes, a few – like Fiona's - stand out. A few judges appear to be have adopted a siege-like mentality towards SRL's, treating them rudely and harshly (a point also made by many service providers and court staff[330]).

This hostility was illustrated in various ways in SRL narratives , including conflicts over the scheduling of hearings (for example conflicts with medical appointments or child care responsibilities[331]), allowing multiple adjournments against the wishes of the SRL[332], accepting evidence that was out of time or improperly served documents – and sometimes in direct interaction between the SRL and the judge.

> "The judge told me 'Don't bother coming back to court tomorrow if you're not wearing a tie' – this was his opening remark to me. It was just hostility, all the time."[333]

ix. Experiencing moral judgment

A very consistent theme among SRL respondents was that many judges seemed to view SRL's as a nuisance and an irritation. Many report being told by judges – sometimes over and over in the course of their case – that they "ought to" retain counsel, along with an implicit or explicit statement that the fact that they were not represented was their "fault." The SRL often described their attempt to explain that they could not afford a lawyer, but found their explanation dismissed.

[329] ON1
[330] For example, BSP20, OSP36. See also the further discussion below at (c)
[331] For example, BC78, BC82
[332] For example, AB18, AB45
[333] BC14

> "The judge I appear before keeps telling me that I need a lawyer. I keep saying that I cannot afford one. The judge asked me about my assets in court in front of other people, which was
> embarrassing – and then said that she does not understand why I don't qualify for Legal Aid." [334]

Another described this as ".. a catch 22 - you can't afford to hire a lawyer, but the courts don't want you to represent yourself - and you can't qualify for Legal Aid. "[335]

Judicial attitudes may stem from the continued assumption that individuals who are self-representing are "choosing" this course of action and "rejecting" legal counsel. As this study clearly shows, this is rarely the case; financial constraints are far more likely to be the real reason why an individual is self-representing (and many will have previously used counsel until they ran out of funds).

The persistence of the assumption that SRL's want to "take on the system" may be the reason that so many told us that the judge not only failed to take their efforts at advocacy seriously (above), but also communicated their moral disapproval that they were representing themselves. One SRL reflected on the pervasiveness of this attitude, which so many experience and feel offended by.

> "I'm afraid it only takes one influential judge to influence the others in coffee break chatter – that SRL's are a bunch of dimwits. Then the standard is established and although they may be judges – and you would think they would be above this type of blanket perception – in the end, they are just people."[336]

A few respondents speculated on the rationale for this pattern of behavior by judges. One mused,

> "They (judges) seem to assume that if SRL's lose, we shall have less of them. But its not working that way."[337]

Several respondents who then went on to retain or to rehire lawyers (having had bad experiences in the first hearing representing themselves), talked about now being "a good girl/boy"[338] now that they were represented.

> "You have to have a lawyer so you can be part of this club…and appear to the judges to be a more conforming person."[339]

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[334] ON21
[335] AB35
[336] AB2
[337] BC52. A more likely rationale is that some judges may feel concerned that they might be charged with showing "favour" towards a SRL, and go to some (perhaps extreme) lengths to avoid this.
[338] AB2
[339] AB38

b. Positive experiences: overview

Some – although sadly far fewer – SRL's described a good experience with a judge who showed them understanding and kindness, and/or specifically helped them in some way. Where a SRL appeared before multiple judges, they fairly often (but by no means always) could identify one judge among the total (usually three to six different judges/ masters) who they felt had treated them kindly. This comment – showing kindness - was the most commonly cited positive experience. We asked for further information about what that judge did that was particularly helpful[340].

i. Respectful communication

> "I recently attended a Family Court application with my self rep clients in X before Justice Y. He was absolutely wonderful to my self reps, he gave then time to speak, as well explained the procedures very clearly to them and treated them very respectfully."[341]

Many SRL's in their negative comments about judges emphasized that what they were seeking was respectful communication, rather than particular assistance or aid. For example, many emphasized the importance of being taken seriously,[342]. This para-legal (above) reflected on a good experience in which the judge provided some information to SRL's but also, crucially, treated them "respectfully."

ii. Assisted in problem-solving and settlement

A few judges were singled out for special thanks for assisting the parties move towards a settlement, a goal expressed by many SRL's but often without a clear sense of how to achieve this. For example, this judge used a settlement conference to advance the resolution of a family case.

> "She did more in one conversation – through some direct questions to the parties separate from their lawyers, in essence to interview them – more than my lawyer could do in three years." [343]

A few family judges were complimented for demonstrating a real commitment to put the rights and interests of children first. "The judge was amazing. She wasn't on my side, but she was on the side of 'what's good for this kid.'" [344]

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[340] See the excellent study by John Greacen "Effectiveness of Courtroom Communication in Hearings Involving Two Self Represented Litigants" Greacen and Associates for the Self Represented Litigants Network, published by the National Center for State Courts 2008. Greacen and his researchers watched judges in 15 hearings in US courtrooms dealing with self-represented litigants and found that the most effective judges developed a range of communication practices with SRL's including asking questions, framing the issues, explaining the law, explaining their decisions, and describing compliance and effects of non-compliance.

[341] ASP4

[342] Being listened to and taken seriously is a well-established aspect of "voice" according to procedural justice research. See for example, Lind, E.A. & Tyler, T., The Social Psychology of Procedural Justice (New York: Plenum Press, 1988

[343] BC2

iii. Coaching

Some SRL's commented on assistance they received on their presentations. This was a small number, challenging the assumption in some parts of the legal profession that judges uniformly assist SRL's, thereby giving them an unfair advantage[345]. An even smaller number said that they received any help with legal argument; most of this assistance was in the form of style, not substance. For example, one SRL who was, by her own account, very upset and strained as she argued her case over custody, was told by the judge "If you change how you talk to people, then they will want to talk to you – you are making me bristly." She appreciated – and adopted - this advice[346].

Some SRL's commented that in their experience judges were generally more patient, understanding and respectful towards them than lawyers – perhaps because they have more experience than lawyers in dealing with SRL's every day in their courtrooms[347].

c. Comments from court staff and service providers

Consistent with data from SRL interviews, court staff and service providers spoke about some judges who were willing to be helpful to SRL's and others who were "getting better"[348] – and others who had no time for them at all. Some saw judges expressing anger towards SRL's[349]. One group of service providers described SRL's commonly feeling "scolded" by judges – "because they are not organized or do not know what to do."[350] While a few court staff and service providers named a particular judge whom they saw as going to great lengths to help SRL's – sometimes too far, in their view – far more often they described judges as being disconnected from the reality of the SRL experience.

> "Judges need to be less afraid and roll up their sleeves and deal with the public. …Judges need to be dealing with the human side first - keep the formality, but be respectful of the human condition." [351]

When asked "what do you think are SRL's most common frustrations?" a significant number of court staff and service providers mentioned judges[352]. They talked about a widespread assumption among SRL's that they would be able to speak directly to a judge and "make them understand".[353]

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[344] BC69
[345] For example, Carson, G. & Stangarone, M. "Self-Represented Litigants in the Family Courts: is Self-Representation an Unfair Tactic?" available at http://www.macdonaldpartners.com/articles/articles_georgina_carson.html
[346] BC8. Also ON42
[347] BC63
[348] ASP5
[349] BSP20
[350] BSP7
[351] OSP16
[352] BSP10, BSP16
[353] BSP21

Some court staff complained that information they gave to SRL's was sometimes contradicted by the judge, or that the judge might tell a SRL something that they could not achieve for them[354]. This added to the frustration of the SRL and hence to the burden on counter staff.

d. Conclusions

> "There are all these buildings – the courthouses - that are like false front buildings, like they have at Universal studios – they are supposed to help you, but they don't."[355]

The negativity of so many SRL comments about judges make for upsetting reading, but they point to some deep-rooted problems that require our urgent attention. Read alongside the poor experiences of many SRL's with legal counsel, they suggest that public confidence in the justice system is damaged, and diminishing further day by day.

A critical first step is to address the widespread misapprehension among members of the Bench and the Bar that SRL's have other (better) choices to representing themselves. This fundamental misreading of the SRL phenomenon in 2013 leads to many other unhelpful assumptions – that SRL's are intentionally bringing a feeling of chaos to their courtrooms, which they use to take unfair advantage. These assumptions are reflected over and over in the comments that SRL's make about their treatment by judges. One SRL who had had a number of successful experiences in the past in small claims court said that he now saw a different climate in the courts, with judges "…corrupted by this SRL stereotype and (using) it to justify (their) own logic."[356]

Judicial appointment and education needs to reflect the new reality – especially in family court – that judges now deal with SRL's on a daily basis. This is a huge change from 20 years ago and an unwelcome one for some judges. Discussing a matter with trained professionals is a completely different process – and one that judges have been well trained to undertake – than communicating with an (often) emotional and overwhelmed SRL. Some useful work has already been done to create judicial guidelines for working with SRL's[357], and it is hoped that the conclusions of this study will feed into this ongoing work. However far more work remains to prepare judges for working with SRL's (see Recommendations, below).

A few especially busy courts[358] are beginning to offer a less intimidating forum for SRL's at first appearance, with a special master assisting them to get ready to speak to a judge. This is a sensible development and should be considered more widely.

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[354] For example APS20, OSP37
[355] BC8
[356] ON54
[357] See for example E. Richardson "Self-represented parties: a trial management guide for the judiciary" Melbourne, County Court of Victoria 2004
[358] For exmple the OCJ in Jarvis Street, Toronto

A few SRL's[359] point to a systemic problem. The foundational principle of the justice system (even in family matters) is adversarial advocacy. Judges and lawyers are accustomed to framing every interaction in these terms. SRL's who lack training in law do not fit easily into this framework; and when they make efforts to adopt this strategy, they are often seen as unreasonable, ignorant and obstructive.

12. Personal and social impact on SRL's

SRL respondents described a wide range of impacts and consequences for them arising out of their decision to self-represent. Many if not most of these were unanticipated, a least to the degree that they became a problem. The experience of speaking with so many SRL's over the 13 months of data collection left the Principal Investigator with a very real sense of the impact experienced by many. At the same time, few SRL respondents saw any other choice. Where there were negative consequences for their lives they therefore saw these inevitable. This did not mean however that they did not carry a sense of grievance – and in some cases, embarrassment and astonishment – over the extent of these consequences.

a. Personal health issues

Many SRL's describe stress-related consequences of acting as a SRL including depression and physical ailments (e.g. sleep disorders, headaches, weight loss, and depression). Some of these appear to be similar to the symptoms of post-traumatic stress disorder[360].

> "It's a traumatic experience every time I walk into the court. The last time I went to court I couldn't get out of bed after for three days."

> "The stress was making me stutter in court….you are so stressed, out of your mind, it all becomes a confusing mess. if I have to go to trial I just don't know if I'm able to do it." (in tears)

> "For a while (after the trial) I could not physically go within a two block perimeter of the courthouse in X….I could not go on the computer after the trial either – I had spent so much time on that computer. I got rid of it and had no computer for six

[359] ON54

[360] PTSD is characterized by extreme anxiety, depression, difficulty concentrating, difficulty sleeping, and panic attacks that are "triggered" by a particular experience. There is an ongoing debate over the "stressor criterion" which is the "gatekeeper" for the American Psychiatric Association's definition of PTSD. The most recent (1994, 4th edition) Diagnostic and Statistical Manual of Mental Disorders describes a traumatic event as any incident that involves "…a threat to the physical integrity of self or others." Others have argued for a broader definition to include non-life threatening events; see Anders, S.L., Frazier, P.A. & Frankfurt, S.B. "Variations in Criterion A and PTSD rates in a community sample of women" 25(2) Journal of Anxiety Disorders (2011) 176. A much anticipated 5th edition will be published in May 2013 that may reflect this debate. The second part of the APA definition is that ". . . the person's response involves intense fear, helplessness, or horror".

> months. Then I bought a different computer and put it in a different place in my house."[361]

It is important to understand these symptoms as beyond the control of the individual. It also appears to be the case (as for example with PTSD) that these symptoms are not related to a pre-existing depressive or anxiety condition or vulnerability. Several SRL's spoke about their amazement that the experience produced such strong emotions in them. In an interview with Macleans magazine in February 2013, one of the study respondents, a mild-mannered middle-class professional whom we have met and spoken with on several occasions described his experience this way:

> "I truly believe I became borderline psychopathic," he says. "I felt so frustrated, so limited in what I could do. I could write a blockbuster story about the nasty, mean thoughts that went through my head."[362]

A number of others described having to take time off work to recover from their symptoms, and a few gave up work altogether[363].

The experience for some of the small number of lawyer SRL's in the sample was equally intense, despite the fact that they were accustomed to appearing in court on behalf of clients.

> "I would say I was traumatized. I was sick for a long time, and I'm not over it.[364]

All the SRL's in the sample had families and friends who were also affected by their experience.

> **"**Judges, policymakers and justice system officers would benefit from the knowledge that intimidation, prejudice and not taking people seriously are not only stressful (and harmful) to those immediately involved, but to those people who love and support them as well."[365]

b. Financial implications

Some SRL's describe having already expended their savings on legal counsel in earlier litigation. A few have now given up work in order to concentrate on preparing for their court case. One woman who is a Human Resources professional described how her increasingly acrimonious custody case – where her ex-husband is represented by counsel – "created so much work for me (like many SRL's, she felt obligated to respond to everything she received from the other side lest she suffer some disadvantage) that it was impossible

[361] BC37
[362] "Why people representing themselves in court are clogging the justice system" Macleans magazine February 04 2013, available at http://www2.macleans.ca/2013/02/04/courting-a-crisis/
[363] B32, BC82
[364] ON3
[365] BC30

to keep working." The consequence as she described it is "that my son and I are being pushed into poverty."[366]

Others describe the impact of the time they spend working on their case on their work responsibilities, including days taken off to attend court and exhaustion from long nights spent preparing their case. Others say that they cannot look for work while they are absorbed with their legal action.

c. Social isolation

Despite their large and growing numbers, SRL's have little contact with one another and their preoccupation with their legal case often isolates them from family and friends. As one respondent acknowledged:

> "I dwell on it all day, every day. There is not a day that goes by when I don't research this, think about it, I am basically fixated on this."[367]

> "I became so overwhelmed that I kept talking about it all the time and alienated myself from my friends."[368]

At the same time, some family SRL's suggested that it was inevitable that they would become "fixated" on their case if they were to commit the time and energy that they believed that it required especially if the matter came to trial.

> "I lost touch with my sons during this time, I was so taken up with the trial. My relationship with my new girlfriend suffered. I was totally immersed in it, *but I had to be*."[369] (my italics)

The Project Facebook page has gradually developed a community of people who want to talk to one another. As further evidence of the extent of this isolation for some SRL's, many said that they needed some face-to-face contact – and a sympathetic ear – even if they could access all the information they needed electronically[370].

d. Failing faith in the justice system

The depth of skepticism being expressed in these interviews about the justice system is difficult to over-state. While some of the most extreme reactions border on the paranoid, many SRL's appraise their experience in a rational and balanced way in coming to the conclusion that the justice system is "broken". Their basic complaint is clear - that instead of a user-friendly, practical means of resolving disputes the courts offer a false promise of "access to justice".

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[366] BC83
[367] ON47
[368] BC29
[369] BC21
[370] See above at (7)(b)

> "No matter how right your cause is, you do not get the justice you deserve because it is about your resources."

This loss of faith is further expressed and reinforced by accounts of negative experiences with justice actors, primarily judges and lawyers. It is deepened by a widespread sense that judges and lawyers are not accountable for their behaviors. A very large number of those complaining about the actions of their own lawyer, the lawyer on the other side, and/or a judge who heard their case described their sense of injustice that there was in their view no effective process to hold this person accountable, anticipating that existing regulatory procedures for bringing a complaint would be ineffectual and a waste of their time, citing what many called "the old boys club."[371]. A few SRL's have brought forward formal complaints, either regarding a lawyer or a judge; all but one have been unsuccessful. Just one respondent in the sample had succeeded in an action against her former counsel for negligence[372].

The final story in this section synthesizes many of the points made above. It comes from a very sophisticated respondent who was pursuing a relatively "trivial" claim for property damage. It illustrates the way in which some SRL's get pulled into the vortex of a case that then begins to impact their life to a far greater extent than anything they could have imagined.

Sonia[373] was horrified when her artist's studio was damaged in a fire. The fire had been accidentally caused by the landlord, and the resulting smoke and water damaged many of her paintings beyond repair.

While the landlord accepted responsibility for the damage, he did not want to make a claim on his insurance to meet Sonia's claim for compensation. They negotiated for a while – she was asking for $1200 to cover the damage to her studio - but the relationship began to get acrimonious and Sonia realized she wasn't going to resolve this by agreement. However "(A)s artists, we had no money to pay for a lawyer." Sonia thought about dropping the case when she discovered how much work it was actually going to be – but she had had some other experiences in which she felt she had been taken advantage of – an accident in her car and another on her bike – and she now felt it was time to stand up for herself. So she decided to press ahead. "I felt at the time, "I can't keep backing down, I need to stand up for myself."

[371] AB27
[372] AB65
[373] BC48

Despite her education and determination, Sonia found the process far more complex than she had expected. Filing the forms and serving the documents was difficult and time-consuming, but this was just the beginning. Sonia's case began in a BC tribunal, moved into the small claims court, and then was appealed by the landlord into the BC Supreme Court.

When Sonia appeared in court for the first time, "I was terrified. It was so strange to find yourself in a courtroom and suddenly I felt like I had done something wrong." All the paperwork filed by the defendant was about her character and made allegations about her truthfulness. By now the defendant was also representing himself and would not settle. In a full day mediation he proposed that both sides drop their claims. Sonia felt she could not give up and accept this.

They went to a three-day trial in the small claims court. "I felt like I was in a comedy law series, because the plot they had spun was so out of control but the problem was, it was being taken seriously. I had to pull in my whole family to help me – there were allegations being made about me that had to be addressed." Sonia says that she was fortunate to appear before a patient and effective judge but he could not persuade the defendant to settle either.

Sonia won in the small claims court but the landlord appealed. She considered again hiring a lawyer, but was worried that it would be "cripplingly expensive". By now, "I felt trapped – if I dropped out now, I might end up paying his costs". She felt that she needed to finish this. Eventually the landlord's appeal was dismissed. However Sonia never received any money from her judgment against him.

"If I have reached such an emotional breaking point over such a trivial issue, where no one was hurt and only a small amount of money is involved, what is it like for people who have lost significant amounts and have had real trauma? I was stuck in the system and could not get out. … I would never ever bring anything into the justice system again, but if there is something really important at stake, that is where the system should be working."

Part 5: Preliminary Recommendations

There is an urgent need to address the consequences of the large and growing numbers of people representing themselves in both family and civil court. Current initiatives are having some impact but are insufficient in terms of both scope and creativity. All parts of the justice system are affected, including courts administration but also members of the legal profession and the Bench.

These preliminary recommendations propose some first steps towards a proactive approach, while recognizing that the complexity of the shift away from representation by agents towards self-representation involves many unknowns. An overarching recommendation therefore is that in order to address this issue we remain open-minded, willing to innovate and experiment, and open to listening to the SRL experience. Taking a systems approach to the challenges we face is also more likely to be effective over the long-term than apportioning blame or privileging any single analysis.

Hopefully, the Dialogue Event ("Opening the Dialogue: the SRL Phenomenon" to be held at the University of Windsor May 9-11th 2013) will build on and strengthen these preliminary recommendations.

How SRL's engage with the justice system

1. Court forms

Study findings:

While on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRL's often find they have made mistakes and omissions. The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/ judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress. These widespread difficulties result in frustration for SRL's and additional burdens on court personnel, including registry staff and judges.

There has been some progress made towards developing user-friendly and simplified court forms, but it is far too little. Many court staff commented that they (and some lawyers) also had difficulty completing complex and lengthy court forms and keeping up with constant changes. In her assignment to apply for a divorce in the three provinces (The Divorce Applications Project), Kyla Fair also found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.

Court guides are an important step towards assisting SRL's complete forms and understand court procedure but these too are often written in a confusing and complex

manner. In her "audit" of three sample Court Guides, Cynthia Eagan found problems very similar to those highlighted above by SRL's regarding court forms (see (2) below).

Preliminary recommendations:

1(a) "Best practice" standards are needed that recognize the nature and scale of SRL problems with comprehending and completing court forms. Best practice standards should reflect systemic problems (above) and include: reducing the multiplicity of forms; simplifying language used on forms which is sometimes at a very high (grade 12 or 13) reading level and frequently includes legal terminology that SRL's do not understand; ensure that information (and vocabulary) is consistent. Where forms are provided on-line, these should also follow the best practice standards adopted for on-line resources (above at (1)(a)).

1(b) It is not helpful for SRL's who cannot afford to pay for legal counsel to be constantly faced with the admonition on each court form (and sometimes on each page of each form) that they "should" retain legal counsel. While this advice is important, there may be more sensitive and effective ways to bring it to the attention of SRL's.

1(c) Complementary court guides for court forms and procedures should adopt the same standards. Where guides are provided on-line, these should also follow the best practice standards adopted for on-line resources (above).

1(d) Individuals (laypersons from a range of educational backgrounds) who have acted as SRL's should be included in planning and reviewing materials and formats in order to develop and to achieve best practice standards.

1(e) The consequence of improperly completed forms is often severe for SRL's, including delays in hearings and their access to a decision. A system for reviewing court forms and documentation prior to submission would save a great deal of judicial and administrative time and ensure that when SRL's take time away from their employment and other responsibilities to attend court, they are not adjourned because of deficiencies with their paperwork. Providing a "form checker" to SRL's would require some resources but would probably be more cost-efficient than allowing unchecked paperwork to go forward.

2. On-line resources

Study findings:

A large amount of the assistance presently made available to SRL's by the courts (and some service providers) is in the form of on-line information and related technologies (on-line forms, informational websites, and some video material). New initiatives in programming and support for SRL's in both Canada and the United States are largely based on the premise that access to the Internet can promote access to justice for SRL's.

While many of these initiatives are in relatively early stages of development, this study suggests there are significant limitations and deficiencies to this material. SRL's who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they began to try to work with what is presently available on-line. In particular, they identified the following weaknesses: an emphasis on substantive legal information and an absence of information on practical tasks like filing or serving, advice on negotiation or a strategy for talking to the other side, presentation techniques, or even legal procedure; often directed them to other sites (sometimes with broken links) with inconsistent information; and multiplicity of sites with no means of differentiating which is the most "legitimate". On-line resources often required some level of understanding and knowledge in order to be able to make best use of them.

The study data also shows that no matter how complete, comprehensive and user-friendly (standards we are still far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced on-line technologies can be an important component of SRL programming – for example the development of sites developed specifically for SRL's making use of interactive technology - but cannot provide a complete service.

Preliminary recommendations:

2(a) Continued development of on-line materials for SRL's (by courts and other service providers) needs to take into account the considerable difficulties faced by many SRL's in navigating and utilizing existing resources. In order to address these difficulties, "best practice" standards should be developed to include: eliminating legal jargon, ensuring consistency, enhancing the procedural "know how" aspect of on-line resources (presently focused primarily on substance), consolidating information as much as possible to avoid duplication and navigation among multiple websites, maintaining active links, and ensuring an appropriate reading level to enable accessibility for SRL's with a range of levels of education.

2(b) Individuals (from a range of educational backgrounds) who have acted as SRL's should be included in planning and reviewing materials, formats and the development of best practice standards.

2(c) Questions and answers (including, for example, both a "decision-tree" style to direct users to the correct procedures/ forms and "FAQ's") are essential to assisting SRL's. Development of FAQ's (frequently asked questions) for websites is another obvious way in which those who have had their own SRL experience could assist in the development of better resources for others.

2(d) Websites could play a larger role in directing SRL's to the appropriate resources available in their community (mediation services, legal advice and legal information services).

2(e) There is the potential for greater interactivity in on-line platforms, as well as links to personal support via chat and phone. This would enhance the accessibility of on-line material and while not equal to face-to-face contact could help to personalize the experience and convey the sense that this material is fashioned *for* SRL's, rather than treating them as "intruders" into the world of legal rules of procedures.

2(f) There is a similar potential for SRL's to support and even mentor one another using on-line platforms. The experience of the Project Facebook (now more than 160 members and still growing) demonstrates that SRL's appreciate the chance to develop a sense of community and mutual support.

2(g) Technical support and maintenance (eg maintaining live links, updating) for on-line resources is also lacking and requires investment and enhancement.

3. Access to legal information

Study findings:

It is clear that many SRL's are eager to access further and better sources of legal information. This fits with the aspiration of many SRL's to continue working on their case themselves once they have determined that they cannot afford to pay (or continue to pay) a private lawyer. SRL's in the study were often seeking "guidance" rather than "direction". The amount of work that many SRL respondents were prepared to do demonstrates their commitment to "get it right" – but they often lack the necessary resources and in particular, information. The expansion of legal information services (and the practical clarification of the legal information/ legal advice distinction, below) has the potential to relieve pressure on more costly public legal services such as duty counsel (see below at (4)).

The most common source of legal information for SRL's are court staff, primarily those working at the registry counters but also staff working in court programs such as Pro Bono

Ontario, FLIC & LinC in Alberta, and the Justice Access Centres in British Columbia. These excellent services are not always clearly "signposted" in the courthouse or on the courthouse website; as a consequence some SRL's appeared to have missed the opportunity to use these programs (this was also a problem for mediation services; see below at (4)). SRL's consistently described staff working in these locations as the "most helpful" person they encountered during their SRL experience. However they also complained about the restrictions on the time and scope of information that these staff can offer, because of the limitation on their providing "legal advice" (which results in substantial personal discretion, which some SRL's are better at exploiting than others) or because of the sheer volume of people they are dealing with.

The distinction between legal information/ legal advice which lies at the heart of the job descriptions of staff working on the court counters and in information services is consistently complained about by both SRL's and staff, as at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff who are required to make constant determinations of how much information they can provide to frustrated and even angry SRL's. This leads to inconsistent applications and creates a barrier between SRL's and certain basic information that may be construed as "legal advice".

Court and agency staff providing legal information to SRL's described an almost identical set of frustrations and challenges to the SRL sample from their own perspective. They also accurately identified the primary frustrations and challenges of the SRL's. Court and agency staff are working under enormous pressure dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they poorly trained and remunerated.

Preliminary recommendations:

3(a) It is critical to ensure that local information services are clearly signposted both in the courthouse and on the court website, with a toll free number widely posted in the community.

3(b) The conventional distinction between legal information and legal advice requires urgent re-examination. It should be possible to achieve the assumed objective – constraining the "unauthorized practice of law" – in a more consumer-friendly and feasible way. In addition it may be important to revisit exactly what this constraint should mean in the new context of widespread representation without agents (for example discussing court procedures – or predicting what a judge would say?). Court staff need more and clearer guidelines to help them to determine, consistently and fairly, what they may and may not provide as information and in response to SRL questions.

3(c) Court staff – whether working on the counter, as court clerks, or in general or legal information services - require training that prepares them to deal with members of the public on a regular basis, including dealing with distressed and emotional people.

3(d) Regular training updates - whether on court forms or procedural changes - should be built into staff development budgets, to avoid staff being faced with forms and questions with which they are unfamiliar / cannot answer. This type of substantive and procedural updating could be offered on-line using a suitable web-based learning platform.

3(e) Court staff should have access to support services (for example as a part of an EAP) offering counseling and stress management programs.

3(f) Each courthouse should examine its present security systems (both inside the courtrooms and also at the counters) to ensure that staff can feel secure in the event of a disruptive person causing a disturbance.

4. Other support & resources for SRL's

Study findings:

SRL's talked about a variety of "non-legal" services that they needed but either were not available to them or in their present form, did not meet their needs. Service providers recognized over and over in interviews that the frustrations of SRL's are a source of pressure on the justice system in general and on court staff and judicial officers in particular. Improving the experience for SRL's by developing low cost support services for them has the potential for improving the efficiency and enhancing the morale of the entire justice system.

SRL's particularly identified the need for orientation and education (aside from legal training) to enable them to better anticipate and plan for what is involved in self-representation. While this study did not evaluate the effectiveness of existing mandatory education programs, it is clear from the study data that many SRL's are looking for different forms of educational workshops to prepare them for the SRL experience. In particular, they are asking for practical tools and skills that they can apply.

SRL's also described a need for one-on-one assistance in the form of "coaching" (eg document review, answering questions) which support them to handle their own case but als provide checks and moral support. For many SRL's who wish to remain in control of their own case, coaching would be an important resource.

A significant number of SRL's say that they were never offered mediation, and/or do not know what it is. This is a clear gap that needs to be urgently addressed (for example in both educational workshops and better publicity). Some SRL's were nervous about participating in mediation, especially where there was a lawyer representing the other side. Some SRL's who wished to try to resolve their case expressed frustration that the Bench would not exercise greater pressure on a recalcitrant opposing side to come to mediation.

At present many SRL's bring friends and/or family members with them to the courthouse for moral support, especially on appearance days. This is a reflection of the need expressed

by many SRL respondents for some type of protection aganst what many experience as a lack of compassion and kindness in the system, especially from some judges. However there is a great deal of confusion and inconsistency surrounding the role of friends or supporters of SRL's, as well as the potential for an unrepresented person to being a McKenzie friend into the courtroom. This lack of clarity and wide exercise of discretion by some judges is creating resentment and confusion.

Finally, many SRL's do not have access to the types of office facilities that they require in order to represent themselves including printing services, photocopying facilities and even computers. Some services are presently provided by counter staff (informally) or overburdened court-based programming.

Preliminary recommendations:

4(a) Educational workshops

If educational workshops are to be attractive to SRL's they should focus on offering practical skills and information, offered by instructors who can provide a skills-based focus, with opportunity for interactivity and asking questions, in group sizes that permit this. Workshops should not be mandatory but SRL's could be strongly encouraged to participate in such sessions. If SRL's perceived such workshops to be useful to them in preparing for their SRL experience, they would participate.

An SRL orientation workshop should be offered in every courthouse (perhaps less frequently for smaller courthouses) for all individuals filing without representation. Given that so many SRL's evidently begin with representation (53% in this study) such information should also be provided to any individual at the time of filing, whether represented or not. An orientation workshop should be framed less as a legal information seminar and more as an orientation to what lies ahead, and might be best offered by non-lawyers. Such workshops should include time for questions and answers, which may or may not require the presence of qualified lawyers. SRL's need to be better informed about the many challenges they will face, including the amount of time required to complete the necessary preparation, the potential impact on their work commitments, the emotional toll of self-representation, the potential impact on social relationships, and even the mental health consequences. At the same time (and this is a difficult balance) it is very important that SRL orientation is not designed to discourage or deter self-representation – but rather to be clear and concrete about its challenges.

Another critical area of SRL education presently lacking is how to progress one's case towards an acceptable negotiated outcome. SRL's receive little or no information about how to resolve their case and how to talk to the other side about a possible settlement (which may be especially intimidating if the other side is represented by a lawyer). A workshop or workshops could prepare SRL's for thinking about settlement and how to make effective use of available settlement processes, including how to prepare for and behave in mediation and judicial settlement conferences, how to negotiate directly with the other side about settlement, how to generate settlement proposals, and how to finalize

settlement agreements by consent order. Where a court offers mediation services, this program should consider offering an orientation workshop that offers practical skills and tips to SRL's.

SRL education should be the responsibility of the justice ministries and ideally promoted and offered in the courthouses. Programming could be provided by outside specialists with the input and assistance of court staff. In developing programs and workshops, those who have had the experience of being a SRL should be consulted.

4(b) Coaching

Rather than focusing on legal issues and procedures, coaching could be offered by specialists in (e.g.) communication, negotiation, and presentation skills (all areas that SRL's described as important but often lacking from their own experience and expertise). In particular, one-on-one coaching for settlement / preparation for mediation / strategic assessment of resolution options would be extremely valuable for many SRL's who wish to pursue settlement, but do not have the tools and skills to do so.

4 (c) Mediation services

It is critical to ensure that local mediation services are clearly signposted both in the courthouse and on the court website, with a toll free number widely posted in the community.

Mediation services should consider offering initial orientation and training specifically designed for SRL's, to enable them to participate more fully and confidently in their programs. This could take the form of an initial session with the mediator in their case. Competent and experiences mediators are already accustomed to accommodating any additional time that some parties require for coaching and preparation before mediation without compromising neutrality.

SRL's who have had good experiences in mediation should be invited to provide "testimonials" to other SRL's who may be nervous about the idea of using mediation.

Where one side is interested in mediation, the Bench should consider using their persuasive powers to encourage the other side to seriously consider this. At minimum, judges should enquire whether SRL's have considered using mediation.

4(d) "Office" services

Office services available for use by SRL's should be consolidated in a central coalition in each courthouse. Such services would have to be operated at cost, but there it is clear that the convenience of such a facility in the courthouse would be significant. This would also relieve pressure on court staff and staff at court-based programs who are currently bearing the brunt of such demands.

4(e) Mentoring and "friends" of SRL's

There is a clear need for a "buddy" / mentoring system to support SRL's in their emotional as well as their substantive and procedural journey. Each courthouse should develop a clear and consistent protocol for the role of SRL "friends" (that is, informal supporters rather than "McKenzie friends": see below) that sets out expectations and responsibilities for appropriate access and behavior. Since physical facilities vary among courthouses it is important that the local protocol is practical and feasible for that building, although general guidelines could be set provincially. Ideally, local protocol could be determined by a committee that includes some SRL representatives. A similar protocol should be established in each courthouse for the use of "McKenzie friends" to avoid confusion and inconsistency.

Each courthouse should also explore the possibility of developing a formal buddy/mentoring scheme utilizing volunteers (perhaps along the lines of Victim Assistance programs) for SRL's. This should build on the premise that assisting a SRL to feel supported and calm will enhance their experience, as well as the experience of those who deal with them.

4(f) Opening hours

Courts should consider some extension of opening hours in order to accommodate the growing numbers of SRL's who have to take time away from their employment in order to file documents and appear in court.

<u>SRL's, judges and lawyers</u>

5. The delivery of legal services to SRL's

Study findings:

This study shows clearly (and consistent with other recent studies) that the primary reason for self-representation is financial. Many SRL's find that the legal services that they can realistically afford are simply not available to them. They also often find that their desire to prioritise the specific areas in which they want assistance is not possible. What they are faced with is a decision to engage in a traditional legal services model or to forego legal services. The problem for many SRL's is that financial retainers and services billed at a rate of $350-400 an hour are beyond their means, and even those who can afford to pay initially often run out of funds or willingness to continue to pay at a certain point

At the same time, 86% of the SRL sample sought legal counsel, either in the form of private legal services of legally aided/ *pro bono* assistance. SRL's are not saying that they do not want lawyers to help them – but that the way in which lawyers are currently offering their services does not fit within their budget. Some are also saying that they prefer to have more control over the progression of their case and resist the traditional assumption of professional control by their lawyer.

Other complaints made consistently by some SRL's about their prior legal services in their case include: counsel "doing nothing", no progress; counsel being disinterested in settlement possibilities and processes (including mediation); counsel not listening to them or consulting them in decision-making; and a sense that their lawyer was insufficiently familiar in the relevant area of law to be effective as counsel. A further complaint was that lawyers were not truly accountable to the public, and that efforts to question their competence (including but not limited to costs in relation to the services provided) were often not taken seriously by the courts or the regulators.

While many SRL's appreciated the assistance they received from duty counsel or other *pro bono* legal services, the study also found dissatisfaction with the most common model of delivery ie the summary legal advice model. While this model works well for some SRL's, others find a time limited opportunity to speak with legal counsel leaves them more confused, and even panicked, than before. At the same time, court duty counsel models are in serious overload. For both reasons, there is a need for a reassessment of how to offer the maximum value to the maximum number of SRL's via the summary advice model.

Respondents frequently questioned the limitations placed on the provision of assistance by para-legals, especially in relation to family matters.

Finally, many SRL's sought some type of "unbundled" legal services from legal counsel; for example, assistance with document review, writing a letter, or appearing in court. Relatively few were successful in accessing legal services on this basis despite a sustained effort. This was perplexing to many respondents, who could not afford to pay a traditional retainer and envisaged that they could undertake some parts of the necessary work themselves, with assistance.

These findings (which are supported by other studies) raise the pressing question of how private legal services are structured and delivered in an era in which a majority of litigants in some family and civil courts are without counsel.

Preliminary recommendations:

5(a) The summary advice model

In order to fully evaluate and enhance the summary legal advice model, we need to:

(i) Re-evaluate the types of advice that must be provided by lawyers, and the potential for other important and needed information and assistance to be offered by para-legals (see also (3)(b) above).

(ii) Offer SRL's an orientation with a staff person before they meet with counsel (either duty counsel or a limited legal advice session) to enable them to prepare questions and focus their concerns, in order that they may obtain maximum benefit from that limited session

(iii) Consider the present system of limiting access to a fixed number of legal advice sessions. Where a SRL returns over and over again to try to access a limited legal advice session, a different strategy is needed to help/ support that SRL and relieve the burden on a single source and type of assistance.

(iv) Consider including a workshop format for answering questions. For example, an open workshop could be offered on questions regarding filing and serving documents, preparing to appear in court, making a proposal for settlement to the other side etc. Such sessions would require experienced counsel and could include a (non-lawyer) moderator.

(v) Consider extending the role of *pro bono* counsel to court appearances in particular circumstances. Where this is not possible, an alternative course might be for counsel to brief a McKenzie friend along with a SRL prior to a court appearance.

5(b) Para-legals

Policymakers and professional regulators should commit to a re-evaluation of the historical reasons for the restriction of para-legal services in Canada, in the light of data in this and other studies on SRL needs. This evaluation should consider what rights-protections require the intervention of a qualified lawyer and how to identify and prioritize those cases in a public legal services model. Such an evaluation should consult SRL's as well as lawyers, court staff and other stakeholders.

This evaluation of para-legal services should also consider private paral-legal services. Many of the needs described by SRL's in this study could be met by para-legals at a much more affordable rate than lawyers. Such an evaluation should include urgent reconsideration of the types of assistance that can be lawfully offered by (licensed) para-legals, especially in relation to family matters where the need appears to be greatest.

5(c) "Unbundling"

Demand from clients for models of legal service beyond the raditional retainer arrangement is becoming deafening. This is especially clear in relation to requests for "unbundling" from personal clients who cannot otherwise afford to pay for legal services. The historical reluctance of the Bar to consider "unbundling" nneds to be transformed into efforts to find answers to legitimate concerns about due diligence and insurance issues. These issues are solvable within (e.g.) a modified professional indemnity model, and appropriate rules of professional conduct. While no lawyer can be required to offer unbundling, CLE programming should be developed to offer skills training, file management and billing procedures that are compatible with offering unbundled legal services.

5(d) Legal costs

There were numerous complaints from SRL's about the failure of lawyers to describe or explain the costs of their services. There is an urgent need to train lawyers to provide more

complete and transparent information about costs to their clients and before they present them with a bill. Sensible cost estimates are possible, and failure to provide them is bringing the profession into disrepute.

5(e) Complaints against lawyers

The present system of accountability – whether the court assessment procedure for legal costs or bringing conduct complaints to the professional bodies for conduct complaints – requires re-examination in the face of widespread public skepticism.

5(f) Code of Conduct

The widespread complaints of both SRL's and lawyers about the uncertainties and tensions where a SRL faces off against legal counsel will not be dealt with simply by developing more "rules" – but that would be a good place to start. It is important to revisit the Professional Code of Conduct for lawyers in each province on the question of the conduct of lawyers facing a SRL. The Code could provide clear guidance to lawyers and should also entrench a commitment to respectful behavior by counsel towards SRL's. This does not negate the responsibility on the part of SRL's to adhere to appropriate and respectful standards of behavior in court and in dealings with counsel (as well as judges and other court staff) but the framework of a Professional Code is an important step in these discussions.

5(g) Legal education

Prospective lawyers need to be exposed to the realities of the SRL phenomenon. The law schools should urgently consider developing courses that as well as providing up-to-date information about the influx of SRL's into family and civil courts, also take on the challenge of teaching law students skills that are important for dealing with a SRL on the other side. Course should also address practical issues such as how to evaluate providing "unbundled" client services. SRL's highlight in particular the need for lawyers to be more engaged in settlement and open to resolving matters with them. There may also be a role for law school to take on some of the orientation for SRL's described above at (4)(b).

6. The judicial role

Study findings:

The influx of SRL's into the family and civil courts has dramatically altered the judicial role. Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients. This is a huge sea change that some members of the judiciary are clearly adjusting to better than others. The study data is replete with SRL descriptions of negative experiences with judges, some of which suggest basic incivility and rudeness. There are also some examples of judicial interventions such as providing advice regarding court procedure, coaching on presentation, and progress towards settlement, which attract positive comments from SRL's. Other studies show that judges are concerned about

showing "favour" towards SRL's and find themselves in a difficult position when one side is represented by counsel, and the other is not.

Most SRL's saw numerous judges during the progress of their case, and many complained that this created inconsistencies and required them to re-establish their credibility with each appearance. Very few SRL's experienced a single judge who managed their entire case, but those who did were far more satisfied with their overall experience.

Whatever the merit of their individual complaints, there was a very widespread sentiment among SRL's that judges were not truly accountable and that the current mechanism (under the auspices of the Canadian Judicial Council) is a protective rather than an investigative system.

Preliminary recommendations:

Judicial education

6(a) Further judicial training to support judges in working with SRL's on a regular basis is urgently needed. This training should include effective communication skills, facilitation skills and stress reduction strategies.

6(b) Judicial education should be developed with reference to the perspective of SRL's *as well as* legal actors. Training should be based on dealing with "ordinary/ majority" SRL's, for example those who contributed to this study. It is important that such training is not framed from a "siege" mentality but rather considers the needs of the ordinary SRL.

6(c) Additional training to enable the identification and management of vexatious and disruptive SRL's should also be provided.

Judicial appointments

6(d) The demands of dealing with SRL's, and the relative skills and willingness of the candidate in this respect, should be considered factors in criteria for judicial appointments, and especially to the Family Bench.

Judicial procedures

6(e) A Code of Conduct for judicial management of SRL's should establish appropriate new norms of judicial practice. Such a Code should be based on common problems and difficulties faced on both sides (judges and SRL's; it could also consult court clerks). This is a project that could be taken on by judicial educators and developed through judicial training sessions (see above at (b)).

In the absence of a formal Code, the study data suggests the following recommendations where one side is represented by counsel, and the other is not:

6(e)(i) A judge might consider opening the hearing with a short speech from the Bench welcoming the parties and setting out his or her expectations for the conduct and procedure of the hearing (including explaining and establishing his or her authority over process in the courtroom) This might include giving an opportunity to the SRL to ask a question / clear up any misapprehensions about procedure at the outset. Such an opening would need to be time limited, but with careful planning could be delivered in 5-8 minutes.

6(e)(ii) A judge should give serious consideration to allowing the SRL to bring a friend and/or a McKenzie friend into the courtroom with them (see also above at (4)(e)).

6(e)(iii) A judge should ensure that the SRL understands when s/he is to be asked to speak and should take care not to give the impression that the Bench is only interested in what counsel has to say.

6(e)(iv) A judge should ensure that any forthcoming consent order drafted by counsel is sent to the SRL for review before being submitted to the court.

6(f) Single judge case management

Progress towards maximizing single judge case management (especially for family matters) should be seriously considered in every courthouse. While this has immediate resource implications, single judge case management may save time and money in the long-term and has been shown to greatly enhance litigant satisfaction.

6(g) SRL courts

There is some limited experience with special SRL courts (eg in Calgary) and this is a development that may have promise. Moreover, it allows judges who are willing to work with this population to begin to develop this as a judicial specialty. A related and promising innovation that deserves a full evaluation is the use of a “First Appearance Master” at Jarvis Street OCJ who readies family SRL’s for their first court appearance.

6(h) Complaints against judges

The present system of judicial accountability via the Canadian Judicial Council requires re-examination in the face of widespread public skepticism.

System Implications of the SRL Phenomenon

7. Social impact and consequences

Study findings:

The study data vividly illustrates the range of negative consequences experienced by SRL's as a result of representing themselves. These include depletion of personal funds and savings for other purposes, instability or loss of employment caused by the amount of time required to manage their legal case themselves, social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming, and a myriad of health issues both physical and emotionally. The scale and frequency of these individually experienced consequences represent a social problem on a scale that requires recognition and attention. The costs are as yet unknown.

Preliminary recommendations:

7(a) Further research should be conducted as a matter of urgency to investigate the relationship between litigation as a SRL and social consequences including financial hardship, difficulty maintaining employment, personal and mental health issues, as well as the broader impact on children affected by the SRL phenomenon. This research agenda should also include an assessmnt of the fiscal impact of these social consequences in relation to (eg) court time, welfare systems, and public services.

7(b) Community agencies that presently do not focus their work on SRL's but see growing numbers of clients who are involved with self-representation should consider what resources and relative funding they should anticipate going forward in order to provide support services to this population.

7(c) SRL's themselves should consider forming support groups to enable other SRL's to find a community that can offer morale support during and even after their self-representation experience.

8. Culture change

Study findings:

This study shows clearly that amoung most SRL's, self-representation is not a choice but a last resort or a necessity. A reorientation to a justice system in which individuals frequently represent themselves rather than relying on expert agents has implications for how SRL's are regarded, welcomes and treated in the courts by staff, lawyers and judges. This is creating a crisis of faith in the Canadian justice system.

Preliminary recommendations:

The following are critical elements in this culture shift that the professional bodies – for example the provincial law societies, the National Judicial Institute, the Canadian Judicial Council, and the Canadian Bar Association – as well as the Canadian law schools are encouraged to consider the following:

8(a) That most SRL's are unrepresented by necessity, and not by choice. This recognition alone has many implications for how we think about SRL's and how to best meet their needs.

8(b) The parallel recognition that pressure on public resources and the cost of private legal services makes it likely that a substantial SRL population in the courts is here to stay.

8(c) The importance of creating more choices for clients in accessing private legal services, and in particular in the financial structure of legal services.

8(d) The role of the law schools and other legal educators (including CLE providers and judicial educators) in integrating changes in the traditional "rules of engagement" of professional services (in which the professional, here the lawyer, is "in charge" and "knows best") into their programs. Lawyers need to be better prepared to work in partnership with their clients in making both strategic and financial decisions.

8(e) A open-minded re-examination of the protected parameters of the lawyers' role in Canada and serious consideration of the potential role of other legally trained professionals who are not qualified lawyers.

8(f) A move away from the adversarial model and a reorientation to problem-solving in a multi-professional context. This includes: more widespread, consistent and effectively endorsed provision of mediation services, both inside and outside the courthouse; further judicial education in the conduct of settlement conferences, including conferences in which one or both parties are self-represented; and the development of specialized services for SRL's that offer them assistance with negotiation and participating in mediation.

8(g) The establishment of an ongoing policy dialogue in the form of an national steering group/ advisory body that is inclusive of all stakeholders, that can act as a convenor for further dialogues, initiate and continue research, and make further recommendations and monitor new pilot programs and initiatives.

APPENDICES

Appendix A: Total Completed Interviews by Province

OVERVIEW OF SRL INTERVIEWS

ALBERTA

LOCATION	#1	#2	Total
Calgary	48	1	
Edmonton	44		
Lethbridge	5		
Wetaskiwin	2		
Other	2		
Secondary interviews		3	
ALBERTA SRL TOTAL	101	4	**105**

TOTAL ALBERTA INTERVIEWS	105

BRITISH COLUMBIA

LOCATION	#1	#2	Total
Vancouver	43	5	
Surrey	10	1	
Nanaimo	15	1	
Prince George	12	1	
Other	12		
Secondary Interviews			
BC SRL TOTAL	92	8	**100**

TOTAL BC INTERVIEWS	100

ONTARIO

LOCATION	#1	#2	Total
Brampton	8		
Sudbury	1		

OVERVIEW OF STAFF/AGENCY INTERVIEWS

LOCATION	#1	#2	Total
CALGARY	13		
EDMONTON	9		
LETHBRIDGE	6		
WETASKIWIN	10		
OTHER	0		
ALBERTA STAFF/AGENCY TOTAL	38		**38**

LOCATION	#1	#2	Total
PRINCE GEORGE	5		
NANAIMO	5		
SURREY	8		
VANCOUVER	8		
SECONDARY		1	
TOTAL PRIMARY	26		
BC STAFF/AGENCY TOTAL			**27**

LOCATION			
BRAMPTON	3		
SUDBURY	8		

Windsor	14		
Other	43		
Secondary Interviews		12	
TOTAL	66	12	**78**

WINDSOR	12		
OTHER	19		
TOTAL PRIMARY INTERVIEWS	42		
TOTAL INTERVIEWS	**42**		**42**

TOTAL ONTARIO INTERVIEWS	**78**

TOTAL PRIMARY INTERVIEWS	259		
TOTAL SECONDARY INTERVIEWS		24	
TOTAL SRL INTERVIEWS			**283**
TOTAL PROJECT INTERVIEWS	**390**		

TOTAL PRIMARY INTERVIEWS	106		
TOTAL SECONDARY INTERVIEWS		1	
TOTAL STAFF/AGENCY INTERVIEWS			**107**

Appendix B: All Field Sites in All Provinces

British Columbia Nanaimo (Provincial and Supreme Court)
Prince George (Provincial and Supreme Court)
Vancouver (Provincial and Supreme Court)
Surrey (Provincial Court only)

A focus group was also conducted in Victoria

Alberta
Calgary (Provincial Court and Court of QB)
Edmonton (Provincial Court and Court of QB)
Wetaskiwin (Provincial Court and Court of QB)
Lethbridge (Provincial Court and Court of QB)

Ontario
Windsor (OCJ and Superior Court)
Sudbury (OCJ and Superior Court)
Brampton (OCJ and Superior Court)
Jarvis, Toronto (OCJ)
Sheppard, Toronto (OCJ and Superior Court)

Appendix C: Service Provider Interview Template

1. Have you seen significant changes in the last 3-5 years?

2. What do your users come asking for/ expecting?

3. What are the socio-economic characteristics of the SRL's you see at your agency? Are there are other characteristic patterns (substantive/ issue-based, psychological, ideological) of the SRL's you see at your agency?

4. What do you think are the most common motivations for self representation – money or other reasons?

5. How often do they have friends with them to help/ support?

6. Have they considered / tried alternatives to court?

7. What is their most common frustration?

8. What is your most common frustration?

Appendix D: SRL Focus Group Template Questions

1. Why did they decide to represent themselves? Was this due to financial reasons? Were there other reasons? Does anyone feel that they would have done much better with a lawyer to represent them? What difference would a lawyer make?

2. What is the distance between what they expected at the outset – and what actually happened (court process, interaction with justice system actors, challenges, rewards)?

3. What was the impact of the experience on them? Emotionally – economically – in relationship terms – other?

4. How could the system work better if it was adjusted to meet the needs of SRL's? Could there be more opportunities for early resolution? More information for SRL's? Access to legal advice/ services?

Some focus group participants also provided demographic data as set out at Part A of the SRL Interview Template, Appendix D below.

Appendix E: SRL Interview Template

A. DEMOGRAPHICS

i. Gender
ii. Are you the plaintiff (petitioner) / the defendant (respondent)?
iii. Is your case ongoing/ concluded?
iv. Age (banded)

Under 20
20-25
25-30
30-40
40-50
50 plus

v. What is your income level (banded)

Under $30,000
$30,000 - 50,000
$50-75,000
$75,000 - 100,000
More than $100,00

vi. What is your highest level of education (banded)

No high school diploma
High school diploma
College
University/ professional qualification
Other (specify)

vii. Have you ever retained a lawyer in the past?

If yes, was that experience good – OK – bad?

viii.Have you retained a lawyer (may include a Legal Aid lawyer on retainer but not an occasional advisor eg duty counsel) to represent you at any stage *in this case*

ix. Are you receiving free legal advice from a service or agency?
If yes, from what source

x. In which court is your action filed?

a. Family
b. Civil (under $25,000)
c. Civil (over $25,000)

First language?

Do you take a support person with you into the court?

Are you comfortable using the computer for research?

Is the other side represented by a lawyer?

B. TOPIC GUIDE

1. Deciding to use a legal process (as plaintiff/ defendant, applicant/ respondent)

Previous experience with the legal system; expectation at the outset of this case of what you could achieve; how likely? (above); did you consider any alternatives to using the legal system? Why did you decide not to pursue alternatives? (cost, process, outcomes, emotions)

2. Deciding to represent yourself

Previous experience with lawyers; assessment of what you would gain by being represented by counsel; assessment of your own ability to represent yourself; did you bring anyone else along with you to help? How important was the issue of costs in deciding to represent yourself? If you could have representation at just one step in the process when would that be?

3. Resources

What resources have you used? What difference did these resources make to you? Who was the most helpful person you have met so far? What was the most helpful resource(s)?

4. Your experience and appraisal

How close was what has happened in the legal process to what you expected? What are the major differences? What was your biggest surprise? Your biggest disappointment? The best moment? What else would you like to happen procedurally that has not? Did you use / are you planning to use mediation? Why/ why not? What would you tell another SRL are your lessons from this experience? Would you choose to represent yourself again? What would you do differently another time? ? If you could have a (free, competent) lawyer now, what would you ask them to do for you? What would you say to the Chief Justice's Task Force on Access to Justice which is currently working on these issues?

Appendix F: SRL Interview Codes

Nodes used in NVivo to code the SRL interview data (in alphabetical order)

(Please note that words in parentheses are sub-sets of that node)

Advice for other SRL's
Confusion about the law/ lack of legal knowledge
Considered alternatives to court
Contact with duty counsel (positive, negative)
Cultural discrimination issues
Different judges heard their case (and impact)
Disappointed with case outcome
Disconnect between expectations and experience
Disconnect between information provided and actual process (lawyers, court personnel)
Domestic violence case
Emotional impact of process (intimidation, humiliation, frustration, bullying)
Employment issues (because of court dates etc)
Expectations of process and outcome
Expectations played out
Experience with court personnel (positive, negative)
Experiences with judges (positive, negative)
Experiences with lawyers (positive, negative)
Gender bias
How to be an effective SRL
Judicial bias towards SRL's
Lawyer not acting in best interests of client
Lawyer unfamiliar with case/ law
Lawyer unwilling to take case
Legal advice or information provided by an agency (and types of other assistance)
Medical Issues and Self -Representation
Memorable quotes
Opposing counsel: tactics and problems
Other resources used
Other side not co-operating
Problems filing paperwork
Problems with lawyers complaints systems
Reasons for representing yourself (financial, mistrust of lawyers, personal interest and confidence, other)
Reasons for retaining a lawyer
Rewards of SRL experience
Support person
Surprises
System improvements

SRL variables noted and analysed

Civil / family
Court
Retained a lawyer in the past and found this experience good, mediocre/ mixed, bad
Used a Legal Aid Lawyer
Have been represented by a lawyer at some point during this case
Received free legal advice at some point in this case
Customarily bring a support person to court with them
Comfortable using the Internet for research
Education (in bands) (no high school diploma, nigh school diploma, college, university/ professional qualification, other
Age (in bands) (under 20, 20-25, 25-30, 30-40, 40-50, 50 plus)
Income (in bands) (under $30,000, $30,000 - 50,000**,** $50-75,000, $75,000 - 100,000, more than $100,00)
Case is concluded / ongoing
Is the Other Side represented?

Appendix G: Service Provider Interview Codes

Agency/staff most common frustration
Alternatives to court
Disconnect between information and process
Expectations of staff by SRL's
Programs that help SRL"s
Reasons SRL's represent themselves
Significant changes in the past five years
Socio-economic characteristics of SRL's
SRL's most common frustration
Support persons
Ways to improve the system

Appendix H: Report of the Divorce Applications Project (by Kyla Fair)

GETTING DIVORCED IN ONTARIO	
ACTION	**OBSERVATIONS**
Googled "how to get divorced in Ontario	
Clicked on a government link, clicked "Guide to Procedures in Family Court"	-the guide is extremely extensive, multiple pages of PDF documents -intimidating to begin reading through all of this material -first two pages of the guide suggest seeking a lawyer -took ten minutes to read through intro, many terms I only know because of my training in civil procedure - intro tells me to visit ontariocourtforms.on.ca for forms
Clicked section 2 of "Guide"	-discusses the 3 types of applications, I determine I need a general application -lists the forms I will need to fill out, there are 7 in the list with no detail of how to fill them out -I am surprised at the number of forms necessary, beginning to feel overwhelmed -I had to copy the list into a word doc so I can continue to refer back to it
Skimmed through other sections of the "Guide"	-continually suggests seeking legal advice- this would feel frustrating to me if I could not afford a lawyer- may feel helpless trying to get through this on my own
Navigated to Ontariocourtforms.on.ca	-found form 8 (General Application) fairly easily, though the list of forms was very long
Filled out form 8 (General Application For Divorce)	-it took me 20 minutes to fill out my basic information -there was a "forms assistant" option, which really made no difference in making the form any easier to fill out -each section requests "supporting documentation" and "supporting facts" but does not explain what this supporting documentation should be comprised of -these forms do not feel "user friendly", they appear to be made for lawyers- very frustrating to have no guidance - at the end of the general application, there is a list of other forms i must fill out if I plan to claim child or spousal support (in addition to the 7 previous forms) -I am starting to lose track of which forms I need to complete
Filled out form 13.1 (Spousal Support)	-after attempting to fill out this form for 30 minutes, I am completely overwhelmed; the amount of detail required about the value of everything you own/ all of your monthly/yearly expenses is extreme -about halfway through the form I am ready to give up- required to give valuation of every item you own on date of marriage,

	valuation date, and today -in reality, this form would take days to complete -at the end, you are required to provide a complete calculation of net family property derived from all of the valuations previously entered -the math alone is complicated, and I feel as though many errors would be made without some legal assistance
Final thoughts	-i am not sure what court I am supposed to bring these forms to, or what the process is after I have filed the forms and served them ie. Does the court contact me? How long will it be until trial? What will the process be at trial? What documentation will I need to bring to trial? After trial, am I legally divorced? What happens if my husband contests the information I provided? Do I get copies of his statements before trial? -This process proved to be much more difficult than I anticipated, and I only filled out parts of the general forms- I have no idea how someone could do this on their own, especially in a time of emotional turmoil

GETTING DIVORCED IN ALBERTA	
ACTION	**OBSERVATIONS**
Googled "how to get divorced in Alberta"	-came to a government website, followed links on how to apply for divorce -information was not specific to AB, just said to fill out appropriate forms in your province
Googled "divorce forms Alberta"	
Navigated to www.albertacourts.ab.ca	-directions on this website were listed as "steps to follow"- a brief description of the forms needed and where to bring them -the forms needed were then listed at the bottom -some of the terms really difficult to ascertain ie. "Praecipe to note in default" -Also, there does not seem to be a description of what to do if you have oral evidence you want to provide
Clicked on form entitled "Statement of Claim for divorce"	-no explanations or definition given- many people wouldn't even understand what "serve" means, or how to reach a "commissioner of oaths" -this form slightly more confusing than ON, although much shorter ex. Uses words like collusion, connived, etc -asks Plaintiff to propose custody and financial arrangements for children, but they may not know what the options are, or what would be appropriate to ask for given the circumstances -when looking at the affidavit of the applicant form, i am confused because under "grounds" for divorce, one of the options in that my spouse committed adultery as evidenced by

	my spouses affidavit herein... does that mean my evidence doesn't count to prove my spouse committed adultery?
Final Thoughts	-it appears that there would be a substantially greater number of forms to fill out if there are children involved -there are other forms listed that I would need to bring to the court that I do not understand how to obtain (ex. Praecipe to note in default, divorce judgement, etc.) -still left with the same questions I was after applying for divorce in Ontario

GETTING DIVORCED IN BRITISH COLUMBIA	
ACTION	**OBSERVATIONS**
Googled "Getting divorced in BC"	
Navigated to a service BC website	(http://www.servicebc.gov.bc.ca/life_events/divorce/index.html) -there is a list of options to select from that look useful ie. Legal terms defined, basic family law, legal advice options, mediation, and the divorce act
Clicked on "Do-It-Yourself Divorce"	-page not found?
Went back to options, selected "Information about Separation and Divorce"	-after reading through, there are no options on how to begin the process
Clicked a link that led me to a "divorce self help kit"	(http://www.familylaw.lss.bc.ca/guides/divorce/) -gives a very detailed list of step-by-step instructions- very long, intimidating -going through each step is fairly easy, there is information on how to fill out each form as well as a link to the form -there are also help videos and a list of agencies that you could call for help -the financial statement, like the other provinces, was long, detailed, and frustrating -After reading through steps 1-5 for over 30 minutes, I have learned that this information package is only for an uncontested divorce ie. When you do not need to appear in front of a judge -this is frustrating because I wasted time reading a lot of information that does not apply to me- already filled out forms that do not apply to me
Googled "contested divorce steps BC"	-Was directed back to the website above -found a section on contested divorces- basically says to resolve it outside of court or get legal advice, "The process for getting a contested divorce is complicated and can take many paths, so we don't offer a guide for it on this website.You don't have to have a

	lawyer to get a divorce, whether defended or undefended, but it's strongly recommended that you get some form of legal advice, especially if you need to settle issues about property, custody, access, guardianship, or support."
Googled "contested divorce BC steps to follow"	-4th or 5th option down in Google was this link: (http://www.justice.gc.ca/e ng/pi/fcy-fea/lib-bib/pub/divorce/pdf/divorce.pdf) -this is a guide to getting divorced - after 20 mins, I have determined that this guide is useful only in giving the "broad brushstrokes" - explains what divorce and separation are, what the general process is, what happens after divorce etc., but gives no indication of how to start the process
Googled "how to start a contested divorce BC"	-links no help
Googled "applying for divorce BC"	- i keep getting led back to the http://www.familylaw.lss.bc.ca/guides/divorce/ link, so I clicked a link called "legislation/court rules" under this website and came to a very long PDF doc of the *Court Rules Act* - this is exactly like what I would see in a Civ Pro law class- how could an average person even begin to decipher this? -also, I am not sure if I need provincial court rules or superior court rules, and cant find any information on this - after reading through the rules for a few minutes, I have determined I need to look at the Superior court rules -when I go to the superior court rules, I am shocked at how long they are.. the table of contents is 20 pages
Navigated to Part 3 of the *Court Rules Act:* "How to start/defend a family law case"	- completely confusing- detailed rules and sub-rules about how to fill out each form- I know I have to fill out form F3 and then serve it (rule 6 discusses requirements I must meet while serving), and there are separate forms for child support and spousal support that all have their own rule requirements that must be met. -after looking through these rules, I am wondering whether I found the correct forms for the Ontario and Alberta divorces, because BC has been much more difficult
Clicked "Court Forms" link, navigated to form F3 (General Application)	- very easy to miss a step because there are drop down boxes on the left that require information but can be easily missed -as I am going through this form it is becoming apparent that I have to keep referring back to the rules, because the question will state for example "I have not condoned any act relied on under section 8 (2) (b) of the Divorce Act (Canada) as a ground for divorce." -like the other provinces, this form asks that if you are claiming division of property or spousal support etc, you propose the

	grounds. This would be difficult for someone who has no idea what is reasonable to ask for/suggest
Final Thoughts	- I have no idea what the next steps are in processing this claim for divorce, or what other forms I need -Having to go through the *Court Rules Act* was extremely challenging even with mny training in the law - BC was the hardest province to find information on how to begin a claim for a contested divorce

Appendix I: Report of the Court Guides Assessment Project (by Cynthia Eagan)

I volunteered to assist Dr. Macfarlane's work after reading about her in the July 8, 2012 edition of *The Windsor Star*. I am a public librarian and on occasion, I am asked to help locate and evaluate legal information. I took an elective in university, years ago, on legal research. This is my background. It may be more than many SRL's who come to this task with no background at all. However I am certainly no expert in this field.

This was not an extensive review. It was a volunteer, time-limited effort. I don't want my report to be considered fault-finding. Legal information is complex, time-sensitive, and often structured in ways not intuitive to the public. It just is. For my small part, I felt overwhelmed by the amount of material online. I could have spent hours scaling the terrain. And when I printed it out--thinking that doing so would simplify it, make it tangible-- I just made mountains. We still need legal professionals.

I volunteered to review a document to evaluate:

- the document's reading level
- whether the experience of navigating URL's was easy
- whether the material used accessible and easily understood language
- whether the material avoided jargon
- whether language and terms were consistent throughout
- whether there seemed to be important unanswered questions
- whether there was a reference point for further questions

In consultation with Julie Macfarlane, I chose the following documents to review:

From British Columbia:
"Applications to Court" available at:
http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf

From Alberta:
"Alberta's Family Law Act: an Overview" available at:
http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf

From Ontario:
"Guide to Serving Documents" available at:
http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf

1. Reading Level

I used Microsoft Word's readability tool and sampled what I thought were representative pages. The Flesch-Kincaid Reading Grade Level results were: Ontario (p.11) 8.9; British Columbia (p.5) 5.1; and Alberta (p.7) 13.6.

Using a word processing program in this way is mentioned in an excellent document that Sue Rice discovered. I encourage any one, any profession, to read it:

"Writing for Self-Represented Litigants: A guide for Maryland's courts and civil legal services providers" available at :
http://www.mdcourts.gov/mdatjc/pdfs/writingforsrls.pdf

2. The URL experience

Occasionally I'd come across a broken link within a recommended website. Not at the top-level domain.

This is not surprising! We see on-screen resources, but not how many (or few) human resources are dedicated to website maintenance.

An example: Student Legal Services of Edmonton. It's listed as an additional resource.
From http://www.slsedmonton.com/where-to-start/
The hyperlink "Will my criminal record stop me from entering other countries?" no longer works.

A different URL situation: Ontario's print document gives me www.ontario.ca/attorneygeneral/ as a URL for further information. It is actually now: http://www.attorneygeneral.jus.gov.on.ca/english/default.asp.

This domain resolves itself—the hyperlink still works. I mention this because some people are lost if a URL does not "switch over" automatically. They don't know the difference between the location bar and the search bar in browsing software. They unwittingly start "searching" Yahoo or Google to find their document, and soon end up way off course from officially-sanctioned information. I've seen this, many times, at the public library.

I have a few other comments on on-line searching, again coming from the place of a public librarian.

a. Alberta: knowing where to access an official copy is very important. I try to find reputable and free resources. I don't encourage using public library computers to purchase items. So I was confused by the Alberta's Queen's Printer website.
Laws Online appeared to be only where you could purchase a copy of the laws.

b. Ontario: when I go onto E-Laws and find the Rules of the Small Claims Court, it is under "Courts of Justice"- not under "Rules" or "Small Claims". This is confusing. People who are not legally trained – myself included - always have the nagging feeling that they are **not** where they need to be-- unless they are explicitly shown/ directed.

c. British Columbia: at the Supreme Court of B.C. website's I felt unsure about the relationship between the Justice Education Society and the related organizations listed in the pull-down menu. How are these organizations working together? Who is in charge of the material? I think it's wonderful material - but I want to be secure in knowing that what I reach for a source it has been sanctioned by the courts/ relevant authorities. Remember a SRL is quickly accessing the website with no background into the hierarchy.

3. Does the material use accessible and easily understood language? Does it avoid jargon or technical terms?

ALBERTA—

Page 1: "on October 1, 2005 Alberta's new Family Law Act will come into effect".
So it's dated.

Page 2: —a significant ambiguity—"Lawyers are required to discuss the different ways of resolving family matters." This could mean:
1.)You must use a lawyer in order to proceed, or
2.) If you hire a lawyer, they must discuss with you the ways of resolving family matters.

Page 4: "adult interdependent partner" this term is used in a few other places, what does it mean, perhaps common-law marriage? Possibly needs defining.

Page 4: "Parents...may apply to either the Provincial Court or the Court of Queens' Bench.... What is it difference, why are there two locations. Possibly needs explaining.

Page 5: (referring to division of property)
Terms: "trust law" "unjust enrichment" "adult interdependent partners"
A sentence that probably could be worded easier: "Support orders and agreements will bind the estate of the paying person."
A possibly ominous paragraph about DNA testing refusal: "...the court can draw any inference considered appropriate to establish the parentage of a child." "Drawing an inference" is a mental activity but as a verb "draw" can mean extract, as in: "draw blood".

Page 6: Who is a guardian -- an example of something perhaps better illustrated by a chart versus a paragraph.

ONTARIO:

Page 4: Unclear term "endorsement record"

It's helpful that portions of the Rules are reproduced and aligned with the topic and that there is a chart for serving documents.

Page 5: Annoying that you will have to refer to another document for fees. At least I think it'd be good to get some idea of what copy fees (or any other legal fee) might be, for example, "as of March 22, 2013 copy costs are 10 cents per page". Okay the price may have gone up but you would have an idea of what to expect.

Page 7: Along those same lines, this section talks about affidavits being "sworn' before a variety of eligible individuals. But is doesn't tell you what these individuals actually "do" (do they have a unique stamp?) so that you would know that they are legitimate. This section also doesn't mention everything that you might need to do to obtain the sworn document —it does state that you show them your **unsigned document,** but do you have to have government or other I.D. to prove who you are? I have had many questions about notary services at the library.

Page 18:
There is probably a clearer way to say the following:
"The affidavit must be signed in the presence of the person before whom it is sworn" and "NOTE: It is a criminal offense to knowingly swear a false affidavit."

BRITISH COLUMBIA

Page 1: Unlike Ontario's material, BC doesn't show portions of it's rules, it just names them "Part 8 of the rules" is that the same thing as Rule 8?

Page 2: Term—"Master in Court" what is this, how does it differ from a judge. Why are there two names for judges?

Page 2: "The registry staff may be able to help you determine whether a judge or master should hear your application". Would they then be giving legal advice? Or is this considered legal information?

Page 2: "Remember that preparing for and attending at a chambers application will cost you time and money." Very vague—is there a ballpark figure (minimum?) for how much money, how much time?

Page 3: Term "draft order". This idea shows up written in various ways, all of which probably allude to the same thing: eg "draft of the proposed order", "attach a draft of the order", and "use this to draft your order" - using it as the same part of speech each time would be better.

Page 5: "Your application record must contain an index". An example would be helpful.

Page 5: Serving your documents. Table format would probably be clearer.

Page 7: "You should request costs in the event that your application succeeds." How? Give better details for anything concerning money or time.

Page 7: "Try not to switch back and forth between facts and law". How? Give examples.

3. Terminology, jargon, and consistency within the documents

A glossary for each province is available online at its own website. However for me, it was unnerving to have one computer window open to a glossary and another at the website I needed it for. Or go to the online glossary and search on paper for the term I remembered just seeing and didn't understand.

It might be helpful to just include the definitions at a document's outset. This is how literacy materials (early readers) are often structured for children.

"Adult interdependent partners" a term used in the Alberta document shows up on pages 2, 4 and 5 but is finally explained on page 8.

Early on, I was clued into the need for clearly arranged documents in print. It's a certain kind of crazy when legal papers get out of order. All three guides use page numbering. British Columbia's footer is exemplary.

4. Unanswered Questions and Reference Points for Further Questions:

Both the Ontario and British Columbia document had a section on affidavits.

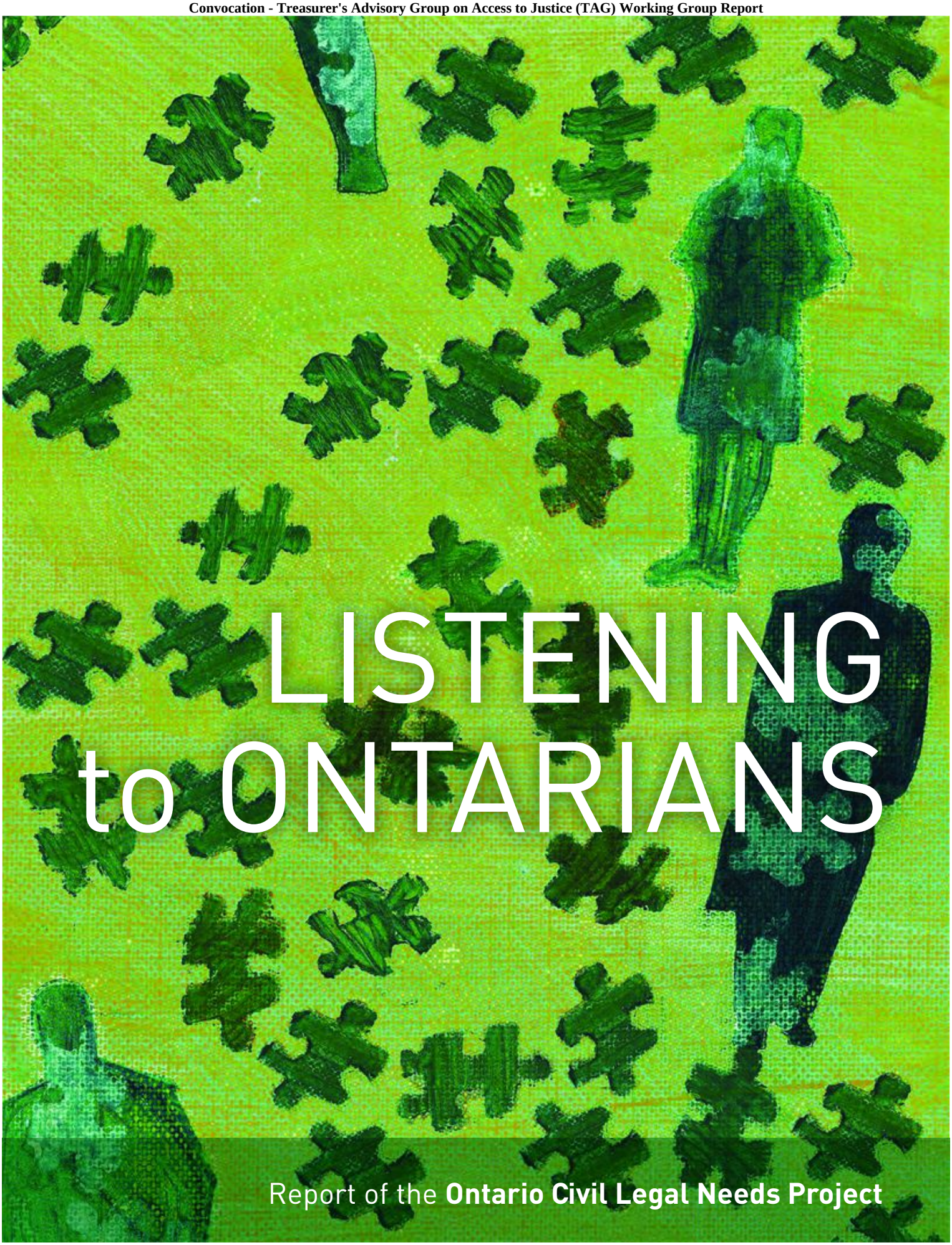
I didn't read in either that a person needs I.D. As a librarian in a community with a large immigrant population, I have noticed that many people do not understand the requirements for obtaining a sworn document. Critical procedures need to be made really clear for laypeople. What you need /who you need/ when are they available?

The British Columbia document covers part of the affidavit process on page 4 and referred me to a subsequent document for more information on page 5. Whenever possible I'd suggest building redundancy within documents to help with possible unanswered questions. People will not necessarily read things in order, and certainly not each time they consult them. Nor might they have them all present each time. Redundancy is not boring, it's reassuring.

The British Columbia document page 2, mentions that a court application will "cost time and money". It is meant generally to imply what's ahead, no doubt. Page 3 suggests people to visit a chamber hearing and/or to contact the registry for details.

Page 7 instructs people to request costs in their application record. However no details are given on how to do this here.

I would have liked to have seen money and time issues more concretely addressed in all these documents. From how much legal professional might charge for doing something, to the copy costs at the courthouse, to when would be a good time to observe court sessions. Practical information given alongside legal information, in the same place, makes it easier to prepare mentally and physically (and fiscally).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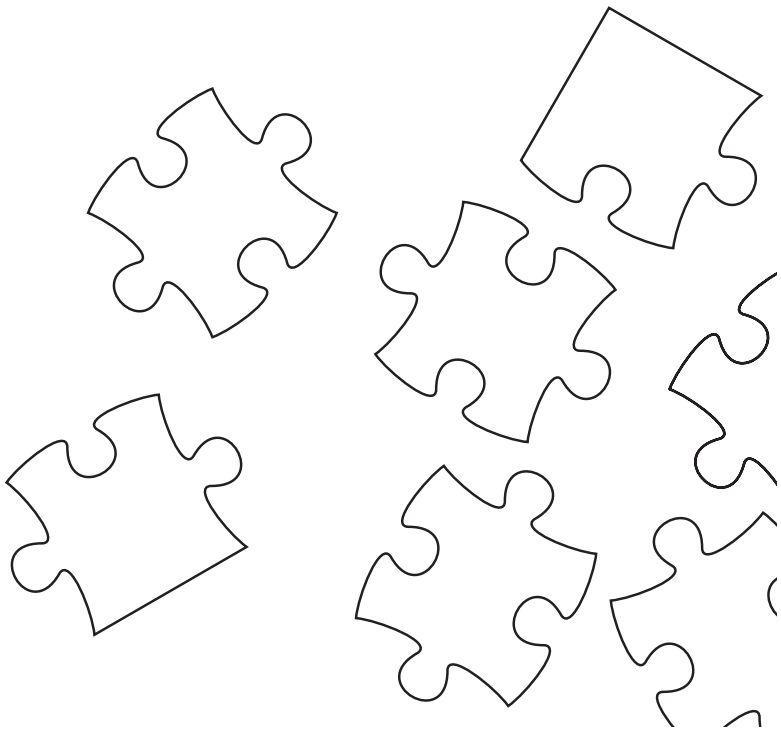

Acknowledgments

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- R. Roy McMurtry – Chair
- Marion Boyd – Bencher, The Law Society of Upper Canada
- John McCamus – Chair, Legal Aid Ontario
- Lorne Sossin – Vice Chair, Pro Bono Law Ontario

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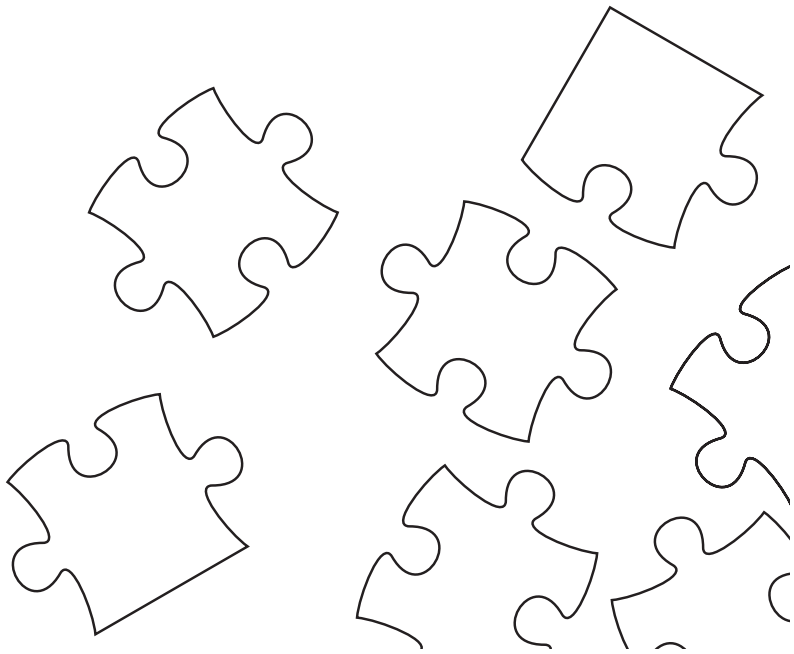
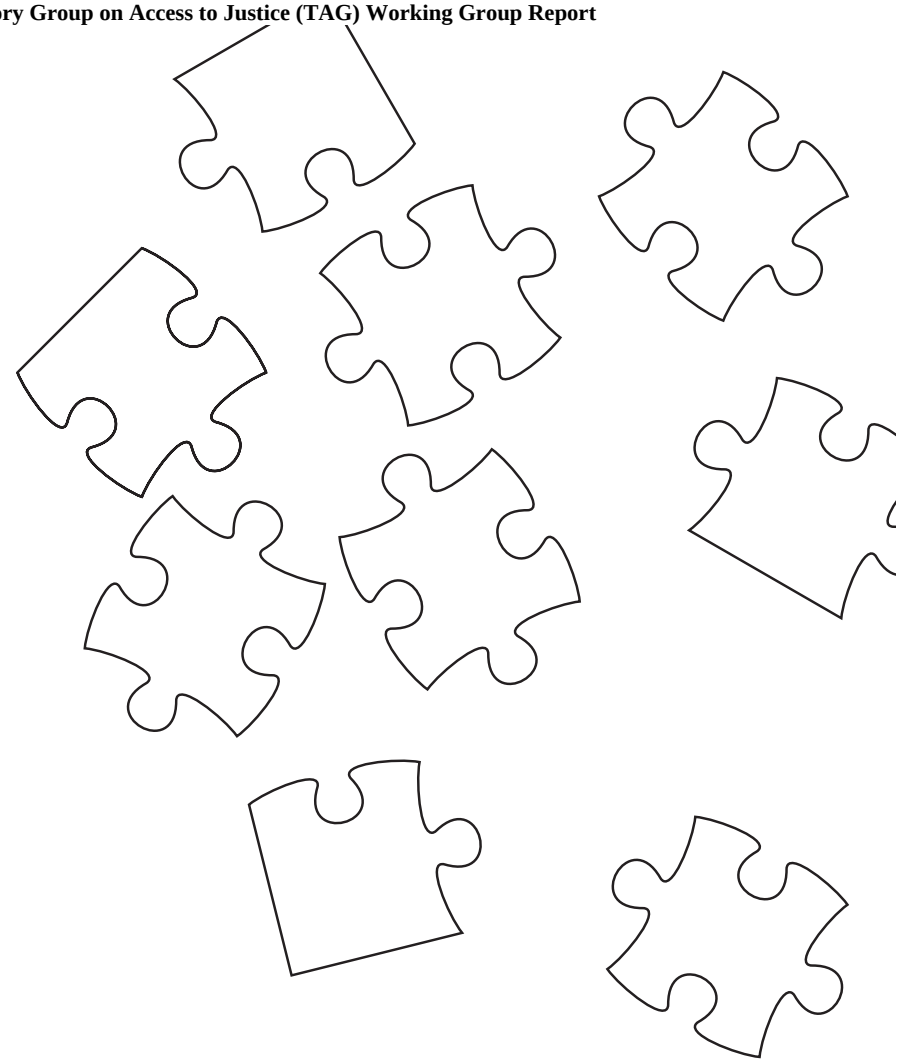




Report of the OCLN Project

Executive Summary

REPORT OF THE OCLN PROJECT

Executive Summary

Most people agree that access to justice is a fundamental right in a democratic society. It is important to examine barriers that Ontarians with civil legal needs may be facing when they seek legal assistance to access the justice system. This report is intended to provide an overview of civil legal needs, examine how those needs are being met, identify gaps, and to suggest strategies for addressing those gaps.

The Law Society of Upper Canada, Legal Aid Ontario, and Pro Bono Law Ontario share a common goal to improve access to justice for Ontarians. All three organizations already have in place a comprehensive range of programs and services designed to provide legal assistance to low and middle-income residents with a civil legal issue. Those services are heavily utilized. Until now, there has been no empirical data on how well those services are received, where there are unmet civil legal needs, and if existing resources could address those needs more effectively.

The three organizations agreed in 2008 to undertake a joint research project to identify and quantify for the first time the civil legal needs experienced by low and middle-income Ontarians. The research has three phases: a phone survey to assess quantitatively the civil legal needs, a series of focus groups with front-line legal and social service providers to identify gaps and areas for collaboration, and a mapping exercise to show the availability and range of existing services. The first two phases are now complete. This report contains the findings of the first two phases, which are focused on civil legal needs. The third phase, devoted to mapping the supply of legal services, will be completed in the fall of 2010.

The three partners agreed that the research results are intended to provide a baseline of reliable data about civil legal needs in order to inform planning and priorities in their ongoing response to civil legal needs. The partners' hope is that this study serves as a catalyst for further collaboration, coordination and innovation to ensure access to justice for all Ontarians.

Accessing the justice system

This study underlines the need to help people demystify the justice system. For the hundreds of thousands of Ontarians who need help with a civil legal issue, the system is poorly understood or perceived to be inaccessible by many. By exploring the civil legal needs of low and middle-income Ontarians through a comprehensive research project, there is now for the first time a body of empirically sound data available for all to study and to use. Legal service providers, legal associations, social agencies, government and members of the justice system will all find in this report a thorough examination of the kinds of legal needs that arise among low and middle-income Ontarians, how they try to resolve those needs, and where resources could be better utilized.

Civil legal needs are a pervasive and invasive presence in the lives of many low and middle-income Ontarians. One in three low and middle-income Ontarians have had a non-criminal legal problem or issue in the past three years and one in ten has had multiple legal problems. Overall, almost four in ten people who had experienced a legal problem and sought assistance in the last three years reported that they were still working to resolve their most important problem.

The disruption that results in the daily lives of Ontarians when their civil legal needs cannot be met is significant. Unmet needs often cascade into greater problems for individuals and their families.

Civil legal issues include child custody disputes, wrongful dismissal, eviction from housing, powers of attorney, personal injury, and consumer debt. Resolving these issues can involve the courts, administrative tribunals, and regulatory bodies. The very complexity of the legal system itself can be a barrier to access to justice.

Satisfaction with existing services

People are generally very satisfied when they get assistance from private lawyers and other professionals in the civil legal system. Almost 70 per cent of low and middle-income Ontarians who have experienced a civil legal problem in the last three years sought legal assistance from a lawyer whom they paid. Eighty per cent of those people stated that they found the assistance helpful.

The programs and other services provided by the Project partners are well received by those who access them. These are significant strengths in Ontario's civil justice system. They provide a valuable foundation for the way ahead.

A significant challenge is to find ways to encourage more people to receive the full benefit of the existing resources available to them. People often can't find

legal help because they don't know where to look, or because they perceive they won't be able to afford it. The study reveals, however, that fully half of the low and middle-income Ontarians who had civil legal needs were able to access free help or to resolve their legal problems for less than $1,000 in legal service fees.

One size does not fit all

The study reinforces the necessity of differentiating the needs of low and middle-income earners. There are vulnerability issues among many low-income Ontarians that compound the disruption and challenge created by a civil legal need. The specific legal issues are often different for the two groups. Middle-income Ontarians anticipate the need for legal assistance with wills, powers of attorney, or real estate issues. Low-income Ontarians are more likely to need legal help with disability-related issues, social assistance, personal injury or employment issues. More Ontarians in the lowest income group rely on non-legal sources of assistance for their problems, in particular friends and relatives.

Family law issues were seen by Ontarians across all income ranges as important to resolve. Other civil legal needs, however, can be disruptive and long-standing as well, including employment and personal injury issues. These findings suggest that there need to be multiple, diverse, and integrated access points and service responses.

Addressing legal needs on their own

One in three respondents among low and middle-class Ontarians said they prefer to resolve their legal needs by themselves with legal advice, but not necessarily with the assistance of a legal professional. Legal advice was sought from a variety of sources, both legal and non-legal. In addition, many civil problems are resolved outside the formal justice system.

These responses indicate there are opportunities for the Project partners to broaden access to reliable information and assistance about legal processes and sources of self-help.

The traditional legal service model

Legal service delivery traditionally assumes individual representation and direct legal support from a lawyer or paralegal in a traditional litigation model. More contemporary views augment the traditional model with an appropriate mix of alternative service models and providers based on an assessment of client needs.

The study also reinforces the value in continuing to rethink how legal services are provided to clients. Breaking down legal services into their component parts – or "unbundling" legal services – could in some cases provide clients the option of choosing which parts of a legal issue they resolve on their own and which parts are appropriate for professional help.

Innovations

The study highlights the need for innovation, and recognizes the important innovations which already have been developed. For example, self-help centres allow self-represented litigants to access the justice system even if they cannot afford to retain a lawyer for full representation privately, or qualify for pro bono or Legal Aid. Pro Bono Law Ontario's pilot project, Law Help Ontario, is a court-based self-help centre which provides a continuum of services based on a triage system that assesses litigant need and allocates resources based on those needs. During the pilot period, the walk-in centre served 6,845 clients, provided over 12,500 brief legal services with the support of over 200 lawyers, who contributed more than 2,100 hours of free legal assistance.

Another resource for those without legal representation is the Lawyer Referral Service (LRS) of the Law Society of Upper Canada. This is a free, public, bilingual service that helps people find a lawyer by providing a toll-free number, with client service representatives who provide the caller with the name and phone number of a local LRS member lawyer who is able to deal with their legal issue. If the person calls the LRS member lawyer, he or she will receive a free consultation of up to 30 minutes. In 2009, 48,329 calls were received by this service.

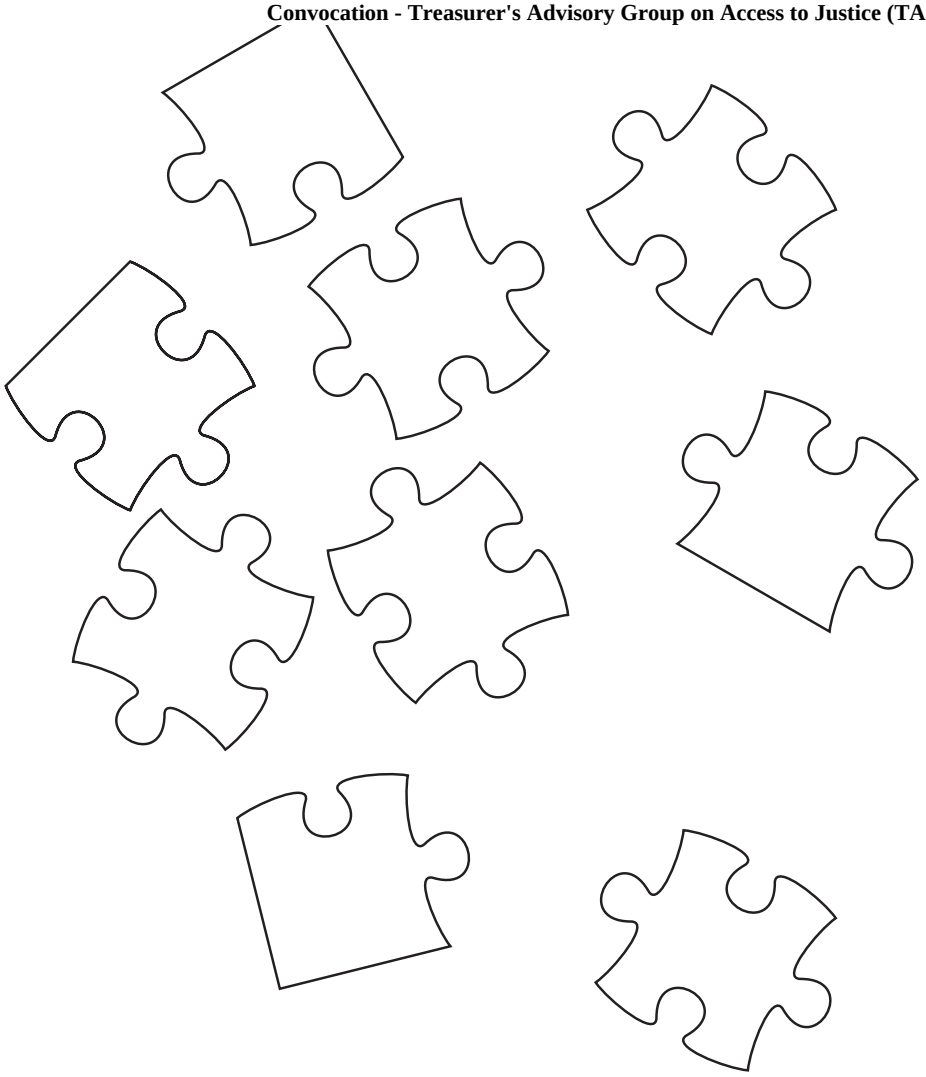
In addition to in-person self-help centres and referral resources, technology holds significant promise as a platform for the delivery of legal resources. According to the study, 84 per cent of low and middle-income Ontarians are connected to the Internet. The Internet is already an important means to convey legal information and resources. For example, CLEOnet, a project of Community Legal Education Ontario (CLEO), makes available an online collection of legal information and resources produced by community agencies and community legal clinics across Ontario. Technology creates opportunities beyond the transmission of legal information. For example, Law Help Ontario provides access to an online document assembly program that allows litigants to complete their court forms quickly and accurately. A total of 6,536 court forms were generated through this service in pilot period.

The survey revealed that most Ontarians are unaware of the online resources available to them through the Government of Ontario, the Law Society of Upper

Canada, Legal Aid Ontario and Pro Bono Law Ontario. Those who did use these resources, however, reported a very high satisfaction rate.

The way forward

The report lays the groundwork for the three Project partners and other members of the legal community to work together in identifying and developing innovative solutions to continue to improve the access to justice for low and middle-income Ontarians. A range of solutions is required. Different people need different types of support based on their unique circumstances. A more vulnerable individual may need the assistance of a lawyer or paralegal while another individual may require access to clear and correct information.



PART ONE

Why are civil legal needs important to all Ontarians?

PART ONE

Why are civil legal needs important to all Ontarians?

The purpose of this report of the Steering Committee of the Ontario Civil Legal Needs Project is to describe and discuss the findings of the needs assessment survey and focus groups undertaken as part of this Project and to chart a path forward for addressing the civil legal needs of low and middle-income Ontarians.[1] A separate mapping initiative associated with this Project will focus on the availability of lawyers in various regions of Ontario and will be released separately.

Civil legal needs cover some of the most important areas of the lives of all Ontarians, including their families, their employment, their housing, their immigration and refugee status, and their economic well-being. Our study found that one-third of Ontarians reported having a civil legal need, and the majority of those people experienced disruption of their lives as a result. It may well be that the real number is even higher, as many people who experience a legal problem may not report it as such, either because they are not aware of their rights or because they simply do not identify their situation as a problem. In this sense, people interact with the civil justice system in complex ways. Some rely on the system to protect their rights and interests, while others face significant barriers to accessing the civil justice system. By choice or by necessity, many litigants navigate the civil justice system without legal representation.

Reinforcing these findings, judges have observed the particular difficulty facing low and middle-income communities. As Chief Justice McLachlin has observed,

1 For purposes of this study, we define "civil justice" problems as legal disputes outside the criminal justice context.

> Access to justice is quite simply critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them become their own lawyers, or try to ... Hard hit are average middle-class Canadians. Those with some income and a few assets may be ineligible for legal aid and therefore without choices. Their options are grim: use up the family assets in litigation; become their own lawyers or give up. The result may be injustice.[2]

Incidents of injustice that are not redressed may lead to a loss of public confidence in the justice system. One of the most striking findings of this Project's assessment of civil legal needs is that almost 80 per cent of Ontarians believe that the legal system works better for the rich than for the poor. In a society committed to the rule of law and the principles of equality and fairness, this perception risks eroding public confidence in the justice system.

Another finding of our assessment of civil legal needs is that a majority of Ontarians seek out a lawyer in private practice to help them solve their civil legal problems, and, while they are highly satisfied with the service they receive, they would prefer to solve their legal problems on their own, though with legal advice. This finding alone speaks volumes about what lawyers and other professionals in the civil justice system are doing right, but it also reveals that Ontarians seek to take control of their legal issues themselves. In order to do this, however, they need to have access to reliable and accurate information and advice. This report will identify these types of opportunities – where the service and information providers in the civil justice system can enhance real access to justice for all Ontarians.

What is a civil legal need?

Before we proceed further, some key terms need to be defined. The civil justice system is most commonly understood by what it is not – that is, criminal law. In other words, all the legal needs that fall outside the sphere of criminal justice are grouped together as "civil justice." This category includes a wide range of legal needs and cuts across matters dealt with by courts, administrative tribunals, and regulatory bodies. It is important to address the myth that civil legal needs, because they are diverse, are somehow less important to people or have less

2 "Justice Comes at Too High a Price: McLachlin" National Post, March 9, 2007, http://www.canada.com/nationalpost/news/story.html?id=54c6a41b-4d85-460f-a21f-524087fbcf2e&k=18398.

impact on society than criminal legal needs. Disputes over custody of children, wrongful dismissal, eviction from housing, powers of attorney, or consumer debt may affect individuals, families, and communities in deep and lasting ways. The telephone survey carried out as part of the Project revealed that three-quarters of low and middle-income Ontarians who had experienced a civil legal problem in the last three years found their problem to be disruptive to their daily lives.[3]

A "civil legal need" occurs when an individual or group encounters an issue or experiences a problem that falls within the domain of the civil justice system. The term "civil legal need" incorporates the idea that the problem or dispute someone is experiencing is justiciable (that is, it is capable of being resolved through a legal process).

Who are low and middle-income Ontarians?

This Project examined the legal needs of low and middle-income Ontarians, defined for the purposes of this study as those living in households with incomes of $75,000 or less.[4]

In framing our discussion of legal needs, we must emphasize the importance of distinguishing between the needs of low-income Ontarians and middle-income Ontarians. While the needs of both are critical to access to justice, programs designed for one group may not be appropriate or effective for the other. For example, those who responded to the survey by indicating that they needed legal assistance in real estate transactions were also more likely to have a postgraduate or professional education and household incomes between $40,000 and $75,000.[5] By contrast, those who were more likely to mention disability-related issues included those with household incomes of less than $20,000 and members of equality-seeking communities in general.[6]

Consistent with the approach of distinguishing between low and middle-income Ontarians, civil legal needs may also be considered in the context of vulnerability. For the purpose of this Project, we measured vulnerability by

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3 Answer to Question 37 of the telephone survey, Civil Legal Needs of Lower and Middle-Income Ontarians: Quantitative Research (Toronto: Environics Research Group, 2009) at 59 ["Quantitative Research"].

4 This figure is based on a calculation using the federal government's Low Income Cut-Off (LICO) amount. This cut-off does not represent a definitive demarcation of low or middle-income earners. It is, rather, a figure we have chosen that is likely inclusive of most low and middle-income earners in Ontario.

5 Quantitative Research, supra note 3 at 13.

6 Quantitative Research, supra note 3 at 17.

comparing an individual's experience with a civil legal problem in relation to one or more influential factors. Our quantitative research revealed that the factors that appear to significantly increase a person's vulnerability include not only income, but also income source, gender, age, membership in an equality-seeking community,[7] geographic location, and the type of civil legal problem encountered. On their own, not only do these factors compromise an individual's capacity and resources to address a civil legal problem, but they also compound the disruption and challenge created by the presence of a civil legal problem. In combination, their effect is complex.

For example, 24 per cent of our respondents to the survey were individuals who indicated that they had received income assistance in the last three years in the form of social assistance, housing supplements, child, or income support.[8] This group represented 51 per cent of the Ontarians who earn less than $20,000 per year.[9] In the overall responses to questions throughout the survey, this group is among the groups more likely to identify experiencing a civil legal problem in the last three years,[10] and they are among the groups more likely to mention family relationship problems.[11] They are also more likely to identify their problem as being very disruptive in their lives,[12] to seek resolution for their problem through a court,[13] and to experience problems in accessing legal assistance.[14] They are also among the groups more likely to decide not to seek legal assistance for a problem, even though they believe it would have helped them,[15] and they are among the groups more likely to mention family relationship problems in this context.[16] In the overall survey, family relationship problems stand out as being mentioned most often by low and middle-income Ontarians who have experienced a civil legal problem in the last three years for which they sought legal assistance or for which legal assistance would have been helpful (even though they did not seek such assistance).[17]

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7 Equality-seeking communities identified in this survey include the following: Francophones, Aboriginal people, people with disabilities, members of racialized communities, gay men, lesbians and bisexuals, and trans-identified persons.

8 Answer to Question M of the telephone survey, Quantitative Research, supra note 3 at 74.

9 Quantitative Research, supra note 3 at 72.

10 Quantitative Research, supra note 3 at 15.

11 Quantitative Research, supra note 3 at 17.

12 Quantitative Research, supra note 3 at 59.

13 Quantitative Research, supra note 3 at 48.

14 Quantitative Research, supra note 3 at 31.

15 Quantitative Research, supra note 3 at 51.

16 Quantitative Research, supra note 3 at 53.

17 Quantitative Research, supra note 3 at 16.

When considering the experience of members of equality-seeking communities – particularly women and persons with disabilities – similar comparisons can be drawn. Women comprised 55 per cent of the survey group, and persons with disabilities comprised 16 per cent of the survey group. In Ontario's lowest-income group, women comprise 62 per cent of Ontarians who earn less than $20,000 per year,[18] and persons with disabilities comprise 42 per cent of that same group[19] – a strikingly higher representation than in the overall group.

Women were among the groups more likely to identify experiencing a civil legal problem in the last three years[20] – and, in particular, they were among the groups more likely to mention family relationship problems.[21] However, they were more likely than men to say that the process for resolving their family relationship problem was fair and to express strong satisfaction with the outcome.[22] Women were also more likely to identify their problem as being very disruptive in their lives,[23] and they were among the groups more likely to seek non-legal assistance for a legal problem (either civil or criminal) through the police.[24] They were among the groups more likely to decide not to seek legal assistance for a problem, even though they believed it would have helped them,[25] and they were also among the groups more likely to mention family relationship problems in this context.[26]

Although persons with disabilities are not found among the groups more likely to have experienced a civil legal problem in the last three years, they are more likely to identify a civil legal problem they encounter as being very disruptive in their lives.[27] The telephone survey results do not highlight persons with disabilities specifically as a group more likely to experience civil problems related to disability, although the inference is reasonable. While they are also among the groups more likely to mention experiencing problems in accessing legal assistance for their problem, the telephone survey revealed that this group

18 Quantitative Research, supra note 3 at 72.
19 Quantitative Research, supra note 3 at 72.
20 Quantitative Research, supra note 3 at 15.
21 Quantitative Research, supra note 3 at 17.
22 Quantitative Research, supra note 3 at 49.
23 Quantitative Research, supra note 3 at 59.
24 Quantitative Research, supra note 3 at 56.
25 Quantitative Research, supra note 3 at 51.
26 Quantitative Research, supra note 3 at 53.
27 Quantitative Research, supra note 3 at 59.

is more likely to seek resolution for a legal problem through a mediator,[28] and this group is also more likely to seek non-legal assistance for a legal problem through a government office, Member of Parliament (MP), or Member of Provincial Parliament (MPP)[29].

On the basis of these findings, a number of observations can be made about individuals who have received income assistance and women and persons with disabilities – and how likely they are to experience a civil legal problem such as family relationship issues, as well as the avenues they are likely to choose to resolve their problem. However, these findings do not enable us to draw a definite conclusion about the relationship between factors that increase an individual's vulnerability (such as income source, gender, or disability) and a particular civil legal need (such as family law) or about why individuals choose legal assistance or not. There are factors that connect these three groups, such as their higher representation among Ontarians earning less than $20,000 per year, and there are also factors that distinguish them individually. More focused information is required.

Although identifying the factors of vulnerability and analyzing their effect on an individual's experience with a civil legal problem is an involved and complicated process, this information is nonetheless useful and descriptive. Throughout this report, these vulnerability factors are presented, along with the survey responses, to provide context for the results. These factors were also considered seriously by the Steering Committee as it identified the principles and strategies for addressing people's unmet civil legal needs in the final part of this report (Part Four).

Who are the Project partners?

This Project is a collaborative initiative of the Law Society of Upper Canada (the Law Society), Legal Aid Ontario (LAO), and Pro Bono Law Ontario (PBLO).[30] The Project has also received financial support from the Law Foundation of Ontario.

The Law Society is the governing body of the legal profession (lawyers and paralegals) in Ontario. Its mandate is to regulate the legal and legal services professions in the public interest. In the course of carrying out its function, the Law Society has a duty to act to facilitate access to justice and to protect the public interest.

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28 Quantitative Research, supra note 3 at 28.

29 Quantitative Research, supra note 3 at 56.

30 See Appendix B for a brief description of the mandates, missions, and access to justice activities of the three partner organizations.

LAO's mandate is to "promote access to justice throughout Ontario for low-income individuals by means of providing consistently high-quality legal aid services in a cost-effective and efficient manner." LAO provides legal aid services to low-income individuals and disadvantaged communities in Ontario for a variety of legal problems, including criminal matters, family disputes, immigration and refugee hearings, and poverty law issues, such as landlord/tenant disputes, disability support, and family benefits payments.

PBLO is the provincial organization dedicated to promoting opportunities for lawyers to provide pro bono legal services to persons of limited means. PBLO provides technical support and strategic guidance to law firms, law associations, and legal departments looking to provide free legal services to persons of limited means and to the community-based organizations that serve them. The organization manages three streams of projects in-house: children's projects, projects serving charitable organizations, and projects serving unrepresented litigants with civil, non-family matters.

Why it's important to understand what low and middle-income Ontarians think about civil justice and civil legal problems

The Project partners represent three very different facets of the civil legal system in Ontario. However, they share a common goal: working to enhance access to justice for all Ontarians. This Project was designed in such a way as to receive the opinions of the groups that we believe face the most significant barriers when attempting to solve their legal problems: low and middle-income Ontarians.

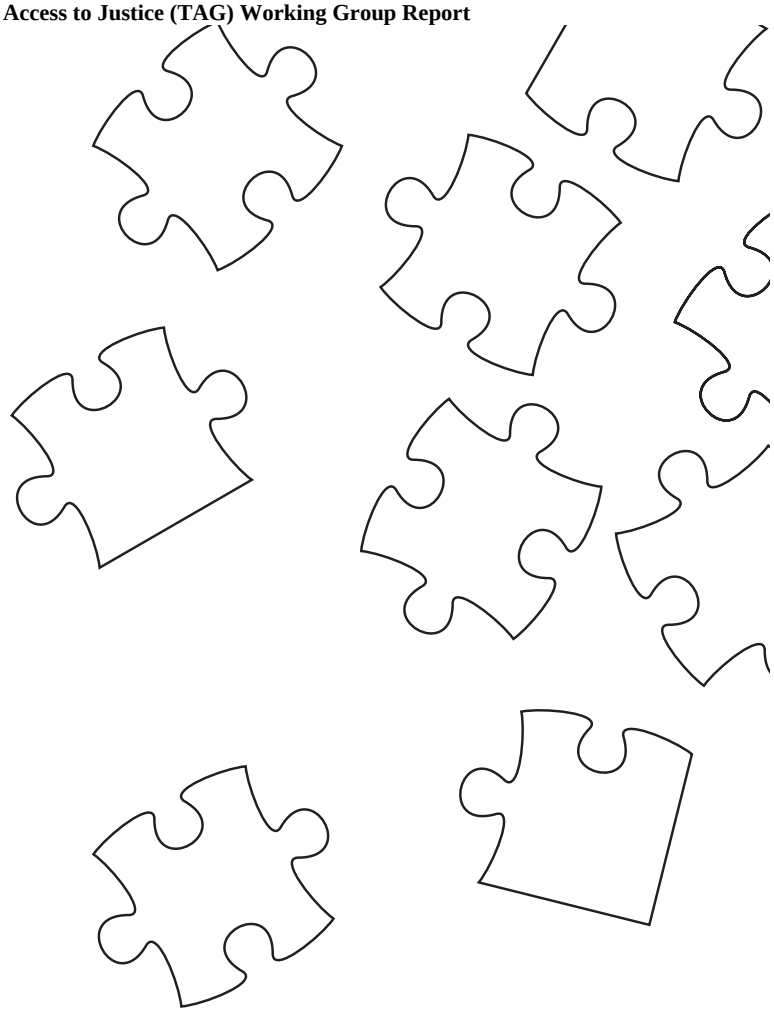
We are surrounded by stories of people in our communities who are struggling with an immigration, family law, employment, or consumer debt problem. These are the types of problems that affect most individuals in a very real way. Hearing directly from low and middle-income Ontarians and the legal service and information providers who assist them is an essential step in creating an accessible civil justice system in Ontario.

The tools we used to acquire a picture of the civil justice system in Ontario

The Ontario Civil Legal Needs Project consists of a telephone survey, focus groups, and a mapping initiative. It combines both quantitative and qualitative research methodologies to identify and quantify the "everyday" legal problems experienced by low and middle-income Ontarians – in a comprehensive manner.

How the findings of this study could affect low and middle-income Ontarians and their families

One of the purposes of the Project is to provide a point of departure for each organization (or organizations working in partnership) to design, develop, and deliver innovative new programs within the context of the distinctive governance and mandates of each organization. Our hope is also that the data and analysis presented in this report will provide a catalyst for other organizations to respond to the unmet needs set out in the report and that this report will stimulate further research, dialogue, and initiatives. Ultimately, the goal for the public release of this report is that it will serve as a catalyst for substantive changes and improvements in how low and middle-income Ontarians access the civil justice system and how they resolve their civil legal problems.



PART TWO

What low and middle-income Ontarians told us about their civil legal needs

PART TWO

What low and middle-income Ontarians told us about their civil legal needs

What have we learned about low and middle-income Ontarians, their civil legal needs, their perception of how legal issues are resolved, and their perceptions of the civil justice system?

Through our survey, we learned that more than one-third of Ontarians have had a legal need in the past three years. We also learned that civil legal needs have had a very serious impact on their lives and that this impact differed across income and equality-seeking communities.

An important finding of this Project is that most low and middle-income Ontarians resolved their legal problems with the assistance of a lawyer and that a strong majority of this group has been satisfied with the legal assistance received. However, there are certain areas of law where a higher proportion of people have legal problems and where their path to resolving those problems is long, complicated, or expensive or a combination of these three factors.

While many people seek assistance from lawyers, others experience substantial barriers to accessing legal assistance for a number of reasons, including income, language, and geographic access. Access issues are not experienced uniformly. Access is a more significant challenge in some areas of law, such as family law, and within particularly vulnerable communities, such as with members of equality-seeking communities. A combination of factors that increase vulnerability will also have a proportionately greater effect on an individual's experience with a civil legal problem. Further, civil needs reflect people's life experiences. For example, older people tend to have more estate law needs than younger people. This information tells us that there are opportunities to respond to unmet legal needs with more tailored legal services.

When asked to discuss trends in access to justice for low and middle-income Ontarians, both clients and providers of legal services stated that they believed demand for civil legal services is growing but that resources to support those

services are limited. This report will include a discussion of how to understand and prioritize resources, and it will suggest potential means to better meet demands within the limits of those resources.

While this Project aims to enhance the Project partners' understanding of the diversity of civil legal needs in Ontario, we recognize the limits of this study as well. The study does not capture the civil legal needs of all (for example, the homeless cannot be reached reliably through a telephone survey). Nor does this study attempt to address the complex range of dynamics that arise when the legal needs of particular groups, such as Aboriginal communities, are examined. That said, this report, when used in combination with other needs assessment techniques, will contribute to a comprehensive picture of civil legal needs in Ontario that should help policy makers, advocates, and service providers at every level of the justice system in Ontario respond more effectively to civil legal needs.

What are people's general impressions of Ontario's civil justice system?

The Project was designed to identify and quantify the "everyday" civil legal problems of low and middle-income Ontarians. We also asked the telephone survey and focus group participants about their perceptions of civil justice and the civil justice system in Ontario.

While the answers to these questions do not provide hard facts, they provide a sense of people's overall impressions of the civil justice system outside the context of a specific legal problem. They also provide a tool for interpreting people's perceptions about the fairness of the civil justice system when they consider their individual legal problem. The bulk of the survey questions related to this last issue.

When people were asked whether they thought "the laws and justice system in Canada are essentially fair," the majority (66 per cent) agreed. Even more people agreed that "courts are an important way for ordinary people to protect their rights" (82 per cent).

When considering access to justice and legal services and costs, most of those surveyed indicated that they believed "the legal system works better for rich people than for poor people" (79 per cent), and respondents were almost evenly split in deciding whether "a middle-income earner can afford to hire a lawyer if he or she needs one" (49 per cent agreed and 46 per cent disagreed).

People were less sure when they were asked whether they believed the following statement: "There are enough free or affordable legal services available if you were in need" (33 per cent agreed, 39 per cent disagreed and 17 per cent did not answer). Similarly, people expressed some uncertainty about whether "you

have to be extremely poor to get access to any free legal services in Ontario" (58 per cent agreed, 31 per cent disagreed, and 11 per cent did not answer).

Paralegals have been a regulated legal services profession since 2008. They provide key legal services to many low and middle-income Ontarians, but the Law Society regularly receives questions from the public about the differences between lawyers and paralegals. In order to gauge public awareness about these differences, survey participants were asked whether "lawyers and paralegals provide the same types of legal services." Respondents were generally uncertain. Thirty per cent agreed, 21 per cent did not know, and 50 per cent disagreed with the statement.[31]

What are people's "everyday legal problems"?

Our survey indicated that 35 per cent of low and middle-income Ontarians said they had experienced a civil legal problem or issue in the last three years.[32] People mentioned a broad range of problems or issues that caused them or someone in their household to need legal assistance, including problems with a family relationship, wills and powers of attorney, real estate transactions, housing or land, employment, personal injury, money or debt, legal actions, disability-related issues, traffic offences, immigration, and small or personal business issues.[33]

31 Quantitative Research, supra note 3 at 9.
32 Quantitative Research, supra note 3 at 15.
33 Quantitative Research, supra note 3 at 16.

TYPES OF LEGAL PROBLEMS – JUNE 2009

	TOTAL SAMPLE %	HAD LEGAL PROBLEM %
Family relationship problems	12	30
Wills and powers of attorney problems	5	13
Housing or land problems	4	10
Real estate transactions	4	9
Employment problems	4	9
Criminal problems	3	9
Personal injury problems	3	7
Money or debt problems	2	5
Legal action problems	1	3
Neighbourhood problems/property damage	1	3
Traffic/speeding offences/violations/tickets	1	3
Disability-related issues	1	2
Consumer problems	1	2
Immigration problems	1	2
Small or personal business issues	1	2
Discrimination/harassment problems	1	2
Welfare or social assistance problems	1	1
Hospital treatment or release problems	*	1
Treatment by police	–	–
Other	3	8
None	62	1
Don't know/not applicable	*	*

* less than 1 per cent

One-quarter of the low and middle-income Ontarians surveyed indicated that they had experienced a civil legal problem or issue in the past three years for which they had sought legal assistance.[34] Fourteen per cent (1 in 7) said they had a civil legal problem or issue in the past three years for which they had not sought legal assistance, even though it would have been helpful.[35]

Those who experience legal problems are generally more vulnerable,[36] including those who have received income assistance in the past three years, those not in the workforce, women and members of equality-seeking

34 Quantitative Research, supra note 3 at 11.
35 Quantitative Research, supra note 3 at 51.
36 Quantitative Research, supra note 3 at 4.

communities. Individuals born outside Canada and older people are least likely to report a legal problem.[37]

Our survey also indicated that certain legal problems have a tendency to cluster, meaning that problems tend to group together. Almost 1 in 10 respondents experienced multiple legal problems.[38] The types of problems that cluster most among those with two or more problems include family relationship issues, wills and powers of attorney, housing and land and real estate.

While our survey measured the incidence of legal problems, it is equally important (if not more so) to consider the impact of those problems. A majority of low and middle-income Ontarians believed their legal problems were very disruptive. Three-quarters of those reporting problems said they experienced at least some disruption in their daily lives as a result of their legal problems or issue; significant proportions reported that they experienced stress-related or mental illness, loss of confidence, physical ill health, loss of employment or income, and relationship breakdown.

Those who were more likely to have found their legal problem to be extremely or very disruptive included the following: women, those with household incomes of less than $20,000, members of equality-seeking communities (particularly people with disabilities), those who had received income assistance in the last three years, those with multiple legal problems, and those who did not seek assistance for their legal problems.[39] Strikingly, 1 in 7 individuals reported experiencing permanent physical or mental disability.[40] These findings suggest a connection between access to justice and broader issues of health, social welfare, and economic well-being.

Our survey also asked people about what they perceived would be their future legal needs. These low and middle-income Ontarians believed that in future they would likely experience legal problems relating to wills and powers of attorney (17 per cent), family relationship (14 per cent), and real estate transactions (12 per cent). Only 21 per cent anticipated that they would not experience legal problems in the future.

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37 Quantitative Research, supra note 3 at 4.

38 Quantitative Research, supra note 3 at 1.

39 Quantitative Research, supra note 3 at 59.

40 Quantitative Research, supra note 3 at 61.

ANTICIPATED REASONS FOR NEEDING FUTURE LEGAL ASSISTANCE – JUNE 2009

	per cent
Wills and powers of attorney problems	17
Family relationship problems	14
Real estate transactions	12
Personal injury problems	7
Housing or land problems	7
Criminal problems	5
Employment problems	4
Legal action problems	3
Money or debt problems	3
Traffic/speeding offences/violations/tickets	2
Small or personal business issues	2
Immigration problems	2
Other	7
None, won't need a lawyer	21
Don't know / not applicable	19

What sources of legal information and legal services are available to people?

The sources of legal assistance for low and middle-income Ontarians are almost as diverse as their legal problems, and they often seek assistance from more than one source.

Our telephone survey suggested that, when faced with a legal problem, people most often seek assistance and information from a lawyer in private practice, followed by friends or relatives and the Internet.[41] When actually dealing with their legal issue using legal assistance, two-thirds of the group consulted with a lawyer for whose service they paid. Almost 30 per cent sought some form of legal assistance. Roughly 1 in 5 sought assistance from the Law Society's Lawyer Referral Service and from a duty counsel each. Approximately 1 in 10 sought assistance from each of a community agency, a pro bono lawyer or program, a telephone advice line, a mediator, or a paralegal.[42]

41 Quantitative Research, supra note 3 at 23.

42 Quantitative Research, supra note 3 at 26.

SOURCES OF INFORMATION AND ASSISTANCE – JUNE 2009

	per cent
Lawyer – private practice	41
Friend or relative (unspecified)	30
Internet site(s) (incl. Googling)	27
Legal aid	19
Friend or relative, who works as a lawyer	9
Other professional	8
Court	7
Phone book/Yellow Pages	6
Advocacy/community group/organization – non-legal	6
Government organization	5
Police	4
Community legal clinic	3
Company/business (including bank)	3
Member of Parliament/MPP	2
Published self-help source	2
Private agency/organization	2
Other	13
Don't know / not applicable	3

A striking finding of our survey is that two-thirds of the respondents who sought legal assistance for a civil justice problem engaged a private lawyer themselves. Those who were more likely to have turned to a lawyer they paid for included residents of the outer Greater Toronto Area (GTA) and Hamilton-Niagara, residents in medium-sized cities (10,000 to one million inhabitants), those aged 60 or older, those who had completed some university education, those with household incomes of $40,000 to $75,000, and those who had experienced problems related to wills or powers of attorney or real estate.[43] Among those who sought assistance from a lawyer they paid for themselves, 8 in 10 found this assistance very or somewhat helpful.

Smaller proportions sought assistance from a legal aid service (including a legal aid clinic, legal aid office, or duty counsel) or from the Law Society of Upper Canada's Lawyer Referral Service. Importantly, of those who received the assistance of a lawyer, the financial burden on those in need varied dramatically. Almost 3 in 10 Ontarians received services pro bono, while another 2 in 10 paid

43 Quantitative Research, supra note 3 at 26.

less than $1,000 for the legal assistance they received. Indeed, our survey revealed that only a third of those who retained a lawyer paid more than $1,000.[44]

Those more likely to have received legal services free of charge included residents of the City of Toronto, those aged 18 to 29, those who had not graduated from high school, those with household incomes of less than $20,000, those who had received income assistance in the last three years, and Aboriginal people.[45]

Respondents most likely to have paid more than $1,000 for their legal services included residents of Niagara-Hamilton and the GTA; people aged 45 to 59; people who earned more than $40,000; members of racialized communities; people with real estate, legal action, immigration, or consumer issues; people with multiple legal problems; and people who found their problems extremely disruptive.[46]

THE DEPTH AND IMPACT OF CIVIL LEGAL NEEDS IN THE AREA OF FAMILY LAW

Family law is an issue common to both low and middle-income earners.

Of the various problems for which respondents sought legal assistance, the statistics for family law stood out. Of those surveyed who indicated they had experienced a family law problem, 81 per cent sought legal assistance, and 30 per cent of that group indicated they had difficulty obtaining that legal assistance.

While both the incidence and impact of family law is troubling, the dilemma for service providers is how to address family law needs while still delivering effective programming to help address equally important legal needs (such as those relating to employment, housing, consumer debt and estates issues).

How do people try to solve their civil legal problems?

The majority of low and middle-income Ontarians solve their legal problems by seeking out a lawyer. In terms of resolving their civil legal problems, about the

44 Quantitative Research, supra note 3 at 29.
45 Quantitative Research, supra note 3 at 29.
46 Quantitative Research, supra note 3 at 30.

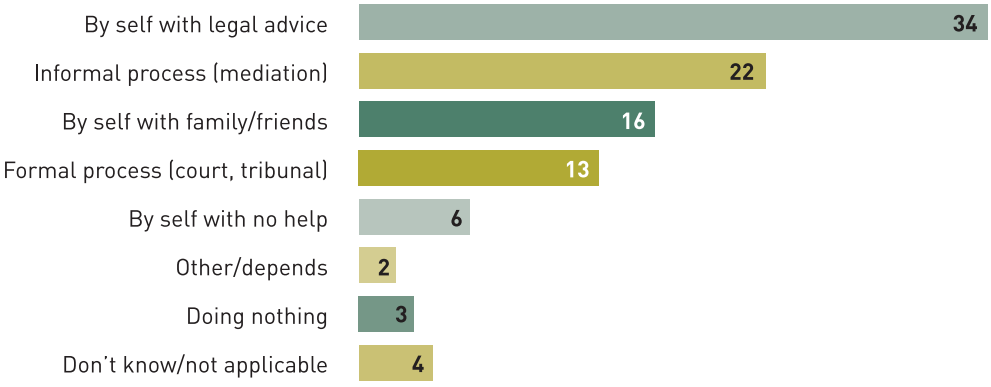
same number of people – 1 in 4 – resolved their legal problem by going to court or a tribunal or by reaching a consensual agreement.[47]

NATURE OF RESOLUTION – JUNE 2009

	per cent
After going to court or a tribunal	26
Agreement was reached between you and the other party	24
I/we the lawyer signed necessary papers	11
Through a lawyer/legal assistance (unspecified)	9
Through mediation	8
The problem just sorted itself out	5
Solved the problem on your own without any help of anyone else	4
Was not resolved/still unresolved	4
Transfer of ownership/custody	3
Help from someone other than a mediator or family and friends	3
Successful transaction	2
Received compensation	2
Other	11
Don't know / not applicable	6

When they were asked how they would prefer to resolve their legal problem, low and middle-income Ontarians in general were most likely to indicate that they would prefer to resolve a legal problem by themselves, though with legal advice (34 per cent); smaller proportions indicated that they would prefer a legal problem to be resolved through an informal process such as mediation (22

PREFERRED WAY OF RESOLVING LEGAL PROBLEM JUNE 2009



47 Quantitative Research, supra note 3 at 48.

per cent), by themselves with help from family or friends (16 per cent), or by themselves without any help (6 per cent). Approximately 13 per cent of Ontarians (or 1 in 8) were likely to prefer to resolve their problems through a formal process such as a court or tribunal.[48]

Those most likely to mention going to court or a tribunal included people aged 18 to 29, those who had received income assistance in the last three years, those with family relationship legal problems, and those whose problems were very disruptive to them.[49] Those most likely to reach an agreement with the other party were men and people with money or debt problems.[50]

While our focus is primarily access to legal assistance, we recognize that non-legal assistance may often be as important in resolving legal problems. The source of non-legal assistance most often relied upon was that of friends and relatives. Those most likely to seek assistance from friends and family represented a very wide spectrum of people, but some patterns emerged. Vulnerable groups tended to use this source of non-legal assistance the most.[51] The sources of non-legal assistance seen as most helpful by those who used them were support groups and spiritual or religious organizations.[52]

EXPERIENCE WITH NON-LEGAL ASSISTANCE – JUNE 2009

	Used this Source %	Found very/ Somewhat helpful %
Friends/relatives	25	85
Self-help through Internet	17	86
Police	12	73
Government office/MP or MPP's office	11	62
Religious/spiritual organization	5	92
Resources through employer	5	74
Support group	5	93
Community centre	5	88
Union	4	74
Cultural organization*	3	86
Somewhere else	6	78

* Small sample sizes in "Found very/somewhat helpful" column

48 Quantitative Research, supra note 3 at 35.
49 Quantitative Research, supra note 3 at 48.
50 Quantitative Research, supra note 3 at 48.
51 Quantitative Research, supra note 3 at 55.
52 Quantitative Research, supra note 3 at 57.

For more than a quarter of the respondents to our survey, the Internet represents a significant source of legal information and assistance. Internet penetration is relatively high among low and middle-income Ontarians, with 84 per cent having access to the Internet at home, work, school or somewhere else.[53] While some groups remain more likely to be "unwired" – for example, 40 per cent of those who are 60 years of age and older have no regular access to the Internet – for those under 30 years of age, a remarkable 97 per cent have access to the Internet, and the rate remains high in rural and northern communities and among Aboriginal peoples.[54] Among those who sought self-help through the Internet, almost 9 in 10 found this assistance to be at least somewhat helpful.

Those most likely to seek assistance through the Internet were a varied group of people, but the following sub-groups stand out: residents of the GTA; men; those with at least some university education; and those with employment, discrimination, harassment, or consumer issues.[55] This finding is of particular interest when we compare it to the results of our focus group sessions. In the focus groups, legal and social service providers caution that the Internet is useful as a source of legal information only for individuals who have access to a private computer and sufficient computer literacy and knowledge of legal issues to be able to interpret the information provided. The telephone survey did not provide us with data as to whether the information people found on the Internet was accurate. It only indicated that they found it helpful.

The Project partners themselves provide online legal information resources to assist all Ontarians. The survey revealed that most Ontarians are unaware of the online resources available to them through the government of Ontario, the Law Society of Upper Canada, LAO and PBLO. Specifically, they were asked about their familiarity with the Ministry of the Attorney General's Justice Ontario website (www.attorneygeneral.jus.on.ca/english/justice-ont/), the Law Society website (www.lsuc.on.ca), the Law Society's Lawyer Referral Service site (www.lsuc.on.ca/public/a/faqs/---lawyer-referral-service/), the LAO site (www.legalaid.on.ca), and PBLO's Law Help Ontario (www.lawhelpontario.org). Although only 1 to 8 per cent of those surveyed had heard of any of the websites, their satisfaction levels were very high (81 per cent and higher).[56]

Overall, those most likely to have accessed the websites tended to be residents of Toronto, the GTA or Eastern Ontario, and were people who have experienced a legal problem in the last three years (whether they had accessed assistance or

53 Quantitative Research, supra note 3 at 41.

54 Quantitative Research, supra note 3 at 41.

55 Quantitative Research, supra note 3 at 56.

56 Quantitative Research, supra note 3 at 41.

not). They also tended to have had multiple legal problems, to have had at least some university education, and to be under 30 (with the exception of the Law Society websites which tend to attract people aged between 45 and 59).[57] Some patterns were found linking familiarity with the site and the type of legal problem experienced. People with an immigration law problem were more likely to use the LAO website.[58] Those with money or debt problems were more likely to use the Justice Ontario website and the Lawyer Referral Service.[59]

What are the most difficult problems for people to resolve, and how long does it take to resolve those problems?

Our survey suggested that some kinds of legal problems or issues are more likely to be resolved than others. For example, problems involving housing or land and wills or powers of attorney were the most likely to be resolved within one year.[60] Problems involving employment, money or debt issues, personal injury and family relationship were the least likely to be resolved within a year.[61] Furthermore, personal injury and family relationship problems were identified as the problems most likely to remain unresolved for three years or more.[62] For people with employment problems, just over 1 in 2 were still working to resolve their problem. A similar proportion of people whose problems involved personal injury were also still working to resolve them.[63] Most also had household incomes of less than $20,000 or had received income assistance in the last three years.[64]

57 Quantitative Research, supra note 3 at 41–43
58 Quantitative Research, supra note 3 at 42
59 Quantitative Research, supra note 3 at 43
60 Quantitative Research, supra note 3 at 3.
61 Quantitative Research, supra note 3 at 46.
62 Quantitative Research, supra note 3 at 46.
63 Quantitative Research, supra note 3 at 47.
64 Quantitative Research, supra note 3 at 46.

LENGTH OF TIME TO RESOLVE PROBLEM – JUNE 2009

Type of problem	Net: < 1 yr.	1 mo.	2–5 mo.	6–11 mo.	Net: 1 yr. or more	12–23 mo.	24–35 mo.	3 yrs. or more	still unresolved
Housing/land*	63	32	26	5	10	7		3	23
Will/power of attorney	55	32	12	11	7	3	3	–	23
Real estate	50	28	20	2	7	4	1	1	24
Employment*	28	16	12	–	14	6	5	2	55
Money/debt*	27	9	4	14	25	17	7	–	40
Personal injury*	25	7	12	7	19	2	6	11	49
Family/relationship	24	4	8	11	27	15	4	8	44

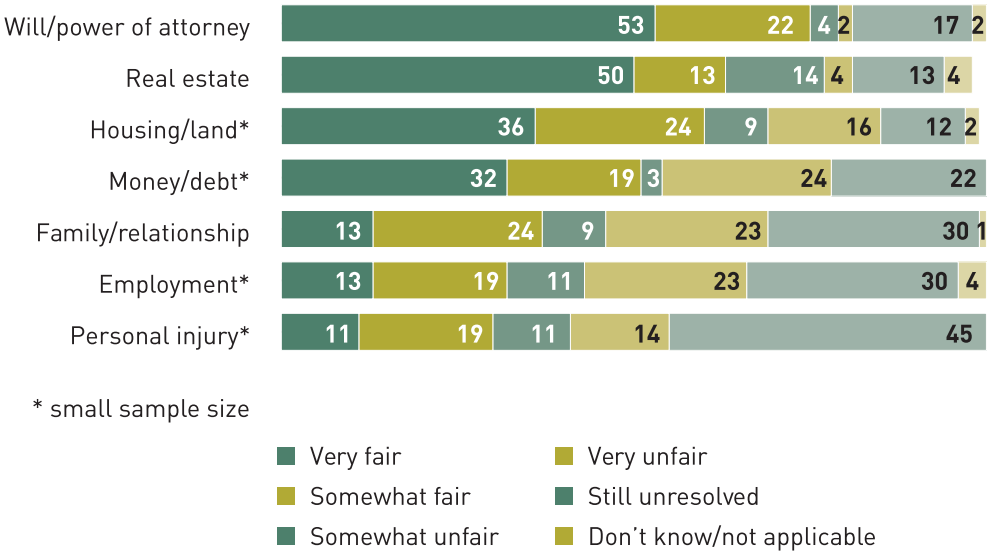
* Small sample size

What people told us about the resolution process for their civil legal problems

Low and middle-income Ontarians who sought legal assistance gave the highest rating in terms of fairness to the resolution process for real estate, wills and powers of attorney problems. This group was also most likely to express satisfaction with the outcomes of their experiences with these issues.[65] People who had sought legal assistance for problems related to family, employment and personal injury (which, coincidentally, represent some of the most adversarial types of proceedings) reported that they felt the resolution process should be rated lowest in terms of fairness.[66] Overall, of those people who had experienced a will or power of attorney problem in the last three years, 53 per cent described the resolution process as very fair, and 72 per cent were very satisfied with the outcome.[67] For real estate problems, 50 per cent found the resolution process very fair,[68] and 66 per cent of low and middle-income Ontarians were very satisfied with the outcome.[69] For family relationship problems, 13 per cent of people found the resolution process very fair.

65 Quantitative Research, supra note 3 at 49.
66 Quantitative Research, supra note 3 at 49.
67 Quantitative Research, supra note 3 at 50.
68 Quantitative Research, supra note 3 at 49.
69 Quantitative Research, supra note 3 at 50.

PROCESS FOR RESOLVING LEGAL PROBLEMS – JUNE 2009



Overall, roughly 1 in 7 Ontarians who had experienced a civil legal problem in the past three years recognized that they needed legal assistance but did not seek any.[70] Within this group, those with the lowest incomes, people living in Central Ontario and the outer GTA, women, members of equality-seeking communities, and those who had received income assistance in the past three years had not sought legal assistance.[71] For most people in this category, the admitted barrier was the perceived high cost of a lawyer.[72]

70 Quantitative Research, supra note 3 at 51.
71 Quantitative Research, supra note 3 at 51.
72 Quantitative Research, supra note 3 at 53.

REASON FOR NOT SEEKING LEGAL ASSISTANCE – JUNE 2009

	%
Cost too much/could not afford a lawyer	42
Did not believe that I would qualify for legal aid or free assistance	8
Not important enough	6
It would take too much time	5
Didn't know what to do	5
Thought nothing could be done	4
Did not know where to get legal assistance	4
Issue resolved itself	3
Too stressful	2
No lawyer available nearby practicing in the area I required help with	2
Further retribution/threatening remarks	2
Other	10
Don't know/not applicable	6

Those most likely to cite cost or inability to afford a lawyer included people living outside of the GTA and particularly residents of Eastern Ontario; women; middle-aged people; and those with legal problems related to wills and powers of attorney, real estate, housing, or land issues.[73] Almost 1 in 10 low and middle-income Ontarians indicated that they did not seek legal assistance for their civil legal problem because they believed they would not qualify for legal aid or free legal assistance.[74] Those most likely to take this position were members of equality-seeking communities in general and people with family relationship issues.[75]

Where people reported that they had legal problems for which they did not seek legal assistance, the types of civil legal problems covered a broad range of legal problems. However, one-quarter of respondents reported that they had family relationship issues, and roughly 1 in 10 reported employment and housing or land problems.[76] People who did not seek legal assistance for their family relationship problems were most likely to be women, younger people, those born in Canada, those who had received income assistance in the last three years, or those with postgraduate education.[77] People who did not seek legal assistance for

73 Quantitative Research, supra note 3 at 54.
74 Quantitative Research, supra note 3 at 53.
75 Quantitative Research, supra note 3 at 54.
76 Quantitative Research, supra note 3 at 52.
77 Quantitative Research, supra note 3 at 53.

employment problems tended to live in Southwestern Ontario, to have at least some university education, or to be Francophones.[78] People who did not seek legal assistance with housing or land problems tended to live outside the GTA, have household incomes of between $20,000 and $40,000, or to be gay, lesbian, or bisexual.[79]

Do people's civil legal needs differ depending on their income level?

While our survey focused primarily on people with household incomes of less than $75,000, the results gave us an opportunity to determine whether differences exist between the legal needs, the path to resolution, and the perception of fairness in the civil legal system for the most vulnerable people in the lowest income category. For the purpose of this analysis, we focused on the responses of people who were earning less than $20,000 per year.

Among the lowest income earners, a significantly higher proportion were women (62 per cent) as compared to the representation of women in the overall survey group (55 per cent).[80] People in the lowest income category were more likely than other low to middle-income Ontarians to be single, divorced, or widowed.[81] They were more likely to be members of equality-seeking communities – particularly persons with disabilities. They were also more likely to be unemployed or retired or to be receiving disability benefits – and almost half were receiving income assistance.[82]

While the rate of incidence of legal problems within this group was consistent with Ontarians in the total survey group, people earning less than $20,000 were most likely to report a higher incidence of legal problems in certain areas. Family relationship problems remained the top problem. Following this were criminal problems, disability-related issues, and welfare or social assistance issues.[83] When asked to predict what their future civil legal problems might be, low-income earners tended to believe that they would experience problems with family relationships (17 per cent, compared with 14 per cent for all respondents). They were less likely to believe that they might have a legal problem with a will or power of attorney (11 per cent, compared to 17 per cent) or real estate (5 per cent compared to 12 per cent).[84]

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78 Quantitative Research, supra note 3 at 53.
79 Quantitative Research, supra note 3 at 53.
80 Quantitative Research, supra note 3 at 72.
81 Quantitative Research, supra note 3 at 72.
82 Quantitative Research, supra note 3 at 72.
83 Quantitative Research, supra note 3 at 68.
84 Quantitative Research, supra note 3 at 72.

INCIDENCE OF LEGAL PROBLEMS – JUNE 2009

	COMBINED HOUSEHOLD INCOME	
	LESS THAN $20,000	TOTAL SAMPLE
	%	%
Any problem	38	35
Family relationship problems	16	12
Wills and powers of attorney problems	5	5
Criminal problems	5	3
Personal injury problems	4	3
Housing or land problems	3	4
Employment problems	3	4
Money or debt problems	3	2
Disability-related issues	3	1
Real estate transactions	2	4
Welfare or social assistance problems	2	1
None, won't need a lawyer/did not have problems	58	62

THE DEPTH AND IMPACT OF POVERTY ON LEGAL NEEDS

Lower-income-earning individuals tended to have more contact with the legal system and government organizations, specifically in the income support context, and they tended to experience more civil legal issues in their lives than higher income groups.[85] They also tended to feel their daily lives were disrupted by their civil legal issue, increasing their vulnerability and making them prone to experiencing negative physical and psychological impacts as a result of their civil legal problems.[86]

Ontarians in the lower income level tended to seek out legal assistance at rates similar to those of people at higher income levels, but they sought advice from a legal clinic at much higher rates (53 per cent[87] compared to 28 per cent[88]). One-quarter of people earning less than $20,000 did not seek legal assistance, but a higher percentage of this group believed they would have benefited from legal assistance as compared to the percentage

85 Quantitative Research, supra note 3 at 59 and 72.
86 Quantitative Research, supra note 3 at 59–62.
87 Quantitative Research, supra note 3 at 69.
88 Quantitative Research, supra note 3 at 2.

of the total survey group who believed they would have benefited from legal assistance.[89]

More Ontarians in the lowest income group relied on non-legal sources of assistance for their problems – in particular, friends and family (31 per cent [90] compared to 25 per cent in the overall survey group[91]). More Ontarians in this income bracket also reported a higher rate (15 per cent) of problems in accessing legal assistance and double the rate of incidence among people earning between $40,000 and $75,000.[92] In spite of this, the reasons they cited were consistent with the reasons cited by people with higher incomes. One-quarter of the lowest-income earners believed that the cost of legal assistance was a barrier to accessing services,[93] compared with 42 per cent of the overall survey group.[94]

In dealing with their legal problems, a higher rate of Ontarians in this group reported that their problems disrupted their daily lives (85 per cent compared to 71 per cent for higher-income earners).[95] Further, they were two to three times more likely to report experiencing another personal issue because of a legal problem than Ontarians in higher income brackets.[96]

What are the legal services and legal information options that people believe are working well now?

People indicated that they sought legal assistance for their civil legal needs from a variety of sources. Lawyers in private practice were consulted most often for legal assistance in the last three years, and satisfaction levels were also highest with lawyers (81 per cent satisfied).[97] Legal clinics and Legal Aid Ontario offices were consulted for legal assistance by roughly 1 in 3 low and middle-income Ontarians, and within this group, satisfaction levels were also high (66 per cent).[98]

89 Quantitative Research, supra note 3 at 69.
90 Quantitative Research, supra note 3 at 69.
91 Quantitative Research, supra note 3 at 69.
92 Quantitative Research, supra note 3 at 70.
93 Quantitative Research, supra note 3 at 70.
94 Quantitative Research, supra note 3 at 53.
95 Quantitative Research, supra note 3 at 71.
96 Quantitative Research, supra note 3 at 71.
97 Quantitative Research, supra note 3 at 26.
98 Quantitative Research, supra note 3 at 27.

One in 5 people who required assistance used the Lawyer Referral Service of the Law Society,[99] and three-quarters of this group expressed satisfaction with the service.[100]

Almost one in five people (18 per cent) sought legal assistance from duty counsel (lawyers who provide services free of charge at courts). Almost three-quarters of those who used this service were satisfied with the legal assistance they received.[101]

The highest levels of satisfaction with legal assistance were expressed by people who received help from a pro bono lawyer or program (84 per cent), although the number of people who accessed the service was roughly 1 in 10 (13 per cent).[102] The same proportion of people accessed legal assistance through a community advocate or agency, and 7 in 10 expressed satisfaction with that service.[103]

One in 10 of low and middle-income Ontarians who sought legal advice in the past three years turned to a paralegal. The majority (62 per cent) expressed satisfaction with the service they received.[104] People most likely to have turned to a paralegal were residents of the GTA, Hamilton-Niagara and Eastern Ontario; people who had received income assistance in the last three years; members of equality-seeking communities; and those who had experienced a problem related to immigration.[105]

ENHANCING PUBLIC CONFIDENCE IN LAWYERS AND PARALEGALS

Our Project revealed that when people accessed information and services provided by the Project partners, they were satisfied with the services they received. The challenge is to find ways to encourage more people to rely on the existing resources that are available to them. This process will involve re-examining how best to communicate and interact with the public. It will

99 The Lawyer Referral Service (LRS) is a free, bilingual call-in service. Upon request, the LRS provides the name of a lawyer who will give a free consultation of up to 30 minutes to help an individual determine his or her rights and options. The LRS website is http://www.lsuc.on.ca/public/a/faqs---lawyer-referral-service/.

100 Quantitative Research, supra note 3 at 27.

101 Quantitative Research, supra note 3 at 27.

102 Quantitative Research, supra note 3 at 28.

103 Quantitative Research, supra note 3 at 28.

104 Quantitative Research, supra note 3 at 28.

105 Quantitative Research, supra note 3 at 28.

also involve supporting the lawyers and paralegals who provide essential services to Ontarians.

One such measure that could enhance the public's confidence in Ontario's lawyers and paralegals, as well as providing support to these two groups, is a compulsory continuing professional development (CPD) program. In February 2010, The Law Society of Upper Canada approved a CPD requirement of 12 hours per year for practising lawyers and licensed paralegals who provide legal services, to come into effect January 1, 2011. According to Law Society Treasurer W. A. Derry Millar, "The introduction of the CPD requirement confirms both the Law Society's commitment to regulation in the public interest and the commitment of lawyers and paralegals to providing the highest level of service to clients."

This program is also in effect in other Canadian provinces, including British Columbia, Saskatchewan, New Brunswick, Nova Scotia and Quebec. As part of such a program, lawyers are required to undertake a minimum number of hours of continuing professional development and legal education each year or in a stated period of years. The goal of the program is to enable the regulatory bodies to ensure that lawyers maintain their competency and commitment to lifelong learning throughout their legal careers. It recognizes that the law is dynamic and that individuals who provide legal services must be aware of, and keep pace with, ways in which the law develops.

The Law Society also supports lawyers and paralegals in their professional responsibility obligations with respect to civility. Initiatives of Law Society Treasurer W. A. Derry Millar, taken in response to public reports,[106] included the development of civility protocols for reporting instances of incivility in courts, and the Civility Forum, a series of province-wide meetings from November 2009 to February 2010 to discuss the challenge of civility in the profession.

One in 10 people accessed legal assistance through a telephone advice line in the last three years, and approximately 7 in 10 expressed satisfaction with the service they received. The same proportion of people used the services of

106 "Report of the Review of Large and Complex Criminal Case Procedures", The Honourable Patrick J. Lesage and Professor Michael Code, November 2008 for the Ministry of the Attorney General, Ontario. See http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/.

a mediator, but in this case, fewer than 6 in 10 expressed satisfaction with the service they received.[107]

More than 1 in 5 indicated that they used other sources of legal assistance, including lawyers, court clerks, the Internet, employers, counsellors, and the Yellow Pages. The satisfaction rating for these other sources was more than 80 per cent.[108]

Survey participants were also asked to identify all the sources of information or assistance that they sought out in order to try to resolve their legal problem, and the results were similar. Four in 10 sought out a lawyer in private practice (41 per cent), 1 in 3 consulted with friends or relatives (30 per cent), and slightly less than that ratio (27 per cent) sought information through the Internet.[109] Of all the sources of information that people sought out, private practice lawyers received the highest rating for usefulness (24 per cent), followed by friends or relatives (11 per cent) and the Internet (10 per cent).[110]

HELPFULNESS OF SOURCES OF ASSISTANCE – JUNE 2009

	USED THIS SOURCE	FOUND VERY / SOMEWHAT HELPFUL
Lawyer that you paid for	65	81
Legal clinic/legal aid office	28	66
Lawyer Referral Service through The Law Society of Upper Canada	20	73
Duty counsel	18	72
Pro bono lawyer or program	13	84
Community advocate/agency	13	70
Telephone advice line	12	69
Paralegal	10	62
Mediator	10	57
Immigration consultant	2	84
Somewhere else	21	82

107 Quantitative Research, supra note 3 at 28.
108 Quantitative Research, supra note 3 at 29.
109 Quantitative Research, supra note 3 at 23.
110 Quantitative Research, supra note 3 at 24.

Survey participants were presented with a potential solution for enhancing access to legal services: legal expense insurance. Legal expense insurance is meant to provide coverage for legal accidents, such as loss of employment or a defect in the construction or reconstruction of a house. Most often, it does not cover family issues or criminal issues because of the higher level of risk to insurers.[111]

Low and middle-income Ontarians were asked whether they would consider purchasing legal expense insurance if it was available in Ontario, and more than two-thirds of people (67 per cent) said they would not be interested.[112] The main reason cited for their lack of interest was that they did not believe they would need it (56 per cent). Almost 1 in 3 believed that it would be too expensive or that they would not be able to afford it.[113]

Given the success of legal expense insurance in other jurisdictions and the entrée of new legal expense insurance providers into the Ontario market, this product has potential to enable low and middle-income Ontarians to gain enhanced access to legal services in the future.

What are the barriers that Ontarians see in the civil legal system?

When people were asked to identify the reason why they chose not to seek out legal assistance for a legal problem, by far the main reason that most people (42 per cent) cited was their perception that legal assistance would cost too much or that they could not afford a lawyer.[114] Other reasons included the fact that they did not believe they would qualify for legal aid or free legal assistance (8 per cent); they did not think their problem was important enough (6 per cent); pursuing a legal remedy would take too long (5 per cent); and not knowing what to do (5 per cent).[115]

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111 This product is widely available in Europe and has been in existence in Quebec for more than 10 years. Legal expense insurance is sold as an insurance product by registered insurers. It can be a stand-alone product (as it is in Quebec) or sold in conjunction with house or car insurance (as is common in Europe).

112 Quantitative Research, supra note 3 at 63.

113 Quantitative Research, supra note 3 at 65.

114 Quantitative Research, supra note 3 at 53.

115 Quantitative Research, supra note 3 at 53.

REASON FOR NOT SEEKING LEGAL ASSISTANCE – JUNE 2009

	%
Cost too much/could not afford a lawyer	42
Did not believe that I would qualify for legal aid or free assistance	8
Not important enough	6
It would take too much time	5
Didn't know what to do	5
Thought nothing could be done	4
Did not know where to get legal assistance	4
Issue resolved itself	3
Too stressful	2
No lawyer available nearby practising in the area I required help with	2
Further retribution/threatening remarks	2
Other	10
Don't know/not applicable	6

Overall, however, fewer than 1 in 10 low and middle-income Ontarians indicated that they had experienced problems with access to legal assistance.

TYPES OF PROBLEMS ACCESSING LEGAL ASSISTANCE – JUNE 2009

Cost/too expensive	31
Refused/did not qualify for legal aid	20
No lawyer available nearby practising in the area I required help with	11
Unable/difficult to find the information I was looking for	10
Lack of communication/information	6
Couldn't arrange convenient meeting time/office not open	3
Health/medical issue	3
They referred me on to someone/somewhere else	3
Unable to contact	3
Didn't know how to contact legal assistance	3
They were not able to help because they had too much work	2
Status card/immigration status	2
Time-consuming	2
Lack of accommodation for my disability	2
Other	9
Don't know/not applicable	11

Those most likely to report problems accessing legal assistance include residents of Central Ontario, people aged 30 to 59, households with incomes of less than $40,000, members of equality-seeking communities (particularly

persons with disabilities), those who have received income assistance in the last three years, people with multiple legal problems, people who found their problems very disruptive, and those whose problems related to discrimination or harassment.[116]

The survey results also revealed that the people who identified cost as a barrier to accessing legal assistance tended to be residents of Eastern Ontario, people aged 45 and older, university graduates, people who did not seek legal assistance for their legal problems, and those with a problem related to real estate or employment.[117]

People with family relationship problems tended to be more likely to mention not qualifying for legal aid. In addition, people with employment law problems were more likely to say that they could not find a lawyer practising in the area where they needed help.[118]

What do the organizations and people who provide low and middle-income Ontarians with legal services and information say about Ontarians' everyday legal problems and how they try to resolve them?

In order to round out the picture we acquired from talking with low and middle-income Ontarians directly, the Project also provided us with an opportunity to speak with smaller groups of lawyers, paralegals and legal and social service agency employees from throughout the province. These discussions were conducted as focus groups, allowing participants to speak in detail about their perceptions of the issues facing Ontarians as they try to resolve their civil legal issues.

When asked about the more common problems their clientele encountered, legal aid providers and social service agencies noted the following: family relationship, housing and employment problems, and issues relating to government income support programs. Lawyers tend to provide services to people with consumer and debt problems, as well as family relationship problems (particularly issues relating to custody and child support).[119]

The focus groups also revealed that the lower the income level of an individual, the more "enveloped by the law" a person's life is. It is the experience of legal service providers that low-income individuals tend to have greater contact with

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116 Quantitative Research, supra note 3 at 31.

117 Quantitative Research, supra note 3 at 32.

118 Quantitative Research, supra note 3 at 32.

119 Civil Legal Needs of Lower and Middle-Income Ontarians: Qualitative Research with Stakeholders (Toronto: Environics Research Group, 2009) at 1 ["Qualitative Research"].

government support programs, and this contact can have far-reaching effects on an individual's circumstances.[120]

The focus group participants were also asked to identify what they perceived to be the barriers that their clientele faced in trying to resolve their legal issues. Financial barriers were seen as common to both low and middle-income earners. The financial threshold for qualifying for legal aid was seen as too low to help even low-income earners. In addition to actual legal costs, the focus group participants pointed out a number of associated costs of accessing services that their clientele were not generally aware of and therefore not prepared for. Among these costs were those related to transportation, obtaining documentation, trial costs outside of the lawyer's services (such as expert witness fees), and childcare costs (as childcare would sometimes be needed to enable a client to attend hearings and trials). Lawyers pointed out that a middle-income earner will make a choice to pursue a legal action by considering the time it will likely take to resolve the issue and whether the costs of pursuing a claim could outweigh the potential reward.[121]

The focus groups also identified systemic barriers. The complexities of the legal system, as well as the qualification process for legal aid, were identified as the top barriers for low and middle-income earners, respectively. With specific reference to civil legal issues, legal aid provides very limited coverage for civil legal issues, thereby having the greatest impact on low-income earners in their decision to pursue these types of cases. Further, paralegals are unable to accept legal aid certificates for their services, and this fact limits access to affordable legal services for low-income Ontarians.[122]

Lack of knowledge about the legal system – and about the resources that are available to support individuals – was identified as another major barrier for both low and middle-income Ontarians. In the case of low-income individuals, lack of knowledge centred on accessing legal aid. For middle-income individuals, lack of knowledge related to accessing affordable legal services and information.

The focus groups identified some of the issues that could exacerbate an individual's negative physical and psychological reaction to his or her legal issue. Fear of becoming involved in the legal system, particularly for those individuals who had had previous experience with the civil or criminal legal system, acted as a deterrent to resolving legal issues. Intimidation by the court system, embarrassment and fear of stigmatization about having a legal problem, and fear of loss of privacy were further deterrents.

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120 Qualitative Research, see note 119 at 2.

121 Qualitative Research, supra note 119 at 7.

122 Qualitative Research, supra note 119 at 6–7.

The focus groups identified specific communities and groups that face barriers in the civil legal system, which accords with the description of vulnerable groups above: Francophones, people whose first language is not English or French, members of equality-seeking groups (particularly persons with disabilities), members of racialized communities, people with limited literacy, people living in remote or rural communities (particularly in the North), seniors and women.[123]

The focus groups were asked to identify future trends in the civil legal process in Ontario. From the perspective of legal service provision, they foresaw that demand would continue to increase, putting additional pressure on their resources and capacity for providing legal services and information. As the Canadian population continues to age, legal issues specific to seniors, including powers of attorney and wills and financial management of estates, will increase – along with the potential for abuse of the elderly. Family legal issues will continue to increase, and economic uncertainty will create further instability in family relationships and in custody and support arrangements in the case of marital breakdown. Self-represented litigants will also likely continue to grow in numbers.

The focus group participants were able to identify measures and initiatives that have potential to improve access to civil justice for low and middle-income Ontarians. For example, restorative justice programs introduced into Aboriginal communities and organizations have resulted in lower incarceration rates in those communities, particularly in the case of youth. Alternative dispute resolution programs in child protection cases are also beneficial to families.

Contingency fees in civil litigation cases create opportunities for people not otherwise able to afford a lawyer's fees to pursue a civil case. Raising the maximum of Small Claims Court claims from $10,000 to $25,000 will also encourage people to pursue their claims, with or without representation. In addition, the growth of mediation is viewed as a progressive step. Statutory changes in legislation affecting low and middle-income Ontarians will benefit them, with changes to the Ontario Human Rights Tribunal process and the Landlord and Tenant Board. The introduction of external tribunals to Workplace Safety and Insurance Board and Canada Pension Plan proceedings is also seen as beneficial.[124]

When asked about potential new modes of legal assistance for low and middle-income Ontarians, legal and social service providers were most supportive of holistic service models, where an individual could access both legal and social

123 Qualitative Research, supra note 119 at 8.

124 Qualitative Research, supra note 119 at 9.

services. They cautioned that the mix of services needs to be carefully planned to avoid creating conflicts, particularly in smaller communities.[125]

Another idea that received some positive support involved rethinking how legal services are charged to clients. Breaking down legal costs into their component parts or "unbundling" legal services could be explored to give clients the option of choosing the part(s) of a legal issue with which they need professional legal help.[126] Public education websites and telephone hotlines can provide basic legal information, but legal and social service providers felt that these services cannot replace in-person service.[127]

The focus group also generated ideas for improving the current system. For the most part, these ideas revolved around public legal education, including public self-help courses and public awareness campaigns; the promotion of the services of paralegals, mediation, and alternative dispute resolution; streamlining court processes, including making forms more accessible, providing more duty counsel and introducing case management where it is not currently available; and enhancing legal aid services through awareness campaigns and creating more volunteer student opportunities.

Putting the pieces of the puzzle together: What do Ontarians and the people who provide them with legal services and information agree on about the civil legal system?

The preceding sections of this report presented the results of the Ontario Civil Legal Needs Project's telephone survey and focus groups. Both studies presented important, but different, pictures of civil legal needs in Ontario, which are summarized below. The implications of our findings will be discussed in more detail in the next section.

- Civil legal needs arise frequently in the lives of low and middle-income Ontarians. Our research shows that civil legal needs touch upon fundamental issues and life circumstances, and unresolved civil legal problems often create great personal hardship. Our research also demonstrates that there is an important connection between access to justice issues and broader issues of health, social welfare and economic well-being. This finding highlights the importance of civil justice both to individuals and to Ontario as a whole.

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125 Qualitative Research, supra note 119 at 2.
126 Qualitative Research, supra note 119 at 3.
127 Qualitative Research, supra note 119 at 3.

- Our research confirms that civil legal needs may occur often but lead to minor inconvenience or they may occur infrequently but lead to devastating consequences. As a result, any system that allocates scarce resources must carefully balance the likelihood of a civil legal problem against its potential impact

- A high proportion of legal needs cluster and cascade. This finding has important implications for service delivery and design. The traditional model of legal services – be it private, publicly funded, or even pro bono – segregates and isolates legal needs into discrete, legally defined categories. Our research demonstrates that the civil justice system should try to break down these barriers and develop integrated or holistic models of service delivery.

- Every group of Ontarians experiences civil needs, but the poorest and most vulnerable Ontarians experience more frequent and more complex and interrelated civil legal problems. (According to our survey, this group includes people affected by factors related to gender, age, income and income source, equality-seeking status, geographic location, and the type of legal problem they encounter.) This finding suggests that service models and priorities must be targeted, designed, and delivered to meet the specialized needs of these communities.

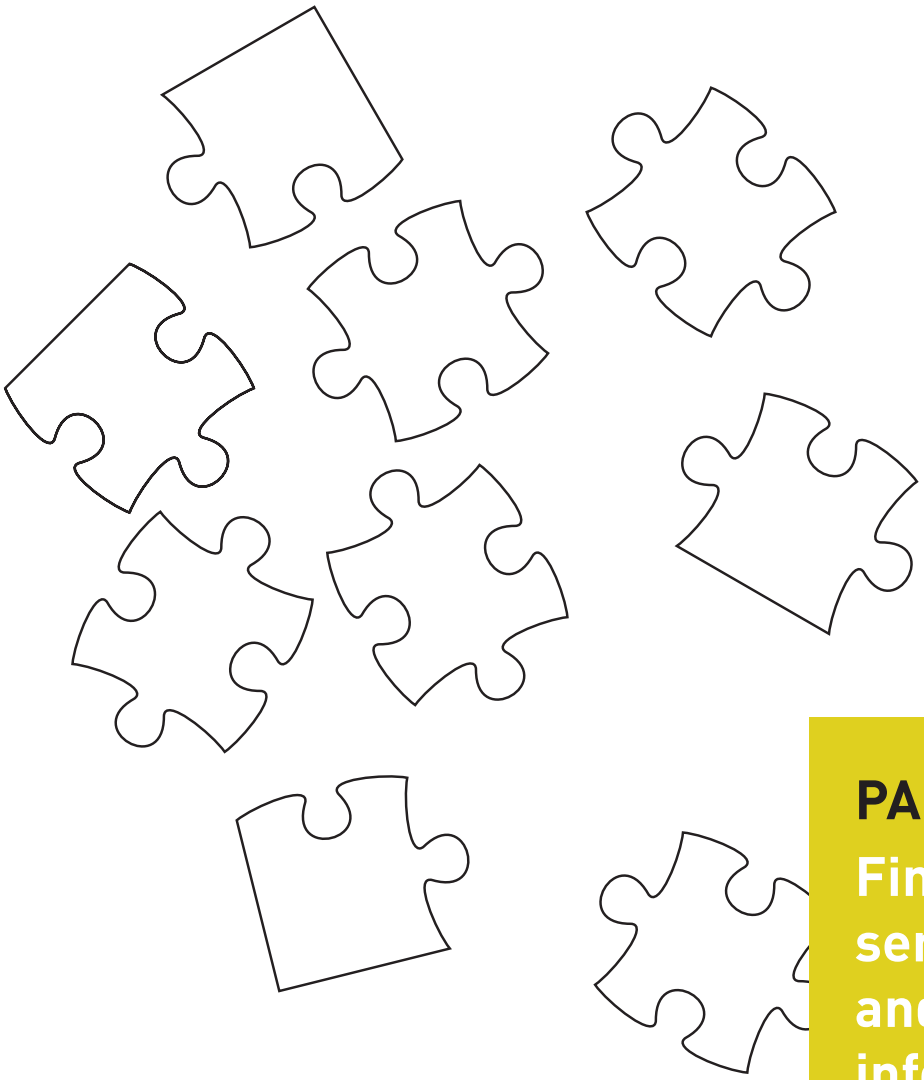
- Family law issues occur across income ranges and are seen as important to resolve by the people who experience them. However, they are not the only issues people have, and other kinds of problems can be as difficult to resolve (e.g., some of the most disruptive issues and the longest ones to resolve are related to employment and personal injury).

- Low and middle-income Ontarians experience many barriers to access to civil justice, including the real and perceived cost of legal services, lack of access to legal aid and lack of access to information and self-help resources. Once again, the poorest and most vulnerable Ontarians experience the greatest barriers. Our survey and focus groups revealed that communities and groups that tend to experience a higher rate of barriers include members of equality-seeking communities (particularly persons with disabilities and people whose first language is neither French nor English), people with limited literacy, people living in remote or rural communities (particularly in Northern Ontario), older people and women. This finding suggests that the civil justice system needs to have multiple, diverse and integrated access points and service responses. It also suggests that strategies should be developed to improve economic and geographic access to lawyers and legal services.

- Our research confirms that people often address their legal needs on their own. Indeed, people generally often want to resolve their legal needs by themselves with legal advice but not necessarily with the assistance of lawyers. Service providers and Ontarians also agree that people tend to and want to access legal services and information from a variety of sources, both legal and non-legal, when faced with a civil legal problem. These findings suggest that access to civil justice for low and middle-income Ontarians depends on access to a wide spectrum of sources of legal information and services.

- Many civil problems are resolved outside the formal justice system. This suggests that the civil justice system has to help people identify and resolve issues outside the traditional system, including better education, information, improved legal knowledge, skills development and self-help.

- Finally, our research confirms that people are generally very satisfied when they receive assistance from private lawyers and other professionals providing services in the civil legal system. This suggests that Ontario is well served by its legal professionals and that any potential proposals to reform the civil justice system must build on the system's existing strengths.



PART THREE

Finding legal services and legal information

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Finding legal services and legal information

Where are legal services and sources of legal information located in Ontario?

The availability of lawyers must be a significant part of any serious discussion about access to civil justice in Ontario. The mapping initiative, which will be released subsequent to this report, will shed light on where and what lawyers practise in Ontario. Needless to say, not all lawyers are the same. And from the perspective of low and middle-income Ontarians, one particular type of lawyer is crucial to ensuring access to civil justice: sole practitioners and lawyers practising in small firms. As a recent report on sole practitioners and small legal firms put it:

> When individual citizens in Ontario require the services of a lawyer to handle a wide range of legal matters such as real estate transactions, will preparation, estates work, representation in matrimonial, other civil disputes or criminal proceedings, advice for small businesses, and appearances before administrative tribunals, overwhelmingly they retain (small firms and sole practitioners). (Small firms and sole practitioners) report that 77% of the clients they represent are individuals.[128]

Small firms and sole practitioners also deliver the majority of legal aid and pro bono services across the province. The distribution and sustainability of small firms and sole practitioners is thus crucial in order to respond to the legal service

128 Final Report of the Sole Practitioner and Small Firm Task Force (Toronto: Law Society of Upper Canada, March 24, 2005) at 16. This report was the first comprehensive analysis of sole practitioners and small law firms (defined as firms with fewer than five lawyers) in Ontario.

needs of low and middle-income Ontarians.

LAO provides or funds two kinds of civil legal services: poverty law services and family law services. Poverty law services are provided through community legal clinics, while most, but not all, family services are provided through private lawyers acting on legal aid certificates or as per diem duty counsel.

Legal aid is premised on a public-private partnership, in which the private bar is relied upon to deliver the majority of legal aid services across the province. While the number of lawyers working in community legal clinics has increased over 40 per cent between 1999 and 2009, LAO's management data also confirm that the number of private lawyers willing to provide family legal aid services has declined rapidly. It also confirms that LAO appears to be having trouble regenerating or renewing the family legal aid bar in sufficient numbers to keep the system sustainable in the long run. For example, there was a 29 per cent decrease in the number of private lawyers accepting family certificates between 1999/2000 and 2006/07. In 1999/2000, there were 855 more lawyers providing family legal aid services than in 2006/07. Young lawyers appear willing to take legal aid cases as they establish their practices. As they become more experienced, however, they leave legal aid. In 1999/2000, 855 "new" lawyers accepted family certificate services. By 2006/07, however, only 392 of that group remained, a decline of 46 per cent.

These statistics are dramatic in their own right. It must be remembered, however, that the time period sampled was actually a period when the legal aid tariff increased by 16 per cent across LAO's three experience levels. Not surprisingly, shortages are already apparent in some locations. Other trends include the following:

- Lawyers appear to be leaving both legal aid and small firms and sole practice.
- The bar providing civil legal services to individuals appears to be "graying."
- New lawyers do not appear to be participating in legal aid or small firms or as sole practitioners in sufficient numbers.

Once again, it is important to emphasize that many lawyers continue to respond to the civil legal needs of low and middle-income Ontarians. Our data and focus groups tell us, however, that in several geographic areas and some practice areas, supply problems already exist or supply is clearly vulnerable. These shortages are important first and foremost because of their potential effect on the families and individuals who are unable to access lawyers in those areas. A single mother who cannot find a lawyer to accept her family legal aid certificate could suffer extraordinary consequences. These situations should also be seen as early warning signs of serious, widespread threats to access to civil justice.

REGIONAL DIFFERENCES IN LEGAL NEEDS

Our Project has confirmed that civil legal needs are not experienced in the same way in all parts of Ontario.

For example, the survey results revealed that the people who identified cost as a barrier to accessing legal assistance tended to be residents of Eastern Ontario,[129] while those most likely to report problems accessing legal assistance included residents of Central Ontario.[130] People most likely to have turned to a paralegal were residents of the GTA, Hamilton-Niagara, and Eastern Ontario.[131]

Of those who reported a civil legal need, the highest proportion of people who did not seek any legal assistance (where such assistance would have been helpful) were residents of Central Ontario and the GTA.[132]

Taken together, our survey and focus groups revealed a number of important insights:

- Many low and middle-income Ontarians experience civil justice legal problems, and those problems have significant impact on their lives.
- Most low and middle-income Ontarians seek out lawyers in private practice for legal information and assistance, and they are generally satisfied with the quality of the services they receive.
- A number of low and middle-income Ontarians are unable to obtain legal information and assistance, nor do they even bother trying, because of cost barriers and the limits of legal aid coverage and eligibility. Many of these people are more vulnerable than those able to obtain a private lawyer.
- A number of Ontarians, especially middle-income groups, wish to solve their legal problems themselves, and they rely on informal networks and the Internet to obtain legal information to do so.

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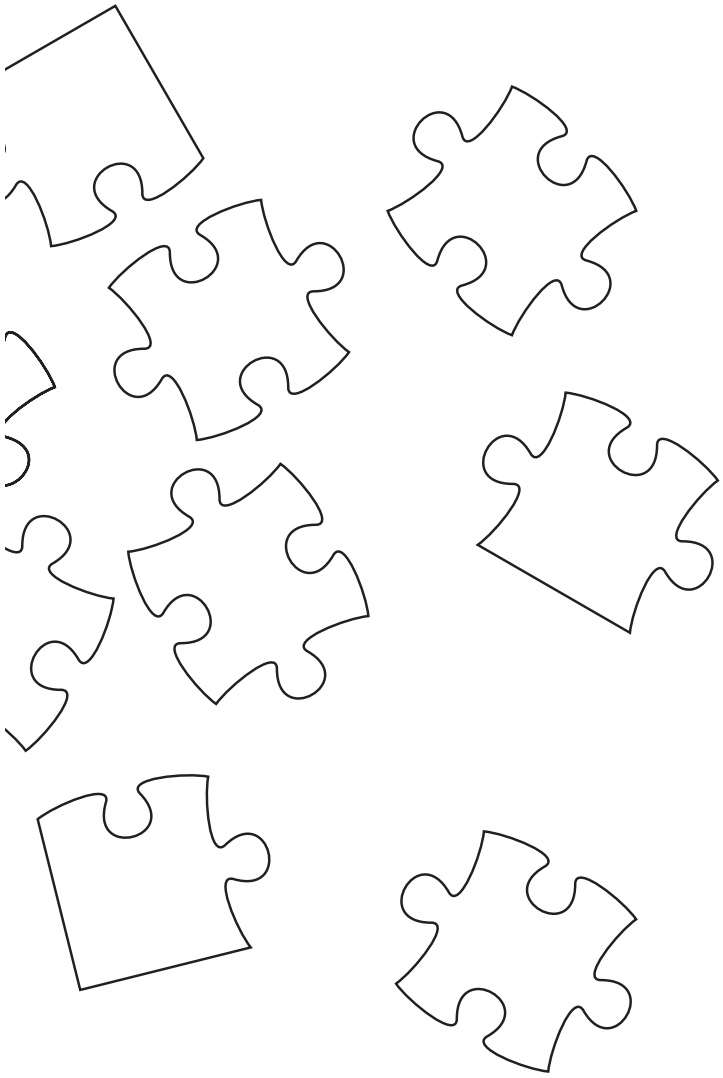
129 Quantitative Research, supra note 3 at 32.
130 Quantitative Research, supra note 3 at 32.
131 Quantitative Research, supra note 3 at 28.
132 Quantitative Research, supra note 3 at 51.

In light of these insights, it is clear that while the traditional model of legal service delivery continues to meet the needs of many, for those unable or unwilling to seek out a lawyer in private practice or through legal aid, models of legal service delivery will have to evolve. In the next section, we explore the ways in which innovation in delivering legal services might address the needs of low and middle-income Ontarians.



PART FOUR

A path for the future: addressing people's unmet civil legal needs

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A path for the future: addressing people's unmet civil legal needs

The last section of Part Two ("Putting the pieces of the puzzle together") summarized the important findings of our study. This section will discuss the implications of our findings and offer some general observations and ideas about potential strategies and solutions.

We must emphasize at the outset that we do not believe there is any single innovation or program that will respond to all the unmet civil legal needs of low and middle-income Ontarians. There are no one-size-fits-all solutions that will apply to all situations. Rather, our emphasis is on the need to tailor solutions to particular problems, and this may lead to a mix of services and programs working, to the extent possible, in complementary and coordinated ways.

We also wish to reiterate that the responsibility for access to justice transcends organizational boundaries. In the past, access to justice was often considered a legal aid issue. According to a more contemporary view, many institutions must be involved. Access to justice is not a matter that falls within the mandate or capacities of any single organization or institution. As a result, success or failure in addressing the unmet needs identified in this Project may well be determined by success or failure in establishing collaborative initiatives.

Civil legal needs reflect people's situations and life experiences

Civil legal needs are not static. They change in response to broad, societal factors (e.g., an economic downturn may cause a spike in consumer debt needs) or to factors within the justice system (e.g., a change to the rules of civil procedure or to the substantive areas of law may create new needs, such as the development of class actions and contingency fees).

The telephone survey and focus groups also revealed that legal needs are tied to an individual's life circumstances. Poor and vulnerable Ontarians often have

distinct needs. Middle-income Ontarians often have other needs. And every person's needs can change as their lives and circumstances change. For example, all Ontarians are hungry for a basic level of knowledge about their legal rights and opportunities for exercising those rights. Not everyone's informational needs are the same, however. Single individuals have less need of family law legal information and services relevant to married or common-law couples. The legal information required by a New Canadian is in many ways unique to that individual's particular stage in life as he or she adjusts to settlement in Canada. Those starting initiatives and projects designed to enhance access to civil justice for individual Ontarians should be mindful of the context of the target audience for their information, as this context will affect the content and the delivery mode of the information.

The issue is to understand civil legal needs and to target resources at the various client groups within the Ontario population. This Project provides a picture in time of the perceptions and challenges that various segments of the Ontario community are facing.

Expanding the range and reach of civil legal services

We believe that civil legal services can be made more accessible by rethinking some of the conventional assumptions about the reach and range of civil legal services.

The traditional model of legal service delivery almost inevitably assumes individual representation and direct legal support from a lawyer in a traditional litigation model. More contemporary views of legal service models augment the traditional model with an appropriate mix of alternative service models and providers based on an assessment of the client's need, the level of complexity of the service required, and the available financial resources. For example, LAO currently spends 95 per cent of its family law resources on individual and/or limited representation. This means that LAO uses a model that presupposes litigation as the principal method of resolving disputes. However, litigation may not be the most effective service for most family disputes and may not be protective of children's best interests. The modern standard of family justice service consists of early access to information, early assessment of cases, and the diversion of appropriate cases to alternative methods of dispute resolution. While access to lawyers is essential for many Ontarians, especially those with low incomes, for those with clustering or multiple legal problems and those with other issues that make them more vulnerable (especially middle-income Ontarians), access to civil justice means more than access to lawyers and courts.

For example, civil legal needs should be addressed through a variety of service providers, designed with the user's and the user's community priorities and needs in mind.

One of the important insights arising from our study is that people are generally satisfied with the legal assistance they find (whether it be a lawyer they pay for, a legal aid lawyer, duty counsel, a pro bono lawyer, a paralegal, or a telephone advice advisor). The challenge is matching people who are now without legal assistance to the kind of assistance they need in more efficient and effective ways. Moving from a static model of legal representation to a broad menu of options for the delivery of legal services will allow more unmet needs to be handled in more efficient and effective ways.

Context matters. A number of studies reinforce the conclusions of this study that the varying capacities of individuals make a "cookie-cutter" approach to legal services untenable. Self-help is a good example. Until the litigant's capacities (not just understanding of the law but mental and physical health, etc.) and a problem's complexities are known, it is not possible to determine whether self-help will be effective. Similarly, income cut-offs alone cannot be used to determine the fit of a program to an individual. This is the reason why upfront triage – assessing and prioritizing needs – is so important.

Finally, we should not lose sight of the value of prevention as a means of avoiding civil legal needs altogether. Prevention may be enhanced by better access to legal information (discussed below) or by public policy initiatives such as no-fault insurance schemes or proactive regulation in consumer protection, which remove the need for legal assistance to resolve problems.

Making civil legal services more economically accessible

People do not need, or want, full legal representation to solve every civil legal issue they encounter. In some cases, partial legal and paralegal representation, or "unbundled" legal services, may be the answer. A significant proportion of middle-income Ontarians can afford to pay for some legal services. Developing innovative programs to harness this market, whether through unbundling, legal expense insurance, or other forms of subsidized legal services, would represent an important step forward. For such initiatives to succeed, however, they must be accompanied by public education as to the potential benefits and cost savings associated with these initiatives. For example, while the option of legal expense insurance appears to hold significant promise to reduce cost and broaden access to legal services, our telephone survey revealed that slightly less than one-third (31 per cent) of the participants would have an interest in, or inclination to,

purchase legal expense insurance, and over half (56 per cent) did not believe it was needed. This result may indicate a lack of interest in this option or it may demonstrate a lack of understanding of its benefits.

If alternatives to the current retainer system for legal fees are considered, public education will also be a crucial step in ensuring the success of these programs. The telephone survey and the focus groups highlight the public's perception that legal services are expensive, even though the reality is that almost 30 per cent of Ontarians with a civil legal problem receive legal services free of charge, and almost 20 per cent pay less than $1,000. Options that have been introduced in other jurisdictions include the unbundling of legal fees and block fees for legal services. Research is required to determine whether these types of fee models could work in the Ontario context.

Meeting family law needs

Our Project consistently revealed that family relationship breakdown is the primary reason why most Ontarians enter the civil justice system. The breakdown of a family relationship is also often at the heart of people encountering multiple civil legal problems, and it is at the centre of clustering civil legal problems. Family relationship problems are also among the most difficult, complicated, and time consuming to resolve. This reality translates into making them most disruptive to people's daily lives and most draining on their resources. Our survey revealed that more than 4 in 10 people (44 per cent) with a family relationship problem had not resolved their problem within three years.

Access to resources in family law in the form of information, legal and social assistance, and resolution of family law problems for low and middle-income Ontarians is a priority issue for the civil legal system. As identified in our Project results, addressing the gap in services and support in family law will require a range of services from all partners in our civil legal system.

Expanding self-help appropriately and creatively

Our data shows that a significant portion of the population has some desire to handle their civil legal problems on their own with legal advice. In 2007, Pro Bono Law Ontario launched Law Help Ontario, a pilot project located at 393 University Avenue in Toronto and funded by The Law Foundation of Ontario. The underlying philosophy of the project is that self-represented litigants have a fundamental right to access the justice system even if they cannot afford to retain a lawyer for full representation privately, or qualify for pro bono or Legal Aid. Law Help

Ontario strives to address self-represented litigants procedural and substantive barriers to justice so they can better navigate the justice system. Specifically, Law Help provides a continuum of brief services based on a triage system that assesses litigant need and allocates resources based on those needs. Law Help is a unique program in North America because it blends the best of self-help models with the best of duty counsel services; and because it leverages the skills of the private bar to deliver services on a pro bono basis. This way Law Help creates meaningful opportunities for lawyers--primarily junior associates--to enhance access to justice and to gain valuable, hands-on, civil litigation experience. During the pilot period, the walk-in centre served 6,845 clients, generated 6,536 court forms, and was supported by over 200 lawyers who provided more than 2,100 hours of free legal assistance.[133]

Expanding the use of technology

In addition to in-person self-help centres and resources, technology holds significant promise as a platform for the delivery of self-help resources. According to the results of the telephone survey, 84 per cent of low and middle-income Ontarians are connected to the Internet. In spite of Ontarians' connectivity to the Internet and their desire to access information online to resolve their legal problems, however, there is a low rate of awareness of the sources of legal information that are accessible to Ontarians, specifically with online resources. The telephone survey pointed out that the organizations that serve the public and whose mandate is to provide legal information to the public are not at the top of mind of the public when they are looking for information on the Internet. The focus groups identified the need to ensure that what people access through the Internet is accurate and reliable and that people are directed to those sources.

Technology holds great promise in expanding the reach of affordable legal information, advice and representation. The Law Help centre's website, for example, logged 144,975 page views during its pilot period.[134] The Law Help Ontario website and walk-in centre also offer an automated document assembly program that allows litigants to complete their court forms. During the pilot period, 6536 court forms were generated[135] and 95 per cent of users reported that

133 Law Help Ontario Pilot Project Final Report (Toronto: Pro Bono Law Ontario, 2010) at 5 ["Law Help Ontario Report"].

134 Law Help Ontario Report, supra note 133 at 5.

135 Law Help Ontario Report, supra note 133 at 5.

they found it to be a useful service[136]. Technology, though, is not itself a panacea, but rather a means to connecting those in need with service providers. The resources provided through the Law Help Ontario, the Law Society website and Lawyer Referral Service, the Ministry of the Attorney General's Justice Ontario website, the Legal Aid Ontario website, and other online sources of advice, information, and referrals suggests the potential of the Internet for empowering individuals to engage in self-help. Provided that the websites are accessible, online resources can enable individuals to self-select the right level of legal assistance for their problem. Knowledge of legal issues and computer literacy are two main concerns that must be addressed to ensure that online resources are accessible and useful to individual users.

As providers, platforms and services increase, issues of coordination and coherence are emerging. Any strategy of enhancing access to justice through computer and Internet-based initiatives will have to operate in a collaborative fashion to be effective.

Other options for optimizing online resources include virtual law firms and online brokers of legal services also suggest ways in which the private bar may reach those people in need more effectively. Online resources cannot replace person-to-person exchanges, however. Low and middle-income Ontarians expressed their preference to solve their legal problems on their own with legal advice but when dealing with their actual legal issue, two-thirds of Ontarians seek the advice of a lawyer they pay for.

Telephone legal advice hotlines do not replace the value of a person-to-person exchange when people are seeking out legal advice and information. Access to a telephone and the privacy needed to discuss legal problems may be a barrier to certain people or communities. To be effective, a telephone advice hotline must be more than a pre-recorded message. Staff for hotlines must be competent and provide referrals where appropriate.

As we discussed above, legal problems do not arise in isolation. The telephone survey indicates that people prefer to access legal advice and information from a variety of sources when they are faced with a legal issue. Our focus groups indicated that the overall concept of "one-stop shopping" for social services – including legal advice and assistance – could be efficient and preferable to a legal advice hotline or websites, because of the face-to-face communication possible with such a model.

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136 Evaluation of Law Help Ontario as a Model for Assisting Self-Represented Litigants in the Ontario Superior Court of Justice at 393 University Avenue in Toronto: Final Report (Toronto: The Resource for Great Programs, Inc. 2009) at 6.

Educating Ontarians about their legal rights and legal services

Our Project revealed that, whatever informational, self-help, or advice services are available, we must also recognize that in some circumstances, access to a qualified lawyer or paralegal is the only means to a just and fair outcome for many low and middle-income Ontarians. Geographic, linguistic, and economic barriers to accessing lawyers and paralegals may be addressed through a mix of strategies, including the use of subsidized legal services, centralized interpretation and translation services, videoconferencing, and other technological assistance.

Along with access to services, public education about lawyers and paralegals and how their roles differ will enable Ontarians to understand that they have choices when it comes to legal services for their civil legal problems. Regulated paralegals are still a relatively new phenomenon, and according to the telephone survey, people who sought their legal advice tended to be from urban areas, members of equality-seeking communities, and people who had problems related to immigration.

Educating people about basic legal principles so that they can themselves better identify when they have a legal issue will open points of entry to the legal system. For example, the Barreau du Québec has launched public education programming through the public access television network. Programming focuses on basic access to justice issues and legal information. This example highlights that there are many modes of disseminating information to the public, including broadcast media, print media, the Internet, and telephone information lines.

Further, educating the public about the availability of lawyers and paralegals, the services available to people to access them (such as the Lawyer Referral Service and the Law Society's Lawyer and Paralegal Directory), and the relative costs of retaining their services will enable low and middle-income Ontarians to make informed choices when it comes to purchasing legal services.

More information and working together

Finally, we believe that accessibility to the civil justice system would improve if organizations committed to access to justice committed to sharing information and working together.

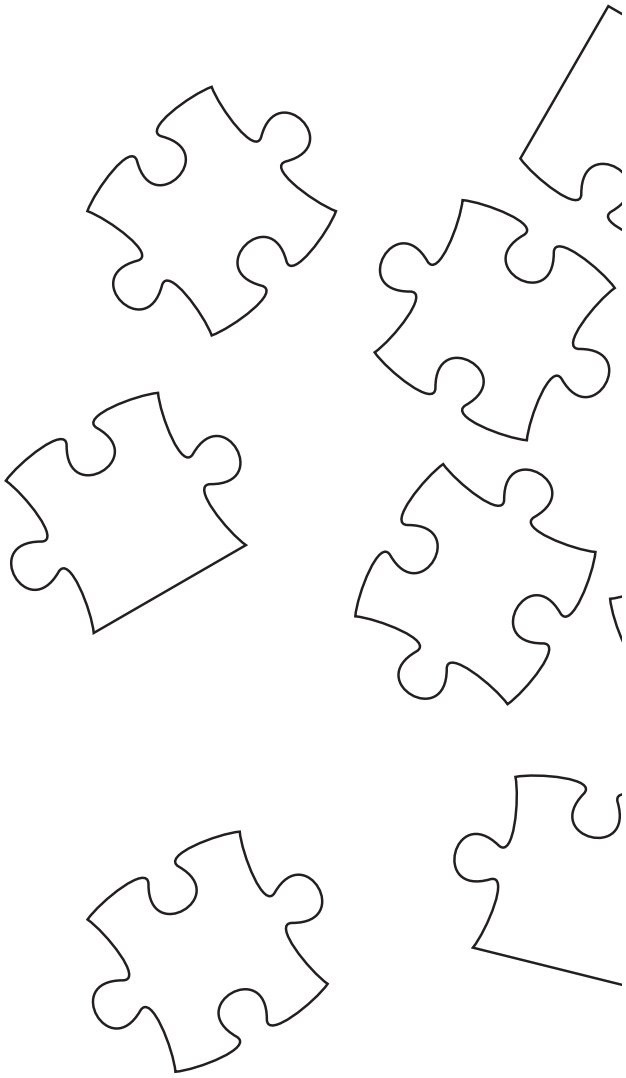
The desire to understand the legal needs of the public, how well the legal system in Ontario has responded to those needs, and where the system can work better has inspired a number of research initiatives and reports in recent years, as

well as currently.[137] Research is an expensive proposition for an organization and often external funding from public sources is used to augment research budgets.

The data and information that is produced through this research is of utmost importance to the organizations involved, as well as to the Ontario public. Essentially, this data and information belongs to everyone.

Moving forward, formalizing and coordinating the sharing of public data and information could be a cost-effective method of maintaining the check-up on the civil justice system in Ontario. It could also be an avenue to build on the foundation of research in recent years and lay out a path for future projects that can be more specialized or focused on specific groups and communities. As we identified at the beginning of this report, there were a number of sub-groups within our study group that we were not able to reach, particularly members of vulnerable communities. This Project can be a point of departure for other groups to look more closely at the civil legal needs of those groups.

137 See The Honourable Patrick J. Lesage and Professor Michael Code, "Report of the Review of Large and Complex Criminal Case Procedures" (November 2008), prepared for the Ministry of the Attorney General, Ontario (http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/); Michael Trebilcock, Report of the Legal Aid Review (Toronto: Ministry of the Attorney General, 2008) at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf; and George Thomson and Karen Cohl, Connecting across Language and Distance: Rural and Linguistic Access to Justice (2008) at http://www.lawfoundation.on.ca/pdf/linguistic_rural_report_dec2008_final.pdf.



APPENDIX A

The Ontario Civil Legal Needs Project process

APPENDIX A

The Ontario Civil Legal Needs Project process

A. Steering Committee

The Project's Steering Committee consists of three individuals (Marion Boyd, Lorne Sossin, and John McCamus) representing the three participating stakeholders (the Law Society, PBLO, and LAO) and chaired by former Attorney General and former Chief Justice of Ontario, R. Roy McMurtry. The Steering Committee provided direction and oversight for the Project, including

- reviewing the study methodology;
- reviewing guidelines for prioritizing areas of inquiry and the allocation of resources;
- providing advice on the selection of third-party consultants;
- providing advice on the work of third-party consultants and providing oversight for the consultants' activities;
- providing oversight for study expenditures; and
- reviewing and approving the study's findings and final report.

B. Staff working group

Senior staff from the three participating organizations assembled the background material, supervised the conduct of the survey and focus groups, coordinated work on all aspects of the Project, and provided general administrative and logistical support to the Steering Committee.

C. Environics

After a competitive search, Environics Research Group ("Environics") was commissioned to undertake the empirical aspects of the civil legal needs study. In June of 2009, Environics conducted 2,000 22-minute telephone interviews

among low-income and middle-income Ontarians (defined as households with a combined income of less than $75,000).[138] Survey participants were asked a comprehensive list of questions to determine whether they had experienced a problem with a legal dimension, what they did to resolve the problem, and how the problem affected them. Participants were also asked to provide basic socio-demographic information so that types or "clusters" of legal problems could be compared with broader categories of social need.

Environics also conducted a series of focus groups with front-line legal and social service providers. Additional focus groups were conducted involving unrepresented litigants who were users of PBLO's court-based self-help project.

This research consisted of three in-person focus groups conducted in Toronto, Hamilton, and Ottawa, as well as four telephone focus groups conducted among residents of Central and Eastern Ontario, Southwestern Ontario, Northern Ontario, and the outer GTA. All groups were conducted between June 25 and July 16, 2009, among front-line legal and social service providers, including lawyers, paralegals, and representatives of social assistance services and legal aid clinics.

Recruiting guidelines were developed to ensure that each group was composed of a mix of legal and social services professionals. The participants were recruited from lists of legal and social service professionals in each region provided by the Project partners.

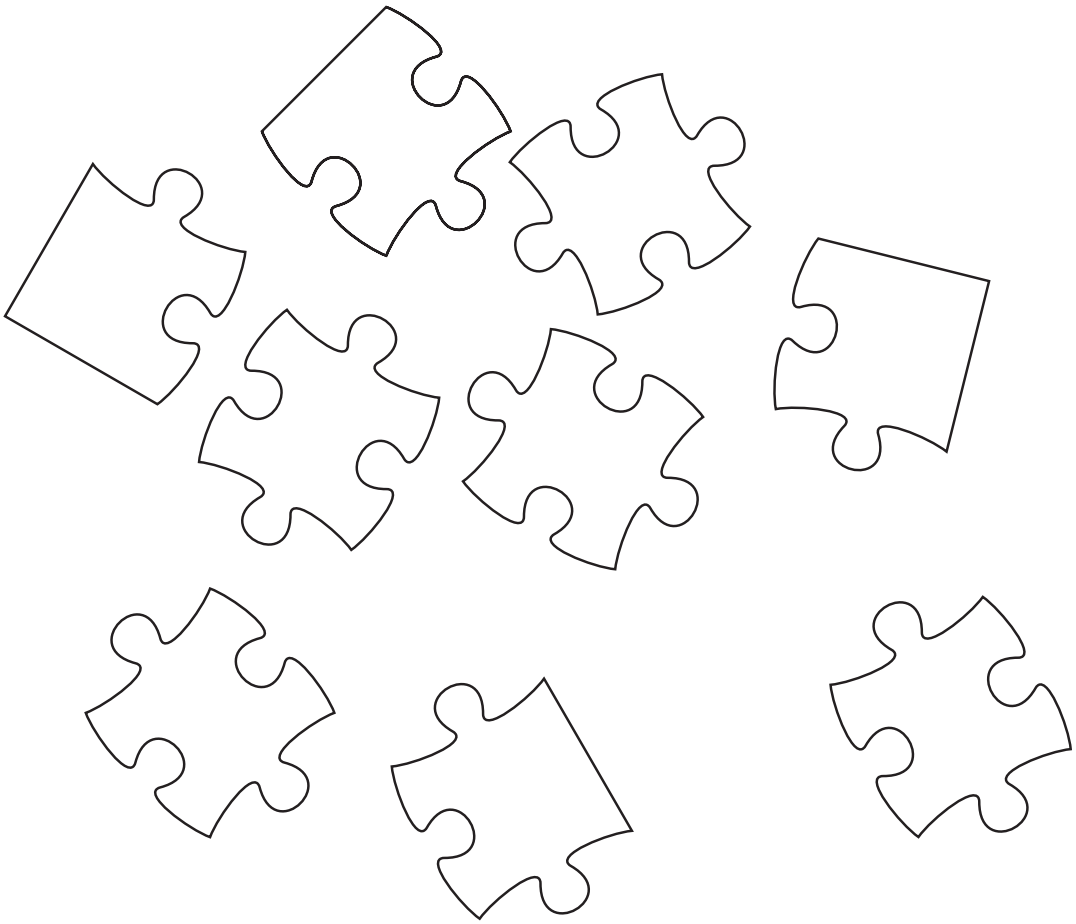
D. Mapping exercise

The Project also includes an Ontario-wide environmental scan or "mapping" exercise, to identify the number, type, range, and location of access to justice programs and initiatives (both private and public) directed toward low and middle-income Ontarians. By contrast, our first two Project phases, the telephone survey and focus groups, analyzed the legal needs of low and middle-income Ontarians. In other words, these Projects analyzed the demand for civil legal services. The mapping exercise will look at the supply of legal professionals available to meet those needs and the capacity of the existing legal services delivery system to meet the needs of low to middle-income Ontarians. Specifically, the mapping exercise (the results of which will be released separately from this report) will identify the number, type, range, and location of legal professionals across Ontario. "Mapping" research is important because it allows policy makers to identify geographic areas or areas of law that may be

138 Results of the telephone survey are considered to be accurate to within plus or minus 2.2 percentage points, 19 times out of 20.

underserved or at risk. It also allows policy makers to make strategic decisions about how and where to prioritize resources.

The Ontario Civil Legal Needs Project is by no means the first organization to tackle this issue. The Law Society, the Ontario Bar Association, the County and District Law Presidents' Association (CDLPA), LAO, and the Law Foundation of Ontario have taken important steps in this regard. Much of our analysis and many of our recommendations in this area will build upon these efforts.



APPENDIX B
Organizational profiles

APPENDIX B

Organizational profiles of the Law Society of Upper Canada, Legal Aid Ontario, and Pro Bono Law Ontario

LAW SOCIETY OF UPPER CANADA (LAW SOCIETY, LSUC)

Mandate of the Law Society

Founded in 1797, The Law Society regulates Ontario lawyers and paralegals in the public interest. The Law Society ensures that these individuals,

- are licensed and insured
- are qualified to help their clients through the legal process
- meet standards of learning, competence and professional conduct.

Licensed paralegals can represent clients in the following types of matters:

- Litigation in Small Claims Court
- Traffic and other offences heard in Provincial Offences Court
- Hearings before tribunals (e.g. the Landlord and Tenant Board or the Workplace Safety and Insurance Board)
- Minor criminal charges under the Criminal Code heard in the Ontario Court of Justice.

Lawyers can help with all types of legal matters, including the following:

- Family matters, such as divorce, separation agreements and custody issues
- Criminal matters at all levels of court
- Civil litigation matters at all levels of court
- Wills, powers of attorney and estate matters

- Real estate matters, including buying and selling residential or commercial property
- Administrative law matters, including hearings before tribunals.

Finding a Lawyer or Paralegal

The Law Society provides resources to members of the public to assist them in finding a lawyer or paralegal. These resources include,

- the Client Service Centre, which is accessible by telephone, facsimile or email. A TTY line is available to provide access for people who are hearing impaired. Members of the public can make enquiries about whether a lawyer or paralegal is currently entitled to provide legal services in Ontario as well as information about the individual's discipline history.
- a fully accessible, bilingual website with features to accommodate visually-impaired people.
- an online Lawyer and Paralegal Directory. This directory enables members of the public who know the name of a lawyer or licensed paralegal to locate their contact information and access information about their status in the profession.
- the Lawyer Referral Service (LRS), which is a free, public, multilingual service that helps people find a lawyer. Individuals call a toll-free number and a client service representative gives that person the name and phone number of one local LRS member lawyer who is able to deal with the legal issue. The person calls the LRS member lawyer and receives a free consultation of up to 30 minutes.
- the Law Society's Certified Specialist program, which is intended to help members of the public identify lawyers who can meet their needs for specialist assistance in complex matters. Specialists are evaluated initially and periodically, and in accordance with specified standards of knowledge, skill, conduct and practice. The program is voluntary, and no lawyer in Ontario is required to be certified as a specialist in order to practise in the area of law covered by that specialty. However, only those certified by the Law Society may refer to themselves as specialists in their advertising, and are included in the Law Society's Directory of Specialists. The Directory of Certified Specialists is available online and a paper directory may also be requested from the Client Service Centre.
- the Client Service Centre will also provide contact information for Legal Aid Ontario (LAO) and the Law Help Ontario service of Pro Bono Law Ontario (PBLO).

Complaining about a lawyer or licensed paralegal

As the regulator for the legal profession, the Law Society receives and responds to written complaints from members of the public about lawyers and paralegals. Every complaint received is reviewed and assessed. The complaints form is available online through the Law Society website.

Where possible, the Law Society tries to help members of the public and the lawyer or paralegal deal with the issues. Where necessary, the Law Society investigates and takes disciplinary action in appropriate cases. Most complaints are resolved without a formal discipline hearing. Where the Law Society cannot help with a complaint, it tries to assist the individual by providing information about other sources of help.

Facts about The Law Society

- As of 2010, there are approximately 41,000 licensed lawyers in Ontario.
- As of 2010, there are approximately 21,000 lawyers in private practice.
- As of 2010, there are approximately 2,700 licensed paralegals in Ontario.
- The Law Society received the following number of enquiries from the public, lawyers and paralegals for 2009:
    - Call Centre – 249,872
    - Membership Services - 102,567
    - Administrative Compliance – 97,392
    - Complaints Services – 26,100
    - Total – 475,931
- Calls to the Lawyer Referral Service in 2009 – 48,939

A snapshot of a diverse profession

The Ontario legal profession is diverse and increasingly representative of the communities it serves. At the point of entry into the profession, the following percentages of Lawyer Licensing candidates self-identified as members of equality-seeking communities (as of December 31, 2009, unless otherwise noted):

- Women - 51.8%
- Racialized communities – 12.8%
- Francophones – 6.4%
- Aboriginal peoples – 1.9%
- Persons with a disability – 1.9% (as of June 2009)

The Office of the Registrar for the licensing process for both lawyer and paralegal candidates provides accommodations to meet the special needs of candidates through its support services office.

Access to Justice Initiatives

In addition to the Client Service Centre, online resources, the Lawyer Referral Service, the Directory of Certified Specialists, the Public Legal Education Task Force and Pro Bono Law Ontario, the Law Society's access to justice initiatives focus on helping to make sure the public is well served by the legal system of Ontario. These other initiatives include the following programs:

- **Access to Justice Committee**
  The Access to Justice Committee is a standing committee of Convocation, the board of governors for the Law Society. Its directive is to develop, for Convocation's approval, policy options to facilitate access to justice for the people of Ontario, in keeping with the Law Society's statutory mandate.
- **Equity and Aboriginal Issues Committee and the Equity Advisory Group**
  The Equity and Aboriginal Issues Committee (EAIC) is a standing committee of Convocation that develops, for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession and for addressing all matters related to Aboriginal peoples and French-speaking peoples. As part of this policy development process, the EAIC consults with the Equity Advisory Group, Rotiio' taties, Association des juristes d'expression francaise de l'Ontario (AJEFO), women and equity-seeking communities. The Equity Advisory Group is a working group of the EAIC, which specifically assists the committee in the development of policy options for the promotion of equity and diversity in the legal profession.
- **Equity Initiatives Department**
  To ensure access to justice, the Law Society integrates equity and diversity values and principles into its model policies, services, programs and procedures. The Law Society seeks to ensure that both law and the practice of law are reflective of all peoples in Ontario by actively participating with Aboriginal, Francophone and equity-seeking groups, through consultations, meetings and public education activities. The Equity Initiatives Department also provides resources for members of the public and the profession, such as publications and reports.
- **Compensation Fund**
  The Law Society has two compensation funds for clients who have lost money because of a lawyer or a paralegal's dishonesty, which are paid for by lawyers and paralegals respectively.
- **Discrimination and Harassment Counsel (DHC)**
  As part of the Law Society of Upper Canada's efforts to enable equity and diversity in the workplace and the profession, and to help stop discrimination and harassment, the Law Society provides a Discrimination and Harassment

Counsel service free-of-charge to the Ontario public, lawyers and paralegals. The Discrimination and Harassment Counsel confidentially assists anyone who may have experienced discrimination or harassment by a lawyer or within a law firm or legal organization or by a paralegal.

CONTACT INFORMATION

Website: www.lsuc.on.ca
Client Service Centre
Toll-free: 1-800-668-7380
General line: 416-947-3300
TTY: 416-644-4886
Language Line for enquiries in languages other than French and English: (1-800-874-9426, Client ID #754032)
Facsimile: 416-947-3924
E-mail: lawsociety@lsuc.on.ca
Mailing Address
The Law Society of Upper Canada, Osgoode Hall, 130 Queen Street West, Toronto, Ontario Canada M5H 2N6

LEGAL AID ONTARIO (LAO)

In 1998, the Ontario government enacted the Legal Aid Services Act in which the province renewed and strengthened its commitment to legal aid. The Act established Legal Aid Ontario (LAO), an independent but publicly funded and publicly accountable non-profit corporation, to administer the province's legal aid program.

LAO's mandate is to "promote access to justice throughout Ontario for low-income individuals by means of providing consistently high quality legal aid services in a cost-effective and efficient manner."

LAO is the second largest justice agency in Ontario. LAO is one of the largest providers of legal services in North America covering a range of legal aid services such as criminal, family, mental health, aboriginal law, clinic law, and refugee law.

LAO operates offices in communities across the province and funds 79 community legal clinics throughout Ontario, including 17 specialty clinics that provide assistance to clients in such areas of law as worker's compensation, housing, income security, and worker's health and safety.

Legal aid is available to financially-eligible low-income individuals and disadvantaged communities for a variety of legal problems, including criminal matters, family disputes, immigration and refugee hearings and poverty law

issues such as landlord/tenant disputes, disability support and family benefits payments.

LAO provides many access to justice programs and services, including in-house legal services, community legal clinics, duty counsel, Student Legal Aid Services Society and the legal aid certificate program, which gives low-income people access to legal representation from a pool of several thousand private lawyers who undertake legal aid work.

FACTS ABOUT LAO

Operations

- Provided more than 1 million assists to Ontarians.
- Legal aid offices and 79 community legal clinics operated across Ontario.
- Duty counsel lawyers are available in courthouses across Ontario to assist un-represented litigants in criminal, family and some administrative matters.

Finance

- Annual operating budget of $362 million (2008).
- The Ontario government provides the majority of legal aid funding.
- The federal government and Law Foundation of Ontario also fund LAO.
- Clients may contribute towards the cost of their legal representation.

Legal Aid Certificates

- 107,299 certificates issued in 2008.

Community Clinics

- Community Legal Clinics assisted 156,588 Ontarians (2008)

Duty Counsel

- Duty counsel provided 1,078,703 legal assists in 2008.
- Advice lawyers assist clients in over 130 locations, including all Family Law Information Centres.

Student Legal Aid Services Societies (SLASS)

- SLASSs are located at each of the six Ontario law schools.
- In-house legal offices.
- LAO operates a variety of in-house legal services, including three family law offices, a refugee law office, and criminal services across Ontario.

CONTACT INFORMATION

Website: http://www.legalaid.on.ca
Toronto: (416) 979-1446
Toll free: 1-800-668-8258
Facsimile: (416) 979-8669
Mailing Address: Provincial Office, Atrium on Bay, 40 Dundas Street West, Suite 200, Toronto, Ontario, Canada M5G 2H1

PRO BONO LAW ONTARIO (PBLO)

Pro Bono Law Ontario (PBLO) was founded in 2001 with a mandate to increase access to justice by promoting and facilitating opportunities for lawyers to provide pro bono (free) legal services to low-income Ontarians and the charitable organizations that serve them. PBLO engages in three core activities that flow from this mandate:

1. Facilitating pro bono participation by developing best practices and pro bono policies, addressing regulatory barriers to participation, and educating the private bar via publications, conferences, presentations and continuing legal education curricula. As a result of PBLO activities, 20 of Ontario's largest law firms have adopted pro bono policies that count pro bono time as billable time.
2. Brokering partnerships between community groups and legal service providers to provide free legal assistance to at-risk individuals and communities. Since launching, PBLO has brokered over 20 partnerships to support Aboriginal communities, children and youth, individuals with cancer, newcomers to Canada, victims of domestic abuse and urban renewal initiatives.
3. Managing three streams of pro bono projects in-house: children's projects, charitable organization assistance (Volunteer Lawyers Service), and litigation assistance projects for low-income individuals with civil, non-family, matters.

PBLO's project development activities adhere to the following guiding principles:

1. Pro bono projects should complement, not duplicate, services offered by Legal Aid Ontario.
2. Pro bono project development should be collaborative and address identified unmet legal needs.
3. Pro bono projects should be innovative and client centred.

PRINCIPLES IN ACTION

In 2007 PBLO launched Law Help Ontario in Toronto, Ontario's first self-help centre for unrepresented litigants – and one of the only programs in North America that uses pro bono lawyers to deliver services. Law Help Ontario provides a number of resources to help unrepresented litigants navigate the justice system including plain language information about court rules and procedure, an automated document assembly program, called A2J, to help users complete court forms, legal advice and representation at some court appearances. A2J is Ontario's first, free, web-based document assembly solution for unrepresented litigants.

The project website, www.lawhelpontario.org offers many of these resources online and allows users to chat with staff in real time about their legal issues.

Despite the fact that PBLO limits outreach to the court building at 393 University Avenue in Toronto, since its inception, Law Help Ontario has:

- Served 9,718 clients
- Generated 7,732 court forms
- www.lawhelpontario.org logged 207,624 page views, and
- Users downloaded 39,075 procedural resources.

In 2009, Law Help Ontario earned the American College of Trial Lawyers Emil Gumpert Award for improving the administration of justice. In 2010, Law Help Ontario received American Lawyer Magazine's Law and Technology News Award for most innovative use of technology in a pro bono project.

Another PBLO project, the Family Legal Health Project, takes into account the connection between access to justice issues and broader issues of health, social welfare and economic well-being. The program is managed in partnership with the Hospital for Sick Children, and uses legal remedies to address the social determinants of childhood health – non-medical issues that can adversely impact a child's health or a family's capacity to care for a sick child. In its first year, the project served over 200 clients with issues that included sub-standard housing conditions, employment problems that arose when parents had to take time from work to care for a sick child and even tax issues.

FACTS ABOUT PBLO

Operations

- Assisted over 9,000 clients in 2009 via its in-house projects.
- Operates out of 4 offices in Toronto, including head office, two Superior Court-based self help centres (at 393 University Avenue and 47 Sheppard Avenue East in Toronto), and the Hospital for Sick Children, which houses

the Family Legal Health Project to address the social determinants of childhood illness.
- Law Help Ontario, Ottawa will launch in spring 2010.
- 26 PBLO registered pro bono projects.
- Over 70 law firms participate in PBLO projects.

Finance

- Annual operating budget of $1.3 million (2009).
- Core funding provided by The Law Foundation of Ontario and Legal Aid Ontario.
- Sponsored by The Law Society of Upper Canada, which provides funding, in-kind support and opportunities for collaboration.

CONTACT AND INFORMATION

Website: http://www.pblo.org
Telephone: (416) 977-4448
Toll free: 1-866-466-PBLO (7256)
Facsimile: (416) 977-6668
Mailing Address: Lynn Burns, Executive Director, 260 Adelaide St. E, PO Box 102, Toronto, ON M5A 1N1

The Law Society of Upper Canada | Barreau du Haut-Canada

PBLO

Legal Aid Ontario
Aide juridique Ontario

The Law Foundation of Ontario
Building a better foundation for justice in Ontario

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 3

Report to Convocation
February 27, 2014

Tribunals Committee

Committee Members
Raj Anand (Chair)
Adriana Doyle (Vice-Chair)
Larry Banack
Jack Braithwaite
Christopher Bredt
Paul Dray
Lee Ferrier
Alan Gold
Howard Goldblatt
Jennifer Halajian
Linda Rothstein
Virginia MacLean
Dow Marmur
Mark Sandler
James Scarfone
Robert Wadden

Purposes of Report: **Decision**
Information

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

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COMMITTEE PROCESS

1. The Committee met on February 13, 2014. Committee members Raj Anand (Chair), Adriana Doyle (Vice-Chair), Jack Braithwaite, Christopher Bredt, Paul Dray, Lee Ferrier, Howard Goldblatt, Virginia MacLean, Dow Marmur and James Scarfone attended. Tribunal Chair, David Wright, and staff members Grace Knakowski, Lisa Mallia and Sophia Sperdakos and also attended.

TAB 3.1

DECISION

HOUSEKEEPING AMENDMENTS TO IMPLEMENT TRIBUNAL-RELATED PROVISIONS OF THE *MODERNIZING REGULATION OF THE LEGAL PROFESSION ACT, 2013 (*BILL 111)

Motion

2. **That to implement Tribunal-related provisions of the *Modernizing Regulation of the Legal Profession Act, 2013*(Bill 111), Convocation:**

   a. Amend By-Law 3 as set out in the motion at TAB 3.1.1: Bilingual Motion By-Law 3,

   b. Revoke and substitute the English Rules of Practice and Procedure, Forms and Tariff as set out in the motion at TAB 3.1.3: Motion Hearing Division Rules – English,

   c. Revoke and substitute the French Rules of Practice and Procedure, Forms and Tariff as set in the motion at TAB 3.1.4: Motion - Hearing Division Rules – French,

   d. Revoke and substitute the English Appeal Panel Rules and Forms as set out in the motion at TAB 3.1.7: Motion Appeal Division Rules – English,

   e. Revoke and substitute the French Appeal Panel Rules and Forms as set out in the motion at TAB 3.1.8: Motion Appeal Division Rules – French,

   f. Amend the Adjudicator Code of Conduct as set out at TAB 3.1.11: Bilingual Amendments Adjudicator Code of Conduct, and

   g. Amend the Practice Direction on Adjournments as set out at TAB 3.1.12: Bilingual Amendments Practice Direction,

   effective March 12, 2014.

Background

3. On December 12, 2013 the *Modernizing Regulation of the Legal Profession Act, 2013*, (Bill 111) received Royal Assent. A number of provisions in the Bill address the Tribunals Committee's Hearings Process Report ("2012 Report") and recommendations that Convocation approved in June 2012.

4. Housekeeping amendments are necessary to By-Law 3, the Rules of Practice and Procedure, Forms and Tariff, the Appeal Rules and Forms, the Adjudicator Code of Conduct and the Practice Direction on Adjournments.

a) Amendments to By-Law 3

5. By-Law 3 includes the mandates of the Law Society's standing committees. Sections 108 and 127 address the Tribunals Committee. Housekeeping amendments are required to address the Bill 111 changes in terminology from "tribunals" to "Tribunal," to remove reference to the Hearing and Appeal Panels and to reflect the role of the new Tribunal Chair. The proposed amendments to By-Law 3 are set out at **TAB 3.1.1: Bilingual Motion By-Law 3**. The English "track changes" are set out at **TAB 3.1.2: Track Changes By-Law 3**.

b) Revocation and Replacement of Rules of Practice and Procedure, Forms and Tariff

6. The current Rules of Practice and Procedure, Forms and Tariff will be revoked and replaced with Rules for the newly constituted Law Society Tribunal. The content of these Rules will remain largely the same except for housekeeping amendments to,

   a. add or amend certain definitions to reflect the appointment of the Tribunal Chair and the positions of Vice-Chair of the Hearing Division and Vice-Chair of the Appeal Division;

   b. replace the terms "Hearing Panel" and "Appeal Panel" with the terms "Hearing Division" and "Appeal Division;"

   c. replace the term "tribunals" with the term "Tribunal;" and

   d. effect certain administrative changes.

7. The proposed Rules, Forms and Tariff are set out in English at **TAB 3.1.3: Motion Hearing Division Rules - English** and in French at **TAB 3.1.4: Motion Hearing Division Rules - French**. The English track changes are set out at **TAB 3.1.5: Track Changes Hearing Division Rules - English**. The French track changes are set out at **TAB 3.1.6: Track Changes Hearing Division Rules – French**.

c) Revocation and Replacement of Appeal Rules and Forms

8. The current Appeal Rules and Forms will be revoked and replaced with Appeal Rules for the newly constituted Law Society Tribunal. The content of these Rules will remain largely the same except for housekeeping amendments to,

   a. add or amend certain definitions to reflect the appointment of the Tribunal Chair and the positions of Vice-Chair of the Hearing Division and Vice-Chair of the Appeal Division;

   b. replace the terms “Hearing Panel” and “Appeal Panel” with the terms “Hearing Division” and “Appeal Division;” and

   c. replace “tribunals” with “Tribunal.”

9. The proposed English Appeal Rules and Forms are set out at **TAB 3.1.7: Motion Appeal Division Rules - English**. The proposed French Appeal Rules and Forms are set out at **TAB 3.1.8: Motion Appeal Division Rules - French**. The English track changes are set out at **TAB 3.1.9: Track Changes Appeal Division Rules - English**. The French track changes are set out at **TAB 3.1.10: Track Changes Appeal Division Rules - French**.

(d) Amendments to Adjudicator Code of Conduct

10. Amendments to the Adjudicator Code of Conduct are required to,

    a. add or amend certain definitions to reflect the appointment of the Tribunal Chair and the positions of Vice-Chair of the Hearing Division and Vice-Chair of the Appeal Division;

    b. replace the terms “Hearing Panel” and “Appeal Panel” with the terms “Hearing Division” and “Appeal Division;”

    c. replace the word “tribunals” with “Tribunal”; and

d. make miscellaneous changes, which among other things, reflect the new role of the Tribunal Chair.

11. The proposed bilingual amendments are set out at **TAB 3.1.11: Bilingual Amendments Adjudicator Code of Conduct**.

(e) Housekeeping Amendments to Practice Direction on Adjournments

12. On October 27, 2011 Convocation approved a Practice Direction on Adjournments. Housekeeping amendments, required to reflect Bill 111 changes in terminology, are set out at **TAB 3.1.12: Bilingual Amendments Practice Direction**.

TAB 3.1.1

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

BY-LAW 3
[BENCHERS, CONVOCATION AND COMMITTEES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2014

MOVED BY

SECONDED BY

THAT By-Law 3 [Benchers, Convocation and Committees], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, September 20, 2007, November 22, 2007, June 26, 2008, April 30, 2009, September 24, 2009, February 25, 2010, May 27, 2010, October 28, 2010, November 25, 2010, January 27, 2011, November 24, 2011, April 26, 2012 and September 27, 2012, be further amended as follows:

1. Paragraph 10 of section 108 of the English version of the By-Law is amended by striking out "Tribunals" and substituting "Tribunal".

2. Paragraph 10 of section 108 of the French version of the By-Law is amended by striking out "des tribunaux" and substituting "du Tribunal".

3. The heading immediately before section 127 of the English version of the By-Law is amended by striking out "TRIBUNALS" and substituting "TRIBUNAL".

4. The heading immediately before section 127 of the French version of the By-Law is amended by striking out "DES TRIBUNAUX" and substituting "DU TRIBUNAL".

5. Section 127 of the English version of the By-Law is revoked and the following substituted:

Mandate

127. (1) The mandate of the Tribunal Committee is to develop, in conjunction with the Chair of the Law Society Tribunal, for Convocation's approval policy options on all matters relating to the Law Society Tribunal, including the development or preparation of practice directions, an adjudicator code of conduct, publication protocols for tribunal decisions and adjudicator professional development.

(2) Subject to the approval of Convocation, in conjunction with the Chair of the Law Society Tribunal, the Tribunal Committee may prepare rules of practice and procedure.

6. Section 127 of the French version of the By-Law is revoked and the following substituted:

Mandat

127. (1) Le mandat du Comité du Tribunal est d'élaborer, de concert avec le président du Tribunal du Barreau, pour approbation du Conseil, différentes politiques sur toutes les questions portant sur le Tribunal du Barreau, y compris l'élaboration ou la préparation des directives de cabinet, un code de déontologie pour les arbitres, un protocole de publication pour rendre les décisions de tribunal et le perfectionnement professionnel des arbitres.

Règles de pratique et de procédure

(2) Sous réserve de l'approbation du Conseil et de concert avec le président du Tribunal du Barreau, le Comité du Tribunal peut préparer des règles de pratique et de procédure.

TAB 3.1.2

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By-Law 3

Establishment of standing committees

108. The following standing committees are hereby established:

1. Audit and Finance Committee.

[2. Revoked.]

3. Government and Public Affairs Committee.

4. Access to Justice Committee.

5. Litigation Committee.

6. Professional Development and Competence Committee.

7. Professional Regulation Committee.

8. Equity and Aboriginal Issues Committee.

9. Inter-Jurisdictional Mobility Committee.

10. Tribunal~~s~~ Committee.

TRIBUNAL~~S~~ COMMITTEE

Mandate

127. (1) The mandate of the Tribunal~~s~~ Committee is to develop, in conjunction with the Chair of the Law Society Tribunal, for Convocation's approval policy options on all matters relating to ~~the operation and administration of~~ the ~~Hearing Panel and the Appeal Panel~~ Law Society Tribunal, including the development or preparation of practice directions, an adjudicator code of conduct, publication protocols for tribunal decisions and adjudicator professional development.

Rules of practice and procedure

(2) Subject to the approval of Convocation, in conjunction with the Chair of the Law Society Tribunal, the Tribunal~~s~~ Committee may prepare rules of practice and procedure.

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE
(applicable to proceedings before the Law Society Hearing Division)
MADE UNDER
SECTION 61.2 OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2014

MOVED BY

SECONDED BY

THAT the rules of practice and procedure applicable to proceedings before the Law Society Hearing Panel, made by Convocation on February 26, 2009 and amended by Convocation on June 25, 2009, June 29, 2010, January 27, 2011, April 28, 2011, February 28, 2013 and April 25, 2013, be revoked, effective March 12, 2014, and the following substituted:

LAW SOCIETY TRIBUNAL
HEARING DIVISION
RULES OF PRACTICE AND PROCEDURE

Made: February 26, 2009
Amended: June 25, 2009
June 29, 2010
January 27, 2011
April 28, 2011
February 28, 2013
April 25, 2013
March 12, 2014

RULE 1
APPLICATION AND INTERPRETATION

Application

1.01 These Rules apply to the following proceedings before the Hearing Division that are commenced on or after July 1, 2009:

1. A licensing proceeding.
2. A restoration proceeding.
3. A conduct proceeding.
4. A capacity proceeding.
5. A competence proceeding.
6. A non-compliance proceeding.
7. A reinstatement proceeding.
8. A terms dispute proceeding.

Definitions and interpretation

1.02 (1) In these Rules, unless the context requires otherwise,

"Act" means the *Law Society Act*;

"capacity proceeding" means a proceeding under section 38 of the Act;

"Chair" means the Chair of the Law Society Tribunal;

"competence proceeding" means a proceeding under section 43 of the Act;

"conduct proceeding" means a proceeding under section 34 of the Act;

"deliver" means serve and file with the Tribunal with proof of service;

"document" includes a paper, book, record, account, sound recording, videotape, film, photograph, chart, graph, map, plan, survey and information recorded or stored by computer or by means of any other device;

"hearing" does not include a consent resolution conference, a proceeding management conference or a pre-hearing conference;

"holiday" means,

(a) any Saturday or Sunday,

(b) New Year's Eve Day, and where New Year's Eve Day falls on a Saturday or Sunday, the preceding Friday,

(c) New Year's Day, and where New Year's Day falls on a Saturday or Sunday, the following Monday,

(d) Family Day,

(e) Good Friday,

(f) Easter Monday,

(g) Victoria Day,

(h) Canada Day, and where Canada Day falls on a Saturday or Sunday, the following Monday,

(i) Civic Holiday,

(j) Labour Day,

(k) Thanksgiving Day,

(l) Remembrance Day, and where Remembrance Day falls on a Saturday or Sunday, the following Monday,

(m) Christmas Eve Day, and where Christmas Eve Day falls on a Saturday or Sunday, the preceding Friday,

(n) Christmas Day, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday, and where Christmas Day falls on a Friday, the following Monday,

(o) Boxing Day, and

(p) any special holiday proclaimed by the Governor General or the Lieutenant Governor;

"licensing proceeding" means a proceeding under section 27 of the Act;

"moving party" means a person who makes a motion;

"non-compliance proceeding" means a proceeding under section 45 of the Act;

"non-party participant" means a person who is not a party to a proceeding who is permitted to participate in a proceeding or a part thereof;

"panel" means the panelist or, collectively, the panelists assigned to a hearing;

"panelist" means a member of the Hearing Division;

"party" includes a moving party and a responding party;

"reinstatement proceeding" means a proceeding under section 49.42 of the Act;

“representative” means a person authorized under the *Law Society Act* to represent a person in a proceeding;

“responding party” means a person against whom a motion is made;

“restoration proceeding” means a proceeding under section 31 of the Act;

“subject of the proceeding” means,

(a) in a licensing proceeding, the person referred to, in subsection 27 (5) of the Act, as the applicant,

(b) in a restoration proceeding, the person referred to, in subsection 31 (4) of the Act, as the person whose licence is in abeyance,

(c) in a conduct proceeding, the person referred to, in subsection 34 (2) of the Act, as the licensee who is the subject of the application,

(d) in a capacity proceeding, the person referred to, in subsection 38 (2) of the Act, as the licensee who is the subject of the application,

(e) in a competence proceeding, the person referred to, in subsection 43 (2) of the Act, as the licensee who is the subject of the application,

(f) in a non-compliance proceeding, the person referred to, in subsection 45 (2) of the Act, as the licensee who is the subject of the application,

(g) in a reinstatement proceeding, the person referred to, in subsection 49.42 (4) of the Act, as the applicant, and

(h) in a terms dispute proceeding, the person referred to, in subsection 49.43 (3) of the Act, as the applicant;

“terms dispute proceeding” means a proceeding under section 49.43 of the Act.

(2) A word or phrase used in these Rules that is defined in the Act bears the definition contained in the Act;

“Tribunal” means the Law Society Tribunal established under the *Law Society Act*, R.S.O. 1990, c. L.8;

“Vice-Chair” means the Vice-Chair of the Hearing Division,

Interpretation of Rules

1.03 (1) These Rules shall be liberally construed to secure the just and expeditious determination of every proceeding on its merits.

(2) Where matters are not provided for in these Rules, the practice shall be determined by analogy to them.

RULE 2
NON-COMPLIANCE WITH RULES

Effect of non-compliance

2.01 (1) A failure to comply with a procedural requirement in these Rules is an irregularity and does not render a proceeding or a step or document in a proceeding a nullity.

Orders on motion attacking irregularity

(2) On the motion of a party to attack a proceeding or a step or document in a proceeding for irregularity, an order may be made,

(a) granting any relief necessary to secure the just determination of the real matters in issue; or

(b) dismissing the proceeding or setting aside a step or document in the proceeding in whole or in part only where and as necessary in the interests of justice.

Attacking irregularity

(3) A motion to attack a proceeding or a step or document in a proceeding for irregularity shall not be made, except with leave,

(a) after the expiry of a reasonable period of time after the moving party knows or ought reasonably to have known of the irregularity;

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity; or

(c) if the moving party has otherwise consented to the irregularity

Order dispensing with compliance

2.02 (1) On the motion of a party or a non-party participant, or on a panel's own motion, an order dispensing with compliance with any procedural requirement in these Rules may be made where it is necessary in the interests of justice.

Consent to non-compliance

(2) A party may dispense with compliance with any procedural requirement in these Rules with the consent of all other parties.

RULE 3
TIME

Computing time

3.01 In computing time under these Rules, or under an order made under these Rules,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens;

(b) where a period of less than seven days is prescribed, holidays shall not be counted;

(c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) where a document would be deemed to be received or service would be deemed to be effective on a day that is a holiday, the document shall be deemed to be received or service shall be deemed to be effective on the next day that is not a holiday.

Extension or abridgment of time periods

3.02 (1) On the motion of a party or a non-party participant, an order extending or abridging any time prescribed by these Rules, or by an order made under these Rules, may be made where it is just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

RULE 4
REPRESENTATION

Change in representation

Notice of change of representative

4.01 (1) A party or a non-party participant who has a representative of record may change the representative of record by serving on the representative and every other party and non-party participant and filing with the Tribunal with proof of service, a notice of change of representative giving the name, address, telephone number, fax number and e-mail address of the new representative.

Form 4A

(2) The notice mentioned in subrule (1) may be in Form 4A.

Notice of appointment of representative

(3) A party or a non-party participant acting in person may appoint a representative of record by delivering a notice of appointment of representative giving the name, address, telephone number, fax number and e-mail address of the representative.

Form 4B

(4) The notice mentioned in subrule (3) may be in Form 4B.

Notice of intention to act in person

(5) A party or a non-party participant who has a representative of record may elect to act in person by serving on the representative and every other party and non-party participant and filing with the Tribunal, with proof of service, a notice of intention to act in person that sets out the person's address for service, telephone number, fax number, if any, and e-mail address, if any.

Form 4C

(6) The notice mentioned in subrule (5) may be in Form 4C.

Removal of representative of record

4.02 On the motion of a representative, a party or another person, an order may be made removing the representative as the representative of record.

RULE 5

COMMUNICATION WITH PANEL

5.01 No party, non-party participant, representative or other person who attends at or participates in a hearing shall communicate with a panel outside of the hearing with respect to the subject matter of the hearing except,

(a) in the presence of all parties and all non-party participants, who have been permitted to participate in the hearing with respect to the subject matter of the communication, or their representatives; or

(b) in writing by sending the written communication to the Tribunal Office and a copy of the written communication to all parties and all non-party participants, who have been permitted to participate in the hearing with respect to the subject matter of the communication, or their representatives.

RULE 6
ADDING PARTIES

Adding parties

6.01 (1) On the motion of a person, an order may be made adding a person as a party to a proceeding where the person is entitled under the *Law Society Act* or otherwise by law to be a party to the proceeding.

Time for bringing motion

(2) A motion under this Rule shall be made prior to the hearing on the merits of the proceeding.

RULE 7

JOINDER OR SEVERANCE OF PROCEEDINGS

Hearing proceedings together or consecutively

7.01 (1) On the motion of a party, an order may be made that the merits of two or more proceedings, in whole or in part, be heard at the same time or one immediately after the other if,

(a) the proceedings have a question of fact, law or mixed fact and law in common;

(b) the proceedings involve the same parties;

(c) the proceedings arise out of the same transaction or occurrence or series of transactions or occurrences; or

(d) for any other reason an order ought to be made under this Rule.

Time for bringing motion

(2) A motion under this Rule shall be made,

(a) prior to the hearing on the merits of any affected proceeding; or

(b) at any time, with leave.

Effect of hearing proceedings together or consecutively

(3) Where an order is made under subrule (1), the panel shall determine the effects of hearing the merits of the proceedings together or one immediately after the other and may give such directions as it deems just with respect to those effects.

Separating proceedings

(4) Where an order is made under subrule (1), if hearing the merits of the proceedings together or one immediately after the other unduly complicates or delays the proceedings or causes prejudice to a party, on the motion of a party or on its own motion, the panel may order separate hearings for all or any part of the proceedings.

Dividing proceeding

7.02 (1) On the motion of a party, or on a panel's own motion, an order may be made that a proceeding be divided into two or more proceedings.

Effect of order

(2) Where an order is made under subrule (1), the panel shall determine the effects of making the order, including how the merits of the separate proceedings shall be heard, and may give such directions as it deems just with respect to the division of the proceeding.

RULE 8
NON-PARTY PARTICIPATION

Non-party participation

8.01 (1) On the motion of a person, an order may be made permitting a person who is not a party to a proceeding to participate in the proceeding or a part thereof if the participation of the person is in the interests of justice.

Extent of participation

(2) Where an order is made under subrule (1), the panel shall determine the extent of the person's participation and may give such directions as it deems just with respect to the person's participation.

Intervening as "friend of the court"

8.02 A panel may invite a person, without becoming a party to a proceeding, to participate in the proceeding or a part thereof for the purpose of rendering assistance to the Tribunal by way of argument.

RULE 9

COMMENCEMENT, AMENDMENT AND ABANDONMENT OF PROCEEDINGS

How proceeding commenced

9.01 (1) A proceeding shall be commenced by the issuing of an originating process.

Notice of application

(2) The originating process for the following proceedings is a notice of application (Form 9A):

1. A conduct proceeding.
2. A capacity proceeding.
3. A competence proceeding.
4. A non-compliance proceeding.
5. A reinstatement proceeding.
6. A terms dispute proceeding.

Notice of referral for hearing

(3) The originating process for the following proceedings is a notice of referral for hearing (Form 9B):

1. A licensing proceeding.
2. A restoration proceeding.

How originating process issued

(4) An originating process is issued by the act of it being assigned a file number and being dated by the Tribunal Office.

Same

(5) An originating process may be issued,

(a) on personal attendance in the Tribunal Office by the party seeking to issue it or by someone on the party's behalf; or

(b) by mail or courier, by the party seeking to issue it,

(i) mailing an original of the originating process by regular lettermail or registered mail to the Tribunal,or

(ii) sending an original of the originating process by courier to the Tribunal.

Copy of originating process to be sent to party

(6) Where an originating process is issued by mail or courier, the Tribunal shall mail a copy of the originating process as issued by regular lettermail to the party that issued it.

File copy of originating process

(7) An original of the originating process as issued shall be filed with the Tribunal when it is issued.

Service of originating process

(8) A copy of the originating process as issued shall be served by the party that issued it on every other party and proof of service shall be filed with the Tribunal within thirty days after the originating process is issued.

Deemed abandonment

(9) Where a party that issued an originating process fails to file, within thirty days after the originating process is issued, proof of service of the originating process on every other party, the proceeding commenced by the issuing of the originating process is deemed to have been abandoned by that party.

Motion to set aside deemed abandonment

(10) On the motion of a person who was deemed to have abandoned a proceeding under subrule (9), an order may be made, as is just, setting aside the deemed abandonment.

Effect of deemed abandonment on subsequent proceeding

(11) Where a party is deemed to have abandoned a proceeding under subrule (9), the deemed abandonment is not a bar to a subsequent proceeding commenced by that party involving the same subject matter.

Amendment of originating process by party

9.02 (1) A party may amend its originating process,

(a) at any time prior to ten days before the hearing on the merits of the proceeding; and

(b) at any time after the time mentioned in clause (a), with leave.

Leave to amend

(2) In considering whether to grant leave to a party to amend its originating process, the Hearing Division may consider,

(a) prejudice to a person;

(b) timeliness of notice to the opposite party; and

(c) any other relevant factor.

No addition of party

(3) An amendment under this rule shall not include the addition of a party.

How amendment made

(4) A party amending its originating process shall file, with the Tribunal, a copy of the original originating process as amended, bearing the date of the original originating process and the title of the original originating process preceded by the word “amended”.

Amendments indicated

(5) A party amending its originating process shall indicate text added to the original originating process by underlining it and text deleted from the original originating process by striking it through.

Same

(6) Where an originating process is amended more than once, each subsequent amendment shall be underlined or struck through with an additional line.

Duties of Tribunal Office

(7) When an amended originating process is filed, the Tribunal Office shall note on it the date on which it is filed and the authority by which the amendment was made.

Date of amendment

(8) The date on which an amended originating process is filed with the Tribunal shall be deemed to be the date on which the original originating process is amended.

Service of amended originating process

(9) A party that amends its originating process shall serve a copy of the amended originating process on every other party forthwith after it is filed with the Tribunal.

Same

(10) An amended originating process shall be served in accordance with subrule 10.01 (1).

Proof of service

(11) Proof of service of an amended originating process shall be filed with the Tribunal forthwith after it is served.

Amendment at hearing

(12) Where an originating process is amended at the hearing on the merits of the proceeding, the amendment shall be made on the face of the record and subrules (4) to (11) do not apply.

Abandonment of proceedings prior to hearing on the merits

Conduct, capacity, competence, non-compliance, reinstatement or terms dispute proceeding

9.03 (1) Prior to the hearing on the merits of the following proceedings, the applicant may abandon the proceeding by delivering a notice of abandonment (Form 9C):

1. A conduct proceeding.
2. A capacity proceeding.
3. A competence proceeding.
4. A non-compliance proceeding.
5. A reinstatement proceeding.
6. A terms dispute proceeding.

Abandonment of licensing or restoration proceeding by Society

(2) Prior to the hearing on the merits of a licensing or a restoration proceeding, the Society may abandon the proceeding by delivering a notice of abandonment (Form 9D).

Abandonment of licensing or restoration proceeding by applicant

(3) Prior to the hearing on the merits of a licensing or restoration proceeding, the applicant may abandon the application that has been referred for a hearing and the proceeding by delivering a notice of abandonment (Form 9E).

RULE 10
SERVICE OF DOCUMENTS

Manner of service: originating process

10.01 (1) An originating process shall be served by personal service or by an alternative to personal service.

Manner of service: all other documents

(2) A document other than an originating process may be served,

(a) by personal service or by an alternative to personal service,

(b) by sending a copy of the document by courier to the last known address of the person or the person's representative;

(c) by faxing a copy of the document to the last known fax number of the person or the person's representative, but if the person being served is a party, service under this clause is only effective if the recipient consents to the faxing prior thereto; or

(d) by e-mailing a copy of the document to the last known e-mail address of the person or the person's representative, but service under this clause is only effective,

(i) if the person being served is a party, if the recipient consents to the e-mailing prior thereto, and

(ii) if the recipient provides by e-mail an acceptance of service and the date of the acceptance.

Service by fax

(3) A document that is served by fax under clause (2) (c) shall include a cover page indicating,

(a) the sender's name, address and telephone number;

(b) the name of the person to be served;

(c) the date and time of transmission;

(d) the total number of pages, including the cover page, transmitted;

(e) the fax number of the sender; and

(f) the name and telephone number of a person to contact in the event of transmission problems.

Service by e-mail

(4) A document that is served by e-mail under clause (2) (d) shall be attached to an e-mail message that shall include,

(a) the sender's name, address, telephone number, fax number and e-mail address;

(b) the date and time of transmission; and

(c) the name and telephone number of a person to contact in the event of transmission problems.

Personal service

(5) Where a document is to be served by personal service, the service shall be made,

(a) on an individual, by leaving a copy of the document with the individual;

(b) on a person other than the Society, by leaving a copy of the document at the premises at which the person carries on business with an adult individual who appears to be in control or management of the place of business; and

(c) on the Society, by leaving a copy of the document with a Discipline Counsel of the Society.

Alternatives to personal service

(6) Where a document may be served by an alternative to personal service, the service shall be made,

(a) by leaving a copy of the document with a person's representative; or

(b) by mailing a copy of the document by regular lettermail or registered mail to the last known address of the person.

Substituted service or dispensing with service

(7) On the motion of a person, an order may be made permitting substituted service or dispensing with service where it appears that it is impractical for any reason to effect service as required under this rule or where it is necessary in the interests of justice.

Effective date of service

10.02 (1) Service under rule 10.01 is deemed to be effective,

(a) if a copy of the document is left with a person,

(i) before 4 p.m., on the day it is left with the person, or

(ii) after 4 p.m., on the day following the day it is left with the person;

(b) if a copy of the document is mailed to a person, on the fifth day after mailing;

(c) if a copy of the document is sent by courier to a person, on the second day after the document was provided to the courier;

(d) if a copy of the document is faxed to a person,

(i) before 4 p.m., on the day it is faxed to the person, or

(ii) after 4 p.m., on the day following the day it is faxed to the person; or

(e) if a copy of the document is e-mailed to a person,

(i) where the e-mail acceptance of service is received before 4 p.m. on any day, on that day,

(ii) where the e-mail acceptance of service is received after 4 p.m. but before midnight on any day, on the following day.

Effective date of service: substituted service

(2) If an order is made permitting substituted service, the order shall specify when service in accordance with the order is effective.

Effective date of service: service dispensed with

(3) If an order is made dispensing with service, the document shall be deemed to have been served on the effective date of the order for the purposes of the computation of time under these Rules.

Proof of Service

10.03 (1) Service of a document may be proved by,

(a) an affidavit of the person who served it; or

(b) where the document is served on a representative or on a Discipline Counsel of the Society, the written admission or acceptance of service of the representative or Discipline Counsel.

(2) The affidavit or written admission or acceptance of service may be printed on the back sheet or on a stamp or sticker affixed to the back sheet of the document served.

RULE 11

SCHEDULING

Hearing on merits of proceeding

11.01 (1) A hearing may be scheduled by a panelist or by the Tribunal Office.

Endorsement

(2) An endorsement of every scheduled hearing on the merits of a proceeding shall be made on the originating process by the panelist, if the hearing is scheduled by a panelist, or by the Tribunal Office, if the hearing is scheduled by the Tribunal Office.

Notice of hearing on merits of proceeding

11.02 (1) The Tribunal shall send to all parties and all non-party participants who have been permitted to participate in the hearing on the merits of a proceeding a notice of the hearing on the merits of the proceeding.

Oral hearing

(2) A notice of an oral hearing shall include,

(a) a statement of the date, time, place and purpose of the hearing; and

(b) a statement that if a person notified does not attend at the hearing, the panel may proceed in the person's absence and the person will not be entitled to any further notice in the proceeding.

Electronic hearing

(3) A notice of an electronic hearing shall include,

(a) a statement of the date, time and purpose of the hearing and details about the manner in which the hearing will be held; and

(b) a statement that if a person notified does not participate in the hearing in accordance with the notice, the panel may proceed without the person's participation and the person will not be entitled to any further notice in the proceeding.

Effect of non-attendance at or non-participation in hearing after due notice

(4) Where notice of a hearing has been given to a person in accordance with subrule (2) or (3), and the person does not attend at or does not participate in the hearing, the panel may proceed in the absence of the person or without the person's participation and

the person is not entitled to any further notice in the proceeding.

Hearing of motion

11.03 A motion may be scheduled for hearing on,

(a) any day on which the merits of the proceeding to which the motion relates is scheduled to be heard; or

(b) a day obtained from the Tribunal Office.

RULE 12
PROCEEDINGS MANAGEMENT

Proceeding management conference

12.01 (1) A proceeding management conference shall be conducted by a panelist on the date specified in the originating process unless, by that date,

(a) a hearing on the merits of the proceeding has been scheduled; and

(b) if a pre-hearing conference is required under clause 22.02 (a), the pre-hearing conference has been scheduled.

Request for proceeding management conference

(2) A party to a proceeding may, at any time, request to attend before a panelist for a proceeding management conference.

Request to Tribunal Office

(3) A request to attend before a panelist for a proceeding management conference shall be made to the Tribunal Office.

Notice of proceeding management conference

(4) Where a request to attend before a panelist for a proceeding management conference has been made, the Tribunal shall send to all parties a notice of the date and time of the proceeding management conference.

Proceeding management conference: format

12.02 A proceeding management conference may be held in person, by telephone conference, by exchange of documents or by any combination of the aforementioned formats.

Attendance at proceeding management conference

12.03 (1) Unless otherwise directed by the panelist conducting the proceeding management conference, or the parties consent, all the parties to the proceeding, or their representatives, are required to attend at or participate in the proceeding management conference.

Failure to attend or participate

(2) Where a person who is required to attend at or participate in a proceeding

management conference does not attend at or participate in the conference, the panelist conducting the conference may proceed in the absence of the person or without the person's participation.

Matters to be dealt with

12.04 (1) At a proceeding management conference, a panelist may,

(a) schedule a further proceeding management conference;

(b) direct the parties to attend at a pre-hearing conference;

(c) schedule or reschedule a pre-hearing conference;

(d) schedule or adjourn a hearing; and

(e) give directions.

Results of proceeding management conference

(2) At the conclusion of a proceeding management conference, the panelist who conducted the conference shall endorse on the originating process the results of the conference, including any future scheduled proceeding management conference and any directions given by the panelist.

RULE 13

MOTIONS

Making the motion

13.01 (1) The following motions shall be made by notice of motion (Form 13A):

1. A motion relating to the jurisdiction of the Hearing Division.
2. A motion to stay or dismiss a proceeding.
3. A motion raising any constitutional issues, including issues raised under the *Canadian Charter of Rights and Freedoms*.
4. A motion relating to disclosure.
5. A motion that a hearing or a part of a hearing in a proceeding be held in the absence of the public.
6. A motion to prohibit a person from disclosing information disclosed in a hearing.

Same

(2) A motion not mentioned in subrule (1) shall be made by notice of motion (Form 13A) unless the nature of the motion or the circumstances make a notice of motion unnecessary.

Contents of notice of motion: motion for order for hearing in absence of public or for non-disclosure

(3) In a motion for an order that a hearing or a part of a hearing in a proceeding be held in the absence of the public or for an order prohibiting a person from disclosing information disclosed in a hearing, the moving party shall include in the notice of motion the grounds upon which the order is sought but shall not include in the notice of motion the specific matters, document or communication in respect of which the order is sought.

Moving party's obligations

Application of rule

13.02 (1) This rule applies where a motion is made by notice of motion.

Service of motion record

(2) The moving party shall serve on every responding party at least ten days before the hearing of the motion a motion record.

(3) The moving party's motion record shall have consecutively numbered pages and shall contain,

(a) a table of contents listing each document contained in the motion record, including each exhibit, and describing each document by its nature and date and, in the case of an exhibit, by its nature, date and exhibit number or letter;

(b) the notice of motion; and

(c) all affidavits and other material upon which the moving party intends to rely.

Service of factum and book of authorities

(4) The moving party shall serve on every responding party at least seven days before the hearing of the motion a factum, if any, and a book of authorities, if any.

Filing documents

(5) The moving party shall file with the Tribunal, with proof of service, at least seven days before the hearing of the motion any documents served on a responding party under this rule.

Same

(6) When filing a document with the Tribunal, the moving party shall file,

(a) two copies of the document where the motion is to be heard by a panel consisting of one panelist; and

(b) four copies of the document where the motion is to be heard by a panel consisting of three panelists.

Responding party's obligations

Application of rule

13.03 (1) This rule applies where a motion is made by notice of motion.

Service of motion record, factum and book of authorities

(2) A responding party shall serve on the moving party and every person served with the moving party's motion record, at least three days before the hearing of the motion, its motion record, if any, its factum, if any, and its book of authorities, if any.

Responding party's motion record

(3) The responding party's motion record shall have consecutively numbered

pages and shall contain,

(a) a table of contents listing each document contained in the motion record, including each exhibit, and describing each document by its nature and date and, in the case of an exhibit, by its nature, date and exhibit number or letter; and

(b) any materials upon which the responding party intends to rely that are not contained in the moving party's motion record.

Filing documents

(4) A responding party shall file with the Tribunal, with proof of service, at least three days before the hearing of the motion any document served on a person under this rule.

Same

(5) When filing a document with the Tribunal, a responding party shall file,

(a) two copies of the document where the motion is to be heard by a panel consisting of one panelist; and

(b) four copies of the document where the motion is to be heard by a panel consisting of three panelists.

Abandoning a motion

13.04 (1) Prior to the hearing of a motion, the moving party may abandon the motion by delivering a notice of abandonment (Form 13B).

(2) Where a moving party serves a motion record but does not file it or appear at the hearing of the motion, the motion is deemed to have been abandoned by the moving party.

(3) Where a motion is abandoned or is deemed to have been abandoned, every responding party on whom the motion record was served is entitled to the costs of the motion.

Motion on consent

13.05 Where a motion is on consent, when filing the motion record with the Tribunal, the moving party shall also file the consent of every person served with the motion record and a draft of the formal order.

Disposition of motion

13.06 After hearing a motion, the panel may,

(a) make the order sought;

(b) dismiss the motion, in whole or in part;

(c) adjourn the hearing of the motion, in whole or in part; or

(d) if the motion is heard prior to the hearing on the merits of the proceeding in which the motion is made or to which the motion relates, adjourn the hearing of the motion to the panel presiding at the hearing on the merits of the proceeding.

RULE 14
ADJOURNMENTS

How to obtain

Before date of hearing

14.01 (1) Where a hearing is scheduled and prior to the date of the hearing a party wishes to adjourn the hearing to another date, the party shall,

(a) request the adjournment from a panelist at a proceeding management conference that, unless it is not possible, is held at least ten days prior to the date of the hearing;

(b) if the Tribunal Office advises the party that a proceeding management conference cannot be scheduled prior to the date of the hearing, make a motion to the panel for an order adjourning the hearing; or

(c) in the case of a hearing of a motion, where all parties and all non-party participants who have been permitted to participate in the hearing consent to the adjournment, request the adjournment from the Tribunal Office.

On date of or during hearing

(2) Where a hearing is scheduled and on the date scheduled for the hearing or during the course of the hearing a party wishes to adjourn the hearing, or the remaining part of the hearing, to a future date, the party shall make a motion to the panel for an order adjourning the hearing, or the remaining part of the hearing, to a future date.

Adjournments by Tribunal Office

14.02 The Tribunal Office may grant a request for an adjournment of a hearing of a motion where,

(a) all parties and all non-party participants who have been permitted to participate in the hearing consent to the adjournment; and

(b) the parties and the non-party participants notify the Tribunal in writing of their consent.

Adjournments: Considerations

14.03 In considering whether to grant an adjournment, a panelist or a panel, as the case may be, may consider,

(a) prejudice to a person;

(b) the timing of the request or motion for the adjournment;

(c) the number of prior requests and motions for an adjournment;

(d) the number of adjournments already granted;

(e) prior directions or orders with respect to the scheduling of future hearings;

(f) the public interest;

(g) the costs of an adjournment;

(h) the availability of witnesses;

(i) the efforts made to avoid the adjournment;

(j) the requirement for a fair hearing; and

(k) any other relevant factor.

RULE 15
LANGUAGE OF HEARING

Hearing in English or French

15.01 (1) A hearing in a proceeding shall be conducted in the English or French language.

Hearing in English

(2) A hearing in a proceeding shall be conducted in the English language unless a party to the proceeding requires that the hearing be conducted in the French language.

Requiring hearing in French: Society

(3) Where the subject of the proceeding speaks French, the Society may require that every hearing in the following proceedings be conducted in the French language by filing with the Tribunal the originating process in the French language:

1. A licensing proceeding.
2. A restoration proceeding.
3. A conduct proceeding.
4. A capacity proceeding.
5. A competence proceeding.
6. A non-compliance proceeding.

Requiring hearing in French: subject of the proceeding

(4) The subject of the proceeding who speaks French may require that every hearing in the following proceedings be conducted in the French language by notifying the Tribunal of the requirement within thirty days after he or she is deemed to have been served with the originating process:

1. A licensing proceeding.
2. A restoration proceeding.
3. A conduct proceeding.
4. A capacity proceeding.
5. A competence proceeding.
6. A non-compliance proceeding.

Requiring hearing in French: subject of the proceeding

(5) The subject of the proceeding who speaks French may require that every hearing in the following proceedings be conducted in the French language by filing with the Tribunal the originating process in the French language:

1. A reinstatement proceeding.
2. A terms dispute proceeding.

Compliance with subrule (4) not required

(6) The subject of the proceeding is not required to comply with subrule (4) if he or she was served with the originating process in the French language.

Hearing in English

15.02 Where a hearing in a proceeding is conducted in the English language,

(a) evidence given at the hearing in a language other than the English language shall be interpreted into the English language; and

(b) a document with respect to the hearing filed with the Tribunal, or received by the panel presiding at the hearing, under these Rules shall be in the English language or shall be accompanied by a translation of the document into the English language certified by an affidavit of the translator.

Hearing in French

15.03 Where a hearing in a proceeding is conducted in the French language,

(a) evidence given and submissions made in the hearing in the English or French language shall be received, recorded and transcribed in the language in which they are given or made;

(b) a document with respect to the hearing filed with the Tribunal, or received by the panel presiding at the hearing, under these Rules may be in the French language and need not be accompanied by a translation of the document into the English language;

(c) on the request of the subject of the proceeding who speaks French but not French and English, the panel presiding at the hearing shall cause anything given orally at the hearing in a language other than the French language to be interpreted into the French language;

(d) on the request of the subject of the proceeding who speaks French but not French and English, the Tribunal may cause any document with respect to the hearing filed with the Tribunal, or received by the panel, in the English language to be translated into the French language; and

(e) the Tribunal shall cause an endorsement, a decision, an order or reasons for a decision or an order with respect to the hearing written in the English language to be translated into the French language, unless the parties to the proceeding agree otherwise.

RULE 16
FORM OF HEARING

Oral hearing

16.01 Subject to rules 16.02 and 16.03, a hearing shall be held as an oral hearing with the parties, non-party participants, if any, and their representatives, if any, appearing in person.

Electronic hearing

Motions

16.02 (1) The following motions may, without a motion or an order being made, be heard as an electronic hearing:

1. A motion on consent.
2. A motion for an adjournment.

Order for electronic hearing

(2) On the motion of a party, or on a panel's own motion, an order may be made that a hearing or a part of a hearing be held as an electronic hearing.

Matters to consider in making order

(3) In deciding whether to order that a hearing be held as an electronic hearing, a panel may consider,

(a) the suitability of an electronic hearing to the subject matter of the hearing;

(b) the nature of the evidence to be called at the hearing and whether credibility is in issue;

(c) whether the matters in dispute in the hearing are questions of law;

(d) the convenience of the parties;

(e) the cost, efficiency and timeliness of the proceeding in which the hearing is being held;

(f) the avoidance of delay or unnecessary length;

(g) the fairness of the process;

(h) public accessibility to the hearing;

(i) the fulfilment of the Society's statutory mandate; and

(j) any other matter relevant in order to secure the just and expeditious determination of the subject matter of the hearing or of the proceeding in which the hearing is being held.

Conduct of electronic hearing

(4) An electronic hearing shall be conducted by telephone or other electronic means and all the parties and all the non-party participants who have been permitted to participate in the hearing and the panel must be able to hear one another and any witnesses throughout the hearing.

Arrangements for electronic hearing

(5) Where a hearing is to be held as an electronic hearing, the Tribunal shall make all the necessary arrangements for the hearing and shall give notice of those arrangements to all the persons participating in the hearing and their representatives, if any.

Written hearing

16.03 (1) Subject to subrule (3) and subrules 16.02 (1) and (2), the following hearings shall be held as a written hearing:

1. The hearing of a motion for an order that a hearing be held as an electronic hearing.

Written hearing of motions

(2) The following motions may be heard as a written hearing:

1. A motion on consent.
2. A motion for an adjournment.

Order for oral hearing

(3) On the motion of a party, or on a panel's own motion, an order may be made that a hearing mentioned in subrule (1) be held as an oral hearing.

Conduct of written hearing

(4) A written hearing shall be conducted by the exchange of documents and all the parties and all the non-party participants who have been permitted to participate in the hearing are entitled to receive every document that the panel receives in the hearing.

Arrangements for written hearing

(5) Where a hearing is to be held as a written hearing, the Tribunal shall make all the necessary arrangements for the hearing and shall give notice of those arrangements to

all the persons participating in the hearing and their representatives, if any.

Motion under Rule 21

No notice required

16.04 The notice requirement in subrule 16.02 (5) and in subrule 16.03 (5) does not apply in the case of a hearing of a motion for an order mentioned in rule 21.01 where an order was made dispensing with service of the motion record.

RULE 17
LOCATION OF HEARING

Location of Hearings

17.01 (1) Subject to subrules (2) and (3), every hearing shall be held at the offices of the Society in Toronto.

(2) Where all parties consent to a hearing being held at a place other than the offices of the Society in Toronto, the hearing shall be held at that place.

(3) On the motion of a party, an order may be made that a hearing be held at a place other than the offices of the Society in Toronto.

(4) In deciding whether to order that a hearing be held at a place other than the offices of the Society in Toronto, a panel may consider,

(a) the convenience of the parties;

(b) the cost, efficiency and timeliness of the proceeding in which the hearing is being held;

(c) the avoidance of delay or unnecessary length;

(d) the fairness of the process;

(e) public accessibility to the hearing;

(f) the fulfilment of the Society's statutory mandate; and

(g) any other matter relevant in order to secure the just and expeditious determination of the subject matter of the hearing or of the proceeding in which the hearing is being held.

(5) An order that a hearing be held at a place other than the offices of the Society in Toronto shall be made only after consultation with the Tribunal Office.

RULE 18

ACCESS TO HEARING

Hearing to be public

18.01 Subject to rule 18.02, every hearing in a proceeding shall be open to the public.

Hearing in the absence of the public

18.02 On the motion of a party, an order may be made that a hearing or a part of a hearing in a proceeding shall be held in the absence of the public where,

(a) matters involving public security may be disclosed;

(b) it is necessary to maintain the confidentiality of a privileged document or communication;

(c) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public; or

(d) in the case of a hearing or a part of a hearing that is to be held as an electronic hearing, it is not practical to hold the hearing or the part of the hearing in a manner that is open to the public.

Attendance at hearing held in the absence of the public

18.03 Where a hearing or a part of a hearing is held in the absence of the public, unless otherwise ordered by the panel, the hearing may be attended by,

(a) subject to rule 24.01, any witness the nature of whose testimony gave rise to the order that the hearing or the part of the hearing be held in the absence of the public;

(b) the parties and their representatives;

(c) the non-party participants who have been permitted to participate in the hearing or the part of the hearing and their representatives; and

(d) such other persons as the panel considers appropriate.

Non-disclosure of information: hearing held in the absence of the public

18.04 (1) Subject to subrule (2), where a hearing or a part of a hearing is held in the absence of the public, no person shall disclose, except to his, her or its representative or to

another person who attends at or participates in the hearing or the part of the hearing that is held in the absence of the public,

(a) any information disclosed in the hearing or the part of the hearing that is held in the absence of the public; and

(b) if and as specified by the panel, the panel's reasons for a decision or an order arising from the hearing or the part of the hearing that is held in the absence of the public, other than the panel's reasons for an order that a subsequent hearing or a part of the subsequent hearing be held in the absence of the public.

Order for disclosure: hearing held in the absence of the public

(2) On the motion of a person, an order may be made permitting a person to disclose any information mentioned in subrule (1).

Order for non-disclosure: hearing open to the public

18.05 On the motion of a party, or on a panel's own motion, if any of clauses 18.02 (a), (b) and (c) apply, an order may be made prohibiting a person who attends at or participates in a hearing or a part of a hearing that is open to the public from disclosing, except to his, her or its representative or to another person who attends at or participates in the hearing or the part of the hearing, any information disclosed in the hearing or the part of the hearing.

Review of order

18.06 If an order is made in respect of any matter dealt with in this Rule, on the motion of a person, the panel may at any time review all or a part of the order and may confirm, vary, suspend or cancel the order.

Prohibition against photography, *etc.* at hearing

18.07 (1) Subject to subrules (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a hearing,

(ii) of any person entering or leaving the room in which a hearing is to be or has been convened, or

(iii) of any person in the building in which a hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2) (b).

Exceptions

(2) Nothing in subrule (1),

(a) prohibits a person from unobtrusively making written notes or sketches at a hearing; or

(b) prohibits a party, a party's representative or a journalist from unobtrusively making an audio recording at a hearing, in the manner that has been approved by the panel presiding at the hearing, for the sole purpose of supplementing or replacing written notes.

Exceptions

(3) Subrule (1) does not apply to a photograph, motion picture, audio recording or record made with the authorization of the panel presiding at a hearing,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the hearing; or

(b) with the consent of the parties and witnesses, for such educational, instructional or other purposes as the panel approves.

RULE 19
DISCLOSURE

Obligations of the Society

19.01 (1) In a proceeding, the Society, as a party, shall make such disclosure to the subject of the proceeding as is required by law and, without limiting the generality of the foregoing, the Society shall provide to the subject of the proceeding, not later than ten days before the hearing on the merits of the proceeding,

(a) a copy of every document upon which the Society intends to rely as evidence and the opportunity to examine any other relevant document;

(b) a signed witness statement for every witness or, where there is no signed witness statement for a witness, a summary of the anticipated oral evidence of the witness; and

(c) a list of witnesses that the Society intends to call.

Obligations of subject of the proceeding

(2) In a licensing proceeding, a restoration proceeding, a reinstatement proceeding or a terms dispute proceeding, the subject of the proceeding shall provide to the Society, not later than ten days before the hearing on the merits of the proceeding,

(a) a copy of every document upon which the subject of the proceeding intends to rely as evidence;

(b) for every witness upon whose oral evidence the subject of the proceeding intends to rely, a signed witness statement or, where there is no signed witness statement for a witness, a summary of the anticipated oral evidence of the witness; and

(c) a list of witnesses that the subject of the proceeding intends to call.

Summary of evidence

(3) A summary of the oral evidence of a witness shall be in writing and shall contain,

(a) the substance of the evidence of the witness;

(b) a list of documents or things, if any, to which the witness will refer; and

(c) the witness's name and address or, if the witness's address is not provided, the name and address of a person through whom the witness may be contacted.

Expert Reports

19.02 (1) Every party and non-party participant shall provide to every other party and non-party participant,

(a) not later than ninety days before the hearing on the merits of a proceeding,

(i) a list of the expert witnesses that the person intends to call,

(ii) a copy of the curriculum vitae of every expert witness included in the list mentioned in subclause (i), and

(iii) a summary of the anticipated oral evidence of every expert witness included in the list mentioned in subclause (i); and

(b) not later than thirty days before the hearing on the merits of a proceeding, a copy of the written report of every expert witness included in the list mentioned in subclause (a) (i), if the person intends to rely on the written report in the hearing.

Summary of evidence

(2) A summary of the oral evidence of an expert witness shall be in writing and shall contain,

(a) the substance of the evidence of the expert witness;

(b) a list of documents or things, if any, to which the expert witness will refer; and

(c) the expert witness's name and address.

Failure to disclose: consequences

Evidence may not be introduced

19.03 Evidence that is not disclosed as required under rule 19.01 or 19.02 may not be introduced as evidence in a proceeding, except with leave of the panel.

RULE 20
ADMISSIONS

Interpretation

20.01 In this Rule, “authenticity” includes the fact that,

(a) a document that is said to be an original was printed, written or otherwise produced and signed or executed as it purports to have been;

(b) a document that is said to be a copy is a true copy of the original; and

(c) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

Request to admit fact or document

20.02 (1) In a proceeding, a party may, at any time but not later than thirty days before the hearing on the merits of the proceeding, request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.

Form of request to admit

(2) A request to admit shall be in Form 20A.

Service of request to admit

(3) A party making a request to admit to another party shall serve on that other party,

(a) the request to admit; and

(b) a copy of any document mentioned in the request to admit, unless a copy is already in the possession of that other party.

Response to request to admit

20.03 (1) A party on whom a request to admit is served shall respond to it within twenty days after it is served by serving on the requesting party a response to the request to admit.

Form and content of response

(2) A response to a request to admit shall be in Form 20B and shall,

(a) admit the truth of a fact or the authenticity of a document mentioned in

the request to admit;

(b) specifically deny the truth of a fact or the authenticity of a document mentioned in the request to admit; or

(c) refuse to admit the truth of a fact or the authenticity of a document mentioned in the request to admit and set out the reason for the refusal.

Effect of request to admit

Deemed admission where no response

20.04 (1) Where a party on whom a request to admit is served fails to serve a response as required by subrule 20.03 (1), the party shall be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

Deemed admission where insufficient response

(2) Subject to subrule (3), where a party on whom a request to admit is served serves a response as required by subrule 20.03 (1) but does not comply with subrule 20.03 (2) in respect of a fact or a document mentioned in the request to admit, the party shall be deemed, for the purposes of the proceeding only, to admit the truth of that fact or the authenticity of that document.

Deemed admission where non-attendance at or non-participation in hearing

(3) Where a party on whom a request to admit is served does not attend at or does not participate in the hearing on the merits of the proceeding, whether or not the party served a response, the party shall be deemed, for the purposes of the hearing only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

Costs on denial or refusal to admit

20.05 Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at a hearing in the proceeding, the panel may take the denial or refusal into account in exercising its discretion respecting costs under section 49.28 of the *Law Society Act* and rule 25.01.

Withdrawal of admission

20.06 (1) On the motion of a party who admits or is deemed to admit the truth of a fact or the authenticity of a document, an order may be made withdrawing the admission.

Time for bringing motion

(2) A motion under this rule shall be made,

(a) prior to the hearing on the merits of the proceeding; or

(b) at any time, with leave.

RULE 21
SUSPENSION OR RESTRICTION ORDER

Authority to make

21.01 On the motion of the Society, the Hearing Division may make an interlocutory order suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services.

General

21.02 (1) Subject to this Rule, Rule 13 applies with necessary modifications to a motion for an order mentioned in rule 21.01.

Authorization required in certain circumstances

(2) The Society shall obtain the authorization of the Proceedings Authorization Committee to make a motion for an order mentioned in rule 21.01 if the motion relates to a proceeding that has not been commenced or if the motion is being made in a proceeding where the Hearing Division has not commenced a hearing on the merits of the proceeding.

Making the motion

21.03 A motion for an order mentioned in rule 21.01 shall be made by notice of motion (Form 13A).

Society's obligations

Service of motion record

21.04 (1) The Society shall serve a motion record on the licensee at least three days before the hearing of the motion.

Method of service

(2) The motion record shall be served in accordance with subrule 10.01 (1) as if it were an originating process.

Dispensing with service

(3) On the motion of the Society, an order may be made dispensing with service of the motion record where,

(a) the circumstances render the service of the motion record impracticable or unnecessary; or

(b) the delay necessary to effect service might entail serious consequences.

Service of factum and book of authorities

(4) Where the motion record has been served, the Society shall serve its factum and book of authorities, if any, on the licensee at least three days before the hearing of the motion.

Filing documents

(5) Where the motion record has been served, the Society shall file with the Tribunal, with proof of service, not later than 4 p.m. on the day before the hearing of the motion, any documents served on the licensee under this rule.

Filing documents with panel

(6) Where an order has been made dispensing with service of the motion record, the Society shall file a motion record, a factum and a book of authorities, if any, with the panel in the hearing of the motion.

Licensee's obligations

Service of motion record, factum and book of authorities

21.05 (1) Where a motion record has been served under rule 21.04, the licensee shall serve on the Society, not later than 2 p.m. on the day before the hearing of the motion, his or her motion record, if any, his or her factum, if any, and his or her book of authorities, if any.

Filing documents

(2) The licensee shall file with the Tribunal, with proof of service, not later than 4 p.m. on the day before the hearing of the motion, any document served on the Society under this rule.

What is admissible in evidence

21.06 (1) Despite rules 24.02, 24.06 and 24.07, and subject to subrule (2), the following may be admitted as evidence and may be acted on at the hearing of a motion for an order mentioned in rule 21.01, whether or not given or proven under oath or affirmation or admissible as evidence in a court:

1. Any oral testimony that is relevant to the subject-matter of the hearing.
2. Any document or other thing that is relevant to the subject-matter of the hearing.

What is inadmissible in evidence

(2) Unless permitted by the Act, nothing shall be admitted in evidence at the hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible under any statute.

Order

21.07 (1) A panel making an order mentioned in rule 21.01 shall specify in the order that the order shall be in effect until the earliest of the following:

1. Where an order was made dispensing with service of the motion record, a panel varies or cancels the order on the basis of evidence that is brought by the licensee to the panel within thirty days of service of the order on the licensee.

2. A panel varies or cancels the order on the consent of the Society and the licensee prior to the hearing on the merits of the proceeding to which the motion relates.

3. A panel varies or cancels the order on the basis of fresh evidence or a material change in circumstances that is brought by the Society or the licensee to the panel prior to the hearing on the merits of the proceeding to which the motion relates.

4. The panel presiding at the hearing on the merits of the proceeding to which the motion relates, prior to disposing of the proceeding, varies or cancels the order.

5. The panel presiding at the hearing on the merits of the proceeding to which the motion relates disposes of the proceeding.

(2) Where an order was made dispensing with service of the motion record, the Society shall serve on the licensee any order made by the panel and a copy of the motion record and all other documents used in the hearing of the motion.

(3) On the motion of the Society, an order may be made dispensing with compliance with a requirement mentioned in subrule (2).

RULE 22

PRE-HEARING CONFERENCES

Purpose of pre-hearing conference

22.01 (1) The purpose of a pre-hearing conference is to facilitate the just and most expeditious disposition of a proceeding.

(2) Without limiting the generality of subrule (1), in a pre-hearing conference, the panelist or other person conducting the pre-hearing conference may discuss with the parties,

(a) the identification, limitation or simplification of the issues in the proceeding;

(b) the identification and limitation of evidence and witnesses;

(c) the possibility of settlement of any or all of the issues in the proceeding;

(d) the possibility of the parties entering into an agreed statement of facts with respect to all or part of the facts in issue in the proceeding; and

(e) directions to be given to the parties with respect to the conduct of the proceeding or a motion in the proceeding.

Pre-hearing conference to be conducted

22.02 A pre-hearing conference shall be conducted in a proceeding where,

(a) one party to the proceeding estimates that the hearing on the merits of the proceeding will be longer than two days;

(b) a panelist or panel directs the parties to a proceeding to attend at a pre-hearing conference; or

(c) the parties agree to attend at a pre-hearing conference.

Who presides at pre-hearing conference

22.03 A pre-hearing conference shall be conducted by a panelist or another person assigned by the Chair or Vice-Chair.

Timing of pre-hearing conferences

22.04 All pre-hearing conferences in a proceeding shall be conducted prior to the completion of the hearing on the merits of the proceeding and, unless otherwise directed , shall be conducted prior to the commencement of the hearing on the merits of the proceeding.

Method of conducting pre-hearing conference

22.05 (1) Subject to subrule (2), a pre-hearing conference shall be conducted in person.

Pre-hearing conference by telephone conference

(2) A pre-hearing conference may be conducted by telephone conference,

(a) if the parties consent; or

(b) the panelist or other person conducting the pre-hearing conference permits it.

Scheduling of pre-hearing conference: by panelist

22.06 (1) A pre-hearing conference may be scheduled by a panelist or by the Tribunal Office.

Endorsement

(2 An endorsement of every scheduled pre-hearing conference shall be made on the originating process by the panelist, if the pre-hearing conference is scheduled by a panelist, or by the Tribunal Office, if the pre-hearing is scheduled by the Tribunal Office.

Notice of pre-hearing conference

(3) The Tribunal shall send to all parties a notice of the date and time of every pre-hearing conference in the proceeding, including the name of the panelist or other person conducting the pre-hearing conference.

Notice not required

(5) Subrule (4) does not apply if,

(a) a panel directs the parties to a proceeding to attend at a pre-hearing conference,

(b) a member of the panel that gave the direction will conduct the pre-hearing conference, and

(c) the pre-hearing conference will be conducted immediately after the direction has been given.

Preparation for pre-hearing conference

22.07 (1) The Law Society shall prepare a pre-hearing conference memorandum and provide a copy of the memorandum to the other parties and to the panelist or other person conducting the pre-hearing conference at least seven days before the pre-hearing

conference.

Non-application of subrule (1)

(2) Subrule (1) does not apply if,

(a) a panel directs the parties to a proceeding to attend at a pre-hearing conference,

(b) a member of the panel that gave the direction will conduct the pre-hearing conference, and

(c) the pre-hearing conference will be conducted immediately after the direction has been given.

Attendance at pre-hearing conference

22.08 Unless otherwise directed by the panelist or other person conducting the pre-hearing conference, all parties to the proceeding, or their representatives, are required to attend at or participate in the pre-hearing conference.

Results of pre-hearing conference

22.09 (1) At the conclusion of the pre-hearing conference, the panelist or other person conducting the pre-hearing conference shall endorse on the originating process,

(a) who attended at or participated in, and who did not attend at or participate in, the pre-hearing conference;

(b) any agreement reached; and

(c) any directions given to the parties with respect to the conduct of the proceeding or a motion in the proceeding.

(2) Any agreement reached at the pre-hearing conference, as endorsed on the originating process, is binding on the parties.

No disclosure to panel

22.10 (1) No communication shall be made to the panel presiding at the hearing on the merits of the proceeding or at the hearing of a motion in the proceeding with respect to any statement made at the pre-hearing conference, except as disclosed in the endorsement made under rule 22.09.

Pre-hearing conference panelist cannot preside at hearing

(2) A panelist conducting a pre-hearing conference in a proceeding shall not preside at the hearing on the merits of the proceeding, except with the consent of the parties to the proceeding.

RULE 22.1

FILING OF CONSENT DOCUMENTS BEFORE HEARING

Documents to be filed

22.1.01 (1) The parties shall file with the Tribunal, prior to the date of a hearing, all documents, including any agreed statements of fact that the parties have agreed may be used or referred to at the hearing.

Timing of filing

(2) Except in exceptional circumstances, the parties shall file documents with the Tribunal under this rule at least two days prior to the date of the hearing.

Confirmation of agreement to be filed

(3) When filing a document with the Tribunal under this rule, the parties shall file, together with the document, written confirmation of their agreement that the document may be used or referred to at the hearing.

Number of copies to be filed

(4) When filing a document with the Tribunal under this rule, the parties shall file,

(a) two copies of the document where the hearing is before a panel consisting of one panelist; and

(b) four copies of the document where the hearing is before a panel consisting of three panelists.

Documents to be made available to panel

(5) Whenever possible, all documents filed with the Tribunal under this rule shall be made available to the panel presiding at the hearing prior to the hearing.

No relief from other requirements

(6) Nothing in this rule relieves a party from any other requirements under these Rules or from the consequences of failing to comply with those other requirements.

Filing document with panel at hearing not prevented

(7) Nothing in this rule prevents a party from filing a document with the panel presiding at the hearing in accordance with these Rules.

RULE 23

CONDUCT OF HEARING

Consent to hearing by one panelist

23.01 For the purposes of paragraph 2 of subsection 2 (1) of Ontario Regulation 167/07, the parties to a conduct proceeding may consent to having one panelist preside at the hearing on the merits of the proceeding by filing a consent (Form 23A),

(a) sent to the Tribunal, as early as possible but not later than three days before the hearing on the merits of the proceeding; or

(b) with the panelist, immediately prior to the commencement of the hearing on the merits of the proceeding.

Transcripts

Production of transcript

23.02 (1) The Tribunal shall cause every oral and electronic hearing to be recorded by a reporting service to permit the production of a transcript of the hearing.

Ordering transcript

(2) A person wishing to have a copy of the transcript of a hearing shall order it from the reporting service that recorded the hearing.

Costs of transcript

(3) The costs of acquiring a transcript of a hearing shall be borne solely by the person wishing to have a copy of the transcript of the hearing.

Requirement to file transcript

(4) The first party to obtain a transcript of a hearing shall file a copy of the transcript with the Tribunal.

Interpreter

23.03 (1) Where a witness does not understand the language or languages in which an examination at a hearing is to be conducted, the Tribunal shall provide an interpreter.

Notice to Tribunal

(2) A person intending to call a witness who will require interpretation shall notify

the Tribunal of the witness' requirement for an interpreter as early as possible and, in any event, not later than five days before the hearing at which the witness will be examined.

Interpreter to be competent

(3) An interpreter shall be competent and independent.

Interpreter to take oath or affirmation

(4) Where an interpreter is required under subrule (1), before the witness is called, the interpreter shall take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation to the witness, the questions put to the witness and the witness' answers.

Accommodation required

23.05 A party or a non-party participant shall notify the Tribunal as early as possible of any needs of the party or the non-party participant or his, her or its witnesses that may require accommodation.

Limitation on examination of witness

23.06 A panel may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

RULE 24
EVIDENCE

Exclusion of witness

24.01 (1) Subject to subrule (2), on the motion of a party, an order may be made excluding a witness from a hearing until the witness is called to give evidence.

Order not to apply to party or witness instructing representative of party

(2) An order under subrule (1) may not be made in respect of a party or a witness whose presence is essential to instruct the representative of the person calling the witness, but an order may be made requiring any such party or witness to give evidence before other witnesses are called to give evidence on behalf of the party or the person calling the witness.

No communication with excluded witness

(3) Subject to subrule (4), where an order is made excluding a witness from a hearing, there shall be no communication to the witness of any evidence given during the witness' absence from the hearing until after the witness has been called to give evidence and has given evidence.

Order permitting communication with excluded witness

(4) On the motion of the person calling a witness who has been excluded from a hearing, an order may be made permitting communication to the witness of any evidence given during the witness' absence from the hearing.

Rules of evidence

24.02 Subject to this Rule, at a hearing, the rules of evidence applicable in civil proceedings apply.

Evidence by affidavit: hearing on the merits of a proceeding

24.03 (1) At the hearing on the merits of a proceeding, the evidence of a witness or proof of a particular fact or document may be given by affidavit, subject to the panel ordering otherwise.

Cross-Examination

(2) Where the evidence of a witness or proof of a particular fact or document is given by affidavit, if a party adverse to the party tendering the affidavit evidence wishes to

cross-examine the deponent,

(a) the deponent shall attend at the hearing on the merits of the proceeding for the purposes of cross-examination; or

(b) the deponent shall attend before an official examiner for the purposes of cross-examination and the transcript of the cross-examination may be admitted in evidence at the hearing on the merits of the proceeding.

(3) A cross-examination conducted under clause (2) (b) shall be conducted in accordance with the Rules of Civil Procedure applicable to oral examinations and, where necessary, the parties may seek direction from the panel.

Agreed facts

24.04 At a hearing on the merits of a proceeding, the panel may receive and act on any facts agreed to by the parties without further proof or evidence.

Admissibility of evidence from former proceeding

Interpretation

24.05 (1) In this rule, “previously admitted evidence” means evidence that was admitted in a proceeding before a court or tribunal, whether in or outside Ontario, at a hearing that occurred before the hearing in which the evidence is now sought to be admitted.

When may be admitted

(2) At a hearing on the merits of a proceeding, previously admitted evidence may be admitted if,

(a) the parties to the proceeding consent to its admission; or

(b)

(i) the panel is satisfied that there is a reasonably accurate transcript of the previous hearing,

(ii) the previously admitted evidence is relevant to the current proceeding,

(iii) the party against whose interest the evidence is sought to be admitted was or is a party to the other proceeding,

(iv) if the party against whose interest the evidence is sought to be admitted was not a witness at the previous hearing, the party had the opportunity to cross-examine the witness at the previous hearing, and

(v) a material issue in the other proceeding is substantially similar to a material issue in the current proceeding.

Proof of prior commission of offence

24.06 (1) Proof that a person has been found by an adjudicative body in Canada to have committed an offence is proof, in the absence of evidence to the contrary, that the offence was committed by the person if,

(a) no appeal of the finding was taken and the time for an appeal has expired; or

(b) an appeal of the finding was taken but was dismissed or abandoned and no further appeal is available.

(2) Subrule (1) applies whether or not the person is a party to the proceeding.

(3) For the purposes of subrule (1), a document certifying the finding, purporting to be signed by the official having custody of the records of the adjudicative body, is sufficient evidence of the finding.

Proof of prior facts

24.07 (1) Specific findings of fact contained in the reasons for decision of an adjudicative body in Canada are proof, in the absence of evidence to the contrary, of the facts so found if,

(a) no appeal of the decision was taken and the time for an appeal has expired; or

(b) an appeal of the decision was taken but was dismissed or abandoned and no further appeal was taken.

(2) If the findings of fact mentioned in subrule (1) are with respect to an individual, subrule (1) only applies if the individual is or was a party to the proceeding giving rise to the decision.

Transcript of proceeding

24.08 (1) At a hearing, a transcript of a hearing before an adjudicative body may be admitted as evidence.

Reasons

(2) At a hearing, the reasons for decision of an adjudicative body may be admitted as evidence

Taking official notice of facts

24.09 The panel may,

(a) take notice of facts that may be judicially noticed; and

(b) take notice of any generally accepted technical facts, information or opinions within its specialized knowledge.

Bank and business records

24.10 Any proof that must be given or any requirement that must be met prior to a bank record or a business record being received or admitted in evidence under any common law or statutory rule may be given or met by the oral testimony or affidavit of an individual given to the best of the individual's knowledge and belief.

Documentary evidence

24.11 At a hearing, a party or a non-party participant tendering a document as evidence shall provide,

(a) a copy of the document to every other party and non-party participant; and

(b) four copies of the document to the panel, where the panel consists of three panelists, or two copies of the document to the panel, where the panel consists of one panelist.

Copies

24.12 Where the panel is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Summonses

24.13 (1) The Tribunal may, by summons, require any person,

(a) to give evidence on oath or affirmation at a hearing; and

(b) to produce in evidence at a hearing specified documents and things.

Form of summons

(2) A summons shall be in Form 24A.

Signing of summons

(3) A summons may be signed by the Registrar.

Summons may be issued in blank

(4) On the request of a person, the Tribunal shall issue to the person a blank summons and the person may complete the summons and insert the name of the witness to be summoned.

Service of summons

(5) Subject to subrule (7), the person who obtains a summons shall serve the summons on the witness to be summoned.

Attendance money

(6) Subject to subrule (7), the person who obtains a summons shall pay or tender to the witness to be summoned, at the same time that the person serves the summons on the witness, attendance money calculated in accordance with Tariff A under the Rules of Civil Procedure.

Service and attendance money not required

(7) If a witness is in attendance at a hearing, a person who obtains a summons is not required to serve the summons on the witness or to pay or tender to the witness attendance money in order to call the witness at the hearing.

Certain information not admissible

24.14 Despite any rule, information obtained by the Discrimination and Harassment Counsel as a result of the performance of his or her duties under clause 19 (1) (a) of By-Law 11 shall not be used and is inadmissible in a hearing.

RULE 25
COSTS

Costs

Costs against the Society

25.01 (1) Costs may only be awarded against the Society,

(a) in a licensing, conduct, capacity, competence or non-compliance proceeding,

(i) where the proceeding was unwarranted; or

(ii) where the Society caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default; and

(b) in a proceeding not mentioned in clause (a), where the Society caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

Costs against the subject of a proceeding

(2) Costs may be awarded against the subject of a proceeding,

(a) where a determination adverse to the subject of the proceeding was made; or

(b) where the subject of the proceeding caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

Costs against a non-party participant

(3) Costs may be awarded against a non-party participant where the non-party participant caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

Consent resolution conference: no costs

(4) Despite subrules (1) and (2), no costs shall be awarded against the Society or the subject of the proceeding based on,

(a) either party's refusal to participate or either party's withdrawal from participation in a consent resolution conference; or

(b) the fact that a consent resolution conference did not result in the

settlement of the decision and order in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made in the conduct proceeding.

Amount of costs: tariff of fees for services

(5) When a panel awards costs, it shall consider, but is not bound by, the tariff of fees for services.

Security for costs

Application

25.02 (1) This rule applies to the following proceedings:

1. A licensing proceeding, if the subject of the proceeding was previously licensed to practise law in Ontario as a barrister and solicitor or to provide legal services in Ontario.
2. A restoration proceeding.
3. A reinstatement proceeding.
4. A terms dispute proceeding.

Where available

(2) On the motion of the Society, an order may be made for security for costs as is just where it appears that,

(a) the subject of the proceeding has an order against him or her for costs in the same or another proceeding under the Act that remain unpaid in whole or in part; or

(b) in the case of a reinstatement or terms dispute proceeding, there is good reason to believe that the proceeding is without merit and the subject of the proceeding has insufficient assets in Ontario to pay an order for costs against him or her if an order were to be made; or

(c) in the case of a licensing or restoration proceeding, there is good reason to believe that the subject of the proceeding has insufficient assets in Ontario to pay an order for costs against him or her if an order were to be made.

Effect of order

(3) Subject to subrule (4), the subject of the proceeding against whom an order for security for costs has been made may not, until the security has been given, take any step in the proceeding.

Order permitting taking of step

(4) On the motion of a party, or on a panel's own motion, an order may be made permitting the subject of the proceeding to take a step in the proceeding.

Default of subject of the proceeding

(5) Where the subject of the proceeding defaults in giving the security required by an order for security for costs, on the motion of the Society, an order may be made dismissing the proceeding.

RULE 26
DECISIONS, ORDERS AND REASONS

Decisions

Effective date

26.01 (1) A decision is effective from the date on which it is made.

Endorsement

(2) An endorsement of every decision shall be made by the chair of the panel,

(a) on the originating process; or

(b) on a separate sheet of paper that is attached to the originating process.

Where written reasons delivered

(3) Where written reasons are delivered, the endorsement may consist of a reference to the reasons.

Orders

Orders issued by panel of one panelist

26.02 (1) A panel consisting of one panelist shall not make an order revoking a licensee's licence or permitting a licensee to surrender his or her licence.

Order for fine

(2) If a panel makes an order imposing a fine on the subject of the proceeding, the panel shall specify in the order,

(a) the principal sum; and

(b) if interest is payable, the rate of interest, which shall be the postjudgment interest rate within the meaning of the *Courts of Justice Act* in effect on the effective date of the order, and the date from which it is to be calculated.

Order for costs

(3) If a panel makes an order for costs, the panel shall specify in the order,

(a) the principal sum; and

(b) the rate of interest, which shall be the postjudgment interest rate within

the meaning of the *Courts of Justice Act* in effect on the effective date of the order, and the date from which it is to be calculated.

Effective date

(4) An order is effective from the date on which it is made, unless it provides otherwise.

Endorsement

(5) An endorsement of every order shall be made by the chair of the panel making it,

(a) on the originating process or a separate sheet of paper that is attached to the originating process; or

(b) if the order relates to a motion, on the motion record or a separate sheet of paper that is attached to the motion record.

Where written reasons delivered

(6) Where written reasons are delivered, the endorsement may consist of a reference to the reasons.

Formal order or decision and order

Preparation of draft formal order or decision and order

26.03 (1) Any party affected by an order or decision and order may prepare a draft of the formal order or formal decision and order.

Form of formal order and decision and order

(2) A formal order shall be in Form 26A and a formal decision and order shall be in Form 26B.

Signing of formal order and decision and order

(3) A party that has prepared a draft of a formal order or decision and order may submit it to the panel that made the order or decision and order at the end of the hearing.

(4) The panel shall review all drafts submitted under subrule (3) and the chair of the panel shall, with or without amending it, sign one of the drafts.

(5) Where a formal order or decision and order is not prepared by any party, it shall be prepared by the Tribunal Office and a panelist on the panel that made the order or decision and order shall sign it.

Written reasons

Where required

26.04 A panel shall give written reasons for,

(a) its decision and order in a capacity proceeding; and

(b) its order or decision and order if,

(i) an oral request for written reasons is made by a party immediately after the order is made, or

(ii) a written request for written reasons is made by a party within sixty days after the order is made.

Correction of errors

26.05 The Registrar or the panel may at any time correct a typographical error, error of calculation or similar minor error made in a decision, an order, a formal decision and order, a formal order or reasons of a panel.

Notice of decisions

26.06 (1) The Tribunal shall send to each party or to the representative of each party,

(a) who participated in a proceeding,

(i) a copy of the formal decision and order,

(ii) a copy of the written reasons, if any, for the decision, order or decision and order, and

(iii) a copy of a corrected decision, corrected order, corrected formal decision and order or corrected reasons; or

(b) who participated in a motion in a proceeding,

(i) a copy of the formal order,

(ii) a copy of the written reasons, if any, for the order, and

(iii) a copy of a corrected order, corrected formal order or corrected reasons.

Method of sending notice

(2) A document required to be sent under subrule (1) shall be sent by,

(a) regular lettermail to the last address of the party or the party's representative known to the Tribunal;

(b) hand delivery to the Society; or

(c) by fax to the last fax number of the party or the party's representative known to the Tribunal, or

(d) by e-mail to the last e-mail address of the party or the party's representative known to the Tribunal.

Same

(3) If a document required to be sent under subrule (1) is being sent to a licensee, a reference in subrule (2) to the last address, fax number or e-mail address known to the Tribunal shall be read as a reference to the last address, fax number or e-mail address contained in the register that the Society is required to establish and maintain under section 27.1 of the Act.

Use of mail

(4) If a copy of a document is sent by regular lettermail, it shall be deemed to be received on the fifth day after mailing.

Use of fax or e-mail

(5) If a copy of a document is faxed or e-mailed, it shall be deemed to be received on the day following the day it is faxed or e-mailed.

RULE 27
RECORD OF PROCEEDING

Requirement to compile record

27.01 (1) The Tribunal shall compile a record of every proceeding.

Contents of record

(2) A record of a proceeding shall contain the following:

1. Every document filed with the Tribunal under these Rules in respect of the proceeding or a step in the proceeding.
2. Every document received by a panel under these Rules in respect of the proceeding or a step in the proceeding.
3. The notice of a hearing on the merits of a proceeding.
4. The endorsement of the decision and order in the proceeding and of the order in a motion in the proceeding.
5. The formal decision and order in the proceeding and the formal order in a motion in the proceeding.
6. The reasons, if any, for the decision or order in the proceeding and for the order in a motion in the proceeding.
7. The transcript of a hearing in the proceeding or in a motion in the proceeding that is obtained by the Tribunal.

Record is public record

(3) Subject to subrule (4), the record of a proceeding is a public record.

Documents not available for public inspection

(4) A document or a part of a document contained in the record of a proceeding that contains information that may not be disclosed under rule 18.04 or 18.05 is not available for public inspection.

RULE 28
REPRIMANDS

Time for administration

28.01 (1) A reprimand shall not be administered before the time for serving a notice of appeal has expired unless the parties have waived their rights of appeal.

Who may administer

(2) A reprimand may be administered by any panelist comprising the panel that ordered the reprimand.

Administration in hearing

(3) Subject to subrule (4), a reprimand shall be administered at a hearing that is open to the public.

Administration in writing

(4) A reprimand may be administered in writing.

(5) The document containing a written reprimand shall be considered to be part of the record of the proceeding in which the reprimand was ordered.

RULE 29
CONSENT RESOLUTION CONFERENCE

Definitions

29.01 In this Rule,

"consent resolution conference" means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

(a) the decision and order to be made in the conduct proceeding; or

(b) the decision to be made and a range of orders that may be made in the conduct proceeding;

"consent resolution panel" means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

"potential proceeding" means a conduct proceeding that has not been commenced;

"subject of a potential proceeding" means the person who will be the subject of a conduct proceeding once it has been commenced.

Consent resolution conference: when shall be conducted

29.02 (1) The Chair or Vice-Chair shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,
   i. to commence a conduct proceeding, and
   ii. to request the Hearing Division to direct that a consent resolution conference be conducted.
2. The conduct proceeding has not been commenced.
3. The Society and the subject of the potential proceeding have agreed to,
   i. the decision and order to be made in the conduct proceeding; or
   ii. the decision to be made and a range of orders that may be made in the conduct proceeding.
4. The subject of the potential proceeding has consented to participate in a consent resolution conference.
5. The Society has requested a consent resolution conference.

Who conducts consent resolution conference

(2) Where the Chair or Vice-Chair directs that a consent resolution conference be conducted under subrule (1), he or she shall assign either one or three panelists to conduct the consent resolution conference.

Request

29.03 (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunal.

Information re conditions

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the Chair or Vice-Chair of the existence of the conditions set out in rule 29.02.

Contact information of subject of potential proceeding

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

Notice of consent resolution conference: Society

29.04 Where the Chair or Vice-Chair directs that a consent resolution conference be conducted, the Tribunal shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

Procedure applicable to consent resolution conference

29.05 (1) The practices and procedures applicable to proceedings before the Hearing Division that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

Consent resolution conference not open to public

(3) A consent resolution conference shall be conducted in the absence of the public.

Withdrawing participation in consent resolution conference

29.06 (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

Notice of withdrawal

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunal.

Settlement at consent resolution conference: commencement of conduct proceeding

29.07 (1) Where a consent resolution conference results in the settlement of the decision and order to be made in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made in the conduct proceeding the Society shall,

(a) commence the conduct proceeding; and

(b) notify the Tribunal in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

Settlement at consent resolution conference: non-application of certain Rules

(2) Where a consent resolution conference results in the settlement of the decision and order to be made in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.
2. Rule 7.
3. Rule 8.
4. Rule 12.
5. Rule 13.
6. Rule 14.
7. Rule 16.
8. Rule 19.
9. Rule 20.
10. Rule 21.
11. Rule 22.

No settlement at or withdrawal from consent resolution conference: subsequent hearings

29.08 Where a consent resolution conference does not result in the settlement of the decision and order to be made in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Division assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

LAW SOCIETY TRIBUNAL
HEARING DIVISION

FORMS UNDER THE

RULES OF PRACTICE AND PROCEDURE

Made: February 26, 2009
Amended: June 25, 2009
June 29, 2010
January 27, 2011
April 28, 2011
February 28, 2013
April 25, 2013
March 12, 2014

GENERAL HEADING (CONDUCT, CAPACITY, COMPETENCE, NON-COMPLIANCE, REINSTATEMENT, TERMS DISPUTE PROCEEDING)

(Law Society Tribunal file no.)

LAW SOCIETY TRIBUNAL

HEARING DIVISION

BETWEEN:

(name)

Applicant

and

(name)

Respondent

APPLICATION UNDER *(statutory provision under which the application is made).*

(Title of document)

(Text of document)

GENERAL HEADING (LICENSING, RESTORATION PROCEEDING)

(Law Society Tribunal file no.)

LAW SOCIETY TRIBUNAL

HEARING DIVISION

BETWEEN:

(name)

Applicant

and

The Law Society of Upper Canada

Respondent

APPLICATION UNDER *(statutory provision under which the application is made)* referred for hearing under *(statutory provision under which application is required to be heard).*

(Title of document)

(Text of document)

FORM 4A - NOTICE OF CHANGE OF REPRESENTATION

(*General heading*)

NOTICE OF CHANGE OF REPRESENTATION

(*Name of party OR non-party participant*), formerly represented by (*name of former representative*), has appointed (*name of new representative*) as representative of record.

(Date)

(*Name, address, telephone number, fax number and e-mail address of new representative*)

TO: (*Name and address of former representative*)

AND TO: (*Names and addresses of representatives for all other parties and non-party participants, or names and addresses of all other parties and all non-party participants)*

FORM 4B – NOTICE OF APPOINTMENT OF REPRESENTATIVE

(*General heading*)

NOTICE OF APPOINTMENT OF REPRESENTATIVE

(*Name of the party OR non-party participant*) has appointed (*name*) as representative of record.

(Date)

(Name, address, telephone number, fax number and e-mail address of representative of record)

TO: (*Names and addresses of representatives for all other parties and non-party participants or names and addresses of all parties and non-party participants*)

FORM 4C - NOTICE OF INTENTION TO ACT IN PERSON

(*General heading*)

NOTICE OF INTENTION TO ACT IN PERSON

(*Name of the party OR non-party participant*), formerly represented by (*name*) as representative of record, intends to act in person

(Date)

(Signature of party/non-party participant)

(Print name of party/non-party participant)

(Complete the following if filed by the representative of record)

I *(name of representative of record)* confirm that I have explained the purpose of this form to *(name of the party OR non-party participant)* and have confirmed (*his/her*) intention to act in person in place of me. (*Name of the party OR non-party participant)* signed this form at the time (*he/she*) consented to act in person.

(Date)

(Signature of representative of record)

(Print name of representative of record)

(Date)

(Name, address for service, telephone number, fax number and e-mail address of party/non-party participant intending to act in person)

TO: (*Name and address of former representative of record*)

AND TO: (*Names and addresses of representatives for all other parties and non-party participants, or names and addresses of all parties and non-party participants)*

FORM 9A - NOTICE OF APPLICATION

(*General heading*)

NOTICE OF APPLICATION

TO THE RESPONDENT:

A (*CONDUCT OR CAPACITY OR COMPETENCE OR NON-COMPLIANCE OR REINSTATEMENT OR TERMS DISPUTE*) PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

YOU ARE REQUIRED TO ATTEND at a proceeding management conference on (*day*), (*date*) at (*time*) at the Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario. You may elect to attend by your representative.

IF YOU OR YOUR REPRESENTATIVE FAIL TO ATTEND AT THE PROCEEDING MANAGEMENT CONFERENCE, THE PANELIST CONDUCTING THE CONFERENCE MAY PROCEED IN YOUR ABSENCE.

(*OR*

THIS APPLICATION will come on for a hearing on (day), (date) at (time) at the Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario.)

Date of issue:

TO: (*Name and address of respondent*)

APPLICATION

1. The applicant makes application for:

2. The grounds for the application are:

3. The particulars of the application are:

(*Name, address for service, telephone number, fax number and e-mail address of applicant or applicant's representative*)

FORM 9B - NOTICE OF REFERRAL FOR HEARING

(*General heading*)

NOTICE OF REFERRAL FOR HEARING

TO THE APPLICANT:

YOUR APPLICATION (*FOR A LICENCE OR TO HAVE YOUR LICENCE RESTORED*) HAS BEEN REFERRED FOR HEARING TO THE LAW SOCIETY TRIBUNAL HEARING DIVISION, thereby resulting in the commencement of a (*licensing OR restoration*) proceeding.

YOU ARE REQUIRED TO ATTEND at a proceeding management conference on (*day*), (*date*) at (*time*) at the Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario. You may elect to attend by your representative.

IF YOU OR YOUR REPRESENTATIVE FAIL TO ATTEND AT THE PROCEEDING MANAGEMENT CONFERENCE, THE PANELIST CONDUCTING THE CONFERENCE MAY PROCEED IN YOUR ABSENCE.

Date of issue:

TO: (*Name and address of applicant*)

(*Name, address for service, telephone number, fax number and e-mail address of the representative for The Law Society of Upper Canada*)

FORM 9C - NOTICE OF ABANDONMENT (CONDUCT, CAPACITY, COMPETENCE, NON-COMPLIANCE, REINSTATEMENT, TERMS DISPUTE PROCEEDING)

(*General heading*)

NOTICE OF ABANDONMENT (CONDUCT, CAPACITY, COMPETENCE, NON-COMPLIANCE, REINSTATEMENT, TERMS DISPUTE PROCEEDING)

THE APPLICANT hereby abandons this (*conduct OR capacity OR competence OR non-compliance OR reinstatement OR terms dispute*) proceeding.

(*Date*)

(*Name, address, telephone number, fax number and e-mail address of applicant's representative or applicant*)

TO: (*Name and address of respondent's respresentative or respondent*)

FORM 9D - NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

(*General heading*)

NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

THE LAW SOCIETY OF UPPER CANADA hereby withdraws the referral for hearing of the applicant's application (*for a licence OR to have her/his licence restored*), thereby abandoning this (*licensing OR restoration*) proceeding.

(*Date*)

(*Name, address, telephone number, fax number and e-mail address of the representative for The Law Society of Upper Canada*)

TO: (*Name and address of applicant's representative or applicant*)

FORM 9E - NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

(*General heading*)

NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

THE APPLICANT hereby abandons (*her OR his*) application (*for a licence OR to have her/his licence restored*), thereby abandoning this (*licensing OR restoration*) proceeding.

(*Date*)

(*Name, address, telephone number, fax number and e-mail address of applicant's representative or applicant*)

TO: (*Name and address of the representative of The Law Society of Upper Canada*)

FORM 13A - NOTICE OF MOTION

(General heading)

NOTICE OF MOTION

The *(identify moving party)* will make a motion to the Law Society Tribunal Hearing Division on *(day)*, *(date)* at *(time)*, or as soon after that time as the motion can be heard, at the Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario *(or name place)*.

PROPOSED METHOD OF HEARING: The motion is to be heard *(choose appropriate option)*:

- ☐ Electronically under subrule 16.02 (1) because it is *(on consent OR for an adjournment).*
- ☐ In writing under subrule 16.03 (1) because it is for an order that a hearing be held as an electronic hearing.
- ☐ In writing under subrule 16.03 (2) because it is *(on consent OR for an adjournment)*.
- ☐ Orally.

THE MOTION IS FOR: *(Set out precise relief sought)*.

THE GROUNDS FOR THE MOTION ARE: *(Set out the grounds to be argued)*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(List the affidavits or other documentary evidence to be relied on).

(Date)

(*Name, address, telephone number, fax number and e-mail address of moving party's representative or moving party*)

TO: (*Name and address of responding party's representative or responding party*)

FORM 13B - NOTICE OF ABANDONMENT (MOTION)

(General heading)

NOTICE OF ABANDONMENT (MOTION)

(Name of moving party) hereby abandons (*its/his/her*) motion for *(insert nature of motion).*

(Date)

(Name, address, telephone number, fax number and e-mail address of moving party's representative or moving party)

TO: (*Name, address and telephone number of responding party's representative or responding party*)

FORM 20A – REQUEST TO ADMIT

(General heading)

REQUEST TO ADMIT

YOU ARE REQUESTED TO ADMIT, for the purposes of this proceeding only, the truth of the following facts: (*Set out facts in consecutively numbered paragraphs*.)

YOU ARE REQUESTED TO ADMIT, for the purposes of this proceeding only, the authenticity (see Rule 20 of the Rules of Practice and Procedure of the Law Society Tribunal Hearing Division) of the following documents: (*Number each document and give particulars sufficient to identify each. Specify whether the document is an original or a copy and, where the document is a copy of a letter, telegram or telecommunication, state the nature of the document.*)

Attached to this request is a copy of each of the documents referred to above. *(Where it is not practicable to attach a copy or where the party already has a copy, state which documents are not attached and give the reason for not attaching them.*)

YOU MUST RESPOND TO THIS REQUEST by serving a response to the request to admit in Form 20B WITHIN TWENTY DAYS after this request is served on you. If you fail to do so, you will be deemed to admit, for the purposes of this proceeding only, the truth of the facts and the authenticity of the documents set out above. If you serve a response within these time limits but do not provide a response to each fact and document listed above, you will be deemed to admit, for the purposes of this proceeding only, the truth of the facts and the authenticity of the documents for which you have not provided a response.

(Date)

(Name, address, telephone number, fax number and e-mail address of representative of party or of party serving request)

TO: *(Name and address of representative of party or of party on whom request is served)*

FORM 20B – RESPONSE TO REQUEST TO ADMIT

(General heading)

RESPONSE TO REQUEST TO ADMIT

In response to your request to admit dated *(date)*, *(name of party serving response)*:

1. Admits the truth of facts numbers *(set out facts numbers)*
2. Admits the authenticity of documents numbers *(set out documents numbers).*
3. Denies the truth of facts numbers *(set out facts numbers).*
4. Denies the authenticity of documents numbers *(set out documents numbers).*
5. Refuses to admit the truth of facts numbers *(set out facts numbers)* for the following reasons: *(Set out reason for refusing to admit each fact.)*
6. Refuses to admit the authenticity of documents numbers *(set out the documents numbers)* for the following reasons: *(Set out reason for refusing to admit each document.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of representative of party or of party serving response)

TO: *(Name and address of representative of party or of party on whom response is served)*

FORM 23A – CONSENT TO HEARING BY ONE PANELIST

(General heading)

CONSENT TO HEARING BEFORE ONE PANELIST

(Name of party other than The Law Society of Upper Canada) and The Law Society of Upper Canada hereby consent to the merits of this proceeding being heard and determined by one panelist.

(Date)

(Signature of party other than The Law Society of Upper Canada)
(Print name of party)

(Date)

(Signature of representative for The Law Society of Upper Canada)
(Print name of representative for The Law Society of Upper Canada)

FORM 24A – SUMMONS

(General heading)

SUMMONS TO A WITNESS BEFORE THE LAW SOCIETY TRIBUNAL HEARING DIVISION

TO *(Name and address of witness)*
(For oral hearing)

YOU ARE REQUIRED TO ATTEND TO GIVE EVIDENCE at the hearing of this proceeding on *(day) , (date)* at *(time)* at the Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario *(or name place)* and to remain until your attendance is no longer required.

YOU ARE REQUIRED TO BRING WITH YOU and produce at the hearing the following documents and things: *(Set out the nature and date of each document and give particulars sufficient to identify each document and thing.)*

IF YOU FAIL TO ATTEND OR TO REMAIN IN ATTENDANCE AS THIS SUMMONS REQUIRES, THE SUPERIOR COURT OF JUSTICE MAY ORDER THAT A WARRANT FOR YOUR ARREST BE ISSUED, OR THAT YOU BE PUNISHED IN THE SAME WAY AS FOR CONTEMPT OF THAT COURT

(For electronic hearing)

YOU ARE REQUIRED TO PARTICIPATE IN AN ELECTRONIC HEARING on *(day), (date) at (time)* in the following manner: *(Give sufficient particulars to enable witness to participate.)*

IF YOU FAIL TO PARTICIPATE IN THE HEARING IN ACCORDANCE WITH THE SUMMONS, THE SUPERIOR COURT OF JUSTICE MAY ORDER THAT A WARRANT FOR YOUR ARREST BE ISSUED, OR THAT YOU BE PUNISHED IN THE SAME WAY AS FOR CONTEMPT OF THAT COURT.

(Date)

Law Society Tribunal

_____

Registrar

NOTE: You are entitled to be paid the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice.

FORM 26A – FORMAL ORDER

(Law Society Tribunal file no.)

LAW SOCIETY TRIBUNAL
HEARING DIVISION

(Names of panelists comprising

the panel)

(Day and date order made)

(Title of proceeding)

ORDER

(Order after hearing of application)

THIS APPLICATION was heard on *(date(s))*, *(at name place OR electronically)*, *(in the presence of the representatives for all parties* (*and non-party participants) OR in the presence of the representative(s) for (name party(ies) and non-party participant(s)), (add as applicable: (name party(ies) and non-party participant(s)) appearing in person; no one appearing for (name party(ies) and non-party participant(s)) although properly notified as appears from (indicate proof of notice of hearing on the merits of the application)).*

ON READING *(THE NOTICE OF APPLICATION AND APPLICATION OR THE NOTICE OF REFERRAL FOR HEARING)* AND THE EVIDENCE FILED BY THE PARTIES *(and non-party participants), (on hearing the oral evidence presented by the parties (and non-party participants)*, and on hearing the submissions of *(the representatives of the parties (and non-party participants) OR the representative(s) for (name party(ies) and non-party participant(s)) and (name party(ies) and non-party participant(s) appearing in person)),*

(AND HAVING DETERMINED THAT (specify determination made giving rising to authority to make order),

(Order after hearing of motion)

THIS MOTION, made by *(name moving party)* for *(state the relief sought in the notice of motion)* was heard on *(date(s)*, *(at name place OR electronically OR in writing).*

ON READING *(give particulars of the material filed on the motion)* and on hearing the submissions of representative*(s)* for *(name parties and non-party participants), (add as applicable: (name parties and non-party participants) appearing in person; no one*

appearing for (name parties and non-party participants), although properly served as appears from (indicate proof of service)),

IT IS ORDERED THAT:

1.

2.

(Signature of chair of panel that made order)

FORM 26B - FORMAL DECISION AND ORDER

(Law Society Tribunal file no.)

LAW SOCIETY TRIBUNAL

HEARING DIVISION

(Names of panelists comprising the panel)

(Day and date order made)

(Title of proceeding)

DECISION AND ORDER

THIS APPLICATION was heard on *(date(s))*, *(at name place OR electronically)*, *(in the presence of the representatives for all parties* (*and non-party participants) OR in the presence of the representative(s) for (name party(ies) and non-party participant(s)), (add as applicable: (name party(ies) and non-party participant(s)) appearing in person; no one appearing for (name party(ies) and non-party participant(s)) although properly notified as appears from (indicate proof of notice of hearing on the merits of the application)).*

ON READING *(THE NOTICE OF APPLICATION AND APPLICATION OR THE NOTICE OF REFERRAL FOR HEARING)* AND THE EVIDENCE FILED BY THE PARTIES *(and non-party participants), (on hearing the oral evidence presented by the parties (and non-party participants)*, and on hearing the submissions of *(the representatives of the parties (and non-party participants) OR the representative(s) for (name party(ies) and non-party participant(s)) and (name party(ies) and non-party participant(s) appearing in person)),*

IT IS DETERMINED THAT *(specify determination made giving rising to authority to make order).*

AND IT IS ORDERED THAT:

1.

2.

(Signature of chair of panel that made order)

LAW SOCIETY TRIBUNAL
TARIFFS UNDER THE RULES OF PRACTICE AND PROCEDURE

Made: February 26, 2009
Amended: June 25, 2009
June 29, 2010
January 27, 2011
April 28, 2011
February 28, 2013
April 25, 2013

TARIFF A

FEES FOR SERVICES TO BE CONSIDERED UNDER RULE 25.01

PART I -- LAWYERS' FEES

Lawyer (20 years and over)	Up to $350 per hour
Lawyer (12 to 20 years)	Up to $325 per hour
Lawyer (11 to 12 years)	Up to $315 per hour
Lawyer (10 to 11 years)	Up to $300 per hour
Lawyer (9 to 10 years)	Up to $285 per hour
Lawyer (8 to 9 years)	Up to $270 per hour
Lawyer (7 to 8 years)	Up to $255 per hour
Lawyer (6 to 7 years)	Up to $240 per hour
Lawyer (5 to 6 years)	Up to $225 per hour
Lawyer (4 to 5 years)	Up to $215 per hour
Lawyer (3 to 4 years)	Up to $205 per hour
Lawyer (2 to 3 years)	Up to $195 per hour
Lawyer (1 to 2 years)	Up to $180 per hour
Lawyer (less than 1 year)	Up to $165 per hour
Lawyer on staff with The Law Society of Upper Canada, other than Discipline Counsel	Up to $190 per hour

PART II -- FEES OTHER THAN LAWYERS' FEES

Licensed paralegal and paralegal on staff with The Law Society of Upper Canada (10 years and more of paralegal experience)	Up to $150 per hour
Licensed paralegal and paralegal on staff with The Law Society of Upper Canada (5 to 10 years of paralegal experience)	Up to $120 per hour
Licensed paralegal and paralegal on staff with The Law Society of Upper Canada (1 to 5 years of paralegal experience)	Up to $90 per hour
Student	Up to $90 per hour
Law Clerk	Up to $90 per hour
Forensic auditor on staff with The Law Society of Upper Canada	Up to $190 per hour
Investigator or Complaints Resolution Officer on staff with The Law Society of Upper Canada	Up to $90 per hour

BARREAU DU HAUT CANADA

RÈGLES DE PRATIQUE ET DE PROCÉDURE
(applicables aux instances tenues devant la Section de première instance du Barreau)
PRISES EN VERTU DE L'ARTICLE 61.2 DE LA *LOI SUR LE BARREAU*

MOTION À PRÉSENTER À LA RÉUNION DU CONSEIL LE 27 FÉVRIER 2014

PROPOSÉE PAR

APPUYÉE PAR

QUE les Règles de pratique et de procédure applicable aux instances introduites devant le Comité d'audition du Barreau, prises par le Conseil le 26 février 2009 et modifiées par le Conseil les 25 juin 2009, 29 juin 2010, 27 janvier 2011, 28 avril 2011, 28 février 2013 et 25 avril 2013, soient abrogées, avec prise d'effet le 12 mars 2014, et remplacées par ce qui suit :

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE
RÈGLES DE PRATIQUE ET DE PROCÉDURE

Prises le : 26 février 2009
Modifiées : 25 juin 2009
29 juin 2010
27 janvier 2011
28 avril 2011
28 février 2013
25 avril 2013
12 mars 2014

RÈGLE 1

CHAMP D'APPLICATION ET INTERPRÉTATION

Champ d'application

1.01 Les présentes règles s'appliquent aux instances suivantes introduites devant la Section de première instance le 1er juillet 2009 ou par la suite :

1. Les instances portant sur la délivrance d'un permis.

2. Les instances en rétablissement visé à l'article 31 de la Loi.

3. Les instances portant sur la conduite.

4. Les instances portant sur l'incapacité.

5. Les instances portant sur la compétence professionnelle.

6. Les instances portant sur l'inobservation.

7. Les instances portant sur rétablissement visé à l'article 49.42 de la Loi.

8. Les instances portant sur un différend concernant des conditions.

Définitions et interprétation

1.02 (1) Sauf indication contraire du contexte, les définitions qui suivent s'appliquent aux présentes règles.

« audience » Sont exclues de la présente définition les conférences sur la résolution des causes avec consentement, les conférences de gestion de l'instance et les conférences préparatoires à l'audience; (*« hearing »*)

« auteur de la motion » Personne qui présente une motion; (*« moving party »*)

« document » S'entend en outre d'un livre, d'un écrit, d'un compte, d'un enregistrement sonore, d'une bande vidéo, d'un film, d'une photographie, d'un tableau, d'un graphique, d'une carte, d'un plan, d'un relevé topographique et de renseignements enregistrés ou stockés sur ordinateur ou sur tout autre dispositif; (*« document »*)

« formation » Le membre de la formation affecté à l'audience ou l'ensemble des membres de la formation qui le sont; (*« panel »*)

« instance portant sur la capacité » Instance visée à l'article 38 de la Loi; (*« capacity proceeding »*)

« instance portant sur la compétence professionnelle » Instance visée à l'article 43 de la Loi; (*« competence proceeding »*)

« instance portant sur la conduite » Instance visée à l'article 34 de la Loi; (*« conduct proceeding »*)

« instance portant sur la délivrance d'un permis » Instance visée à l'article 27 de la Loi; (*« licensing proceeding »*)

« instance portant sur l'inobservation » Instance visée à l'article 45 de la Loi; (*« non-compliance proceeding »*)

« instance portant sur le rétablissement visé à l'article 31 de la Loi » Instance visée à l'article 31 de la Loi; (*« restoration proceeding »*)

« instance portant sur le rétablissement visé à l'article 49.42 de la Loi » Instance visée à l'article 49.42 de la Loi; (*« reinstatement proceeding »*)

« instance portant sur un différend concernant des conditions » Instance visée à l'article 49.43 de la Loi; (*« terms dispute proceeding »*)

« jour férié » :

a) le samedi et le dimanche;

b) la veille du jour de l'An; si elle tombe un samedi ou un dimanche, le vendredi précédant;

c) le jour de l'An; s'il tombe un samedi ou un dimanche, le lundi suivant;

d) le jour de la Famille;

e) le Vendredi saint;

f) le lundi de Pâques;

g) la fête de Victoria;

h) la fête du Canada; si elle tombe un samedi ou un dimanche, le lundi suivant;

i) le Congé civique;

j) la fête du Travail;

k) le jour d'Action de grâce;

l) le jour du Souvenir; s'il tombe un samedi ou un dimanche, le lundi suivant;

m) la veille de Noël; si elle tombe un samedi ou un dimanche, le vendredi précédent;

n) le jour de Noël; s'il tombe un samedi ou un dimanche, le lundi et le mardi suivants et, s'il tombe un vendredi, le lundi suivant,

o) le 26 décembre;

p) le jour proclamé tel par le gouverneur général ou le lieutenant-gouverneur; (*« holiday »*);

« Loi » La *Loi sur le Barreau*; (*« Act »*)

« membre de la formation » Membre de la Section de première instance; (*« panelist »*)

« partie » S'entend notamment de l'auteur d'une motion et de la partie intimée; (*« party »*)

« partie intimée » Personne contre laquelle une motion est présentée; (*« respondent »*)

« président » Désigne le président du Tribunal du Barreau; (*« Chair »*)

« remettre » Signifier et déposer auprès du Tribunal avec la preuve de la signification; (*« deliver »*)

« représentant » Personne autorisée en vertu de la *Loi sur le Barreau* à en représenter une autre dans le cadre d'une instance; (*« representative »*)

« tiers » Personne qui, sans être partie à l'instance, est autorisée à intervenir dans tout ou partie de celle-ci; (*« non-party participant »*)

« Tribunal » Désigne le Tribunal du Barreau établi en vertu de la *Loi sur le Barreau*, L.R.O. 1990, c. L.8; (*« Tribunal »*)

« vice-président » Désigne le vice-président de la Section de première instance; (*« Vice-Chair »*)

« visée par l'instance » S'entend des personnes suivantes :

a) dans le cadre d'une instance portant sur la délivrance d'un permis, celle appelée l'auteur de la demande au paragraphe 27 (5) de la Loi;

b) dans le cadre d'une instance portant sur le rétablissement visé à l'article 31 de la Loi, celle appelée la personne dont le permis est en suspens au paragraphe 31 (4) de la Loi;

c) dans le cadre d'une instance portant sur la conduite, celle appelée le titulaire de permis visé par la requête au paragraphe 34 (2) de la Loi;

d) dans le cadre d'une instance portant sur la capacité, celle appelée le titulaire de permis visé par la requête au paragraphe 38 (2) de la Loi;

e) dans le cadre d'une instance portant sur la compétence professionnelle, celle

appelée le titulaire de permis visé par la requête au paragraphe 43 (2) de la Loi;

f) dans le cadre d'une instance portant sur l'inobservation, celle appelée le titulaire de permis visé par la requête au paragraphe 45 (2) de la Loi;

g) dans le cadre d'une instance portant sur le rétablissement visé à l'article 49.42 de la Loi, celle appelée le requérant au paragraphe 49.42 (4) de la Loi;

h) dans le cadre d'une instance portant sur un différend concernant les conditions, celle appelée le requérant au paragraphe 49.43 (3) de la Loi. (*« subject of the proceeding »*)

(2) Les termes qui figurent dans les présentes règles et qui sont définies dans la Loi s'entendent au sens de la Loi.

Interprétation des règles

1.03 (1) Les présentes règles doivent recevoir une interprétation large de façon à entraîner la résolution équitable sur le fond de chaque instance.

(2) En cas de silence des présentes règles, la pratique applicable est déterminée par analogie avec celles-ci.

RÈGLE 2

INOBSERVATION DES RÈGLES

Effet de l’inobservation

2.01 (1) L’inobservation d’une des règles de procédure énoncées dans les présentes règles constitue une irrégularité et n’est pas cause de nullité de l’instance ni d’une mesure prise ou d’un document donné dans le cadre de celle-ci.

Ordonnances suite à une contestation de la régularité

(2) Sur motion présentée par une partie pour contester la régularité d’une instance ou d’une mesure prise ou d’un document donné dans le cadre de celle-ci, la formation peut, par ordonnance :

a) soit accorder les mesures de redressement nécessaires afin d’assurer une résolution équitable des véritables questions en litige;

b) soit rejeter l’instance ou à annuler une mesure prise ou un document donné dans le cadre de celle-ci, en tout ou en partie, seulement si cela est nécessaire dans l’intérêt de la justice.

Contestation de la régularité

(3) La motion qui vise à contester la régularité d’une instance ou d’une mesure prise ou d’un document donné dans le cadre de celle-ci ne doit pas être présentée, sauf avec autorisation :

a) après l’expiration d’un délai raisonnable après que l’auteur de la motion a pris ou aurait raisonnablement dû prendre connaissance de l’irrégularité;

b) si l’auteur de la motion a pris une autre mesure dans le cadre de l’instance après avoir pris connaissance de l’irrégularité;

c) si l’auteur de la motion a par ailleurs consenti à l’irrégularité.

Ordonnance de dispense de l’observation

2.02 (1) Sur motion d’une partie ou d’un tiers, ou de son propre chef, la formation peut, par ordonnance, dispenser de l’observation d’une règle de procédure énoncée dans les présentes règles lorsque cela est nécessaire dans l’intérêt de la justice.

Consentement à l’inobservation

(2) Une partie peut dispenser de l’observation d’une règle de procédure énoncée

dans les présentes règles avec le consentement de toutes les autres parties.

RÈGLE 3

DÉLAIS

Calcul des délais

3.01 Le calcul des délais fixés par les présentes règles ou par une ordonnance rendue en vertu de celles-ci obéit aux règles suivantes :

a) si le délai est exprimé en nombre de jours séparant deux événements, il se calcule en excluant le jour où a lieu le premier événement, mais en incluant le jour ou a lieu le second;

b) si le délai fixé est inférieur à sept jours, les jours fériés ne sont pas comptés;

c) si le délai pour accomplir un acte expire un jour férié, l'acte peut être accompli le jour suivant qui n'est pas un jour férié;

d) tout document qui est réputé reçu un jour férié et toute signification qui est réputée faite un jour férié est réputé l'être le jour suivant qui n'est pas férié.

Prorogation ou abrègement des délais

3.02 (1) Sur motion d'une partie ou d'un tiers, la formation peut, à des conditions justes, rendre une ordonnance prorogeant ou abrégeant tout délai fixé par les présentes règles ou par une ordonnance rendue en vertu de celles-ci.

(2) La motion qui vise à obtenir la prorogation d'un délai peut être présentée avant ou après l'expiration du délai fixé.

RÈGLE 4

REPRÉSENTATION

Constitution de nouveau représentant

Avis de constitution de nouveau représentant

4.01 (1) La partie ou le tiers qui a un représentant commis ou une représentante commise au dossier peut en constituer un nouveau ou une nouvelle en lui signifiant à son représentant ou à sa représentante, à toutes les autres parties et à tous les autres tiers et en déposant auprès du Tribunal, avec la preuve de sa signification, un avis de constitution de nouveau représentant qui précise les nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du nouveau représentant ou de la nouvelle représentante.

Formulaire 4A

(2) L'avis visé au paragraphe (1) peut être rédigé selon le formulaire 4A.

Avis de constitution de représentant

(3) La partie ou le tiers qui agit en son propre nom peut nommer un représentant commis ou une représentante commise au dossier en remettant un avis de constitution de représentant qui précise les nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant ou de la représentante.

Formulaire 4B

(4) L'avis visé au paragraphe (3) peut être rédigé selon le formulaire 4B.

Avis de l'intention d'agir en son propre nom

(5) La partie ou le tiers qui a un représentant commis ou une représentante commise au dossier peut choisir d'agir en son propre nom en lui signifiant, ainsi qu'à toutes les autres parties et à tous les autres tiers, et en déposant auprès du Tribunal, avec la preuve de sa signification, un avis à cet effet qui précise son adresse aux fins de signification, son numéro de téléphone, ainsi que son numéro de télécopieur et son adresse électronique, s'il en a.

Formulaire 4C

(6) L'avis visé au paragraphe (5) peut être rédigé selon le formulaire 4C.

Révocation du représentant commis au dossier

4.02 Sur motion d'un représentant ou d'une représentante, d'une partie ou d'une autre personne, la formation peut, par ordonnance, révoquer le représentant ou la représentante en

qualité de représentant commis ou de représentante commise au dossier.

RÈGLE 5

COMMUNICATION AVEC LA FORMATION

5.01 Les parties, les tiers, les représentants ou les personnes qui assistent ou participent à une audience ne doivent pas communiquer avec la formation à l'égard de l'objet de l'audience en dehors de celle-ci, sauf, selon le cas :

a) en présence de toutes les parties et de tous les tiers qui ont été autorisés à participer à l'audience à l'égard de l'objet de la communication, ou de leurs représentants;

b) par écrit, en envoyant la communication écrite au greffe du Tribunal et sa copie à toutes les parties et à tous les tiers qui ont été autorisés à participer à l'audience à l'égard de l'objet de la communication, ou à leurs représentants.

RÈGLE 6

JONCTION DES PARTIES

Jonction des parties

6.01 (1) Sur motion d'une personne, la formation peut, par ordonnance, joindre toute personne comme partie à l'instance si la *Loi sur le Barreau* ou, par ailleurs, le droit, lui donne le droit de l'être.

Délai de présentation de la motion

(2) La motion visée à la présente règle est présentée avant l'audience sur le fond de l'instance.

RÈGLE 7

RÉUNION OU SÉPARATION DES INSTANCES

Réunion ou instruction consécutive d'instances

7.01 (1) Sur motion d'une partie, une ordonnance peut disposer que plusieurs instances soient, en tout ou en partie, instruites sur le fond en même temps ou immédiatement l'une après l'autre si, selon le cas :

a) elles ont en commun une question de droit ou de fait ou des deux;

b) elles mettent en cause les mêmes parties;

c) elles naissent de la même opération ou du même événement ou de la même série d'opérations ou d'événements;

d) il est par ailleurs nécessaire de rendre une ordonnance en application de la présente règle.

Temps de présentation de la motion

(2) La motion visée à la présente règle est présentée :

a) soit avant l'instruction sur le fond de l'instance concernée;

b) en tout temps, avec autorisation.

Effet de l'instruction simultanée ou consécutive des instances

(3) Si une ordonnance est rendue en vertu du paragraphe (1), la formation doit décider de l'effet de procéder à l'instruction simultanée ou consécutive des instances sur le fond et peut donner les directives qu'il estime justes à l'égard de cet effet.

Séparation des instances

(4) Si une ordonnance est rendue en vertu du paragraphe (1), la formation peut, sur motion d'une partie ou de son propre chef, ordonner des audiences distinctes pour tout ou partie des instances si leur instruction simultanée ou consécutive sur le fond les complique ou les retarde indûment ou cause un préjudice indu à une partie.

Scission de l'instance

7.02 (1) Sur motion d'une partie ou de son propre chef, la formation peut, par ordonnance, disposer qu'une instance soit scindée en plusieurs instances.

Effet de l’ordonnance

(2) Si une ordonnance est rendue en vertu du paragraphe (1), la formation détermine l’effet de l’ordonnance, notamment la manière d’instruire les instances distinctes sur le fond; il peut alors donner les directives qu’il estime justes à l’égard de la scission de l’instance.

RÈGLE 8

INTERVENTION DE TIERS

Intervention de tiers

8.01 (1) Sur motion d'une personne, une ordonnance peut permettre à un tiers à l'instance d'intervenir dans tout ou partie de celle-ci si cette intervention est requise dans l'intérêt de la justice.

Étendue de la participation

(2) Si une ordonnance est rendue en vertu du paragraphe (1), la formation fixe l'étendue de l'intervention du tiers; il peut alors donner les directives qu'il estime justes à cet égard.

Intervention bénévole

8.02 À l'invitation d'une formation, quiconque peut, sans devenir partie à l'instance, intervenir dans tout ou partie de celle-ci aux fins d'aider le Tribunal en présentant une argumentation.

RÈGLE 9

INTRODUCTION ET MODIFICATION D'UNE INSTANCE ET DÉSISTEMENT

Mode d'introduction d'une instance

9.01 (1) Les instances sont introduites par la délivrance d'un acte introductif d'instance.

Avis de requête

(2) L'acte introductif d'instance est l'avis de requête (formulaire 9A) dans le cas des instances suivantes :

1. Les instances portant sur la conduite.

2. Les instances portant sur la capacité.

3. Les instances portant sur la compétence professionnelle.

4. Les instances portant sur l'inobservation.

5. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

6. Les instances portant sur un différend concernant des conditions.

Avis de renvoi à l'audience

(3) L'acte introductif d'instance est l'avis de renvoi à l'audience (formulaire 9B) dans le cas des instances suivantes :

1. Les instances portant sur la délivrance d'un permis.

2. Les instances portant sur le rétablissement visé à l'article 31 de la Loi.

Mode de délivrance d'un acte introductif d'instance

(4) L'acte introductif d'instance est délivré lorsque le greffe du Tribunal lui attribue un numéro de dossier et le date.

Idem

(5) Un acte introductif d'instance peut être délivré :

a) si la partie qui en demande la délivrance ou son représentant ou sa représentante se présente en personne au greffe du Tribunal;

b) par courrier ou messagerie, si la personne qui en demande la délivrance :

(i) en envoie l'original par courrier ordinaire ou recommandé au Tribunal,

(ii) en envoie l'original par messagerie au Tribunal.

Envoi d'une copie de l'acte introductif d'instance à la partie

(6) À la suite de la délivrance d'un acte introductif d'instance par courrier ou par messagerie, le Tribunal envoie une copie de l'acte tel que délivré à la partie qui en a demandé la délivrance.

Dépôt d'une copie de l'acte introductif d'instance

(7) L'original de l'acte introductif d'instance délivré est déposé au Tribunal lors de sa délivrance.

Signification de l'acte introductif d'instance

(8) Une copie de l'acte introductif d'instance délivré est signifiée par la partie qui en a demandé la délivrance à toutes les autres parties et la preuve de la signification est déposée auprès du Tribunal dans les trente jours de la délivrance de l'acte.

Défaut réputé un désistement

(9) La partie qui a demandé la délivrance d'un acte introductif d'instance et qui ne dépose pas, dans les trente jours de sa délivrance, la preuve de sa signification à toutes les autres parties est réputée s'être désistée de l'instance introduite par cette délivrance.

Motion en annulation de désistement

(10) Sur motion de la personne qui est réputée s'être désistée d'une instance en application du paragraphe (9), une ordonnance d'annulation du désistement peut être rendue à des conditions justes.

Effet du désistement sur une instance subséquente

(11) Si une partie est réputée s'être désistée d'une instance en application du paragraphe (9), le désistement ne fait pas obstacle à une instance subséquente qu'elle introduira relativement au même objet.

Modification de l'acte introductif d'instance par une partie

9.02 (1) Une partie peut modifier son acte introductif d'instance :

a) avant le dixième jour qui précède l'audience sur le fond;

b) après le délai fixé à l’alinéa a), avec autorisation.

Autorisation de modifier

(2) Lorsqu’il examine s’il y a lieu d’autoriser une partie à modifier son acte introductif d’instance, la Section de première instance tient compte de ce qui suit :

a) le préjudice causé à une personne;

b) la célérité de la notification de la partie adverse;

c) tout autre facteur pertinent.

Interdiction de joindre une partie

(3) La modification visée à la présente règle ne doit pas prévoir la jonction d’une partie.

Procédure de modification

(4) La partie qui modifie son acte introductif d’instance dépose, auprès du Tribunal, une copie de l’acte modifié portant la date de l’acte initial et son intitulé suivi du mot « modifié ».

Indication des modifications

(5) La partie qui modifie son acte introductif d’instance indique les ajouts faits à l’acte initial en les soulignant et les suppressions, en les biffant.

Idem

(6) Si un acte introductif d’instance a été modifié à plusieurs reprises, chacune des modifications subséquentes est indiquée par autant de traits de soulignement ou de biffage qu’il y a eu de modifications.

Fonction du greffe du Tribunal

(7) Quand des actes introductifs d’instance modifiés sont déposés, le greffe du Tribunal y consigne la date de leur dépôt et la disposition en vertu de laquelle la modification a été faite.

Date de la modification

(8) La date du dépôt d’un acte introductif d’instance modifié auprès du Tribunal est réputée la date de modification de l’acte initial.

Signification de l’acte introductif d’instance modifié

(9) La partie qui modifie son acte introductif d’instance signifie une copie de l’acte

introductif d'instance modifié à toutes les autres parties immédiatement après l'avoir déposé auprès du Tribunal.

Idem

(10) L'acte introductif d'instance modifié est signifié conformément au paragraphe 10.01 (1).

Preuve de la signification

(11) La preuve de la signification d'un acte introductif d'instance modifié est déposée après du Tribunal immédiatement après sa signification.

Modification à l'instruction

(12) Si un acte introductif d'instance est modifié à l'audience sur le fond de l'instance, la modification est inscrite au dossier et les paragraphes (4) à (11) ne s'appliquent pas.

Désistement avant l'audience sur le fond

Instance portant sur la conduite, la capacité, la compétence professionnelle, l'inobservation, le rétablissement visé à l'article 49.42 de la Loi ou sur un différend concernant des conditions

9.03 (1) Avant l'instruction sur le fond des instances suivantes, le requérant ou la requérante peut se désister en remettant un avis de désistement (formulaire 9C) :

1. Les instances portant sur la conduite.

2. Les instances portant sur la capacité.

3. Les instances portant sur la compétence professionnelle.

4. Les instances portant sur l'inobservation.

5. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

6. Les instances portant sur un différend concernant des conditions.

Désistement du Barreau dans une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi

(2) Avant l'instruction sur le fond d'une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi, le Barreau peut se désister en remettant un avis de désistement (formulaire 9D).

Désistement du requérant dans une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi

(3) Avant l'instruction sur le fond d'une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi, le requérant ou la requérante peut se désister de la requête qui a été renvoyée à l'audience en remettant un avis de désistement (formulaire 9E).

RÈGLE 10

SIGNIFICATION DES DOCUMENTS

Mode de signification : acte introductif d'instance

10.01 (1) L'acte introductif d'instance est signifié à personne ou selon un autre mode de signification directe.

Mode de signification : autres documents

(2) Tout document autre qu'un acte introductif d'instance peut être signifié selon l'un ou l'autre des modes suivants :

a) à personne ou selon un autre mode de signification directe;

b) en en envoyant une copie par messager à la dernière adresse connue du ou de la destinataire ou de son représentant ou de sa représentante;

c) en le télécopiant au dernier numéro de télécopieur connu du ou de la destinataire ou de son représentant ou de sa représentante; toutefois, si le ou la destinataire est une partie, la signification effectuée conformément au présent alinéa n'est valide que si elle y consent au préalable;

d) en en envoyant une copie par courrier électronique à la dernière adresse connue du ou de la destinataire ou de son représentant ou de sa représentante; toutefois, la signification effectuée conformément au présent alinéa n'est valide que si les conditions suivantes sont réunies :

(i) si le ou la destinataire est une partie, elle consent à l'envoi par courrier électronique au préalable;

(ii) le ou la destinataire fournit une acceptation de la signification et la date de celle-ci par courrier électronique.

Signification par télécopie

(3) Le document qui est signifié par télécopie en vertu de l'alinéa (2) c) comprend une page de couverture qui indique :

a) les nom, adresse et numéro de téléphone de l'expéditeur ou de l'expéditrice;

b) le nom du ou de la destinataire de la signification;

c) les date et heure de la transmission;

d) le nombre total de pages transmises, y compris la page de couverture;

e) le numéro de télécopieur de l'expéditeur ou de l'expéditrice;

f) les nom et numéro de téléphone d'une personne à qui le ou la destinataire pourra s'adresser en cas de difficultés de transmission.

Signification par courrier électronique

(4) Le document qui est signifié par courrier électronique en vertu de l'alinéa (2) d) est joint à un message électronique qui comprend ce qui suit :

a) les nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique de l'expéditeur ou de l'expéditrice;

b) les date et heure de la transmission;

c) les nom et numéro de téléphone d'une personne à qui le ou la destinataire pourra s'adresser en cas de difficultés de transmission.

Signification à personne

(5) Le document qui doit être signifié à personne l'est comme suit :

a) s'il s'agit d'une personne, en lui laissant une copie du document;

b) s'il s'agit d'une personne autre que le Barreau, en laissant une copie du document à son établissement entre les mains d'une personne adulte qui semble assumer la direction de celui-ci;

(c) s'il s'agit du Barreau, en laissant une copie du document à un conseiller juridique ou à une conseillère juridique de son service de la discipline.

Autres modes de signification directe

(6) Le document qui peut être signifié selon un autre mode de signification directe l'est :

a) soit en laissant une copie du document au représentant ou à la représentante de la personne;

b) soit en envoyant une copie du document par courrier ordinaire ou recommandé à la dernière adresse connue de la personne.

Signification indirecte ou dispense de signification

(7) Sur motion d'une personne, une ordonnance peut permettre la signification indirecte ou dispenser de la signification s'il semble difficile, pour quelque raison que ce soit,

d’effectuer la signification comme l’exige la présente règle ou si l’intérêt de la justice l’exige.

Date de validité de la signification

10.02 (1) La signification effectuée en application de la règle 10.01 est réputée valide :

a) lorsqu’une copie du document est laissée à une personne :

(i) avant 16 heures, le jour de la remise,

(ii) après 16 heures, le jour suivant;

b) lorsqu’une copie du document est envoyée par la poste à une personne, le cinquième jour qui suit son envoi;

c) lorsqu’une copie du document est envoyée par messager à une personne, le deuxième jour qui suit sa remise au service de messagerie;

d) lorsqu’une copie du document est transmise par télécopieur à une personne :

(i) avant 16 heures, le jour de la transmission,

(ii) après 16 heures, le jour suivant;

e) lorsqu’une copie du document est envoyée par courrier électronique à une personne :

(i) si l’acceptation électronique de la signification est reçue avant 16 heures, le jour de cette réception,

(ii) si l’acceptation électronique de la signification est reçue entre 16 heures et minuit, le jour suivant cette réception.

Date de validité de la signification : signification indirecte

(2) L’ordonnance qui permet la signification indirecte précise la date à laquelle est valide la signification qui lui est conforme.

Date de validité de la signification : dispense de la signification

(3) Si l’ordonnance dispense de la signification d’un document, celui-ci est réputé, aux fins de la computation des délais aux termes des présentes règles, signifié à la date à laquelle l’ordonnance prend effet.

Preuve de la signification

10.03 (1) La signification d’un document peut être établie :

a) soit par un affidavit de la personne qui l'a effectuée;

b) soit, si le document est signifié à un représentant ou à une représentante ou à un conseiller juridique ou à une conseillère juridique du service de discipline du Barreau, par sa reconnaissance ou son acceptation écrite de la signification.

(2) L'affidavit ou la reconnaissance ou l'acceptation écrite de la signification peut être imprimé sur la feuille arrière du document signifié, ou sur une estampille ou une vignette apposée sur la feuille arrière.

RÈGLE 11

FIXATION DES DATES

Audience sur le fond de l'instance

11.01 (1) Un membre de la formation ou le greffe du Tribunal peuvent fixer les dates des audiences.

Inscription

(2) La date de chaque audience sur le fond de l'instance est inscrite sur l'acte introductif d'instance par le membre de la formation ou par le greffe du Tribunal, selon celui ou celle qui l'a inscrite au calendrier.

Avis de l'audience sur le fond de l'instance

11.02 (1) Le Tribunal envoie à toutes les parties et à tous les tiers qui ont été autorisés à y participer un avis de l'audience sur le fond de l'instance.

Audience orale

(2) L'avis d'audience orale comprend :

a) l'indication de l'heure, de la date, du lieu et de l'objet de l'audience;

b) un avertissement précisant que, si la personne recevant l'avis ne comparaît pas à l'audience, la formation peut procéder sans elle et qu'elle n'aura pas droit à d'autres avis dans le cadre de l'instance.

Audience électronique

(3) L'avis d'audience électronique comprend :

a) l'indication de l'heure, de la date, du lieu et de l'objet de l'audience, ainsi que des détails sur la manière dont l'audience sera tenue;

b) un avertissement précisant que, si la personne recevant l'avis ne participe pas à l'audience conformément à l'avis, la formation peut procéder sans elle et qu'elle n'aura pas droit à d'autres avis dans le cadre de l'instance.

Défaut de comparution

(4) Si un avis d'audience est donné à une personne conformément au paragraphe (2) ou (3) et qu'elle n'y comparaît pas ou n'y participe pas, la formation peut procéder sans elle et elle n'a pas droit à d'autres avis dans le cadre de l'instance.

Audition des motions

11.03 La date d'audition d'une motion peut être fixée :

a) soit à n'importe quel jour où l'instance à laquelle elle se rapporte doit être entendue sur le fond;

b) soit à une date obtenue du greffe du Tribunal.

RÈGLE 12

GESTION DES INSTANCES

Conférence de gestion de l’instance

12.01 (1) Un membre de la formation mène une conférence de gestion de l’instance à la date précisée dans l’acte introductif d’instance sauf si les conditions suivantes sont réunies à ce moment-là :

a) la date d’une audience sur le fond de l’instance a été fixée;

b) la date de la conférence préparatoire à l’audience exigée dans le cas prévu à l’alinéa 22.02 a) a été fixée, le cas échéant.

Demande de conférence de gestion de l’instance

(2) Toute partie à une instance peut demander de comparaître devant un membre de la formation dans le cadre d’une conférence de gestion de l’instance.

Présentation de la demande au greffe du Tribunal

(3) La demande de comparution devant un membre de la formation dans le cadre d’une conférence de gestion de l’instance est présentée au greffe du Tribunal.

Avis de conférence de gestion de l’instance

(4) Lorsqu’il reçoit une demande de comparution devant un membre de la formation dans le cadre d’une conférence de gestion de l’instance, le Tribunal avise toutes les parties de la date et de l’heure de la conférence.

Conférence de gestion de l’instance : modalités

12.02 La conférence de gestion de l’instance peut avoir lieu en présence des parties, par conférence téléphonique, par échange de documents ou par une combinaison de ces modalités.

Comparution lors d’une conférence de gestion de l’instance

12.03 (1) À moins que le membre de la formation qui mène la conférence de gestion de l’instance n’ordonne le contraire ou que les parties n’y consentent, toutes les parties à l’instance ou leurs représentants sont tenus de comparaître ou de participer à la conférence.

Défaut de comparaître ou de participer

(2) Le membre de la formation qui mène la conférence de gestion de l’instance peut procéder en l’absence de quiconque est tenu de comparaître ou de participer à la conférence,

mais ne le fait pas, ou sans sa participation.

Pouvoirs

12.04 (1) Dans le cadre de la conférence de gestion de l'instance, le membre de la formation peut :

a) fixer la date d'une autre conférence de gestion de l'instance;

b) ordonner aux parties de comparaître à une conférence préparatoire à l'instance;

c) fixer la date d'une conférence préparatoire à l'instance ou en fixer une autre;

d) fixer la date d'une audience ou l'ajourner;

e) donner des directives.

Résultats de la conférence de gestion de l'instance

(2) À la conclusion de la conférence de gestion de l'audience, le membre de la formation qui l'a menée en inscrit les résultats sur l'acte introductif d'instance, notamment toute conférence de gestion de l'instance ultérieure qu'il a prévue ou toute directive qu'il a donnée.

RÈGLE 13

MOTIONS

Présentation des motions

13.01 (1) Les motions suivantes sont présentées par voie d'avis de motion (formulaire 13A) :

1. Les motions portant sur la compétence de la Section de première instance.

2. Les motions en suspension ou rejet de l'instance.

3. Les motions soulevant des questions constitutionnelles, notamment dans le cadre de la *Charte canadienne des droits et libertés*;

4. Les motions portant sur la divulgation.

5. Les motions visant à obtenir que tout ou partie d'une audience tenue dans le cadre d'une instance se déroule à huis clos.

6. Les motions visant à interdire la divulgation de renseignements rendus publics au cours d'une audience.

Idem

(2) Les motions qui ne figurent pas au paragraphe (1) sont présentées par voie d'avis de motion (formulaire 13A) sauf si l'avis n'est pas nécessaire en raison des circonstances ou de la nature de la motion.

Teneur de l'avis de motion : motion visant à obtenir une ordonnance de huis clos ou de non-divulgation

(3) Sur motion visant à obtenir une ordonnance disposant que tout ou partie d'une audience tenue dans le cadre d'une instance se déroule à huis clos ou interdisant la divulgation de renseignements rendus publics au cours d'une audience, l'auteur de la motion précise, dans l'avis de motion, les motifs à l'appui de celle-ci, sans toutefois faire mention des questions, des communications ou des documents particuliers visés par l'ordonnance.

Obligations de l'auteur de la motion

Application

13.02 (1) La présente règle s'applique si une motion est présentée par voie d'avis de motion.

Signification du dossier de motion

(2) L'auteur de la motion signifie un dossier de motion à chaque partie intimée au moins dix jours avant l'audition de la motion.

(3) Le dossier de motion de l'auteur de la motion comprend, dans des pages numérotées consécutivement :

a) une table des matières décrivant chaque document, y compris les pièces, selon leur nature et leur date et, dans le cas d'une pièce, selon sa nature et son numéro ou sa lettre;

b) l'avis de motion;

c) les affidavits et les autres documents que l'auteur de la motion entend invoquer à l'appui de celle-ci.

Signification du mémoire et du recueil des éléments de doctrine et de jurisprudence

(4) L'auteur de la motion signifie un mémoire, le cas échéant, et un recueil des éléments de doctrine et de jurisprudence, le cas échéant, à toutes les parties intimées au moins sept jours avant l'audition de la motion.

Dépôt des documents

(5) L'auteur de la motion dépose auprès du Tribunal, avec la preuve de leur signification, au moins sept jours avant l'audition de la motion, tous les documents signifiés aux parties intimées en application de la présente règle.

Idem

(6) L'auteur de la motion dépose les documents auprès du Tribunal :

a) en deux exemplaires, si la motion doit être entendue par un seul membre de la formation;

b) en quatre exemplaires, si la motion doit être entendue par une formation de trois membres.

Obligations de la partie intimée

Application

13.03 (1) La présente règle s'applique si la motion est présentée par voie d'avis de motion.

Signification du dossier de motion, du mémoire et du recueil des éléments de doctrine et de jurisprudence

(2) La partie intimée signifie à l'auteur de la motion et à toutes les personnes à qui le dossier de motion de l'auteur de la motion a été signifié, au moins trois jours avant l'audition de la motion, son dossier de motion, le cas échéant, son mémoire, le cas échéant, et son recueil des éléments de doctrine et de jurisprudence, le cas échéant.

Dossier de motion de la partie intimée

(3) Le dossier de motion de la partie intimée comprend, dans des pages numérotées consécutivement :

a) une table des matières décrivant chaque document, y compris les pièces, selon leur nature et leur date et, dans le cas d'une pièce, selon sa nature et son numéro ou sa lettre;

b) les documents que la partie intimée entend invoquer à l'appui de la motion et qui ne figurent pas au dossier de motion de l'auteur de celle-ci.

Dépôt des documents

(4) La partie intimée dépose auprès du Tribunal, avec la preuve de leur signification, au moins sept jours avant l'audition de la motion, tous les documents signifiés à quiconque en application de la présente règle.

Idem

(5) La partie intimée dépose les documents auprès du Tribunal :

a) en deux exemplaires, si la motion doit être entendue par un seul membre de la formation;

b) en quatre exemplaires, si la motion doit être entendue par une formation de trois membres.

Désistement de la motion

13.04 (1) Avant l'audition de la motion, son auteur peut s'en désister en remettant un avis de désistement (formulaire 13B).

(2) L'auteur de la motion qui signifie un dossier de motion et qui ne le dépose pas ou qui ne se présente pas à l'audition de la motion est réputé d'être désisté de la motion.

(3) Si la motion a fait ou est réputée avoir fait l'objet d'un désistement, la partie intimée qui a reçu signification du dossier de motion ont droit aux dépens de la motion.

Motion sur consentement

13.05 Si la motion est présentée sur consentement, son auteur dépose auprès du Tribunal, avec le dossier de motion, le consentement de toutes les personnes qui ont reçu signification de ce dossier et un projet d'ordonnance.

Décision sur la motion

13.06 Après l'audition de la motion, la formation peut, selon le cas :

a) rendre l'ordonnance demandée;

b) rejeter la motion, en totalité ou en partie;

c) ajourner l'audition de la motion, en totalité ou en partie;

d) si la motion est entendue avant l'audience sur le fond de l'instance dans le cadre de laquelle elle a été présentée ou à laquelle elle se rapporte, la renvoyer à la formation qui préside cette audience.

RÈGLE 14

AJOURNEMENTS

Présentation de la demande

Avant la date de l'audience

14.01 (1) La partie qui, avant la date prévue de l'audience, souhaite en obtenir l'ajournement :

a) soit présente une demande d'ajournement au membre de la formation lors de la conférence de gestion de l'instance qui, à moins que ce ne soit pas possible, est tenue au moins dix jours avant la date de l'audience;

b) soit, si le greffe du Tribunal l'informe qu'il est impossible d'inscrire une conférence de gestion de l'instance au calendrier avant cette date, présente à la formation une motion visant à obtenir une ordonnance d'ajournement de l'audience;

c) soit, dans le cas de l'audition d'une motion, présente une demande d'ajournement au greffe du Tribunal si toutes les parties et tous les tiers qui ont été autorisés à participer à l'audience y consentent.

À la date de l'audience ou pendant celle-ci

(2) La partie qui, à la date prévue de l'audience ou pendant celle-ci, souhaite en obtenir l'ajournement, en totalité ou pour ce qu'il en reste, présente à la formation une motion visant à obtenir l'ordonnance d'ajournement pertinente.

Ajournement par le greffe du Tribunal

14.02 Le greffe du Tribunal peut accéder à une demande d'ajournement de l'audition d'une motion si les conditions suivantes sont réunies :

a) toutes les parties et tous les tiers qui ont été autorisés à participer à l'audience y consentent;

b) les parties et les tiers avisent le Tribunal par écrit de leur consentement.

Ajournement : facteurs

14.03 Lorsqu'il ou elle examine s'il y a lieu d'accorder l'ajournement, le membre de la formation ou la formation, selon le cas, peut tenir compte des facteurs suivants :

a) le préjudice causé à quiconque;

b) le moment de la présentation de la demande d’ajournement ou de la motion visant à obtenir l’ajournement;

c) le nombre de fois qu’une demande d’ajournement ou une motion visant à obtenir l’ajournement a déjà été présentée;

d) le nombre d’ajournements déjà accordés;

e) les directives ou les ordonnances antérieures visant l’inscription au calendrier des audiences ultérieures;

f) l’intérêt public;

g) les dépens qui découlent de l’ajournement;

h) la possibilité pour les témoins d’être présents à l’audience;

i) les efforts faits pour éviter l’ajournement;

j) le principe de l’instruction équitable;

k) tout autre facteur pertinent.

RÈGLE 15

LANGUE DES AUDIENCES

Audience en français ou en anglais

15.01 (1) L’audience d’une instance est instruite en français ou en anglais.

Audience en anglais

(2) L’audience d’une instance est instruite en anglais, sauf si une partie à l’instance exige qu’elle soit instruite en français.

Demande d’audience en français : Barreau

(3) Si la personne visée par l’audience est francophone, le Barreau peut exiger que toutes les audiences des instances suivantes soient instruites en français en déposant l’acte introductif d’instance en français auprès du Tribunal :

1. Les instances portant sur la délivrance d’un permis.
2. Les instances portant sur le rétablissement visé à l’article 31 de la Loi.
3. Les instances portant sur la conduite.
4. Les instances portant sur la capacité.
5. Les instances portant sur la compétence professionnelle.
6. Les instances portant sur l’inobservation.

Demande d’audience en français : personne visée par l’instance

(4) La ou le francophone qui est visé par l’instance peut exiger que toutes les audiences des instances suivantes soient instruites en français en en avisant le Tribunal dans les 30 jours qui suivent le moment où il ou elle est réputé avoir reçu signification de l’acte introductif d’instance :

1. Les instances portant sur la délivrance d’un permis.
2. Les instances portant sur le rétablissement visé à l’article 31 de la Loi.
3. Les instances portant sur la conduite.
4. Les instances portant sur la capacité.
5. Les instances portant sur la compétence professionnelle.

6. Les instances portant sur l'inobservation.

Demande d'audience en français : personne visée par l'instance

(5) La ou le francophone qui est visé par l'instance peut exiger que toutes les audiences des instances suivantes soient instruites en français en déposant l'acte introductif d'instance en français auprès du Tribunal :

1. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

2. Les instances portant sur un différend concernant des conditions.

Observation du paragraphe (4) non obligatoire

(6) La personne visée par l'instance n'est pas tenue d'observer le paragraphe (4) si elle a reçu signification de l'acte introductif d'instance en français.

Audience en anglais

15.02 Les règles suivantes s'appliquent si l'audience d'une instance se déroule en anglais :

a) les témoignages présentés dans une autre langue que l'anglais à l'audience sont traduits en anglais;

b) les documents se rapportant à l'audience qui sont déposés auprès du Tribunal, ou qui sont reçus par la formation qui préside l'audience, en application des présentes règles sont soit rédigés en anglais, soit accompagnés d'une traduction en langue anglaise certifiée conforme par un affidavit du traducteur.

Audience en français

15.03 Les règles suivantes s'appliquent si l'audience d'une instance se déroule en français :

a) les témoignages et les observations présentés en français ou en anglais sont reçus, enregistrés et transcrits dans la langue dans laquelle ils sont présentés;

b) les documents se rapportant à l'audience qui sont déposés auprès du Tribunal, ou qui sont reçus par la formation qui préside l'audience, en application des présentes règles peuvent être rédigés en français et ne doivent pas nécessairement être accompagnés de leur traduction en anglais;

c) à la demande de la personne visée par l'instance qui parle français, mais pas anglais, la formation qui préside l'audience fournit l'interprétation en français de tout ce qui est donné oralement dans une autre langue que le français à l'audience;

d) à la demande de la personne visée par l’instance qui parle français, mais pas anglais, le Tribunal fait faire traduire en français tout document se rapportant à l’audience qui lui est déposé ou qui est reçu par la formation en anglais;

e) le Tribunal fait traduire en français les inscriptions, les décisions, les ordonnances ou les motifs d’une décision ou d’une ordonnance se rapportant à l’audience qui sont rédigés en anglais, à moins que les parties à l’instance ne conviennent autrement.

RÈGLE 16

MÉTHODE D'INSTRUCTION

Audience orale

16.01 Sous réserve des règles 16.02 et 16.03, les audiences se tiennent oralement, en présence des parties, des tiers, le cas échéant, et de leurs représentants respectifs, le cas échéant.

Audience électronique

Motions

16.02 (1) Les motions suivantes sont, sans motion ni ordonnance, entendues par voie d'audience électronique :

1. Les motions sur consentement.

2. Les motions visant à obtenir un ajournement.

Ordonnance pour tenue d'une audience électronique

(2) Sur motion d'une partie ou de son propre chef, la formation peut ordonner que tout ou partie de l'audience se tienne électroniquement.

Facteurs à prendre en considération

(3) Lorsqu'elle décide s'il convient de tenir une audience électroniquement, la formation peut peser ce qui suit :

a) la pertinence de l'objet de l'audience;

b) la nature de la preuve et la question de savoir si la crédibilité est en litige;

c) la question de savoir si les questions en litige sont des questions de droit;

d) la facilité pour les parties de se conformer à l'ordonnance;

e) le coût et l'efficience de l'instance dans le cadre de laquelle se tient l'audience, ainsi que le respect des délais;

f) le fait d'éviter les retards ou toute prolongation inutile de l'instance;

g) l'équité du processus;

h) l’accès du public à l’audience;

i) le fait que le Barreau puisse remplir la mission que lui confie la Loi;

j) toute autre question qu’elle considère comme pertinente dans ses efforts visant à en arriver à un règlement juste et rapide de l’instance dans le cadre de laquelle se tient l’audience.

Méthode d’instruction électronique

(4) L’audience électronique se tient au téléphone ou par le biais d’un autre moyen électronique. Toutes les parties, tous les tiers qui ont été autorisés à participer à l’audience et la formation doivent pouvoir s’entendre les uns les autres ainsi que les témoins tout au long de l’audience.

Prise de dispositions en vue d’une audience électronique

(5) Le Tribunal prend toutes les dispositions nécessaires à la tenue de l’audience électronique et avise de ces dispositions toutes les personnes qui y participent et leurs représentants, le cas échéant.

Audience sur pièces

16.03 (1) Sous réserve du paragraphe (3) et des paragraphes 16.02 (1) et (2), les audiences suivantes se tiennent sur pièces :

1. Les audiences portant sur une motion présentée en vue d’obtenir une ordonnance disposant qu’une audience se tienne électroniquement.

Audition de motions sur pièces

(2) Les motions suivantes sont entendues sur pièces :

1. Les motions sur consentement.

2. Les motions visant à obtenir un ajournement.

Ordonnance prévoyant la tenue d’une audience orale

(3) Sur motion d’une partie ou de son propre chef, la formation peut ordonner qu’une audience visée au paragraphe (1) se tienne oralement.

Méthode d’instruction sur pièces

(4) L’audience sur pièces se tient par voie d’échange de documents. Toutes les parties et tous les tiers qui ont été autorisés à participer à l’audience ont le droit de recevoir dans le cadre de celle-ci les mêmes documents que la formation.

Prise de dispositions en vue d’une audience sur pièces

(5) Le Tribunal prendre toutes les dispositions nécessaires à la tenue de l’audience sur pièces et avise de ces dispositions toutes les personnes qui y participent et leurs représentants, le cas échéant.

Motion présentée en vertu de la règle 21

Avis non obligatoire

16.04 L’obligation de donner un avis, prévue aux paragraphes 16.02 (5) et 16.03 (5) ne vaut pas dans le cas de l’audition d’une motion visant à obtenir une ordonnance visée à la règle 21.01 s’il a été rendu une ordonnance dispensant de la signification d’un dossier de motion.

RÈGLE 17

LIEU DES AUDIENCES

Lieu des audiences

17.01 (1) Sous réserve des paragraphes (2) et (3), toutes les audiences se tiennent dans les bureaux du Barreau à Toronto.

(2) Si toutes les parties y consentent, l'audience se tient ailleurs que dans les bureaux du Barreau à Toronto, à l'endroit dont elles ont convenu.

(3) Sur motion d'une partie, la formation peut ordonner que l'audience se tienne ailleurs que dans les bureaux du Barreau à Toronto.

(4) Lorsqu'elle décide s'il convient d'ordonner qu'une audience se tienne ailleurs que dans les bureaux du Barreau à Toronto, la formation peut peser ce qui suit :

a) la facilité pour les parties de se conformer à l'ordonnance;

b) le coût et l'efficience de l'instance dans le cadre de laquelle se tient l'audience, ainsi que le respect des délais;

c) le fait d'éviter les retards ou toute prolongation inutile de l'instance;

d) l'équité du processus;

e) l'accès du public à l'audience;

f) le fait que le Barreau puisse remplir la mission que lui confie la Loi;

g) toute autre question qu'elle considère comme pertinente dans ses efforts visant à en arriver à un règlement juste et rapide de l'instance dans le cadre de laquelle se tient l'audience.

(5) L'ordonnance disposant qu'une audience se tienne ailleurs que dans les bureaux du Barreau à Toronto ne doit être rendue qu'après consultation du greffe du Tribunal.

RÈGLE 18

ACCÈS AUX AUDIENCES

Audiences publiques

18.01 Sous réserve de la règle 18.02, toutes les audiences sont publiques.

Audiences à huis clos

18.02 Sur motion d'une partie, la formation peut ordonner que tout ou partie d'une audience d'une instance se tienne à huis clos si, selon le cas :

a) des questions intéressant la sécurité publique pourraient être révélées;

b) il est nécessaire de préserver le secret d'un document ou d'une communication protégé;

c) des questions financières ou personnelles de nature intime ou d'autres questions pourraient être révélées, qui sont telles qu'eu égard aux circonstances, l'avantage qu'il y a à ne pas les révéler dans l'intérêt de la personne concernée ou dans l'intérêt public l'emporte sur le principe de la publicité des audiences;

d) dans le cas d'une audience tenue en totalité ou en partie électroniquement, il n'est pas commode de le faire publiquement.

Audience à huis clos

18.03 Sauf si la formation en décide autrement, les personnes suivantes peuvent être présentes à l'audience qui se tient, en totalité ou en partie, à huis clos :

a) sous réserve de la règle 24.01, tout témoin dont, par sa nature, le témoignage a donné naissance à l'ordonnance de huis clos;

b) les parties et leurs représentants;

c) les tiers qui ont été autorisés à participer à tout ou partie de l'audience et leurs représentants;

d) les autres personnes que la formation juge indiquées.

Interdiction de divulgation : audiences à huis clos

18.04 (1) Sous réserve du paragraphe (2), si tout ou partie d'une audience se tient à huis clos, nul ne doit divulguer ce qui suit à quiconque, si ce n'est son représentant, sa représentante

ou une autre personne qui assiste ou participe à l'audience ou à la partie de celle-ci qui se tient à huis clos :

a) les renseignements divulgués à l'audience ou à la partie de celle-ci qui s'est tenue à huis clos;

b) si la formation le précise et dans la mesure où elle le fait, les motifs de la décision ou de l'ordonnance qu'elle rend à la suite de l'audience ou de la partie de celle-ci qui s'est tenue à huis clos, à l'exclusion de ceux de l'ordonnance disposant qu'une audience ultérieure se tienne en totalité ou en partie à huis clos.

Ordonnance de publication : audience à huis clos

(2) Sur motion d'une personne, la formation peut, par ordonnance, permettre à une personne de divulguer des renseignements visés au paragraphe (1).

Ordonnance de non-publication : audience publique

18.05 Sur motion d'une partie ou de son propre chef, la formation, en cas d'application de l'un ou l'autre des alinéas 18.02 a), b) et c), peut, par ordonnance, interdire à quiconque assiste ou participe à une audience publique de divulguer les renseignements divulgués au cours de tout ou partie de l'audience à quiconque, si ce n'est son représentant ou sa représentante ou une autre personne qui y assiste ou y participe.

Révision de l'ordonnance

18.06 La formation peut, sur motion d'une personne, réviser tout ou partie d'une ordonnance rendue à l'égard de toute question visée à la présente règle et confirmer, modifier, suspendre ou annuler l'ordonnance.

Interdiction de prendre des photographies, etc. à l'audience

18.07 (1) Sous réserve des paragraphes (2) et (3), nul ne peut,

a) faire ou tenter de faire une reproduction susceptible de donner, par procédé électronique ou autre, des représentations visuelles ou sonores, notamment par photographie, par film ou par enregistrement sonore,

(i) à une audience,

(ii) d'une personne qui entre dans la salle où se tient ou doit se tenir l'audience, ou en sort,

(iii) d'une personne qui se trouve dans l'édifice où se tient ou doit se tenir l'audience, s'il existe des motifs valables de croire que la personne se rend à la salle d'audience ou la quitte;

b) publier, diffuser, reproduire ou distribuer autrement les photographies, les films ou les enregistrements sonores ou autres reproductions faits contrairement à l'alinéa a);

c) diffuser ou reproduire un enregistrement sonore fait de la manière décrite à l'alinéa (2) b).

Exceptions

(2) Le paragraphe (1) n'empêche pas,

a) une personne de prendre discrètement des notes par écrit ou de faire des croquis discrètement, à l'audience;

b) une partie, le représentant d'une partie ou un journaliste de faire, discrètement et de la manière approuvée par la formation, un enregistrement sonore au cours de l'audience destiné uniquement à compléter ou à remplacer des notes manuscrites.

Exceptions

(3) Le paragraphe (1) ne s'applique pas à la photographie, au film, à l'enregistrement sonore ni à l'autre reproduction établie avec l'autorisation de la formation présidant l'audience,

a) aux fins de l'audience, et notamment pour la présentation de la preuve ou pour servir d'archives;

b) aux fins éducatives ou autres approuvées par la formation, avec le consentement des parties et des témoins.

RÈGLE 19

DIVULGATION

Obligations du Barreau

19.01 (1) Dans toute instance, le Barreau, en tant que partie, divulgue à la personne visée par l'instance tout ce qu'exige la loi et, notamment, il lui fournit ce qui suit, au plus tard 10 jours avant l'audience sur le fond de l'instance :

a) une copie de tout document sur lequel il se propose de s'appuyer en plus de donner à la personne l'occasion d'examiner tout autre document pertinent;

b) une déclaration écrite signée de chaque témoin ou, à défaut, un résumé du témoignage oral prévu du témoin;

c) la liste des témoins que le Barreau se propose d'appeler.

Obligations de la personne visée par l'instance

(2) Dans les instances portant sur la délivrance d'un permis, sur le rétablissement visé à l'article 31 de la Loi, sur le rétablissement visé à l'article 49.42 de la Loi ou sur un différend concernant des conditions, la personne visée par l'instance fournit ce qui suit au Barreau, au plus tard 10 jours avant l'audience sur le fond de l'instance :

a) une copie de tout document sur lequel elle se propose de s'appuyer;

b) une déclaration écrite signée de chaque témoin sur lequel elle se propose de s'appuyer ou, à défaut, un résumé du témoignage oral prévu du témoin;

c) la liste des témoins qu'elle se propose d'appeler.

Résumé des témoignages

(3) Le résumé du témoignage oral d'un témoin est écrit et comprend ce qui suit :

a) la teneur du témoignage;

b) la liste des documents ou objets, le cas échéant, auxquels le témoin renverra;

c) les nom et adresse du témoin ou, à défaut de l'adresse, les nom et adresse d'une personne par l'intermédiaire de laquelle il est possible de communiquer avec lui.

Rapports d’experts

19.02 (1) Chaque partie et chaque tiers fournissent ce qui suit à toutes les autres parties et à tous les autres tiers :

a) au plus tard 90 jours avant l’audience sur le fond de l’instance :

(i) la liste des experts que la personne se propose d’appeler,

(ii) une copie du *curriculum vitae* de chaque expert figurant dans la liste prévue au sous-alinéa (i),

(iii) un résumé du témoignage oral prévu de chaque expert figurant dans la liste prévue au sous-alinéa (i);

b) au plus tard 30 jours avant l’audience sur le fond de l’instance, une copie du rapport écrit de chaque expert figurant dans la liste prévue au sous-alinéa a) (i), si la personne se propose de s’appuyer sur ce rapport à l’audience.

Résumé des témoignages

(2) Le résumé du témoignage oral d’un expert est écrit et comprend ce qui suit :

a) la teneur du témoignage de l’expert;

b) la liste des documents ou objets, le cas échéant, auxquels l’expert renverra;

c) les noms et adresse de l’expert.

Défaut de divulguer : conséquences

Preuve inadmissible

19.03 Les éléments de preuve qui ne sont pas divulgués comme l’exige la règle 19.01 ou 19.02 sont inadmissibles dans une instance, sauf avec la permission de la formation.

RÈGLE 20

AVEUX

Interprétation

20.01 La définition qui suit s'applique à la présente règle.

«authenticité» L'authenticité d'un document comprend les cas où :

a) un document présenté comme un original a été produit, notamment par impression ou rédaction, et signé ou passé comme il paraît l'avoir été;

b) un document présenté comme une copie est une copie conforme de l'original;

c) si le document est la copie d'une lettre, d'un télégramme ou d'un document transmis par télécommunication, l'original a été envoyé comme il paraît l'avoir été et il a été reçu par la personne à qui il est adressé.

Demande d'aveux relatifs à un fait ou à un document

20.02 (1) Dans une instance, une partie peut, au moins 30 jours avant l'audience sur le fond de l'instance, demander à une autre partie de reconnaître, aux fins de l'audience uniquement, la véracité d'un fait ou l'authenticité d'un document.

Formulaire de demande d'aveux

(2) La demande d'aveux est rédigée selon le formulaire 20A.

Signification de la demande d'aveux

(3) La partie qui présente une demande d'aveux à une autre partie lui signifie :

a) d'une part, la demande d'aveux;

b) d'autre part, une copie du document mentionné dans la demande d'aveux, à moins que l'autre partie ne l'ait déjà en sa possession.

Réponse à la demande d'aveux

20.03 (1) La partie à laquelle une demande d'aveux est signifiée y répond dans les 20 jours suivant la signification en signifiant une réponse à la demande d'aveux à la partie qui l'a présentée.

Formulaire et contenu de la réponse

(2) La réponse à une demande d'aveux est rédigée selon le formulaire 20B et, selon le cas :

a) reconnaît la véracité du fait ou l'authenticité du document mentionné dans la demande;

b) nie expressément la véracité du fait ou l'authenticité du document mentionné dans la demande;

c) refuse de reconnaître la véracité du fait ou l'authenticité du document mentionné dans la demande d'aveux en exposant les motifs du refus.

Effet de la demande d'aveux

Défaut de répondre assimilé à un aveu

20.04 (1) La partie qui reçoit signification d'une demande d'aveux et qui ne signifie pas sa réponse dans le délai prescrit au paragraphe 20.03 (1) est réputée, aux fins de l'instance uniquement, reconnaître la véracité des faits ou l'authenticité des documents mentionnés dans la demande.

Réponse insuffisante assimilée à un aveu

(2) Sous réserve du paragraphe (3), la partie qui reçoit signification d'une demande d'aveux et qui signifie sa réponse dans le délai prescrit au paragraphe 20.03 (1) sans toutefois se conformer au paragraphe 20.03 (2) à l'égard d'un fait ou d'un document mentionné dans la demande est réputée, aux fins de l'instance uniquement, reconnaître la véracité de ce fait ou l'authenticité de ce document.

Absence de l'audience ou non-participation à celle-ci assimilée à un aveu

(3) La partie qui reçoit signification d'une demande d'aveux et qui n'assiste pas ou ne participe pas à l'audience sur le fonds de l'instance, est réputée, aux fins de l'instance uniquement, qu'elle ait ou non signifié une réponse, reconnaître la véracité des faits ou l'authenticité des documents mentionnés dans la demande.

Dépens en cas de dénégation ou de refus

20.05 Si une partie nie ou refuse de reconnaître la véracité d'un fait ou l'authenticité d'un document après avoir reçu une demande d'aveux et que la véracité de ce fait ou l'authenticité de ce document est par la suite établie dans le cadre de l'instance, la formation peut prendre la dénégation ou le refus en considération dans l'exercice de son pouvoir discrétionnaire d'adjudication des dépens que lui confèrent l'article 49.28 de la *Loi sur le Barreau* et la règle 25.01.

Rétractation de l’aveu

20.06 (1) Sur motion de la partie qui reconnaît ou est réputée reconnaître la véracité d’un fait ou l’authenticité d’un document, une ordonnance peut être rendue pour rétracter les aveux.

Délai de présentation de la motion

(2) La motion prévue à la présente règle est présentée :

a) soit avant l’audience sur le fond de l’instance;

b) soit en tout temps, avec autorisation.

RÈGLE 21

ORDONNANCES DE SUSPENSION OU DE RESTRICTION

Pouvoir de rendre une ordonnance

21.01 Sur motion du Barreau, la Section de première instance peut rendre une ordonnance interlocutoire ayant pour effet de suspendre le permis du ou de la titulaire de permis ou de restreindre la manière dont un ou une titulaire de permis peut pratiquer le droit ou fournir des services juridiques.

Disposition générale

21.02 (1) Sous réserve de la présente règle, la règle 13 s'applique, avec les adaptations nécessaires, aux motions présentées en vue d'obtenir une ordonnance prévue à la règle 21.01.

Autorisation nécessaire dans certains cas

(2) Le Barreau doit obtenir l'autorisation du Comité d'autorisation des instances avant de présenter une motion en vue d'obtenir une ordonnance prévue à la règle 21.01 si la motion se rapporte à une instance dont l'instruction n'a pas commencé ou qu'elle est présentée dans le cadre d'une instance sur le fond de laquelle la Section de première instance n'a pas commencé d'audience.

Présentation de la motion

21.03 Les motions présentées en vue d'obtenir une ordonnance prévue à la règle 21.01 le sont par voie d'avis de motion (formulaire 13A).

Obligations du Barreau

Signification du dossier de motion

21.04 (1) Le Barreau signifie un dossier de motion au ou à la titulaire de permis au moins trois jours avant la date d'audition de la motion.

Mode de signification

(2) Le dossier de motion est signifié conformément au paragraphe 10.01 (1) comme s'il s'agissait d'un acte introductif d'instance.

Dispense de la signification

(3) Sur motion du Barreau, une ordonnance peut dispenser de la signification du dossier de motion si, selon le cas :

a) les circonstances rendent la signification peu pratique ou inutile;

b) le délai nécessaire à la signification risque d'avoir des conséquences graves.

Signification du mémoire et du recueil des éléments de doctrine et de jurisprudence

(4) En cas de signification du dossier de motion, le Barreau signifie, s'il en a, son mémoire et son recueil des éléments de doctrine et de jurisprudence au ou à la titulaire de permis au moins trois jours avant la date d'audition de la motion.

Dépôt des documents

(5) En cas de signification du dossier de motion, le Barreau dépose les documents signifiés au ou à la titulaire de permis en application de la présente règle, avec la preuve de leur signification, auprès du Tribunal au plus tard à 16 heures, la veille de l'audition de la motion.

Dépôt des documents auprès de la formation

(6) En cas d'ordonnance dispensant de la signification du dossier de motion, le Barreau dépose, s'il en a, un dossier de motion, son mémoire et son recueil des éléments de doctrine et de jurisprudence auprès de la formation chargée de l'audition de la motion.

Obligations du titulaire de permis

Signification du dossier de motion, du mémoire et du recueil des éléments de doctrine et de jurisprudence

21.05 (1) En cas de signification du dossier de motion en application de la règle 21.04, le ou la titulaire de permis signifie au Barreau, au plus tard à 14 heures, la veille de l'audition de la motion, son dossier de motion, s'il en a, son mémoire, s'il en a, et son recueil des éléments de doctrine et de jurisprudence, s'il en a.

Dépôt des documents

(2) Le ou la titulaire de permis dépose les documents signifiés au Barreau en application de la présente règle, avec la preuve de leur signification, auprès du Tribunal au plus tard à 16 heures, la veille de l'audition de la motion.

Ce qui est admissible en preuve

21.06 (1) Malgré les règles 24.02, 24.06 et 24.07, et sous réserve du paragraphe (2), les éléments suivants peuvent être admis en preuve et servir de fondement à une décision lors de l'audition d'une motion présentée en vue d'obtenir une ordonnance prévue à la règle 21.01, même s'ils ne sont pas donnés ou prouvés sous serment ou affirmation solennelle et même s'ils sont inadmissibles en preuve devant un tribunal judiciaire :

1. Les preuves testimoniales qui sont pertinentes à l'objet de l'audience.

2. Les écrits et les objets qui sont pertinents à l'objet de l'audience.

Ce qui est inadmissible en preuve

(2) Sauf dans la mesure permise par la Loi, est inadmissible en preuve au cours de l'audience :

a) ce qui serait inadmissible en preuve devant un tribunal judiciaire en raison d'un privilège reconnu en droit de la preuve;

b) ce qui est inadmissible en vertu de n'importe quelle loi.

Ordonnance

21.07 (1) La formation qui rend une ordonnance prévue à la règle 21.01 précise dans l'ordonnance que celle-ci a effet jusqu'au premier en date des événements suivants :

1. En cas d'ordonnance dispensant de la signification du dossier de motion, une formation la modifie ou l'annule en se fondant sur des preuves que le ou la titulaire de permis lui présente dans les 30 jours de celui où il ou elle a reçu signification de l'ordonnance.

2. Une formation modifie ou annule l'ordonnance sur consentement du Barreau et du ou de la titulaire de permis avant l'audience sur le fond de l'instance à laquelle se rapporte la motion.

3. Une formation modifie ou annule l'ordonnance en se fondant sur de nouvelles preuves ou un changement important que le Barreau ou le ou la titulaire de permis lui présente avant l'audience sur le fond de l'instance à laquelle se rapporte la motion.

4. La formation qui préside l'audience sur le fond de l'instance à laquelle se rapporte la motion modifie ou annule l'ordonnance avant de rendre une décision définitive dans l'instance.

5. La formation qui préside l'audience sur le fond de l'instance à laquelle se rapporte la motion rend une décision définitive dans l'instance.

(2) En cas d'ordonnance dispensant de la signification du dossier de motion, le Barreau signifie au ou à la titulaire de permis toute ordonnance de la formation, ainsi qu'une copie du dossier de motion et de tous les autres documents utilisés au cours de l'audition de la motion.

(3) Sur motion du Barreau, une ordonnance peut dispenser de l'observation d'une exigence visée au paragraphe (2).

RÈGLE 22

CONFÉRENCES PRÉPARATOIRES À L'AUDIENCE

Objet de la conférence préparatoire à l'audience

22.01 (1) L'objet de la conférence préparatoire à l'audience est de faciliter une résolution équitable de l'instance, de la façon la plus expéditive.

(2) Sans préjudice de la portée générale du paragraphe (1), la personne, notamment un membre de la formation, qui préside une conférence préparatoire à l'audience peut discuter de ce qui suit avec les parties :

a) la définition, la restriction ou la simplification des questions en litige;

b) la précision de la preuve, le choix des témoins et la restriction de l'une ou des autres;

c) la possibilité de transiger sur une partie ou la totalité des questions en litige dans l'instance;

d) la possibilité pour les parties de s'entendre sur un exposé conjoint de tout ou partie des faits en litige dans l'instance;

e) les directives à donner aux parties relativement au déroulement de l'instance ou à une motion dans l'instance.

Obligation de tenir une conférence préparatoire à l'audience

22.02 Il est tenu une conférence préparatoire à l'audience dans une instance si, selon le cas :

a) une partie à l'instance estime que l'audience sur le fond de celle-ci durera plus de deux jours;

b) un membre de la formation ordonne aux parties à une instance de s'y présenter;

c) les parties conviennent de s'y présenter.

Présidence de la conférence préparatoire à l'audience

22.03 La conférence préparatoire à l'audience est présidée par la personne, notamment un membre de la formation, que nomme le président ou le vice-président.

Temps des conférences préparatoires à l'audience

22.04 Toutes les conférences préparatoires à l'audience tenues dans le cadre d'une instance le sont avant la fin de l'audience sur le fond de l'instance et, à moins de directive contraire, avant le début de cette audience.

Présence à la conférence préparatoire à l'audience

22.05 (1) Sous réserve du paragraphe (2), la conférence préparatoire à l'audience se tient en présence des parties.

Tenue de la conférence préparatoire à l'audience par conférence téléphonique

(2) La conférence préparatoire à l'audience peut se tenir par conférence téléphonique si, selon le cas :

a) les parties y consentent;

b) le membre de la formation ou la personne qui préside la conférence le permet.

Fixation de la date de la conférence préparatoire à l'audience : par le membre de la formation

22.06 (1) Un membre de la formation ou le greffe du Tribunal peuvent fixer les dates des conférences préparatoires à l'audience.

Inscription

(2) Chaque conférence préparatoire à l'audience est inscrite à l'acte introductif d'instance par un membre de la formation ou par le greffe du Tribunal, selon celui qui en fixe la date.

Avis de la conférence préparatoire à l'audience

(3) Le Tribunal avise toutes les parties de la date et de l'heure de chaque conférence préparatoire à l'audience tenue dans le cadre d'une instance en précisant le nom de la personne, notamment le membre de la formation, qui la présidera.

Avis facultatif

(4) Le paragraphe (4) ne s'applique pas si les conditions suivantes sont réunies :

a) une formation ordonne aux parties à une instance de se présenter à une conférence préparatoire à l'audience;

b) un membre de la formation qui a donné l'ordre présidera la conférence

préparatoire à l'audience;

c) la conférence préparatoire à l'audience suivra immédiatement l'ordre.

Préparation de la conférence préparatoire à l'audience

22.07 (1) Le Barreau prépare un mémoire et le remet aux autres parties et à la personne, notamment le membre de la formation, qui préside la conférence préparatoire à l'audience au moins sept jours avant la tenue de celle-ci.

Non-application du paragraphe (1)

(2) Le paragraphe (1) ne s'applique pas si les conditions suivantes sont réunies :

a) une formation ordonne aux parties à une instance de se présenter à une conférence préparatoire à l'audience;

b) un membre de la formation qui a donné l'ordre présidera la conférence préparatoire à l'audience;

c) la conférence préparatoire à l'audience suivra immédiatement l'ordre.

Présence à la conférence préparatoire à l'audience

22.08 À moins que la personne, notamment un membre de la formation, qui préside la conférence préparatoire à l'audience n'ordonne le contraire, les parties à l'instance ou leurs représentants sont tenus d'assister en personne à la conférence et d'y participer.

Résultats de la conférence préparatoire à l'audience

22.09 (1) À l'issue de la conférence préparatoire à l'audience, la personne, notamment le membre de la formation, qui la préside inscrit ce qui suit à l'acte introductif d'instance :

a) le nom des personnes qui ont assisté en personne à la conférence ou qui y ont participé, et celui de celles qui ne l'ont pas fait;

b) les transactions conclues;

c) toute directive donnée aux parties relativement au déroulement de l'instance ou à une motion dans l'instance.

(2) Les transactions conclues lors d'une conférence préparatoire à l'audience et inscrites à l'acte introductif d'instance lient les parties.

Non-divulgation à la formation

22.10 (1) Aucun renseignement relatif à la conférence préparatoire à l'audience n'est

communiqué à la formation qui préside l'audience sur le fond de l'instance ou l'audition d'une motion dans l'instance, sauf dans la mesure prévue par l'inscription faite en application de la règle 22.09.

Deux membres différents pour présider les audiences

(2) Le membre de la formation qui préside la conférence préparatoire à l'audience ne préside pas l'audience sur le fond de l'instance, sauf avec le consentement des parties à l'instance.

RULE 22.1

DÉPÔT DE DOCUMENTS DE CONSENTEMENT AVANT L'AUDIENCE

Documents à déposer

22.1.01 (1) Avant la date de l'audience, les parties déposent auprès du Tribunal tous les documents, y compris tout exposé conjoint des faits, qui du consentement des parties, peuvent être utilisés ou mentionnés au cours de l'audience.

Moment du dépôt

(2) À moins de circonstances exceptionnelles, les parties déposent les documents auprès du Tribunal en application de la présente règle au moins deux jours avant la date de l'audience.

Confirmation de l'accord à déposer

(3) Lors du dépôt de tout document auprès du Tribunal en application de la présente règle, les parties déposent, en même temps que le document, une confirmation écrite de leur accord à l'utilisation ou à la mention de celui-ci au cours de l'audience.

Nombre de copies à déposer

(4) Lors du dépôt d'un document auprès du Tribunal en application de la présente règle, les parties déposent selon le cas :

a) deux exemplaires du document si l'audience se tient devant une formation composée d'un seul membre de la formation;

b) quatre exemplaires du document si l'audience se tient devant une formation composée de trois membres.

Documents à mettre à la disposition de la formation

(5) Autant que possible, tous les documents déposés auprès du Tribunal en application de la présente règle sont mis à la disposition de la formation qui préside l'audience avant le début de celle-ci.

Aucune dispense des autres exigences

(6) La présente règle n'a pas pour effet de dispenser une partie des exigences prévues aux Règles ou des conséquences du non-respect de ces exigences.

Dépôt de documents auprès de la formation durant l’audience

(7) La présente règle n’a pas pour effet d’empêcher une partie de déposer un document auprès de la formation qui préside l’audience en application des présentes Règles.

RÈGLE 23

DÉROULEMENT DES AUDIENCES

Consentement à l'instruction de l'instance par un seul membre

23.01 Pour l'application de la disposition 2 du paragraphe 2 (1) du Règlement de l'Ontario 167/07, les parties à une instance portant sur la conduite peuvent consentir à ce qu'un seul membre de la formation préside l'audience sur le fond de l'instance en déposant leur consentement (formulaire 23A) :

a) soit auprès du Tribunal, le plus tôt possible, mais au moins trois jours avant la date de l'audience;

b) soit auprès du membre de la formation, avant le début de l'audience.

Transcriptions

Production des transcriptions

23.02 (1) Le Tribunal fait enregistrer toutes les audiences orales et électroniques par un service de sténographie de façon à permettre la production d'une transcription.

Commande d'une transcription

(2) La personne qui souhaite avoir une transcription de l'audience la commande auprès du service de sténographie qui a enregistré l'audience.

Coût de la transcription

(3) Le coût de la transcription d'une audience est à la charge exclusive de la personne qui souhaite l'avoir.

Obligation de déposer la transcription

(4) La première partie qui obtient la transcription d'une audience en dépose une copie auprès du Tribunal.

Interprètes

23.03 (1) Le Tribunal fournit l'interprète dont a besoin un témoin qui ne comprend pas la ou les langues dans lesquelles doit se dérouler un interrogatoire pendant l'audience.

Avis au Tribunal

(2) La personne qui a l'intention d'appeler un témoin qui a besoin d'interprétation en

avise le Tribunal le plus tôt possible, mais au moins cinq jours avant l'audience à laquelle le témoin subira un interrogatoire.

Compétence de l'interprète

(3) L'interprète est compétent et indépendant.

Serment ou affirmation solennelle

(4) L'interprète requis en application du paragraphe (1) s'engage, sous serment ou affirmation solennelle, avant que le témoin soit appelé, à traduire fidèlement le serment ou l'affirmation solennelle du témoin ainsi que les questions qui lui sont posées et ses réponses.

Besoins particuliers

23.05 Les parties ou les tiers informent le plus tôt possible le greffe du Tribunal de leurs besoins particuliers ou de ceux de leurs témoins.

Limite imposée à l'interrogatoire

23.06 La formation peut imposer des limites raisonnables à la poursuite de l'interrogatoire ou du contre-interrogatoire d'un témoin si elle est convaincue que l'interrogatoire ou le contre-interrogatoire a déjà fait toute la lumière sur tout ce qui touche aux questions en litige dans le cadre de l'instance.

RÈGLE 24

PREUVE

Exclusion de témoins

24.01 (1) Sous réserve du paragraphe (2), sur motion d'une partie, la formation peut, par ordonnance, exclure un témoin de la salle d'audience jusqu'à ce qu'il soit appelé à témoigner.

Restriction

(2) L'ordonnance visée au paragraphe (1) ne peut être rendue à l'égard d'une partie ou d'un témoin dont la présence est essentielle pour renseigner le représentant ou la représentante de la personne qui l'a appelé à témoigner. La formation peut toutefois, par ordonnance, exiger que cette partie ou ce témoin témoigne avant que d'autres témoins soient appelés à témoigner pour cette partie ou cette personne.

Interdiction de communiquer avec un témoin exclu

(3) Sous réserve du paragraphe (4), nul ne peut communiquer au témoin exclu d'une audience par suite d'une ordonnance le contenu des témoignages entendus pendant son absence, avant que ce témoin soit lui-même appelé et témoigne.

Ordonnance permettant la communication avec un témoin exclu

(4) Sur motion de la personne qui appelle à témoigner le témoin exclu de l'audience, la formation peut, par ordonnance, permettre de communiquer au témoin des témoignages entendus pendant son absence.

Règles d'administration de la preuve

24.02 Sous réserve de la présente règle, les règles d'administration de la preuve applicables dans les instances civiles s'appliquent aux audiences.

Preuve par affidavit : audience sur le fond de l'instance

24.03 (1) Lors de l'audience sur le fond de l'instance, la déposition d'un témoin ou la preuve de l'existence d'un fait ou d'un document donné peut être faite au moyen d'un affidavit, sous réserve de toute ordonnance à l'effet contraire de la formation.

Contre-interrogatoire

(2) Lorsque la déposition d'un témoin ou la preuve de l'existence d'un fait ou d'un document donné est faite au moyen d'un affidavit, le déposant ou la déposante qu'une partie opposée à la partie qui présente la preuve ainsi faite souhaite contreinterroger :

a) soit assiste en personne à l'audience sur le fond de l'instance aux fins du contre-interrogatoire;

b) soit se présente devant un auditeur officiel aux fins du contre-interrogatoire, la transcription de celui-ci pouvant alors être admise en preuve à l'audience sur le fond de l'instance.

(3) Le contre-interrogatoire mené en application de l'alinéa (2) b) l'est conformément aux dispositions des Règles de procédure civile applicables aux interrogatoires oraux et, au besoin, les parties peuvent demander des directives à la formation.

Accord sur les faits

24.04 Lors de l'audience sur le fond de l'instance, la formation peut recevoir les faits sur lesquels les parties se sont mises d'accord sans autre preuve ni témoignage, et agir en conséquence.

Admissibilité de la preuve admise à l'égard d'une autre instance

Interprétation

24.05 (1) La définition suivante s'applique à la présente règle.

«preuve déjà admise» Preuve qui a été admise dans le cadre d'une autre instance devant un Tribunal judiciaire ou administratif, qu'il soit situé ou non en Ontario, lors d'une audience tenue avant celle dans laquelle son admission est maintenant demandée.

Moment de l'admission

(2) La preuve déjà admise peut être admise lors de l'audience sur le fond de l'instance si, selon le cas :

a) les parties à l'instance y consentent;

b) les conditions suivantes sont réunies :

(i) la formation est convaincue qu'il existe une transcription raisonnablement fidèle de l'audience antérieure,

(ii) la preuve déjà admise est pertinente dans le cadre de l'audience en cours,

(iii) la partie à laquelle la preuve dont l'admission est demandée est défavorable était ou est une partie à l'autre instance,

(iv) la partie à laquelle la preuve dont l'admission est demandée est défavorable a eu l'occasion de contreinterroger le témoin à l'audience antérieure si elle n'y a pas elle-même témoigné,

(v) une question importante en litige dans l'autre instance est semblable sur le fond à une question importante en litige dans l'instance en cours.

Preuve d'une infraction antérieure

24.06 (1) La preuve qu'une personne a été déclarée par un organisme juridictionnel du Canada coupable d'avoir commis une infraction constitue la preuve, en l'absence de preuve contraire, que l'infraction a été commise par la personne si, selon le cas :

a) il n'a pas été interjeté appel de la déclaration de culpabilité et le délai d'appel est expiré;

b) il a été interjeté appel de la déclaration de culpabilité, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Le paragraphe (1) s'applique que la personne soit partie à l'instance ou non.

(3) Pour l'application du paragraphe (1), un document attestant la déclaration de culpabilité, qui se présente comme étant signé par l'officier ayant la garde des archives de l'organisme juridictionnel, constitue une preuve suffisante de la déclaration de culpabilité.

Preuve de faits antérieurs

24.07 (1) Les constatations de fait précises qui figurent dans les motifs de la décision d'un organisme juridictionnel du Canada constituent la preuve, en l'absence de preuve contraire, des faits en cause si, selon le cas :

a) il n'a pas été interjeté appel de la décision et le délai d'appel est expiré;

b) il a été interjeté appel de la décision, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Si les constatations de fait visées au paragraphe (1) concernent un particulier, ce paragraphe ne s'applique que si celui-ci est ou était partie à l'instance qui a donné lieu à la décision.

Transcription de l'instance

24.08 (1) Une transcription de l'audience devant un organisme juridictionnel peut être admise en preuve à l'audience.

Motifs

(2) Les motifs de la décision d'un organisme juridictionnel peuvent être admis en preuve à l'audience.

Connaissance des faits

24.09 La formation peut :

a) prendre connaissance des faits qu'un tribunal judiciaire peut connaître d'office;

b) prendre connaissance des données, renseignements ou opinions techniques qui sont généralement reconnus dans le domaine de sa spécialité.

Dossiers bancaires et commerciaux

24.10 Toute preuve qui doit être faite ou toute exigence qui doit être remplie avant qu'un dossier bancaire ou commercial puisse être reçu ou admis en preuve en application d'une règle de common law ou d'origine législative peut être faite ou remplie au moyen du témoignage oral ou d'un affidavit d'un particulier qui énonce les faits au mieux de sa connaissance et de ce qu'il tient pour véridique.

Éléments de preuve documentaire

24.11 Lors d'une audience, la partie ou le tiers qui présente un écrit comme élément de preuve en fournit :

a) d'une part, un exemplaire à chacune des autres parties et à chacun des autres tiers;

b) d'autre part, quatre exemplaires à la formation, si elle est composée de trois membres, et trois, si elle est composée d'un seul membre.

Copies

24.12 Est admissible en preuve au cours d'une audience la copie d'un écrit ou d'un objet dont la formation est convaincue de l'authenticité.

Assignation

24.13 (1) Le Tribunal peut assigner une personne à comparaître à une audience pour l'obliger :

a) d'une part, à témoigner sous serment ou affirmation solennelle;

b) d'autre part, à produire des écrits ou des objets précisés comme éléments de preuve.

Formulaire de l'assignation

(2) L'assignation est rédigée selon le formulaire 24A.

Signature de l’assignation

(3) L’assignation peut porter la signature de la greffière ou du greffier.

Possibilité de délivrer des assignations en blanc

(4) À la demande d’une personne, le Tribunal peut lui délivrer une assignation en blanc. La personne peut remplir l’assignation et y inscrire le nom des témoins.

Signification de l’assignation

(5) Sous réserve du paragraphe (7), la personne qui a obtenu l’assignation la signifie au témoin.

Indemnité de présence

(6) Sous réserve du paragraphe (7), la personne qui a obtenu l’assignation verse l’indemnité de présence au témoin, au moment où elle la lui signifie, conformément au tarif A des *Règles de procédure civile.*

Signification et indemnité de présence facultatives

(7) Il n’est pas nécessaire que la personne qui a obtenu l’assignation la signifie à un témoin qui est présent à l’audience ni qu’elle lui verse une indemnité de présence pour le faire comparaître comme témoin à l’audience.

Non-admissibilité de certains renseignements

24.14 Malgré toute règle, les renseignements obtenus par le conseiller ou la conseillère juridique en matière de discrimination et de harcèlement dans l’exercice des fonctions que lui attribue l’alinéa 19 (1) a) du Règlement administratif n^{o} 11 ne doivent pas être utilisés au cours d’une audience et y sont inadmissibles.

RÈGLE 25

DÉPENS

Dépens

Condamnation aux dépens du Barreau

25.01 (1) Le Barreau ne peut être condamné aux dépens :

a) dans une instance portant sur la délivrance d'un permis, la conduite, la capacité, la compétence professionnelle ou l'inobservation :

(i) soit que si l'instance était injustifiée;

(ii) soit que s'il les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission;

b) dans une instance non visée à l'alinéa a), que s'il les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission.

Condamnation aux dépens de la personne visée par l'instance

(2) La personne visée par l'instance peut être condamnée aux dépens si, selon le cas :

a) la décision rendue lui est défavorable;

b) elle les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission.

Condamnation aux dépens d'un tiers

(3) Un tiers peut être condamné aux dépens s'il les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission.

Conférence sur la résolution de la cause avec consentement : pas de condamnation aux dépens

(4) Malgré les paragraphes (1) et (2), ni le Barreau ni la personne visée par l'instance ne doit être condamné aux dépens pour l'un ou l'autre des motifs suivants :

a) le refus de l'une ou l'autre partie de participer à une conférence sur la résolution de la cause avec consentement ou son retrait d'une telle conférence;

b) le fait qu'une conférence sur la résolution de la cause avec consentement ne s'est pas soldée par un règlement soit quant à la décision et à l'ordonnance dans l'instance portant sur la conduite, soit quant à la décision à rendre et à l'éventail des ordonnances qui peuvent être rendues dans une telle instance.

Montant des dépens : tarif des honoraires relatifs aux services

(5) Lorsque la formation adjuge les dépens, elle tient compte du tarif des honoraires relatifs aux services, sans toutefois être liée par celui-ci.

Cautionnement pour dépens

Champ d'application

25.02 (1) La présente règle d'applique aux instances suivantes :

1. Les instances portant sur la délivrance d'un permis, si la personne visée en l'espèce a déjà été titulaire d'un permis l'autorisant à pratiquer le droit en Ontario en qualité d'avocat ou à fournir des services juridiques en Ontario.

2. Les instances portant sur le rétablissement visé à l'article 31 de la Loi.

3. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

4. Les instances portant sur un différend concernant des conditions.

Applicabilité

(2) Sur motion du Barreau, la formation peut rendre une ordonnance de cautionnement pour dépens juste s'il est établi que :

a) la personne visée par l'instance fait l'objet d'une ordonnance de condamnation aux dépens dans la même instance ou dans une autre prévue par la Loi et que ceux-ci n'ont pas encore été acquittés, en totalité ou en partie;

b) dans le cas d'une instance portant sur le rétablissement visé à l'article 49.42 de la Loi ou un différend concernant des conditions, il existe de bonnes raisons de croire que l'instance est injustifiée et que la personne qu'elle vise n'a pas suffisamment de biens en Ontario pour payer les dépens du Barreau si cela lui était ordonné;

c) dans le cas d'une instance portant sur la délivrance d'un permis ou le

rétablissement visé à l’article 31 de la Loi, il existe de bonnes raisons de croire que la personne qu’elle vise n’a pas suffisamment de biens en Ontario pour payer les dépens du Barreau si cela lui était ordonné.

Effet de l’ordonnance

(3) Sous réserve du paragraphe (4), la personne visée par l’instance contre qui est rendue une ordonnance de cautionnement pour dépens ne peut prendre d’autres mesures dans l’instance tant que le cautionnement n’a pas été versé.

Ordonnance permettant de prendre une mesure

(4) Sur motion d’une partie ou de son propre chef, la formation peut, par ordonnance, permettre à la personne visée par l’instance de prendre une mesure dans celle-ci.

Défaut de la personne visée par l’instance

(5) Si la personne visée par l’instance ne verse pas le cautionnement imposé par l’ordonnance de cautionnement pour dépens, la formation peut, sur motion du Barreau, ordonner le rejet de l’instance.

RÈGLE 26

DÉCISIONS, ORDONNANCES ET MOTIFS

Décisions

Date de prise d'effet

26.01 (1) La décision prend effet à compter de la date à laquelle elle est rendue.

Inscription

(2) Le président ou la présidente de la formation inscrit chaque décision :

a) soit à l'acte introductif d'instance;

b) soit à une feuille de papier distincte annexée à l'acte introductif d'instance.

Cas où des motifs écrits sont rendus

(3) Si des motifs écrits sont rendus, l'inscription peut consister en un renvoi à ces motifs.

Ordonnances

Ordonnances rendues par une formation d'un membre de la formation

26.02 (1) Il est interdit à une formation composée d'un seul membre de la formation de rendre une ordonnance révoquant le permis d'un ou d'une titulaire de permis ou autorisant le ou la titulaire de permis à remettre son permis.

Ordonnance infligeant une amende

(2) La formation qui rend une ordonnance infligeant une amende à la personne visée par l'instance y précise ce qui suit :

a) le montant du principal;

b) si des intérêts sont payables, le taux d'intérêt, lequel est le taux d'intérêt postérieur au jugement au sens de la *Loi sur les tribunaux judiciaires* en vigueur à la date de prise d'effet de l'ordonnance, et la date à partir de laquelle ils doivent être calculés.

Ordonnance d'adjudication des dépens

(3) La formation qui rend une ordonnance d'adjudication des dépens y précise ce qui

suit :

a) le montant du principal;

b) le taux d'intérêt, lequel est le taux d'intérêt postérieur au jugement au sens de la *Loi sur les tribunaux judiciaires* en vigueur à la date de prise d'effet de l'ordonnance, et la date à partir de laquelle il doit être calculé.

Date de prise d'effet

(4) L'ordonnance, à moins qu'elle ne contienne une disposition contraire, prend effet à compter de la date à laquelle elle est rendue.

Inscription

(5) L'ordonnance est inscrite par le président ou la présidente de la formation qui la rend :

a) soit à l'acte introductif d'instance ou à une feuille de papier distincte qui lui est annexée;

b) soit, si l'ordonnance se rapporte à une motion, au dossier de motion ou à une feuille de papier distincte qui lui est annexée.

Cas où des motifs écrits sont rendus

(6) Si des motifs écrits sont rendus, l'inscription peut consister en un renvoi à ces motifs.

Ordonnance définitive ou décision et ordonnance définitive

Rédaction du projet d'ordonnance ou de décision et d'ordonnance

26.03 (1) La partie sur laquelle une ordonnance ou une décision et une ordonnance ont une incidence peut rédiger un projet d'ordonnance ou d'ordonnance et de décision.

Forme de l'ordonnance définitive ou de la décision et de l'ordonnance définitive

(2) L'ordonnance définitive est rédigée selon le formulaire 26A et la décision et l'ordonnance définitives sont rédigées selon le formulaire 26B.

Signature de l'ordonnance ou de la décision et de l'ordonnance

(3) La partie qui a rédigé un projet d'ordonnance ou de décision et d'ordonnance peut le remettre à la formation qui a rendu l'ordonnance ou la décision et l'ordonnance à la fin de l'audience.

(4) La formation examine tous les projets qui lui sont remis en application du

paragraphe (3) et son président ou sa présidente signe l'un d'eux en le modifiant ou non.

(5) Si aucune des parties ne rédige de projet d'ordonnance ou de décision et d'ordonnance, le greffe du Tribunal en rédige un et un membre de la formation qui fait partie de la formation qui a rendu l'ordonnance ou la décision et l'ordonnance le signe.

Motifs écrits

Motifs obligatoires

26.04 La formation motive par écrit :

a) sa décision et son ordonnance dans une instance portant sur la capacité;

b) son ordonnance ou sa décision et son ordonnance si, selon le cas :

(i) une partie le demande oralement immédiatement après le prononcé de l'ordonnance,

(ii) une partie le demande par écrit dans les 60 jours qui suivent le prononcé de l'ordonnance.

Correction d'erreurs

26.05 La greffière ou le greffier ou la formation peuvent en tout temps corriger une erreur typographique, une erreur de calcul ou une erreur mineure semblable dans une décision, une ordonnance, une décision et ordonnance définitive, une ordonnance définitive ou les motifs de la formation.

Avis des décisions

26.06 (1) Le Tribunal envoie à chaque partie, ou au représentant ou à la représentante de chaque partie :

a) qui a participé à une instance :

(i) une copie de la décision et de l'ordonnance définitives,

(ii) une copie des motifs écrits, le cas échéant, de la décision, de l'ordonnance ou de la décision et de l'ordonnance,

(iii) une copie de la décision corrigée, de l'ordonnance corrigée, de la décision et des ordonnances définitives corrigées ou des motifs corrigés;

b) qui a participé à l'audition d'une motion dans une instance :

(i) une copie de l'ordonnance définitive,

(ii) une copie des motifs écrits, le cas échéant, de l'ordonnance,

(iii) une copie de l'ordonnance corrigée, de l'ordonnance définitive corrigée ou des motifs corrigés.

Mode d'envoi de l'avis

(2) Tout document qui doit être envoyé en application du paragraphe (1) l'est :

a) soit par courrier ordinaire à la dernière adresse de la partie ou de son représentant ou de sa représentante connue du Tribunal;

b) soit par livraison en personne au Barreau;

c) soit par télécopie au dernier numéro de télécopieur de la partie ou de son représentant ou de sa représentante connu du Tribunal,

d) soit par courrier électronique à la dernière adresse électronique de la partie ou de son représentant ou de sa représentante connue du Tribunal.

Idem

(3) Si un document qui doit être envoyé en application du paragraphe (1) l'est à un ou à une titulaire de permis, la mention au paragraphe (2) de la dernière adresse, du dernier numéro de télécopieur ou de la dernière adresse électronique connu du Tribunal vaut mention de celui ou de celle qui figure au registre que le Barreau est tenu de créer et de tenir à jour en application de l'article 27.1 de la Loi.

Courrier

(4) Tout document envoyé par courrier ordinaire est réputé reçu le cinquième jour qui suit la date de sa mise à la poste.

Télécopie ou courrier électronique

(5) Tout document envoyé par télécopie ou par courrier électronique est réputé reçu le lendemain de son envoi.

RÈGLE 27

DOSSIER DE L'INSTANCE

Obligation d'établir un dossier

27.01 (1) Le Tribunal établit un dossier de toutes les instances.

Teneur du dossier

(2) Le dossier de l'instance comprend ce qui suit :

1. Tous les documents déposés auprès du Tribunal en application des présentes règles à l'égard de l'instance ou d'une de ses étapes.

2. Tous les documents reçus par une formation en application des présentes règles à l'égard de l'instance ou d'une de ses étapes.

3. L'avis de l'audience sur le fond de l'instance.

4. L'inscription de la décision et de l'ordonnance rendue dans l'instance et de l'ordonnance rendue à la suite d'une motion présentée dans l'instance.

5. La décision et l'ordonnance définitives rendues dans l'instance ou l'ordonnance définitive rendue à la suite d'une motion présentée dans l'instance.

6. Les motifs, le cas échéant, de la décision ou de l'ordonnance rendue dans l'instance ou de l'ordonnance rendue à la suite d'une motion présentée dans l'instance.

7. La transcription de l'audience tenue dans l'instance ou de l'audition d'une motion présentée dans l'instance qu'obtient le Tribunal.

Domaine public

(3) Sous réserve du paragraphe (4), le dossier d'une instance est du domaine public.

Documents soustraits au public

(4) Les documents ou parties de document versés au dossier de l'instance dont la divulgation est interdite en application de la règle 18.04 ou 18.05 ne sont pas mis à la disposition du public.

RÈGLE 28

RÉPRIMANDES

Temps de l’administration

28.01 (1) Une réprimande ne doit pas être administrée avant l’expiration du délai de signification d’un avis d’appel à moins que les parties ne renoncent au droit d’appel.

Habileté à administrer

(2) N’importe quel membre de la formation qui fait partie de la formation qui a ordonné la réprimande peut l’administrer.

Administration pendant une audience

(3) Sous réserve du paragraphe (4), la réprimande est administrée lors d’une séance publique.

Administration par écrit

(4) La réprimande peut être administrée par écrit.

(5) Le document qui contient la réprimande écrite est considéré comme faisant partie du dossier de l’instance dans le cadre de laquelle son administration a été ordonnée.

RÈGLE 29

CONFÉRENCE SUR LA RÉSOLUTION DE LA CAUSE AVEC CONSENTEMENT

Définitions

29.01 Les définitions qui suivent s'appliquent à la présente règle.

« conférence sur la résolution de la cause avec consentement » Conférence à laquelle participent le Barreau et la personne visée par une instance éventuelle, qui est présidée par une formation de résolution de la cause avec consentement et qui se tient avant l'introduction de l'instance portant sur la conduite en vue d'en arriver à un règlement :

a) soit quant à la décision et à l'ordonnance à rendre dans une telle instance;

b) soit quant à la décision à rendre et à l'éventail des ordonnances qui peuvent être rendues dans une telle instance. (*« consent resolution conference »*)

« formation de résolution de la cause avec consentement » Le ou, collectivement, les membres de la formation nommés à la présidence d'une conférence sur la résolution de la cause avec consentement. (*« consent resolution panel »*)

«instance éventuelle» Instance portant sur la conduite qui n'a pas encore été introduite. (*« potential proceeding »*)

« personne visée par une instance éventuelle » Personne qui sera visée par une instance portant sur la conduite quand elle aura été introduite. (*« subject of a potential proceeding* »)

Moment de la tenue d'une conférence sur la résolution de la cause avec consentement

29.02 (1) Le président ou le vice-président ordonne la tenue d'une conférence sur la résolution de la cause avec consentement si les conditions suivantes sont réunies :

1. Le Barreau a obtenu du Comité d'autorisation des instances l'autorisation :

   i. d'une part, d'introduire une instance portant sur la conduite,

   ii. d'autre part, de demander à la Section de première instance d'ordonner la tenue d'une conférence sur la résolution de la cause avec consentement.

2. L'instance portant sur la conduite n'a pas été introduite.

3. Le Barreau et la personne visée par l'instance éventuelle ont convenu :

i. soit de la décision et de l'ordonnance à rendre dans l'instance portant sur la conduite;

ii. soit de la décision à rendre et de l'éventail des ordonnances qui peuvent être rendues dans l'instance portant sur la conduite.

4. La personne visée par l'instance éventuelle a consenti à participer à une conférence sur la résolution de la cause avec consentement.

5. Le Barreau a demandé la tenue d'une conférence sur la résolution de la cause avec consentement.

Présidence de la conférence sur la résolution de la cause avec consentement

(2) La conférence sur la résolution de la cause avec consentement est présidée par une formation d'un ou de trois membres que nomme le président ou le vice-président lorsqu'il ou elle en ordonne la tenue en application du paragraphe (1).

Présentation d'une demande

29.03 (1) Le Barreau peut demander la tenue d'une conférence sur la résolution de la cause avec consentement en présentant une demande écrite au Tribunal.

Renseignements sur les conditions

(2) Le Barreau donne, dans la demande écrite qu'il présente pour obtenir la tenue d'une conférence sur la résolution de la cause avec consentement, des renseignements suffisants pour convaincre le président ou le vice-président de l'existence des conditions énoncées à la règle 29.02.

Coordonnées de la personne visée par l'instance éventuelle

(3) Le Barreau donne également, dans la demande écrite qu'il présente pour obtenir la tenue d'une conférence sur la résolution de la cause avec consentement, le nom de la personne visée par l'instance éventuelle de même que son adresse aux fins de signification, son numéro de téléphone ainsi que, si elle en a, son numéro de télécopieur et son adresse électronique.

Avis de la tenue d'une conférence sur la résolution de la cause avec consentement : Barreau

29.04 Si le président ou le vice-président ordonne la tenue d'une conférence sur la résolution de la cause avec consentement, le Tribunal avise le Barreau et la personne visée par l'instance éventuelle des date, heure et endroit fixés pour la tenue de la conférence.

Procédure de la conférence sur la résolution de la cause avec consentement

29.05 (1) Les règles de pratique et de procédure applicables aux instances tenues devant la Section de première instance qui sont énoncées aux règles 2 à 20 et 22 à 28 ne s'appliquent pas aux conférences sur la résolution des causes avec consentement.

(2) Sous réserve de la présente règle, les règles de pratique et de procédure applicables à la conférence sur la résolution de la cause avec consentement sont fixées par la formation de résolution de la cause avec consentement qui la préside.

Huis clos

(3) La conférence sur la résolution de la cause avec consentement se tient à huis clos.

Retrait de la conférence sur la résolution de la cause avec consentement

29.06 (1) Le Barreau ou la personne visée par l'instance éventuelle peut se retirer de la conférence sur la résolution de la cause avec consentement en tout temps avant ou pendant la conférence.

Avis de retrait

(2) Qu'il s'agisse du Barreau ou de la personne visée par l'instance éventuelle, la partie qui souhaite se retirer de la conférence sur la résolution de la cause avec consentement en vertu du paragraphe (1) en avise par écrit l'autre partie et le Tribunal.

Règlement lors de la conférence sur la résolution de la cause avec consentement : introduction d'une instance portant sur la conduite

29.07 (1) Lorsque la conférence sur la résolution de la cause avec consentement se solde par un règlement soit quant à la décision et à l'ordonnance à rendre dans l'instance portant sur la conduite, soit quant à la décision à rendre et à l'éventail des ordonnances qui peuvent être rendues dans une telle instance, le Barreau :

a) d'une part, introduit cette instance;

b) d'autre part, avise par écrit le Tribunal de ce fait et de la teneur générale du règlement atteint lors de la conférence sur la résolution de la cause avec consentement au plus tard le jour de l'introduction de l'instance.

Règlement lors de la conférence sur la résolution de la cause avec consentement : non-application de certaines règles

(2) Lorsque la conférence sur la résolution de la cause avec consentement se solde par un règlement quant à la décision et à l'ordonnance à rendre dans l'instance portant sur la conduite, malgré la règle 1.01, les règles suivantes ne s'appliquent pas à cette instance :

1. La règle 6.

2. La règle 7.

3. La règle 8.

4. La règle 12.

5. La règle 13.

6. La règle 14.

7. La règle 16.

8. La règle 19.

9. La règle 20.

10. La règle 21.

11. La règle 22.

Absence de règlement ou retrait lors d'une conférence sur la résolution de la cause avec consentement : audiences ultérieures

29.08 Si la conférence sur la résolution de la cause avec consentement ne se solde pas par un règlement soit quant à la décision et à l'ordonnance à rendre dans l'instance portant sur la conduite, soit quant à la décision à rendre et à l'éventail des ordonnances qui peuvent être rendues dans une telle instance, ou si le Barreau ou la partie visée par l'instance éventuelle se retire de la conférence en vertu de la règle 29.06 :

a) d'une part, rien ne doit être communiqué à aucun membre de la Section de première instance nommé à la présidence d'une audience tenue dans le cadre de l'instance portant sur la conduite de tout document créé spécifiquement ni de toute déclaration faite lors de la conférence sur la résolution de la cause avec consentement;

b) d'autre part, aucun membre de la formation de résolution de la cause avec consentement ne doit être nommé à la présidence d'une audience tenue dans le cadre de l'instance portant sur la cause.

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE
FORMULAIRES PRÉVUS PAR LES RÈGLES DE PRATIQUE ET DE PROCÉDURE

Prises le : 26 février 2009
Modifiées : 25 juin 2009
29 juin 2010
27 janvier 2011
28 avril 2011
28 février 2013
25 avril 2013
12 mars 2014

TITRE DES DOCUMENTS (INSTANCES PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

(N^{o} du dossier du Tribunal du Barreau)

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

ENTRE :

(nom)

requérant(e)

et

(nom)

intimé(e)

REQUÊTE PRÉSENTÉE AUX TERMES DE *(disposition législative aux termes desquelles la requête est présentée).*

(Intitulé du document)

(Corps du document)

TITRE DES DOCUMENTS

(INSTANCES PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(N^{o} du dossier du Tribunal du Barreau)

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

ENTRE :

(nom)

requérant(e)

et

Le Barreau du Haut-Canada

intimé

REQUÊTE PRÉSENTÉE AUX TERMES DE *(disposition législative aux termes desquelles la requête est présentée)* renvoyée à l'audience aux termes de *(disposition législative aux termes de laquelle la requête doit être entendue).*

(Intitulé du document)

(Corps du document)

FORMULAIRE 4A – AVIS DE CONSTITUTION DE NOUVEAU REPRÉSENTANT

(*titre*)

AVIS DE CONSTITUTION DE NOUVEAU REPRÉSENTANT

(*Nom de la partie OU du tiers*), jusqu'ici représenté(e) par (*nom de l'ancien représentant*), a constitué (*nom du nouveau représentant*) son(sa) représentant(e) commis(e) au dossier.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du nouveau représentant*)

DESTINATAIRES : (*nom et adresse de l'ancien représentant)*
(*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

FORMULAIRE 4B – AVIS DE CONSTITUTION DE REPRÉSENTANT

(*titre*)

AVIS DE CONSTITUTION DE REPRÉSENTANT

(*nom de la partie OU du tiers*) a constitué (*nom*) son(sa) représentant(e) commis(e) au dossier.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant commis au dossier*)

DESTINATAIRES : (*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

FORMULAIRE 4C – AVIS D'INTENTION D'AGIR EN SON PROPRE NOM

(*titre*)

AVIS D'INTENTION D'AGIR EN SON PROPRE NOM

(*nom de la partie OU du tiers*), jusqu'ici représenté(e) par (*nom*) à titre de représentant(e) commis(e) au dossier, a l'intention d'agir en son propre nom.

(date)

(Signature de la partie/du tiers)

(Indiquer en caractères d'imprimerie le nom de la partie/du tiers)

(Remplir ce qui suit si c'est le représentant commis au dossier qui dépose le présent formulaire.)

Je *(nom du représentant commis au dossier)* confirme que j'ai expliqué l'objet du présent formulaire à *(nom de la partie OU du tiers)* et que j'ai confirmé son intention d'agir en son propre nom à ma place. (*nom de la partie OU du tiers)* a signé le présent formulaire au moment où il (*elle*) a consenti à agir en son propre nom.

(date)

(Signature du représentant commis au dossier)
(Indiquer en caractères d'imprimerie le nom du représentant commis au dossier)

(date)

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique de la partie/du tiers qui a l'intention d'agir en son propre nom)*

DESTINATAIRES : (*nom et adresse de l'ancien représentant)*
(*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

FORMULAIRE 9A – AVIS DE REQUÊTE

(*titre*)

AVIS DE REQUÊTE

À L'INTIMÉ(E)

UNE INSTANCE PORTANT SUR (*LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS*) A ÉTÉ INTRODUITE par le(la) requérant(e). La demande présentée par le(la) requérant(e) est exposée dans la page suivante.

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER à une conférence de gestion de l'instance le (*jour*) (*date*), à (*heure*), au Tribunal du Barreau, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario). Vous pouvez choisir de comparaître par ministère de représentant.

SI VOUS OU VOTRE REPRÉSENTANT(E) NE VOUS PRÉSENTEZ PAS À LA CONFÉRENCE DE GESTION DE L'AUDIENCE, LE MEMBRE DE LA FORMATION QUI LA PRÉSIDE POURRA PROCÉDER EN VOTRE ABSENCE.

(*OU*

LA PRÉSENTE REQUÊTE sera entendue le (jour) (date), à (heure), au Tribunal du Barreau, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario).)

Date :

DESTINATAIRE : (*nom et adresse de l'intimé)*

REQUÊTE

1. L'objet de la requête est le suivant :

2. Les motifs de la requête sont les suivants :

3. Les allégations de la requête sont les suivantes :

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)*

FORMULAIRE 9B – AVIS DE RENVOI À L'AUDIENCE

(*titre*)

AVIS DE RENVOI À L'AUDIENCE

AU(À LA) REQUÉRANT(E) :

VOTRE DEMANDE DE (*PERMIS OU RÉTABLISSEMENT DE VOTRE PERMIS EN APPLICATION DE L'ARTICLE 31 DE LA LOI*) A ÉTÉ RENVOYÉE À L'AUDIENCE DEVANT LA SECTION DE PREMIÈRE INSTANCE DU TRIBUNAL DU BARREAU, ce qui entraîne l'introduction d'une instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER à une conférence de gestion de l'instance le (*jour*) (*date*), à (*heure*), au Tribunal du Barreau, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario). Vous pouvez choisir de comparaître par ministère de représentant.

SI VOUS OU VOTRE REPRÉSENTANT(E) NE VOUS PRÉSENTEZ PAS À LA CONFÉRENCE DE GESTION DE L'AUDIENCE, LE MEMBRE DE LA FORMATION QUI LA PRÉSIDE POURRA PROCÉDER EN VOTRE ABSENCE.

Date :

DESTINATAIRE : (*nom et adresse du requérant)*

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant du Barreau du Haut-Canada)*

FORMULAIRE 9C – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

(*titre*)

AVIS DE DÉSISTEMENT

(INSTANCE PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

LE(LA) REQUÉRANT(E) se désiste de l'instance portant sur (*la conduite, la capacité, la compétence professionnelle, l'inobservation, le rétablissement visé à l'article 49.42 de la Loi ou un différend concernant des conditions*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)*

DESTINATAIRE : (*nom et adresse du représentant de l'intimé ou de l'intimé*)

FORMULAIRE 9D – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(*titre*)

AVIS DE DÉSISTEMENT

(INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

LE BARREAU DU HAUT-CANADA retire le renvoi à l'audience de la demande (*de permis OU de rétablissement de son permis en application de l'article 31 de la Loi*) présentée par le(la) requérant(e) et, de ce fait, se désiste de l'instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant du Barreau du Haut-Canada)*

DESTINATAIRE : (*nom et adresse du représentant du requérant ou du requérant*)

FORMULAIRE 9E – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(*titre*)

AVIS DE DÉSISTEMENT

(INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

LE(LA) REQUÉRANT(E) retire sa demande (*de permis OU de rétablissement de son permis en application de l'article 31 de la Loi*) et, de ce fait, se désiste de l'instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

(*date*)

(nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)

DESTINATAIRE : (*nom et adresse du représentant du Barreau du Haut-Canada*)

FORMULAIRE 13A – AVIS DE MOTION

(titre)

AVIS DE MOTION

Le/La/L' *(désigner l'auteur de la motion)* présentera auprès de la Section de première instance du Tribunal du Barreau une motion le *(jour) (date)*, à *(heure)*, ou dès que possible par la suite, au Tribunal du Barreau, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario) *(ou préciser l'endroit)*.

TYPE D'AUDIENCE PROPOSÉ : Je propose que la motion soit entendue *(cocher la case appropriée)* :

- ☐ par voie d'audience électronique en vertu du paragraphe 16.02 (1) parce *(qu'elle est présentée sur consentement OU qu'il s'agit d'une motion d'ajournement).*
- ☐ sur pièces en vertu du paragraphe 16.03 (1) parce qu'il s'agit d'une motion présentée en vue d'obtenir une ordonnance disposant qu'une audience se tienne électroniquement.
- ☐ sur pièces en vertu du paragraphe 16.03 (2) parce *(qu'elle est présentée sur consentement OU qu'il s'agit d'une motion d'ajournement)*.
- ☐ oralement.

L'OBJET DE LA MOTION EST LE SUIVANT : *(indiquer ici la mesure de redressement précise demandée)*.

LES MOYENS À L'APPUI DE LA MOTION SONT LES SUIVANTS : *(préciser les moyens qui seront plaidés)*.

LA PREUVE DOCUMENTAIRE SUIVANTE sera utilisée lors de l'audition de la motion :

(indiquer les affidavits ou les autres preuves documentaires à l'appui de la motion).

(date)

(nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant de l'auteur de la motion ou de l'auteur de la motion)

DESTINATAIRE : (nom et adresse du représentant de l'intimé ou de l'intimé)

FORMULAIRE 13B – AVIS DE DÉSISTEMENT (MOTION)

(titre)

AVIS DE DÉSISTEMENT (MOTION)

(nom de l'auteur de la motion) se désiste de sa motion visant *(indiquer la nature de la motion).*

(date)

(nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant de l'auteur de la motion ou de l'auteur de la motion)

DESTINATAIRE : (nom, adresse et numéro de téléphone du représentant de l'intimé ou de l'intimé)

FORMULAIRE 20A – DEMANDE D'AVEUX

(titre)

DEMANDE D'AVEUX

VOUS ÊTES PRIÉ(E), aux fins de l'instance uniquement, DE RECONNAÎTRE la véracité des faits suivants : (*indiquer les faits sous forme de dispositions numérotées consécutivement)*

VOUS ÊTES PRIÉ(E), aux fins de l'instance uniquement, DE RECONNAÎTRE l'authenticité (voir la règle 20 des Règles de pratique et de procédure de la Section de première instance du Tribunal du Barreau) des documents suivants : (*Numéroter chaque document et donner suffisamment de précisions pour permettre de l'identifier. Préciser si le document constitue l'original ou une copie et, s'il s'agit de la copie d'une lettre, d'un télégramme ou d'une télécommunication, préciser la nature du document.)*

Une copie de chacun des documents susmentionnés est annexée à la présente demande. *(s'il n'est pas pratique d'annexer une copie ou si la partie en a déjà une en sa possession, préciser les documents qui ne sont pas annexés et donner les motifs à l'appui)*

VOUS DEVEZ RÉPONDRE À LA PRÉSENTE DEMANDE en signifiant une réponse à la demande d'aveux, rédigée selon le formulaire 20B, DANS LES VINGT JOURS après que vous recevez signification de la présente demande. À défaut de ce faire, vous serez réputé (e), aux fins de l'instance uniquement, reconnaître la véracité des faits et l'authenticité des documents susmentionnés. Si vous signifiez une réponse dans le délai prescrit ci-dessus sans vous prononcer sur chaque fait ou document susmentionné, vous serez réputé (e), aux fins de l'instance uniquement, reconnaître la véracité des seuls faits et l'authenticité des seuls documents pour lesquels vous n'avez pas fourni de réponse.

(date)

(nom, adresse, numéro de téléphone, numéro de télécopieur
et adresse électronique du représentant
ou de la partie qui signifie la demande)

DESTINATAIRE : (nom et adresse du représentant
ou de la partie à qui est signifiée la demande)

FORMULAIRE 20B – RÉPONSE À LA DEMANDE D'AVEUX

(titre)

RÉPONSE À LA DEMANDE D'AVEUX

En réponse à votre demande d'aveux du *(date)*, *(nom de la partie qui signifie la réponse) :*

1. reconnaît la véracité des faits portant les numéros *(indiquer les numéros des faits)*
2. reconnaît l'authenticité des documents portant les numéros *(indiquer les numéros des documents)*
3. nie la véracité des faits portant les numéros *(indiquer les numéros des faits)*
4. nie l'authenticité des documents portant les numéros *(indiquer les numéros des documents)*
5. refuse de reconnaître la véracité des faits portant les numéros *(indiquer les numéros des faits)* pour les motifs suivants : *(indiquer le motif de votre refus pour chacun des faits)*
6. refuse de reconnaître l'authenticité des documents portant les numéros *(indiquer les numéros des documents)* pour les motifs suivants : *(indiquer le motif de votre refus pour chacun des documents)*

(date)

(nom, adresse, numéro de téléphone, numéro de télécopieur
et adresse électronique du représentant
ou de la partie qui signifie la réponse)

DESTINATAIRE : (nom et adresse du représentant
ou de la partie à qui est signifiée la réponse)

FORMULAIRE 23A – CONSENTEMENT À LA TENUE D'UNE AUDIENCE DEVANT UN SEUL MEMBRE DE LA FORMATION

(titre)

CONSENTEMENT À LA TENUE D'UNE AUDIENCE DEVANT UN SEUL MEMBRE DE LA FORMATION

(nom de la partie autre que le Barreau du Haut-Canada) et le Barreau du Haut-Canada consentent à ce que l'instance soit instruite sur le fond et tranchée par un seul membre de la formation.

(date)

(signature de la partie autre que le Barreau du Haut-Canada)
(Indiquer en caractères d'imprimerie le nom de la partie)

(date)

(signature du représentant du Barreau du Haut-Canada)
(Indiquer en caractères d'imprimerie le nom du représentant du Barreau du Haut-Canada)

FORMULAIRE 24A – ASSIGNATION

(titre)

ASSIGNATION À TÉMOIGNER DEVANT DE LA SECTION DE PREMIÈRE INSTANCE DU TRIBUNAL DU BARREAU

À *(nom et adresse du témoin)*

(audience orale)

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER DEVANT LA SECTION DE PREMIÈRE INSTANCE AFIN D'Y TÉMOIGNER lors de l'instruction de la présente instance le *(jour), (date)*, à *(heure)*, au Tribunal du Barreau, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario) *(ou indiquer l'endroit)* et d'y demeurer jusqu'à ce que votre présence ne soit plus requise.

VOUS ÊTES REQUIS(E) D'APPORTER AVEC VOUS et de produire, lors de l'instruction, les documents et objets suivants : *(indiquer la nature et la date de chaque document et donner suffisamment de précisions pour permettre d'identifier chaque document et objet)*

SI VOUS NE VOUS PRÉSENTEZ PAS OU NE DEMEUREZ PAS PRÉSENT(E) COMME LE REQUIERT LA PRÉSENTE ASSIGNATION, LA COUR SUPÉRIEURE DE JUSTICE PEUT ORDONNER QU'UN MANDAT D'ARRÊT SOIT DÉCERNÉ CONTRE VOUS OU QUE VOUS SOYEZ SANCTIONNÉ(E) DE LA MÊME FAÇON QUE POUR OUTRAGE AU TRIBUNAL.

(audience électronique)

VOUS ÊTES REQUIS(E) DE PARTICIPER À UNE AUDIENCE ÉLECTRONIQUE le *(jour) (date)*, à *(heure)*, de la manière suivante : *(donner suffisamment de précisions pour permettre au témoin de participer)*

SI VOUS NE PARTICIPEZ PAS À L'AUDIENCE COMME LE REQUIERT LA PRÉSENTE ASSIGNATION, LA COUR SUPÉRIEURE DE JUSTICE PEUT ORDONNER QU'UN MANDAT D'ARRÊT SOIT DÉCERNÉ CONTRE VOUS OU QUE VOUS SOYEZ SANCTIONNÉ(E) DE LA MÊME FAÇON QUE POUR OUTRAGE AU TRIBUNAL.

(date)

Tribunal du Barreau

_____

Greffier/Greffière

REMARQUE : Vous avez le droit de toucher la même indemnité pour votre présence ou votre participation à l'audience que celle que toucherait une personne assignée à comparaître devant la Cour supérieure de justice.

FORMULAIRE 26A – ORDONNANCE DÉFINITIVE

(N^{o} du dossier du Tribunal du Barreau)

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

(noms des membres de la Section dont est composée la formation)

(jour et date du prononcé de l'ordonnance)

(titre de l'instance)

ORDONNANCE

(Ordonnance faisant suite à l'audition d'une requête)

LA REQUÊTE a été entendue le ou les *(jour(s))*, *(*à *indiquer l'endroit OU par voie électronique)*, *(en présence des représentants de toutes les parties* (*et de tous les tiers) OU en présence du(des) représentant(s) de (désigner la ou les parties et le ou les tiers), (ajouter au besoin : (désigner la ou les parties et le ou les tiers) comparaissant en personne, personne ne représentant (désigner la ou les parties et le ou les tiers), bien que remise appropriée de l'avis lui(leur) ait été faite comme l'atteste (indiquer la preuve de la remise de l'avis de l'audience sur le fond de la requête)).*

APRÈS AVOIR LU *(L'AVIS DE REQUÊTE ET LA REQUÊTE OU L'AVIS DE RENVOI À L'AUDIENCE)* ET LES ÉLÉMENTS DE PREUVE DÉPOSÉS PAR LES PARTIES *(et les tiers), (Après avoir entendu les témoignages présentés par les parties (et les tiers)*, et après avoir entendu les plaidoiries *(des représentants des parties (et des tiers) OU du(des) représentant(s) de (désigner la ou les parties et le ou les tiers) et de (désigner la ou les parties et le ou les tiers comparaissant en personne)),*

(ET AYANT CONCLU QUE (préciser la conclusion habilitant à rendre l'ordonnance),

(Ordonnance faisant suite à l'audition d'une motion)

LA MOTION présentée par *(désigner l'auteur de la motion)* en vue d'obtenir *(indiquer la mesure de redressement demandée dans l'avis de motion)* a été entendue le(*s*) *(jour(s)*, *(*à *indiquer l'endroit OU par voie électronique OU sur pièces).*

APRÈS AVOIR LU *(préciser les documents déposés à l'appui de la motion)* et après avoir entendu les plaidoiries du(*des*) représentant*(s)* de *(désigner les parties et les tiers), (ajouter au besoin : (désigner les parties et les tiers) comparaissant en personne, personne ne représentant (désigner les parties et les tiers), bien que la signification appropriée de l'avis lui(leur) ait été faite (indiquer la preuve de la signification)),*

IL EST ORDONNÉ QUE :

1.

2.

(signature du président ou de la présidente de la formation qui a rendu l’ordonnance)

FORMULAIRE 26B – DÉCISION ET ORDONNANCE DÉFINITIVE

(N^{o} du dossier du Tribunal du Barreau)

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

(noms des membres de la section dont est composée la formation)

(jour et date du prononcé de l'ordonnance)

(titre de l'instance)

DÉCISION ET ORDONNANCE

LA REQUÊTE a été entendue le ou les *(jour(s))*, à (*indiquer l'endroit OU par voie électronique)*, *en présence des représentants de toutes les parties* (*et de tous les tiers) OU en présence du(des) représentant(s) de (désigner la ou les parties et le ou les tiers), (ajouter au besoin : (désigner la ou les parties et le ou les tiers) comparaissant en personne, personne ne représentant (désigner la ou les parties et le ou les tiers), bien que remise appropriée de l'avis lui(leur) ait été faite comme l'atteste (indiquer la preuve de la remise de l'avis de l'audience sur le fond de la requête).*

APRÈS AVOIR LU *(L'AVIS DE REQUÊTE ET LA REQUÊTE OU L'AVIS DE RENVOI À L'AUDIENCE)* ET LES ÉLÉMENTS DE PREUVE DÉPOSÉS PAR LES PARTIES *(et les tiers), après avoir entendu les témoignages présentés par les parties (et les tiers)*, et après avoir entendu les plaidoiries *(des représentants des parties (et des tiers) OU du(des) représentant(s) de (désigner la ou les parties et le ou les tiers) et de (désigner la ou les parties et le ou les tiers comparaissant en personne)),*

IL EST CONCLU QUE *(préciser la conclusion habilitant à rendre l'ordonnance),*

ET IL EST ORDONNÉ QUE :

1.

2.

(signature du président ou de la présidente de la formation qui a rendu l'ordonnance)

TRIBUNAL DU BARREAU
TARIFS EN VERTU DES RÈGLES DE PRATIQUE ET DE PROCÉDURE

Adoptés : 26 février 2009
Modifiés : 25 juin 2009
29 juin 2010
27 janvier 2011
28 avril 2011
28 février 2013
25 avril 2013

TARIF A

HONORAIRES RELATIFS AUX SERVICES À PRENDRE EN CONSIDÉRATION EN VERTU DE LA RÈGLE 25.01

PREMIÈRE PARTIE – HONORAIRES DES AVOCATS

Avocat (20 ans et plus de pratique)	Jusqu'à concurrence de 350 $ l'heure
Avocat (12 à 20 ans)	Jusqu'à concurrence de 325 $ l'heure
Avocat (11 à 12 ans)	Jusqu'à concurrence de 315 $ l'heure
Avocat (10 à 11 ans)	Jusqu'à concurrence de 300 $ l'heure
Avocat (9 à 10 ans)	Jusqu'à concurrence de 285 $ l'heure
Avocat (8 à 9 ans)	Jusqu'à concurrence de 270 $ l'heure
Avocat (7 à 8 ans)	Jusqu'à concurrence de 255 $ l'heure
Avocat (6 à 7 ans)	Jusqu'à concurrence de 240 $ l'heure
Avocat (5 à 6 ans)	Jusqu'à concurrence de 225 $ l'heure
Avocat (4 à 5 ans)	Jusqu'à concurrence de 215 $ l'heure
Avocat (3 à 4 ans)	Jusqu'à concurrence de 205 $ l'heure
Avocat (2 à 3 ans)	Jusqu'à concurrence de 195 $ l'heure
Avocat (1 à 2 ans)	Jusqu'à concurrence de 180 $ l'heure
Avocat (moins d'un an)	Jusqu'à concurrence de 165 $ l'heure
Avocat employé du Barreau du Haut-Canada, auprès d'un service autre que le Service de la discipline	Jusqu'à concurrence de 190 $ l'heure

DEUXIÈME PARTIE – AUTRES HONORAIRES

Parajuriste titulaire de permis et parajuriste employé du Barreau du Haut-Canada (10 ans et plus d'expérience en tant que parajuriste)	Jusqu'à concurrence de 150 $ l'heure
Parajuriste titulaire de permis et parajuriste employé du Barreau du Haut-Canada (5 à 10 ans d'expérience en tant que parajuriste)	Jusqu'à concurrence de 120 $ l'heure
Parajuriste titulaire de permis et parajuriste employé du Barreau du Haut-Canada (1 à 5 ans d'expérience en tant que parajuriste)	Jusqu'à concurrence de 90 $ l'heure
Étudiant	Jusqu'à concurrence de 90 $ l'heure
Clerc	Jusqu'à concurrence de 90 $ l'heure
Vérificateur judiciaire employé du Barreau du Haut-Canada	Jusqu'à concurrence de 190 $ l'heure
Enquêteur ou agent au règlement des plaintes employé du Barreau du Haut-Canada	Jusqu'à concurrence de 90 $ l'heure

LAW SOCIETY TRIBUNAL
HEARING DIVISION
RULES OF PRACTICE AND PROCEDURE

~~**(applicable to proceedings before the Law Society Hearing Panel)**~~

Made: February 26, 2009
Amended: June 25, 2009
June 29, 2010
January 27, 2011
April 28, 2011
February 28, 2013
April 25, 2013
March 12, 2014

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RULE 1

APPLICATION AND INTERPRETATION

Application

1.01 These Rules~~, and no other rules of practice and procedure applicable to proceedings before the Hearing Panel made under section 61.2 of the Act,~~ apply to the following proceedings before the Hearing Division that are commenced on or after July 1, 2009:

1. A licensing proceeding.
2. A restoration proceeding.
3. A conduct proceeding.
4. A capacity proceeding.
5. A competence proceeding.
6. A non-compliance proceeding.
7. A reinstatement proceeding.
8. A terms dispute proceeding.

Definitions and interpretation

1.02 (1) In these Rules, unless the context requires otherwise,

"Act" means the *Law Society Act*;

"capacity proceeding" means a proceeding under section 38 of the Act;

"Chair" means the Chair of the Law Society Tribunal;

"competence proceeding" means a proceeding under section 43 of the Act;

"conduct proceeding" means a proceeding under section 34 of the Act;

"deliver" means serve and file with the Tribunal~~s Office~~ with proof of service;

"document" includes a paper, book, record, account, sound recording, videotape, film, photograph, chart, graph, map, plan, survey and information recorded or stored by computer or by means of any other device;

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"hearing" does not include a consent resolution conference, a proceeding management conference or a pre-hearing conference;

"holiday" means,

(a) any Saturday or Sunday,

(b) New Year's Eve Day, and where New Year's Eve Day falls on a Saturday or Sunday, the preceding Friday,

(c) New Year's Day, and where New Year's Day falls on a Saturday or Sunday, the following Monday,

(d) Family Day,

(e) Good Friday,

(f) Easter Monday,

(g) Victoria Day,

(h) Canada Day, and where Canada Day falls on a Saturday or Sunday, the following Monday,

(i) Civic Holiday,

(j) Labour Day,

(k) Thanksgiving Day,

(l) Remembrance Day, and where Remembrance Day falls on a Saturday or Sunday, the following Monday,

(m) Christmas Eve Day, and where Christmas Eve Day falls on a Saturday or Sunday, the preceding Friday,

(n) Christmas Day, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday, and where Christmas Day falls on a Friday, the following Monday,

(o) Boxing Day, and

(p) any special holiday proclaimed by the Governor General or the Lieutenant Governor;

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"licensing proceeding" means a proceeding under section 27 of the Act;

"moving party" means a person who makes a motion;

"non-compliance proceeding" means a proceeding under section 45 of the Act;

"non-party participant" means a person who is not a party to a proceeding who is permitted to participate in a proceeding or a part thereof;

"panel" means the panelist or, collectively, the panelists assigned to a hearing;

"panelist" means a member of the ~~Hearing Panel~~Hearing Division;

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"party" includes a moving party and a responding party;

"reinstatement proceeding" means a proceeding under section 49.42 of the Act;

"representative" means a person authorized under the *Law Society Act* to represent a person in a proceeding;

"responding party" means a person against whom a motion is made;

"restoration proceeding" means a proceeding under section 31 of the Act;

"subject of the proceeding" means,

(a) in a licensing proceeding, the person referred to, in subsection 27 (5) of the Act, as the applicant,

(b) in a restoration proceeding, the person referred to, in subsection 31 (4) of the Act, as the person whose licence is in abeyance,

(c) in a conduct proceeding, the person referred to, in subsection 34 (2) of the Act, as the licensee who is the subject of the application,

(d) in a capacity proceeding, the person referred to, in subsection 38 (2) of the Act, as the licensee who is the subject of the application,

(e) in a competence proceeding, the person referred to, in subsection 43 (2) of the Act, as the licensee who is the subject of the application,

(f) in a non-compliance proceeding, the person referred to, in subsection 45 (2) of the Act, as the licensee who is the subject of the application,

(g) in a reinstatement proceeding, the person referred to, in subsection 49.42 (4) of the Act, as the applicant, and

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(h) in a terms dispute proceeding, the person referred to, in subsection 49.43 (3) of the Act, as the applicant;

"terms dispute proceeding" means a proceeding under section 49.43 of the Act.

(2) A word or phrase used in these Rules that is defined in the Act bears the definition contained in the Act;

"Tribunal" means the Law Society Tribunal established under the *Law Society Act*, R.S.O. 1990, c. L.8;

"Vice-Chair" means the Vice-Chair of the Hearing Division.

"

Interpretation of Rules

1.03 (1) These Rules shall be liberally construed to secure the just and expeditious determination of every proceeding on its merits.

(2) Where matters are not provided for in these Rules, the practice shall be determined by analogy to them.

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RULE 2

NON-COMPLIANCE WITH RULES

Effect of non-compliance

2.01 (1) A failure to comply with a procedural requirement in these Rules is an irregularity and does not render a proceeding or a step or document in a proceeding a nullity.

Orders on motion attacking irregularity

(2) On the motion of a party to attack a proceeding or a step or document in a proceeding for irregularity, an order may be made,

(a) granting any relief necessary to secure the just determination of the real matters in issue; or

(b) dismissing the proceeding or setting aside a step or document in the proceeding in whole or in part only where and as necessary in the interests of justice.

Attacking irregularity

(3) A motion to attack a proceeding or a step or document in a proceeding for irregularity shall not be made, except with leave ~~of the Hearing Panel~~,

(a) after the expiry of a reasonable period of time after the moving party knows or ought reasonably to have known of the irregularity;

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity; or

(c) if the moving party has otherwise consented to the irregularity

Order dispensing with compliance

2.02 (1) On the motion of a party or a non-party participant, or on a panel's own motion, an order dispensing with compliance with any procedural requirement in these Rules may be made where it is necessary in the interests of justice.

Consent to non-compliance

(2) A party may dispense with compliance with any procedural requirement in these Rules with the consent of all other parties.

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RULE 3

TIME

Computing time

3.01 In computing time under these Rules, or under an order made under these Rules,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens;

(b) where a period of less than seven days is prescribed, holidays shall not be counted;

(c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) where a document would be deemed to be received or service would be deemed to be effective on a day that is a holiday, the document shall be deemed to be received or service shall be deemed to be effective on the next day that is not a holiday.

Extension or abridgment of time periods

3.02 (1) On the motion of a party or a non-party participant, an order extending or abridging any time prescribed by these Rules, or by an order made under these Rules, may be made where it is just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

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RULE 4

REPRESENTATION

Change in representation

Notice of change of representative

4.01 (1) A party or a non-party participant who has a representative of record may change the representative of record by serving on the representative and every other party and non-party participant and filing with the ~~Tribunals Office,~~Tribunal, with proof of service, a notice of change of representative giving the name, address, telephone number, fax number and e-mail address of the new representative.

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Form 4A

(2) The notice mentioned in subrule (1) may be in Form 4A.

Notice of appointment of representative

(3) A party or a non-party participant acting in person may appoint a representative of record by delivering a notice of appointment of representative giving the name, address, telephone number, fax number and e-mail address of the representative.

Form 4B

(4) The notice mentioned in subrule (3) may be in Form 4B.

Notice of intention to act in person

(5) A party or a non-party participant who has a representative of record may elect to act in person by serving on the representative and every other party and non-party participant and filing with the ~~Tribunals Office~~Tribunal, with proof of service, a notice of intention to act in person that sets out the person's address for service, telephone number, fax number, if any, and e-mail address, if any.

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Form 4C

(6) The notice mentioned in subrule (5) may be in Form 4C.

Removal of representative of record

4.02 On the motion of a representative, a party or another person, an order may be made removing the representative as the representative of record.

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RULE 5

COMMUNICATION WITH PANEL~~HEARING PANEL~~

~~**Communication with panel**~~

5.01 ~~**Communication with panel**~~

5.01 No party, non-party participant, representative or other person who attends at or participates in a hearing shall communicate with a panel outside of the hearing with respect to the subject matter of the hearing except,

(a) in the presence of all parties and all non-party participants, who have been permitted to participate in the hearing with respect to the subject matter of the communication, or their representatives; or

(b) in writing by sending the written communication to the Tribunal~~s~~ Office and a copy of the written communication to all parties and all non-party participants, who have been permitted to participate in the hearing with respect to the subject matter of the communication, or their representatives.

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RULE 6

ADDING PARTIES

Adding parties

6.01 (1) On the motion of a person, an order may be made adding a person as a party to a proceeding where the person is entitled under the *Law Society Act* or otherwise by law to be a party to the proceeding.

Time for bringing motion

(2) A motion under this Rule shall be made prior to the hearing on the merits of the proceeding.

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RULE 7

JOINDER OR SEVERANCE OF PROCEEDINGS

Hearing proceedings together or consecutively

7.01 (1) On the motion of a party, an order may be made that the merits of two or more proceedings, in whole or in part, be heard at the same time or one immediately after the other if,

(a) the proceedings have a question of fact, law or mixed fact and law in common;

(b) the proceedings involve the same parties;

(c) the proceedings arise out of the same transaction or occurrence or series of transactions or occurrences; or

(d) for any other reason an order ought to be made under this Rule.

Time for bringing motion

(2) A motion under this Rule shall be made,

(a) prior to the hearing on the merits of any affected proceeding; or

(b) at any time, with leave ~~of the Hearing Panel~~.

Effect of hearing proceedings together or consecutively

(3) Where ~~the Hearing Panel makes~~ an order is made under subrule (1), the ~~Hearing Panel~~ panel shall determine the effects of hearing the merits of the proceedings together or one immediately after the other and may give such directions as it deems just with respect to those effects.

Separating proceedings

(4) Where ~~the Hearing Panel makes~~ an order is made under subrule (1), if hearing the merits of the proceedings together or one immediately after the other unduly complicates or delays the proceedings or causes prejudice to a party, on the motion of a party or on its own motion, the ~~Hearing Panel~~panel may order separate hearings for all or any part of the proceedings.

Dividing proceeding

7.02 (1) On the motion of a party, or on a panel's own motion, an order may be

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made that a proceeding be divided into two or more proceedings.

Effect of order

(2) Where ~~the Hearing Panel~~ ~~, makes~~ an order is made under subrule (1), the ~~Hearing Panel~~panel shall determine the effects of making the order, including how the merits of the separate proceedings shall be heard, and may give such directions as it deems just with respect to the division of the proceeding.

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RULE 8

NON-PARTY PARTICIPATION

Non-party participation

8.01 (1) On the motion of a person, an order may be made permitting a person who is not a party to a proceeding to participate in the proceeding or a part thereof if the participation of the person is in the interests of justice.

Extent of participation

(2) Where ~~the Hearing Panel makes~~ an order is made under subrule (1), the ~~Hearing Panel~~panel shall determine the extent of the person's participation and may give such directions as it deems just with respect to the person's participation.

Intervening as "friend of the court"

8.02 A panel may invite a person, without becoming a party to a proceeding, to participate in the proceeding or a part thereof for the purpose of rendering assistance to the ~~Hearing Panel~~Tribunal by way of argument.

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RULE 9

COMMENCEMENT, AMENDMENT AND ABANDONMENT OF PROCEEDINGS

How proceeding commenced

9.01 (1) A proceeding shall be commenced by the issuing of an originating process.

Notice of application

(2) The originating process for the following proceedings is a notice of application (Form 9A):

1. A conduct proceeding.
2. A capacity proceeding.
3. A competence proceeding.
4. A non-compliance proceeding.
5. A reinstatement proceeding.
6. A terms dispute proceeding.

Notice of referral for hearing

(3) The originating process for the following proceedings is a notice of referral for hearing (Form 9B):

1. A licensing proceeding.
2. A restoration proceeding.

How originating process issued

(4) An originating process is issued by the act of it being assigned a file number and being dated by the ~~Tribunals Office~~Tribunal Office.

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(5) An originating process may be issued,

(a) on personal attendance in the Tribunal~~s~~ Office by the party seeking to issue it or by someone on the party's behalf; or

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(b) by mail or courier, by the party seeking to issue it,

(i) mailing an original of the originating process by regular lettermail or registered mail to the Tribunal~~Tribunals Office~~,or

(ii) sending an original of the originating process by courier to the ~~Tribunals Office~~Tribunal.

Copy of originating process to be sent to party

(6) Where an originating process is issued by mail or courier, the ~~Tribunals Office~~Tribunal shall mail a copy of the originating process as issued by regular lettermail to the party that issued it.

File copy of originating process

(7) An original of the originating process as issued shall be filed with~~in~~ the ~~Tribunals~~ Tribunal~~Office~~ when it is issued.

Service of originating process

(8) A copy of the originating process as issued shall be served by the party that issued it on every other party and proof of service shall be filed with the Tribunal~~s Office~~ within thirty days after the originating process is issued.

Deemed abandonment

(9) Where a party that issued an originating process fails to file, within thirty days after the originating process is issued, proof of service of the originating process on every other party, the proceeding commenced by the issuing of the originating process is deemed to have been abandoned by that party.

Motion to set aside deemed abandonment

(10) On the motion of a person who was deemed to have abandoned a proceeding under subrule (9), an order may be made, as is just, setting aside the deemed abandonment.

Effect of deemed abandonment on subsequent proceeding

(11) Where a party is deemed to have abandoned a proceeding under subrule (9), the deemed abandonment is not a bar to a subsequent proceeding commenced by that party involving the same subject matter.

Amendment of originating process by party

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9.02 (1) A party may amend its originating process,

(a) at any time prior to ten days before the hearing on the merits of the proceeding; and

(b) at any time after the time mentioned in clause (a), with leave ~~of the Hearing Panel~~.

Leave to amend

(2) In considering whether to grant leave to a party to amend its originating process, the ~~Hearing Panel~~Hearing Division may consider,

(a) prejudice to a person;

(b) timeliness of notice to the opposite party; and

(c) any other relevant factor.

No addition of party

(3) An amendment under this rule shall not include the addition of a party.

How amendment made

(4) A party amending its originating process shall file, with the Tribunal~~s Office~~, a copy of the original originating process as amended, bearing the date of the original originating process and the title of the original originating process preceded by the word “amended”.

Amendments indicated

(5) A party amending its originating process shall indicate text added to the original originating process by underlining it and text deleted from the original originating process by striking it through.

Same

(6) Where an originating process is amended more than once, each subsequent amendment shall be underlined or struck through with an additional line.

Duties of Tribunal~~s Office~~ Office

(7) When an amended originating process is filed~~ with the Tribunals Office~~, the Tribunal Office~~Tribunals Office~~ shall note on it the date on which it is filed and the

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authority by which the amendment was made.

Date of amendment

(8) The date on which an amended originating process is filed with the Tribunals ~~Office~~ shall be deemed to be the date on which the original originating process is amended.

Service of amended originating process

(9) A party that amends its originating process shall serve a copy of the amended originating process on every other party forthwith after it is filed with the Tribunals ~~Office~~.

Same

(10) An amended originating process shall be served in accordance with subrule 10.01 (1).

Proof of service

(11) Proof of service of an amended originating process shall be filed with the Tribunals ~~Office~~ forthwith after it is served.

Amendment at hearing

(12) Where an originating process is amended at the hearing on the merits of the proceeding, the amendment shall be made on the face of the record and subrules (4) to (11) do not apply.

Abandonment of proceedings prior to hearing on the merits

Conduct, capacity, competence, non-compliance, reinstatement or terms dispute proceeding

9.03 (1) Prior to the hearing on the merits of the following proceedings, the applicant may abandon the proceeding by delivering a notice of abandonment (Form 9C):

1. A conduct proceeding.

2. A capacity proceeding.

3. A competence proceeding.

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4. A non-compliance proceeding.

5. A reinstatement proceeding.

6. A terms dispute proceeding.

Abandonment of licensing or restoration proceeding by Society

(2) Prior to the hearing on the merits of a licensing or a restoration proceeding, the Society may abandon the proceeding by delivering a notice of abandonment (Form 9D).

Abandonment of licensing or restoration proceeding by applicant

(3) Prior to the hearing on the merits of a licensing or restoration proceeding, the applicant may abandon the application that has been referred for a hearing and the proceeding by delivering a notice of abandonment (Form 9E).

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RULE 10

SERVICE OF DOCUMENTS

Manner of service: originating process

10.01 (1) An originating process shall be served by personal service or by an alternative to personal service.

Manner of service: all other documents

(2) A document other than an originating process may be served,

(a) by personal service or by an alternative to personal service,

(b) by sending a copy of the document by courier to the last known address of the person or the person's representative;

(c) by faxing a copy of the document to the last known fax number of the person or the person's representative, but if the person being served is a party, service under this clause is only effective if the recipient consents to the faxing prior thereto; or

(d) by e-mailing a copy of the document to the last known e-mail address of the person or the person's representative, but service under this clause is only effective,

(i) if the person being served is a party, if the recipient consents to the e-mailing prior thereto, and

(ii) if the recipient provides by e-mail an acceptance of service and the date of the acceptance.

Service by fax

(3) A document that is served by fax under clause (2) (c) shall include a cover page indicating,

(a) the sender's name, address and telephone number;

(b) the name of the person to be served;

(c) the date and time of transmission;

(d) the total number of pages, including the cover page, transmitted;

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(e) the fax number of the sender; and

(f) the name and telephone number of a person to contact in the event of transmission problems.

Service by e-mail

(4) A document that is served by e-mail under clause (2) (d) shall be attached to an e-mail message that shall include,

(a) the sender's name, address, telephone number, fax number and e-mail address;

(b) the date and time of transmission; and

(c) the name and telephone number of a person to contact in the event of transmission problems.

Personal service

(5) Where a document is to be served by personal service, the service shall be made,

(a) on an individual, by leaving a copy of the document with the individual;

(b) on a person other than the Society, by leaving a copy of the document at the premises at which the person carries on business with an adult individual who appears to be in control or management of the place of business; and

(c) on the Society, by leaving a copy of the document with a Discipline Counsel of the Society.

Alternatives to personal service

(6) Where a document may be served by an alternative to personal service, the service shall be made,

(a) by leaving a copy of the document with a person's representative; or

(b) by mailing a copy of the document by regular lettermail or registered mail to the last known address of the person.

Substituted service or dispensing with service

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(7) On the motion of a person, an order may be made permitting substituted service or dispensing with service where it appears that it is impractical for any reason to effect service as required under this rule or where it is necessary in the interests of justice.

Effective date of service

10.02 (1) Service under rule 10.01 is deemed to be effective,

(a) if a copy of the document is left with a person,

(i) before 4 p.m., on the day it is left with the person, or

(ii) after 4 p.m., on the day following the day it is left with the person;

(b) if a copy of the document is mailed to a person, on the fifth day after mailing;

(c) if a copy of the document is sent by courier to a person, on the second day after the document was provided to the courier;

(d) if a copy of the document is faxed to a person,

(i) before 4 p.m., on the day it is faxed to the person, or

(ii) after 4 p.m., on the day following the day it is faxed to the person; or

(e) if a copy of the document is e-mailed to a person,

(i) where the e-mail acceptance of service is received before 4 p.m. on any day, on that day,

(ii) where the e-mail acceptance of service is received after 4 p.m. but before midnight on any day, on the following day.

Effective date of service: substituted service

(2) If an order is made permitting substituted service, the order shall specify when service in accordance with the order is effective.

Effective date of service: service dispensed with

(3) If an order is made dispensing with service, the document shall be deemed to have been served on the effective date of the order for the purposes of the computation of time under these Rules.

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Proof of Service

10.03 (1) Service of a document may be proved by,

(a) an affidavit of the person who served it; or

(b) where the document is served on a representative or on a Discipline Counsel of the Society, the written admission or acceptance of service of the representative or Discipline Counsel.

(2) The affidavit or written admission or acceptance of service may be printed on the back sheet or on a stamp or sticker affixed to the back sheet of the document served.

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RULE 11

SCHEDULING

Hearing on merits of proceeding

~~**Scheduling by panelist**~~

11.01 (1) ~~Subject to subrule (2), a panelist shall schedule every hearing on the merits of a proceeding.~~A hearing may be scheduled by a panelist or by the Tribunal Office.

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~~Scheduling by Tribunals Office~~

~~(2) The Tribunals Office may schedule a hearing on the merits of a proceeding where,~~

~~(a) the hearing is to determine whether a licensee has contravened section 33 of the Act by one or more of the following means:~~

~~i. practising law in Ontario, or holding himself or herself out as, or representing himself or herself to be, a person who may practice law in Ontario while his or her licence is suspended,~~

~~ii. providing legal services in Ontario, or holding himself or herself out as, or representing himself or herself to be, a person who may provide legal services in Ontario while his or her licence is suspended,~~

~~iii. breaching an undertaking to the Society,~~

~~iv. failing to maintain financial records as required by the by-laws,~~

~~v. failing to respond to inquiries from the Society,~~

~~vi. failing to co-operate with a person conducting an audit, investigation, review, search or seizure under Part II of the Act,~~

~~vii. failing to pay costs awarded to the Society by the Hearing Panel or the Appeal Panel,~~

~~viii. failing to register an address with the Society or to notify the Society of any changes in the address, as required by the by-laws,~~

~~ix. failing to provide the Society with information or to file certificates, reports or other documents with the Society, as required by the by-~~

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laws,

x. in the case of a person licensed to practise law in Ontario as a barrister and solicitor, failing to report a claim, or the circumstances of an error, omission or negligent act that a reasonable person would expect to give rise to a claim, to an insurer through which indemnity for professional liability is provided under section 61 of the Act, as required under a policy for indemnity for professional liability,

xi. in the case of a person licensed to provide legal services in Ontario, failing to report a claim, or the circumstances of an error, omission or negligent act that a reasonable person would expect to give rise to a claim, to an insurer, as required under a policy for indemnity for professional liability,

xii. failing to honour a financial obligation to the Society,

xiii. failing to maintain an investment authority or a report on an investment as required by the by-laws;

(b) the proceeding is a non-compliance proceeding;

(c) the nature of the proceeding requires that the hearing be expedited; or

(d) the parties agree on the date of the hearing, which is not later than 90 days after the day on which the originating process is deemed to have been served by the party that issued the originating process on all other parties, and the parties notify the Tribunals Office in writing of their agreement.

Endorsement

(23) An endorsement of every scheduled hearing on the merits of a proceeding shall be made on the originating process by the panelist, if the hearing is scheduled by a panelist, or by the Tribunals Office, if the hearing is scheduled by the Tribunals Office.

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Notice of hearing on merits of proceeding

11.02 (1) The Tribunals Office shall send to all parties and all non-party participants who have been permitted to participate in the hearing on the merits of a proceeding a notice of the hearing on the merits of the proceeding.

Oral hearing

(2) A notice of an oral hearing shall include,

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(a) a statement of the date, time, place and purpose of the hearing; and

(b) a statement that if a person notified does not attend at the hearing, the panel may proceed in the person's absence and the person will not be entitled to any further notice in the proceeding.

Electronic hearing

(3) A notice of an electronic hearing shall include,

(a) a statement of the date, time and purpose of the hearing and details about the manner in which the hearing will be held; and

(b) a statement that if a person notified does not participate in the hearing in accordance with the notice, the panel may proceed without the person's participation and the person will not be entitled to any further notice in the proceeding.

Effect of non-attendance at or non-participation in hearing after due notice

(4) Where notice of a hearing has been given to a person in accordance with subrule (2) or (3), and the person does not attend at or does not participate in the hearing, the panel may proceed in the absence of the person or without the person's participation and the person is not entitled to any further notice in the proceeding.

Hearing of motion

11.03 A motion may be scheduled for hearing on,

(a) any day on which the merits of the proceeding to which the motion relates is scheduled to be heard; or

(b) a day obtained from the Tribunals Office.

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RULE 12

PROCEEDINGS MANAGEMENT

Proceeding management conference

12.01 (1) A proceeding management conference shall be conducted by a panelist on the date specified in the originating process unless, by that date,

(a) a hearing on the merits of the proceeding has been scheduled ~~by the Tribunals Office~~; and

(b) if a pre-hearing conference is required under clause 22.02 (a), the pre-hearing conference has been scheduled ~~by the Tribunals Office~~.

Request for proceeding management conference

(2) A party to a proceeding may, at any time, request to attend before a panelist for a proceeding management conference.

Request to Tribunal~~s~~ Office

(3) A request to attend before a panelist for a proceeding management conference shall be made to the Tribunal~~s~~ Office.

Notice of proceeding management conference

(4) Where a request to attend before a panelist for a proceeding management conference has been made, the Tribunal~~s~~ ~~Office~~ shall send to all parties a notice of the date and time of the proceeding management conference.

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Proceeding management conference: format

12.02 A proceeding management conference may be held in person, by telephone conference, by exchange of documents or by any combination of the aforementioned formats.

Attendance at proceeding management conference

12.03 (1) Unless otherwise directed by the panelist conducting the proceeding management conference, or the parties consent, all the parties to the proceeding, or their representatives, are required to attend at or participate in the proceeding management conference.

Failure to attend or participate

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(2) Where a person who is required to attend at or participate in a proceeding management conference does not attend at or participate in the conference, the panelist conducting the conference may proceed in the absence of the person or without the person's participation.

Matters to be dealt with

12.04 (1) At a proceeding management conference, a panelist may,

(a) schedule a further proceeding management conference;

(b) direct the parties to attend at a pre-hearing conference;

(c) schedule or reschedule a pre-hearing conference;

(d) schedule or adjourn a hearing; and

(e) give directions.

Results of proceeding management conference

(2) At the conclusion of a proceeding management conference, the panelist who conducted the conference shall endorse on the originating process the results of the conference, including any future scheduled proceeding management conference and any directions given by the panelist.

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RULE 13

MOTIONS

Making the motion

13.01 (1) The following motions shall be made by notice of motion (Form 13A):

1. A motion relating to the jurisdiction of the ~~Hearing Panel~~Hearing Division.
2. A motion to stay or dismiss a proceeding.
3. A motion raising any constitutional issues, including issues raised under the *Canadian Charter of Rights and Freedoms*.
4. A motion relating to disclosure.
5. A motion that a hearing or a part of a hearing in a proceeding be held in the absence of the public.
6. A motion to prohibit a person from disclosing information disclosed in a hearing.

Same

(2) A motion not mentioned in subrule (1) shall be made by notice of motion (Form 13A) unless the nature of the motion or the circumstances make a notice of motion unnecessary.

Contents of notice of motion: motion for order for hearing in absence of public or for non-disclosure

(3) In a motion for an order that a hearing or a part of a hearing in a proceeding be held in the absence of the public or for an order prohibiting a person from disclosing information disclosed in a hearing, the moving party shall include in the notice of motion the grounds upon which the order is sought but shall not include in the notice of motion the specific matters, document or communication in respect of which the order is sought.

Moving party's obligations

Application of rule

13.02 (1) This rule applies where a motion is made by notice of motion.

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Service of motion record

(2) The moving party shall serve on every responding party at least ten days before the hearing of the motion a motion record.

(3) The moving party's motion record shall have consecutively numbered pages and shall contain,

(a) a table of contents listing each document contained in the motion record, including each exhibit, and describing each document by its nature and date and, in the case of an exhibit, by its nature, date and exhibit number or letter;

(b) the notice of motion; and

(c) all affidavits and other material upon which the moving party intends to rely.

Service of factum and book of authorities

(4) The moving party shall serve on every responding party at least seven days before the hearing of the motion a factum, if any, and a book of authorities, if any.

Filing documents ~~with Tribunals Office~~

(5) The moving party shall file with the Tribunal~~s Office~~, with proof of service, at least seven days before the hearing of the motion any documents served on a responding party under this rule.

Same

(6) When filing a document with the Tribunal~~s Office~~, the moving party shall file,

(a) two copies of the document where the motion is to be heard by a panel consisting of one panelist; and

(b) four copies of the document where the motion is to be heard by a panel consisting of three panelists.

Responding party's obligations

Application of rule

13.03 (1) This rule applies where a motion is made by notice of motion.

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Service of motion record, factum and book of authorities

(2) A responding party shall serve on the moving party and every person served with the moving party's motion record, at least three days before the hearing of the motion, its motion record, if any, its factum, if any, and its book of authorities, if any.

Responding party's motion record

(3) The responding party's motion record shall have consecutively numbered pages and shall contain,

(a) a table of contents listing each document contained in the motion record, including each exhibit, and describing each document by its nature and date and, in the case of an exhibit, by its nature, date and exhibit number or letter; and

(b) any materials upon which the responding party intends to rely that are not contained in the moving party's motion record.

Filing documents ~~with Tribunals Office~~

(4) A responding party shall file with the Tribunal~~s Office~~, with proof of service, at least three days before the hearing of the motion any document served on a person under this rule.

Same

(5) When filing a document with the Tribunal~~s Office~~, a responding party shall file,

(a) two copies of the document where the motion is to be heard by a panel consisting of one panelist; and

(b) four copies of the document where the motion is to be heard by a panel consisting of three panelists.

Abandoning a motion

13.04 (1) Prior to the hearing of a motion, the moving party may abandon the motion by delivering a notice of abandonment (Form 13B).

(2) Where a moving party serves a motion record but does not file it or appear at the hearing of the motion, the motion is deemed to have been abandoned by the moving party.

(3) Where a motion is abandoned or is deemed to have been abandoned,

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every responding party on whom the motion record was served is entitled to the costs of the motion.

Motion on consent

13.05 Where a motion is on consent, when filing the motion record with the Tribunal~~s Office~~, the moving party shall also file the consent of every person served with the motion record and a draft of the formal order.

Disposition of motion

13.06 After hearing a motion, the panel may,

(a) make the order sought;

(b) dismiss the motion, in whole or in part;

(c) adjourn the hearing of the motion, in whole or in part; or

(d) if the motion is heard prior to the hearing on the merits of the proceeding in which the motion is made or to which the motion relates, adjourn the hearing of the motion to the panel presiding at the hearing on the merits of the proceeding.

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RULE 14

ADJOURNMENTS

How to obtain

Before date of hearing

14.01 (1) Where a hearing is scheduled and prior to the date of the hearing a party wishes to adjourn the hearing to another date, the party shall,

(a) request the adjournment from a panelist at a proceeding management conference that, unless it is not possible, is held at least ten days prior to the date of the hearing;

(b) if the Tribunal~~s~~ Office advises the party that a proceeding management conference cannot be scheduled prior to the date of the hearing, make a motion to the panel for an order adjourning the hearing; or

(c) in the case of a hearing of a motion, where all parties and all non-party participants who have been permitted to participate in the hearing consent to the adjournment, request the adjournment from the Tribunal~~s~~ Office.

On date of or during hearing

(2) Where a hearing is scheduled and on the date scheduled for the hearing or during the course of the hearing a party wishes to adjourn the hearing, or the remaining part of the hearing, to a future date, the party shall make a motion to the panel for an order adjourning the hearing, or the remaining part of the hearing, to a future date.

Adjournments by Tribunal~~s~~ Office

14.02 The Tribunal~~s~~ Office may grant a request for an adjournment of a hearing of a motion where,

(a) all parties and all non-party participants who have been permitted to participate in the hearing consent to the adjournment; and

(b) the parties and the non-party participants notify the Tribunal~~s Office~~ in writing of their consent.

Adjournments: Considerations

14.03 In considering whether to grant an adjournment, a panelist or a panel, as the case may be, may consider,

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(a) prejudice to a person;

(b) the timing of the request or motion for the adjournment;

(c) the number of prior requests and motions for an adjournment;

(d) the number of adjournments already granted;

(e) prior directions or orders with respect to the scheduling of future hearings;

(f) the public interest;

(g) the costs of an adjournment;

(h) the availability of witnesses;

(i) the efforts made to avoid the adjournment;

(j) the requirement for a fair hearing; and

(k) any other relevant factor.

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RULE 15

LANGUAGE OF HEARING

Hearing in English or French

15.01 (1) A hearing in a proceeding shall be conducted in the English or French language.

Hearing in English

(2) A hearing in a proceeding shall be conducted in the English language unless a party to the proceeding requires that the hearing be conducted in the French language.

Requiring hearing in French: Society

(3) Where the subject of the proceeding speaks French, the Society may require that every hearing in the following proceedings be conducted in the French language by filing with the Tribunals ~~Office~~ the originating process in the French language:

1. A licensing proceeding.
2. A restoration proceeding.
3. A conduct proceeding.
4. A capacity proceeding.
5. A competence proceeding.
6. A non-compliance proceeding.

Requiring hearing in French: subject of the proceeding

(4) The subject of the proceeding who speaks French may require that every hearing in the following proceedings be conducted in the French language by notifying the Tribunals ~~Office~~ of the requirement within thirty days after he or she is deemed to have been served with the originating process:

1. A licensing proceeding.
2. A restoration proceeding.
3. A conduct proceeding.

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4. A capacity proceeding.

5. A competence proceeding.

6. A non-compliance proceeding.

Requiring hearing in French: subject of the proceeding

(5) The subject of the proceeding who speaks French may require that every hearing in the following proceedings be conducted in the French language by filing with the Tribunals ~~Office~~ the originating process in the French language:

1. A reinstatement proceeding.

2. A terms dispute proceeding.

Compliance with subrule (4) not required

(6) The subject of the proceeding is not required to comply with subrule (4) if he or she was served with the originating process in the French language.

Hearing in English

15.02 Where a hearing in a proceeding is conducted in the English language,

(a) evidence given at the hearing in a language other than the English language shall be interpreted into the English language; and

(b) a document with respect to the hearing filed with the Tribunals ~~Office~~, or received by the panel presiding at the hearing, under these Rules shall be in the English language or shall be accompanied by a translation of the document into the English language certified by an affidavit of the translator.

Hearing in French

15.03 Where a hearing in a proceeding is conducted in the French language,

(a) evidence given and submissions made in the hearing in the English or French language shall be received, recorded and transcribed in the language in which they are given or made;

(b) a document with respect to the hearing filed with the Tribunals ~~Office~~, or received by the panel presiding at the hearing, under these Rules may be in the French language and need not be accompanied by a translation of

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the document into the English language;

(c) on the request of the subject of the proceeding who speaks French but not French and English, the panel presiding at the hearing shall cause anything given orally at the hearing in a language other than the French language to be interpreted into the French language;

(d) on the request of the subject of the proceeding who speaks French but not French and English, the Tribunal~~s Office or the panel presiding at the hearing~~ may cause any document with respect to the hearing filed with the Tribunal~~s Office~~, or received by the panel, in the English language to be translated into the French language; and

(e) the Tribunal~~s Office~~ shall cause an endorsement, a decision, an order or reasons for a decision or an order with respect to the hearing written in the English language to be translated into the French language, unless the parties to the proceeding agree otherwise.

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RULE 16

FORM OF HEARING

Oral hearing

16.01 Subject to rules 16.02 and 16.03, a hearing shall be held as an oral hearing with the parties, non-party participants, if any, and their representatives, if any, appearing in person.

Electronic hearing

Motions

16.02 (1) The following motions may, without a motion or an order being made, be heard as an electronic hearing:

1. A motion on consent.

2. A motion for an adjournment.

Order for electronic hearing

(2) On the motion of a party, or on a panel's own motion, an order may be made that a hearing or a part of a hearing be held as an electronic hearing.

Matters to consider in making order

(3) In deciding whether to order that a hearing be held as an electronic hearing, a panel may consider,

(a) the suitability of an electronic hearing to the subject matter of the hearing;

(b) the nature of the evidence to be called at the hearing and whether credibility is in issue;

(c) whether the matters in dispute in the hearing are questions of law;

(d) the convenience of the parties;

(e) the cost, efficiency and timeliness of the proceeding in which the hearing is being held;

(f) the avoidance of delay or unnecessary length;

(g) the fairness of the process;

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(h) public accessibility to the hearing;

(i) the fulfilment of the Society's statutory mandate; and

(j) any other matter relevant in order to secure the just and expeditious determination of the subject matter of the hearing or of the proceeding in which the hearing is being held.

Conduct of electronic hearing

(4) An electronic hearing shall be conducted by telephone or other electronic means and all the parties and all the non-party participants who have been permitted to participate in the hearing and the panel must be able to hear one another and any witnesses throughout the hearing.

Arrangements for electronic hearing

(5) Where a hearing is to be held as an electronic hearing, the ~~Tribunals Office~~ Tribunal shall make all the necessary arrangements for the hearing and shall give notice of those arrangements to all the persons participating in the hearing and their representatives, if any.

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Written hearing

16.03 (1) Subject to subrule (3) and subrules 16.02 (1) and (2), the following hearings shall be held as a written hearing:

1. The hearing of a motion for an order that a hearing be held as an electronic hearing.

Written hearing of motions

(2) The following motions may be heard as a written hearing:

1. A motion on consent.

2. A motion for an adjournment.

Order for oral hearing

(3) On the motion of a party, or on a panel's own motion, an order may be made that a hearing mentioned in subrule (1) be held as an oral hearing.

Conduct of written hearing

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(4) A written hearing shall be conducted by the exchange of documents and all the parties and all the non-party participants who have been permitted to participate in the hearing are entitled to receive every document that the panel receives in the hearing.

Arrangements for written hearing

(5) Where a hearing is to be held as a written hearing, the ~~Tribunals Office~~Tribunal shall make all the necessary arrangements for the hearing and shall give notice of those arrangements to all the persons participating in the hearing and their representatives, if any.

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Motion under Rule 21

No notice required

16.04 The notice requirement in subrule 16.02 (5) and in subrule 16.03 (5) does not apply in the case of a hearing of a motion for an order mentioned in rule 21.01 where an order was made dispensing with service of the motion record.

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RULE 17

LOCATION OF HEARING

Location of Hearings

17.01 (1) Subject to subrules (2) and (3), every hearing shall be held at the offices of the Society in Toronto.

(2) Where all parties consent to a hearing being held at a place other than the offices of the Society in Toronto, the hearing shall be held at that place.

(3) On the motion of a party, an order may be made that a hearing be held at a place other than the offices of the Society in Toronto.

(4) In deciding whether to order that a hearing be held at a place other than the offices of the Society in Toronto, a panel may consider,

(a) the convenience of the parties;

(b) the cost, efficiency and timeliness of the proceeding in which the hearing is being held;

(c) the avoidance of delay or unnecessary length;

(d) the fairness of the process;

(e) public accessibility to the hearing;

(f) the fulfilment of the Society's statutory mandate; and

(g) any other matter relevant in order to secure the just and expeditious determination of the subject matter of the hearing or of the proceeding in which the hearing is being held.

(5) An order that a hearing be held at a place other than the offices of the Society in Toronto shall be made only after consultation with the ~~Tribunals Office~~Tribunal Office.

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RULE 18

ACCESS TO HEARING

Hearing to be public

18.01 Subject to rule 18.02, every hearing in a proceeding shall be open to the public.

Hearing in the absence of the public

18.02 On the motion of a party, an order may be made that a hearing or a part of a hearing in a proceeding shall be held in the absence of the public where,

(a) matters involving public security may be disclosed;

(b) it is necessary to maintain the confidentiality of a privileged document or communication;

(c) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public; or

(d) in the case of a hearing or a part of a hearing that is to be held as an electronic hearing, it is not practical to hold the hearing or the part of the hearing in a manner that is open to the public.

Attendance at hearing held in the absence of the public

18.03 Where a hearing or a part of a hearing is held in the absence of the public, unless otherwise ordered by the ~~Hearing Panel~~panel, the hearing may be attended by,

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(a) subject to rule 24.01, any witness the nature of whose testimony gave rise to the order that the hearing or the part of the hearing be held in the absence of the public;

(b) the parties and their representatives;

(c) the non-party participants who have been permitted to participate in the hearing or the part of the hearing and their representatives; and

(d) such other persons as the panel considers appropriate.

Non-disclosure of information: hearing held in the absence of the public

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18.04 (1) Subject to subrule (2), where a hearing or a part of a hearing is held in the absence of the public, no person shall disclose, except to his, her or its representative or to another person who attends at or participates in the hearing or the part of the hearing that is held in the absence of the public,

(a) any information disclosed in the hearing or the part of the hearing that is held in the absence of the public; and

(b) if and as specified by the panel, the panel's reasons for a decision or an order arising from the hearing or the part of the hearing that is held in the absence of the public, other than the panel's reasons for an order that a subsequent hearing or a part of the subsequent hearing be held in the absence of the public.

Order for disclosure: hearing held in the absence of the public

(2) On the motion of a person, an order may be made permitting a person to disclose any information mentioned in subrule (1).

Order for non-disclosure: hearing open to the public

18.05 On the motion of a party, or on a panel's own motion, if any of clauses 18.02 (a), (b) and (c) apply, an order may be made prohibiting a person who attends at or participates in a hearing or a part of a hearing that is open to the public from disclosing, except to his, her or its representative or to another person who attends at or participates in the hearing or the part of the hearing, any information disclosed in the hearing or the part of the hearing.

Review of order

18.06 If an order is made in respect of any matter dealt with in this Rule, on the motion of a person, the ~~Hearing Panel~~panel may at any time review all or a part of the order and may confirm, vary, suspend or cancel the order.

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Prohibition against photography, *etc.* at hearing

18.07 (1) Subject to subrules (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a hearing,

(ii) of any person entering or leaving the room in which a hearing is to

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be or has been convened, or

(iii) of any person in the building in which a hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2) (b).

Exceptions

(2) Nothing in subrule (1),

(a) prohibits a person from unobtrusively making written notes or sketches at a hearing; or

(b) prohibits a party, a party's representative or a journalist from unobtrusively making an audio recording at a hearing, in the manner that has been approved by the panel presiding at the hearing, for the sole purpose of supplementing or replacing written notes.

Exceptions

(3) Subrule (1) does not apply to a photograph, motion picture, audio recording or record made with the authorization of the panel presiding at a hearing,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the hearing; or

(b) with the consent of the parties and witnesses, for such educational, instructional or other purposes as the panel approves.

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RULE 19

DISCLOSURE

Obligations of the Society

19.01 (1) In a proceeding, the Society, as a party, shall make such disclosure to the subject of the proceeding as is required by law and, without limiting the generality of the foregoing, the Society shall provide to the subject of the proceeding, not later than ten days before the hearing on the merits of the proceeding,

(a) a copy of every document upon which the Society intends to rely as evidence and the opportunity to examine any other relevant document;

(b) a signed witness statement for every witness or, where there is no signed witness statement for a witness, a summary of the anticipated oral evidence of the witness; and

(c) a list of witnesses that the Society intends to call.

Obligations of subject of the proceeding

(2) In a licensing proceeding, a restoration proceeding, a reinstatement proceeding or a terms dispute proceeding, the subject of the proceeding shall provide to the Society, not later than ten days before the hearing on the merits of the proceeding,

(a) a copy of every document upon which the subject of the proceeding intends to rely as evidence;

(b) for every witness upon whose oral evidence the subject of the proceeding intends to rely, a signed witness statement or, where there is no signed witness statement for a witness, a summary of the anticipated oral evidence of the witness; and

(c) a list of witnesses that the subject of the proceeding intends to call.

Summary of evidence

(3) A summary of the oral evidence of a witness shall be in writing and shall contain,

(a) the substance of the evidence of the witness;

(b) a list of documents or things, if any, to which the witness will refer; and

(c) the witness's name and address or, if the witness's address is not

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provided, the name and address of a person through whom the witness may be contacted.

Expert Reports

19.02 (1) Every party and non-party participant shall provide to every other party and non-party participant,

(a) not later than ninety days before the hearing on the merits of a proceeding,

(i) a list of the expert witnesses that the person intends to call,

(ii) a copy of the curriculum vitae of every expert witness included in the list mentioned in subclause (i), and

(iii) a summary of the anticipated oral evidence of every expert witness included in the list mentioned in subclause (i); and

(b) not later than thirty days before the hearing on the merits of a proceeding, a copy of the written report of every expert witness included in the list mentioned in subclause (a) (i), if the person intends to rely on the written report in the hearing.

Summary of evidence

(2) A summary of the oral evidence of an expert witness shall be in writing and shall contain,

(a) the substance of the evidence of the expert witness;

(b) a list of documents or things, if any, to which the expert witness will refer; and

(c) the expert witness's name and address.

Failure to disclose: consequences

Evidence may not be introduced

19.03 Evidence that is not disclosed as required under rule 19.01 or 19.02 may not be introduced as evidence in a proceeding, except with leave of the panel.

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RULE 20

ADMISSIONS

Interpretation

20.01 In this Rule, “authenticity” includes the fact that,

(a) a document that is said to be an original was printed, written or otherwise produced and signed or executed as it purports to have been;

(b) a document that is said to be a copy is a true copy of the original; and

(c) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

Request to admit fact or document

20.02 (1) In a proceeding, a party may, at any time but not later than thirty days before the hearing on the merits of the proceeding, request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.

Form of request to admit

(2) A request to admit shall be in Form 20A.

Service of request to admit

(3) A party making a request to admit to another party shall serve on that other party,

(a) the request to admit; and

(b) a copy of any document mentioned in the request to admit, unless a copy is already in the possession of that other party.

Response to request to admit

20.03 (1) A party on whom a request to admit is served shall respond to it within twenty days after it is served by serving on the requesting party a response to the request to admit.

Form and content of response

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(2) A response to a request to admit shall be in Form 20B and shall,

(a) admit the truth of a fact or the authenticity of a document mentioned in the request to admit;

(b) specifically deny the truth of a fact or the authenticity of a document mentioned in the request to admit; or

(c) refuse to admit the truth of a fact or the authenticity of a document mentioned in the request to admit and set out the reason for the refusal.

Effect of request to admit

Deemed admission where no response

20.04 (1) Where a party on whom a request to admit is served fails to serve a response as required by subrule 20.03 (1), the party shall be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

Deemed admission where insufficient response

(2) Subject to subrule (3), where a party on whom a request to admit is served serves a response as required by subrule 20.03 (1) but does not comply with subrule 20.03 (2) in respect of a fact or a document mentioned in the request to admit, the party shall be deemed, for the purposes of the proceeding only, to admit the truth of that fact or the authenticity of that document.

Deemed admission where non-attendance at or non-participation in hearing

(3) Where a party on whom a request to admit is served does not attend at or does not participate in the hearing on the merits of the proceeding, whether or not the party served a response, the party shall be deemed, for the purposes of the hearing only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

Costs on denial or refusal to admit

20.05 Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at a hearing in the proceeding, the ~~Hearing Panel~~panel may take the denial or refusal into account in exercising its discretion respecting costs under section 49.28 of the *Law Society Act* and rule 25.01.

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Withdrawal of admission

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20.06 (1) On the motion of a party who admits or is deemed to admit the truth of a fact or the authenticity of a document, an order may be made withdrawing the admission.

Time for bringing motion

(2) A motion under this rule shall be made,

(a) prior to the hearing on the merits of the proceeding; or

(b) at any time, with leave ~~of the Hearing Panel~~panel.

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RULE 21

SUSPENSION OR RESTRICTION ORDER

Authority to make

21.01 On the motion of the Society, the ~~Hearing Panel~~Hearing Division may make an interlocutory order suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services.

General

21.02 (1) Subject to this Rule, Rule 13 applies with necessary modifications to a motion for an order mentioned in rule 21.01.

Authorization required in certain circumstances

(2) The Society shall obtain the authorization of the Proceedings Authorization Committee to make a motion for an order mentioned in rule 21.01 if the motion relates to a proceeding that has not been commenced or if the motion is being made in a proceeding where the ~~Hearing Panel~~Hearing Division has not commenced a hearing on the merits of the proceeding.

Making the motion

21.03 A motion for an order mentioned in rule 21.01 shall be made by notice of motion (Form 13A).

Society's obligations

Service of motion record

21.04 (1) The Society shall serve a motion record on the licensee at least three days before the hearing of the motion.

Method of service

(2) The motion record shall be served in accordance with subrule 10.01 (1) as if it were an originating process.

Dispensing with service

(3) On the motion of the Society, an order may be made dispensing with service of the motion record where,

(a) the circumstances render the service of the motion record impracticable or

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unnecessary; or

(b) the delay necessary to effect service might entail serious consequences.

Service of factum and book of authorities

(4) Where the motion record has been served, the Society shall serve its factum and book of authorities, if any, on the licensee at least three days before the hearing of the motion.

Filing documents ~~with Tribunals Office~~

(5) Where the motion record has been served, the Society shall file with the Tribunal~~s Office~~, with proof of service, not later than 4 p.m. on the day before the hearing of the motion, any documents served on the licensee under this rule.

Filing documents with panel

(6) Where an order has been made dispensing with service of the motion record, the Society shall file a motion record, a factum and a book of authorities, if any, with the panel in the hearing of the motion.

Licensee's obligations

Service of motion record, factum and book of authorities

21.05 (1) Where a motion record has been served under rule 21.04, the licensee shall serve on the Society, not later than 2 p.m. on the day before the hearing of the motion, his or her motion record, if any, his or her factum, if any, and his or her book of authorities, if any.

Filing documents ~~with Tribunals Office~~

(2) The licensee shall file with the Tribunal~~s Office~~, with proof of service, not later than 4 p.m. on the day before the hearing of the motion, any document served on the Society under this rule.

What is admissible in evidence

21.06 (1) Despite rules 24.02, 24.06 and 24.07, and subject to subrule (2), the following may be admitted as evidence and may be acted on at the hearing of a motion for an order mentioned in rule 21.01, whether or not given or proven under oath or affirmation or admissible as evidence in a court:

1. Any oral testimony that is relevant to the subject-matter of the hearing.

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2. Any document or other thing that is relevant to the subject-matter of the hearing.

What is inadmissible in evidence

(2) Unless permitted by the Act, nothing shall be admitted in evidence at the hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible under any statute.

Order

21.07 (1) A panel making an order mentioned in rule 21.01 shall specify in the order that the order shall be in effect until the earliest of the following:

1. Where an order was made dispensing with service of the motion record, a panel varies or cancels the order on the basis of evidence that is brought by the licensee to the panel within thirty days of service of the order on the licensee.

2. A panel varies or cancels the order on the consent of the Society and the licensee prior to the hearing on the merits of the proceeding to which the motion relates.

3. A panel varies or cancels the order on the basis of fresh evidence or a material change in circumstances that is brought by the Society or the licensee to the panel prior to the hearing on the merits of the proceeding to which the motion relates.

4. The panel presiding at the hearing on the merits of the proceeding to which the motion relates, prior to disposing of the proceeding, varies or cancels the order.

5. The panel presiding at the hearing on the merits of the proceeding to which the motion relates disposes of the proceeding.

(2) Where an order was made dispensing with service of the motion record, the Society shall serve on the licensee any order made by the panel and a copy of the motion record and all other documents used in the hearing of the motion.

(3) On the motion of the Society, an order may be made dispensing with compliance with a requirement mentioned in subrule (2).

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RULE 22

PRE-HEARING CONFERENCES

Purpose of pre-hearing conference

22.01 (1) The purpose of a pre-hearing conference is to facilitate the just and most expeditious disposition of a proceeding.

(2) Without limiting the generality of subrule (1), in a pre-hearing conference, the panelist or other person conducting the pre-hearing conference may discuss with the parties,

(a) the identification, limitation or simplification of the issues in the proceeding;

(b) the identification and limitation of evidence and witnesses;

(c) the possibility of settlement of any or all of the issues in the proceeding;

(d) the possibility of the parties entering into an agreed statement of facts with respect to all or part of the facts in issue in the proceeding; and

(e) directions to be given to the parties with respect to the conduct of the proceeding or a motion in the proceeding.

Pre-hearing conference to be conducted

22.02 A pre-hearing conference shall be conducted in a proceeding where,

(a) one party to the proceeding estimates that the hearing on the merits of the proceeding will be longer than two days;

(b) a panelist or panel directs the parties to a proceeding to attend at a pre-hearing conference; or

(c) the parties agree to attend at a pre-hearing conference.

Who presides at pre-hearing conference

22.03 A pre-hearing conference shall be conducted by a panelist or another person assigned by the Chair or Vice-Chair~~chair of the Hearing Panel.~~

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Timing of pre-hearing conferences

22.04 All pre-hearing conferences in a proceeding shall be conducted prior to the

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completion of the hearing on the merits of the proceeding and, unless otherwise directed ~~by the Hearing Panel~~, shall be conducted prior to the commencement of the hearing on the merits of the proceeding.

Method of conducting pre-hearing conference

22.05 (1) Subject to subrule (2), a pre-hearing conference shall be conducted in person.

Pre-hearing conference by telephone conference

(2) A pre-hearing conference may be conducted by telephone conference,

(a) if the parties consent; or

(b) the panelist or other person conducting the pre-hearing conference permits it.

Scheduling of pre-hearing conference: by panelist

22.06 (1) ~~Subject to subrule (2), a panelist shall schedule every~~A pre-hearing conference may be scheduled by a panelist or by the Tribunal Office ~~at a proceeding management conference.~~

~~**Scheduling of pre-hearing conference: by Tribunals Office**~~

~~(2) The Tribunals Office may schedule a pre-hearing conference where,~~

~~(a) the parties agree on the date and time of the pre-hearing conference; and~~

~~(b) the parties notify the Tribunals Office in writing of their agreement.~~

Endorsement

(2~~3~~) An endorsement of every scheduled pre-hearing conference shall be made on the originating process by the panelist, if the pre-hearing conference is scheduled by a panelist, or by the Tribunal~~s~~ Office, if the pre-hearing is scheduled by the Tribunal~~s~~ Office.

Notice of pre-hearing conference

(3~~4~~) The Tribunal~~s Office~~ shall send to all parties a notice of the date and time of every pre-hearing conference in the proceeding, including the name of the panelist or other person conducting the pre-hearing conference.

Notice not required

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(5) Subrule (4) does not apply if,

(a) a panel directs the parties to a proceeding to attend at a pre-hearing conference,

(b) a member of the panel that gave the direction will conduct the pre-hearing conference, and

(c) the pre-hearing conference will be conducted immediately after the direction has been given.

Preparation for pre-hearing conference

22.07 (1) The Law Society shall prepare a pre-hearing conference memorandum and provide a copy of the memorandum to the other parties and to the panelist or other person conducting the pre-hearing conference at least seven days before the pre-hearing conference.

Non-application of subrule (1)

(2) Subrule (1) does not apply if,

(a) a panel directs the parties to a proceeding to attend at a pre-hearing conference,

(b) a member of the panel that gave the direction will conduct the pre-hearing conference, and

(c) the pre-hearing conference will be conducted immediately after the direction has been given.

Attendance at pre-hearing conference

22.08 Unless otherwise directed by the panelist or other person conducting the pre-hearing conference, all parties to the proceeding, or their representatives, are required to attend at or participate in the pre-hearing conference.

Results of pre-hearing conference

22.09 (1) At the conclusion of the pre-hearing conference, the panelist or other person conducting the pre-hearing conference shall endorse on the originating process,

(a) who attended at or participated in, and who did not attend at or participate in, the pre-hearing conference;

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(b) any agreement reached; and

(c) any directions given to the parties with respect to the conduct of the proceeding or a motion in the proceeding.

(2) Any agreement reached at the pre-hearing conference, as endorsed on the originating process, is binding on the parties.

No disclosure to panel

22.10 (1) No communication shall be made to the panel presiding at the hearing on the merits of the proceeding or at the hearing of a motion in the proceeding with respect to any statement made at the pre-hearing conference, except as disclosed in the endorsement made under rule 22.09.

Pre-hearing conference panelist cannot preside at hearing

(2) A panelist conducting a pre-hearing conference in a proceeding shall not preside at the hearing on the merits of the proceeding, except with the consent of the parties to the proceeding.

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RULE 22.1

FILING OF CONSENT DOCUMENTS BEFORE HEARING

Documents to be filed

22.1.01 (1) The parties shall file with the Tribunals ~~Office~~, prior to the date of a hearing, all documents, including any agreed statements of fact~~,~~ that the parties have agreed may be used or referred to at the hearing.

Timing of filing

(2) Except in exceptional circumstances, the parties shall file documents with the Tribunals ~~Office~~ under this rule at least two days prior to the date of the hearing.

Confirmation of agreement to be filed

(3) When filing a document with the Tribunals ~~Office~~ under this rule, the parties shall file, together with the document, written confirmation of their agreement that the document may be used or referred to at the hearing.

Number of copies to be filed

(4) When filing a document with the Tribunals ~~Office~~ under this rule, the parties shall file,

(a) two copies of the document where the hearing is before a panel consisting of one panelist; and

(b) four copies of the document where the hearing is before a panel consisting of three panelists.

Documents to be made available to panel

(5) Whenever possible, all documents filed with the Tribunals ~~Office~~ under this rule shall be made available to the panel presiding at the hearing prior to the hearing.

No relief from other requirements

(6) Nothing in this rule relieves a party from any other requirements under these Rules or from the consequences of failing to comply with those other requirements.

Filing document with panel at hearing not prevented

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(7) Nothing in this rule prevents a party from filing a document with the panel presiding at the hearing in accordance with these Rules.

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RULE 23

CONDUCT OF HEARING

Consent to hearing by one panelist

23.01 For the purposes of paragraph 2 of subsection 2 (1) of Ontario Regulation 167/07, the parties to a conduct proceeding may consent to having one panelist preside at the hearing on the merits of the proceeding by filing a consent (Form 23A),

(a) sent to~~with~~ the Tribunal~~s Office~~, as early as possible but not later than three days before the hearing on the merits of the proceeding; or

(b) with the panelist, immediately prior to the commencement of the hearing on the merits of the proceeding.

Transcripts

Production of transcript

23.02 (1) The Tribunal~~s Office~~ shall cause every oral and electronic hearing to be recorded by a reporting service to permit the production of a transcript of the hearing.

Ordering transcript

(2) A person wishing to have a copy of the transcript of a hearing shall order it from the reporting service that recorded the hearing.

Costs of transcript

(3) The costs of acquiring a transcript of a hearing shall be borne solely by the person wishing to have a copy of the transcript of the hearing.

Requirement to file transcript

(4) The first party to obtain a transcript of a hearing shall file a copy of the transcript with the Tribunal~~s Office~~.

Interpreter

23.03 (1) Where a witness does not understand the language or languages in which an examination at a hearing is to be conducted, the Tribunal~~s Office~~ shall provide an interpreter.

Notice to Tribunal~~s Office~~

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(2) A person intending to call a witness who will require interpretation shall notify the Tribunals ~~Office~~ of the witness' requirement for an interpreter as early as possible and, in any event, not later than five days before the hearing at which the witness will be examined.

Interpreter to be competent

(3) An interpreter shall be competent and independent.

Interpreter to take oath or affirmation

(4) Where an interpreter is required under subrule (1), before the witness is called, the interpreter shall take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation to the witness, the questions put to the witness and the witness' answers.

Accommodation required

23.05 A party or a non-party participant shall notify the Tribunals ~~Office~~ as early as possible of any needs of the party or the non-party participant or his, her or its witnesses that may require accommodation.

Limitation on examination of witness

23.06 A panel may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

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RULE 24

EVIDENCE

Exclusion of witness

24.01 (1) Subject to subrule (2), on the motion of a party, an order may be made excluding a witness from a hearing until the witness is called to give evidence.

Order not to apply to party or witness instructing representative of party

(2) An order under subrule (1) may not be made in respect of a party or a witness whose presence is essential to instruct the representative of the person calling the witness, but an order may be made requiring any such party or witness to give evidence before other witnesses are called to give evidence on behalf of the party or the person calling the witness.

No communication with excluded witness

(3) Subject to subrule (4), where an order is made excluding a witness from a hearing, there shall be no communication to the witness of any evidence given during the witness' absence from the hearing until after the witness has been called to give evidence and has given evidence.

Order permitting communication with excluded witness

(4) On the motion of the person calling a witness who has been excluded from a hearing, an order may be made permitting communication to the witness of any evidence given during the witness' absence from the hearing.

Rules of evidence

24.02 Subject to this Rule, at a hearing, the rules of evidence applicable in civil proceedings apply.

Evidence by affidavit: hearing on the merits of a proceeding

24.03 (1) At the hearing on the merits of a proceeding, the evidence of a witness or proof of a particular fact or document may be given by affidavit, subject to the ~~Hearing Panel~~panel ordering otherwise.

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Cross-Examination

(2) Where the evidence of a witness or proof of a particular fact or document is given by affidavit, if a party adverse to the party tendering the affidavit evidence wishes to cross-examine the deponent,

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(a) the deponent shall attend at the hearing on the merits of the proceeding for the purposes of cross-examination; or

(b) the deponent shall attend before an official examiner for the purposes of cross-examination and the transcript of the cross-examination may be admitted in evidence at the hearing on the merits of the proceeding.

(3) A cross-examination conducted under clause (2) (b) shall be conducted in accordance with the Rules of Civil Procedure applicable to oral examinations and, where necessary, the parties may seek direction from the panel.

Agreed facts

24.04 At a hearing on the merits of a proceeding, the panel may receive and act on any facts agreed to by the parties without further proof or evidence.

Admissibility of evidence from former proceeding

Interpretation

24.05 (1) In this rule, "previously admitted evidence" means evidence that was admitted in a proceeding before a court or tribunal, whether in or outside Ontario, at a hearing that occurred before the hearing in which the evidence is now sought to be admitted.

When may be admitted

(2) At a hearing on the merits of a proceeding, previously admitted evidence may be admitted if,

(a) the parties to the proceeding consent to its admission; or

(b) (i) the panel is satisfied that there is a reasonably accurate transcript of the previous hearing,

(ii) the previously admitted evidence is relevant to the current proceeding,

(iii) the party against whose interest the evidence is sought to be admitted was or is a party to the other proceeding,

(iv) if the party against whose interest the evidence is sought to be admitted was not a witness at the previous hearing, the party had the opportunity to cross-examine the witness at the previous hearing, and

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(v) a material issue in the other proceeding is substantially similar to a material issue in the current proceeding.

Proof of prior commission of offence

24.06 (1) Proof that a person has been found by an adjudicative body in Canada to have committed an offence is proof, in the absence of evidence to the contrary, that the offence was committed by the person if,

(a) no appeal of the finding was taken and the time for an appeal has expired; or

(b) an appeal of the finding was taken but was dismissed or abandoned and no further appeal is available.

(2) Subrule (1) applies whether or not the person is a party to the proceeding.

(3) For the purposes of subrule (1), a document certifying the finding, purporting to be signed by the official having custody of the records of the adjudicative body, is sufficient evidence of the finding.

Proof of prior facts

24.07 (1) Specific findings of fact contained in the reasons for decision of an adjudicative body in Canada are proof, in the absence of evidence to the contrary, of the facts so found if,

(a) no appeal of the decision was taken and the time for an appeal has expired; or

(b) an appeal of the decision was taken but was dismissed or abandoned and no further appeal was taken.

(2) If the findings of fact mentioned in subrule (1) are with respect to an individual, subrule (1) only applies if the individual is or was a party to the proceeding giving rise to the decision.

Transcript of proceeding

24.08 (1) At a hearing, a transcript of a hearing before an adjudicative body may be admitted as evidence.

Reasons

(2) At a hearing, the reasons for decision of an adjudicative body may be

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admitted as evidence

Taking official notice of facts

24.09 The ~~Hearing Panel~~panel may,

(a) take notice of facts that may be judicially noticed; and

(b) take notice of any generally accepted technical facts, information or opinions within its specialized knowledge.

Bank and business records

24.10 Any proof that must be given or any requirement that must be met prior to a bank record or a business record being received or admitted in evidence under any common law or statutory rule may be given or met by the oral testimony or affidavit of an individual given to the best of the individual's knowledge and belief.

Documentary evidence

24.11 At a hearing, a party or a non-party participant tendering a document as evidence shall provide,

(a) a copy of the document to every other party and non-party participant; and

(b) four copies of the document to the panel, where the panel consists of three panelists, or two copies of the document to the panel, where the panel consists of one panelist.

Copies

24.12 Where the panel is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Summonses

24.13 (1) The ~~Hearing Panel~~Tribunal may, by summons, require any person,

(a) to give evidence on oath or affirmation at a hearing; and

(b) to produce in evidence at a hearing specified documents and things.

Form of summons

(2) A summons shall be in Form 24A.

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Signing of summons

(3) A summons may be signed by the ~~Senior Counsel and Manager, Tribunals Office.~~Registrar.

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Summons may be issued in blank

(4) On the request of a person, the Tribunal~~s Office~~ shall issue to the person a blank summons and the person may complete the summons and insert the name of the witness to be summoned.

Service of summons

(5) Subject to subrule (7), the person who obtains a summons shall serve the summons on the witness to be summoned.

Attendance money

(6) Subject to subrule (7), the person who obtains a summons shall pay or tender to the witness to be summoned, at the same time that the person serves the summons on the witness, attendance money calculated in accordance with Tariff A under the Rules of Civil Procedure.

Service and attendance money not required

(7) If a witness is in attendance at a hearing, a person who obtains a summons is not required to serve the summons on the witness or to pay or tender to the witness attendance money in order to call the witness at the hearing.

Certain information not admissible

24.14 Despite any rule, information obtained by the Discrimination and Harassment Counsel as a result of the performance of his or her duties under clause 19 (1) (a) of By-Law 11 shall not be used and is inadmissible in a hearing.

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RULE 25

COSTS

Costs

Costs against the Society

25.01 (1) Costs may only be awarded against the Society,

(a) in a licensing, conduct, capacity, competence or non-compliance proceeding,

(i) where the proceeding was unwarranted; or

(ii) where the Society caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default; and

(b) in a proceeding not mentioned in clause (a), where the Society caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

Costs against the subject of a proceeding

(2) Costs may be awarded against the subject of a proceeding,

(a) where a determination adverse to the subject of the proceeding was made; or

(b) where the subject of the proceeding caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

Costs against a non-party participant

(3) Costs may be awarded against a non-party participant where the non-party participant caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

Consent resolution conference: no costs

(4) Despite subrules (1) and (2), no costs shall be awarded against the Society or the subject of the proceeding based on,

(a) either party's refusal to participate or either party's withdrawal from

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participation in a consent resolution conference; or

(b) the fact that a consent resolution conference did not result in the settlement of the decision and order ~~to be made by the Hearing Panel~~ in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made ~~by the Hearing Panel~~ in the conduct proceeding.

Amount of costs: tariff of fees for services

(5) When a ~~the Hearing Panel~~panel awards costs, ~~the Hearing Panel~~it shall consider, but is not bound by, the tariff of fees for services.

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Security for costs

Application

25.02 (1) This rule applies to the following proceedings:

1. A licensing proceeding, if the subject of the proceeding was previously licensed to practise law in Ontario as a barrister and solicitor or to provide legal services in Ontario.

2. A restoration proceeding.

3. A reinstatement proceeding.

4. A terms dispute proceeding.

Where available

(2) On the motion of the Society, an order may be made for security for costs as is just where it appears that,

(a) the subject of the proceeding has an order against him or her for costs in the same or another proceeding under the Act that remain unpaid in whole or in part; or

(b) in the case of a reinstatement or terms dispute proceeding, there is good reason to believe that the proceeding is without merit and the subject of the proceeding has insufficient assets in Ontario to pay an order for costs against him or her if an order were to be made; or

(c) in the case of a licensing or restoration proceeding, there is good reason to believe that the subject of the proceeding has insufficient assets in Ontario to pay an order for costs against him or her if an order were to be

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made.

Effect of order

(3) Subject to subrule (4), the subject of the proceeding against whom an order for security for costs has been made may not, until the security has been given, take any step in the proceeding.

Order permitting taking of step

(4) On the motion of a party, or on a panel's own motion, an order may be made permitting the subject of the proceeding to take a step in the proceeding.

Default of subject of the proceeding

(5) Where the subject of the proceeding defaults in giving the security required by an order for security for costs, on the motion of the Society, an order may be made dismissing the proceeding.

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RULE 26

DECISIONS, ORDERS AND REASONS

Decisions

Effective date

26.01 (1) A decision is effective from the date on which it is made.

Endorsement

(2) An endorsement of every decision shall be made by the chair of the panel,

(a) on the originating process; or

(b) on a separate sheet of paper that is attached to the originating process.

Where written reasons delivered

(3) Where written reasons are delivered, the endorsement may consist of a reference to the reasons.

Orders

Orders issued by panel of one panelist

26.02 (1) A panel consisting of one panelist shall not make an order revoking a licensee's licence or permitting a licensee to surrender his or her licence.

Order for fine

(2) If a panel makes an order imposing a fine on the subject of the proceeding, the panel shall specify in the order,

(a) the principal sum; and

(b) if interest is payable, the rate of interest, which shall be the postjudgment interest rate within the meaning of the *Courts of Justice Act* in effect on the effective date of the order, and the date from which it is to be calculated.

Order for costs

(3) If a panel makes an order for costs, the panel shall specify in the order,

(a) the principal sum; and

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(b) the rate of interest, which shall be the postjudgment interest rate within the meaning of the *Courts of Justice Act* in effect on the effective date of the order, and the date from which it is to be calculated.

Effective date

(4) An order is effective from the date on which it is made, unless it provides otherwise.

Endorsement

(5) An endorsement of every order shall be made by the chair of the panel making it,

(a) on the originating process or a separate sheet of paper that is attached to the originating process; or

(b) if the order relates to a motion, on the motion record or a separate sheet of paper that is attached to the motion record.

Where written reasons delivered

(6) Where written reasons are delivered, the endorsement may consist of a reference to the reasons.

Formal order or decision and order

Preparation of draft formal order or decision and order

26.03 (1) Any party affected by an order or decision and order may prepare a draft of the formal order or formal decision and order.

Form of formal order and decision and order

(2) A formal order shall be in Form 26A and a formal decision and order shall be in Form 26B.

Signing of formal order and decision and order

(3) A party that has prepared a draft of a formal order or decision and order may submit it to the panel that made the order or decision and order at the end of the hearing.

(4) The panel shall review all drafts submitted under subrule (3) and the chair of the panel shall, with or without amending it, sign one of the drafts.

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(5) Where a formal order or decision and order is not prepared by any party, it shall be prepared by the Tribunals ~~-~~Office and a panelist on the panel that made the order or decision and order shall sign it.

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Written reasons

Where required

26.04 A panel shall give written reasons for,

(a) its decision and order in a capacity proceeding; and

(b) its order or decision and order if,

(i) an oral request for written reasons is made by a party immediately after the order is made, or

(ii) a written request for written reasons is made by a party ~~to the Tribunals Office~~ within sixty days after the order is made.

Correction of errors

26.05 The ~~Tribunals Office~~ Registrar or the panel may at any time correct a typographical error, error of calculation or similar minor error made in a decision, an order, a formal decision and order, a formal order or reasons of a panel.

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Notice of decisions

26.06 (1) The Tribunals ~~Office~~ shall send to each party or to the representative of each party,

(a) who participated in a proceeding,

(i) a copy of the formal decision and order,

(ii) a copy of the written reasons, if any, for the decision, order or decision and order, and

(iii) a copy of a corrected decision, corrected order, corrected formal decision and order or corrected reasons; or

(b) who participated in a motion in a proceeding,

(i) a copy of the formal order,

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(ii) a copy of the written reasons, if any, for the order, and

(iii) a copy of a corrected order, corrected formal order or corrected reasons.

Method of sending notice

(2) A document required to be sent under subrule (1) shall be sent by,

(a) regular lettermail to the last address of the party or the party's representative known to the Tribunal~~'s Office~~;

(b) hand delivery to the Society; or

(c) ~~with the prior consent of the recipient,~~

~~(i)~~ by fax to the last fax number of the party or the party's representative known to the Tribunal~~'s Office~~, or

(d~~ii~~) by e-mail to the last e-mail address of the party or the party's representative known to the Tribunal~~'s Office~~.

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(3) If a document required to be sent under subrule (1) is being sent to a licensee, a reference in subrule (2) to the last address, fax number or e-mail address known to the Tribunal~~'s Office~~ shall be read as a reference to the last address, fax number or e-mail address contained in the register that the Society is required to establish and maintain under section 27.1 of the Act.

Use of mail

(4) If a copy of a document is sent by regular lettermail, it shall be deemed to be received on the fifth day after mailing.

Use of fax or e-mail

(5) If a copy of a document is faxed or e-mailed, it shall be deemed to be received on the day following the day it is faxed or e-mailed.

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RULE 27

RECORD OF PROCEEDING

Requirement to compile record

27.01 (1) The Tribunal~~s Office~~ shall compile a record of every proceeding.

Contents of record

(2) A record of a proceeding shall contain the following:

1. Every document filed with the Tribunal~~s Office~~ under these Rules in respect of the proceeding or a step in the proceeding.

2. Every document received by a panel under these Rules in respect of the proceeding or a step in the proceeding.

3. The notice of a hearing on the merits of a proceeding.

4. The endorsement of the decision and order in the proceeding and of the order in a motion in the proceeding.

5. The formal decision and order in the proceeding and the formal order in a motion in the proceeding.

6. The reasons, if any, for the decision or order in the proceeding and for the order in a motion in the proceeding.

7. The transcript of a hearing in the proceeding or in a motion in the proceeding that is obtained by the Tribunal~~s Office~~.

Record is public record

(3) Subject to subrule (4), the record of a proceeding is a public record.

Documents not available for public inspection

(4) A document or a part of a document contained in the record of a proceeding that contains information that may not be disclosed under rule 18.04 or 18.05 is not available for public inspection.

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RULE 28

REPRIMANDS

Time for administration

28.01 (1) A reprimand shall not be administered before the time for serving a notice of appeal has expired unless the parties have waived their rights of appeal.

Who may administer

(2) A reprimand may be administered by any panelist comprising the panel that ordered the reprimand.

Administration in hearing

(3) Subject to subrule (4), a reprimand shall be administered at a hearing that is open to the public.

Administration in writing

(4) A reprimand may be administered in writing.

(5) The document containing a written reprimand shall be considered to be part of the record of the proceeding in which the reprimand was ordered.

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RULE 29

CONSENT RESOLUTION CONFERENCE

Definitions

29.01 In this Rule,

"consent resolution conference" means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

(a) the decision and order to be made ~~by the Hearing Panel~~ in the conduct proceeding; or

(b) the decision to be made and a range of orders that may be made~~made by the Hearing Panel~~ in the conduct proceeding;

"consent resolution panel" means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

"potential proceeding" means a conduct proceeding that has not been commenced;

"subject of a potential proceeding" means the person who will be the subject of a conduct proceeding once it has been commenced.

Consent resolution conference: when shall be conducted

29.02 (1) The ~~chair, or, in the absence of the chair, the vice-chair~~Chair or Vice-Chair, ~~of the Hearing Panel~~ shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,

   i. to commence a conduct proceeding, and

   ii. to request the ~~Hearing Panel~~Hearing Division to direct that a consent resolution conference be conducted.

2. The conduct proceeding has not been commenced.

3. The Society and the subject of the potential proceeding have agreed to,

   i. the decision and order to be made ~~by the Hearing Panel~~ in the conduct proceeding; or

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ii. the decision to be made and a range of orders that may be made ~~by the Hearing Panel~~ in the conduct proceeding.

4. The subject of the potential proceeding has consented to participate in a consent resolution conference.

5. The Society has requested a consent resolution conference.

Who conducts consent resolution conference

(2) Where the ~~chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel~~Chair or Vice-Chair directs that a consent resolution conference be conducted under subrule (1), ~~the chair, or, in the absence of the chair, the vice-chair,~~he or she shall assign either one or three panelists to conduct the consent resolution conference.

Request ~~to Tribunals Office~~

29.03 (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunal~~s Office~~.

Information re conditions

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the ~~chair, or, in the absence of the chair, the vice-chair, of~~Chair or Vice-Chair ~~the Hearing Panel~~ of the existence of the conditions set out in rule 29.02.

Contact information of subject of potential proceeding

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

Notice of consent resolution conference: Society

29.04 Where the ~~chair, or, in the absence of the chair, the vice-chair, of the Hear~~Chair or Vice-Chair~~ing Panel~~ directs that a consent resolution conference be conducted, the Tribunal~~s Office~~ shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

Procedure applicable to consent resolution conference

29.05 (1) The practices and procedures applicable to proceedings before the ~~Hearing Panel~~Hearing Division that are set out in Rules 2 to 20 and Rules 22 to 28 do

not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

Consent resolution conference not open to public

(3) A consent resolution conference shall be conducted in the absence of the public.

Withdrawing participation in consent resolution conference

29.06 (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

Notice of withdrawal

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunal~~s Office~~.

Settlement at consent resolution conference: commencement of conduct proceeding

29.07 (1) Where a consent resolution conference results in the settlement of the decision and order to be made ~~by the Hearing Panel~~ in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made ~~by the Hearing Panel~~ in the conduct proceeding the Society shall,

(a) commence the conduct proceeding; and

(b) notify the Tribunal~~s Office~~ in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

Settlement at consent resolution conference: non-application of certain Rules

(2) Where a consent resolution conference results in the settlement of the decision and order to be made ~~by the Hearing Panel~~ in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.

2. Rule 7.

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3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

No settlement at or withdrawal from consent resolution conference: subsequent hearings

29.08 Where a consent resolution conference does not result in the settlement of the decision and order to be made ~~by the Hearing Panel~~ in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made ~~by the Hearing Panel~~ in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the ~~Hearing Panel~~Hearing Division assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

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LAW SOCIETY TRIBUNAL
HEARING DIVISION

FORMS UNDER THE
RULES OF PRACTICE AND PROCEDURE

~~(applicable to proceedings before the Law Society Hearing Panel)~~

Made: February 26, 2009
Amended: June 25, 2009
June 29, 2010
January 27, 2011
April 28, 2011
February 28, 2013
April 25, 2013
, 2014

~~FORMS~~

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GENERAL HEADING (CONDUCT, CAPACITY, COMPETENCE, NON-COMPLIANCE, REINSTATEMENT, TERMS DISPUTE PROCEEDING)

(Law Society ~~Hearing Panel~~Tribunal file no.)

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LAW SOCIETY TRIBUNAL
HEARING DIVISION~~HEARING PANEL~~

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BETWEEN:

(name)

Applicant

and

(name)

Respondent

APPLICATION UNDER *(statutory provision under which the application is made).*

(Title of document)

(Text of document)

GENERAL HEADING (LICENSING, RESTORATION PROCEEDING)

(Law Society ~~Hearing Panel~~Tribunal file no.)

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LAW SOCIETY ~~HEARING PANEL~~TRIBUNAL
HEARING DIVISION

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BETWEEN:

(name)

Applicant

and

The Law Society of Upper Canada

Respondent

APPLICATION UNDER *(statutory provision under which the application is made)* referred for hearing under *(statutory provision under which application is required to be heard).*

(Title of document)

(Text of document)

FORM 4A - NOTICE OF CHANGE OF REPRESENTATION

(*General heading*)

NOTICE OF CHANGE OF REPRESENTATION

(*Name of party OR non-party participant*), formerly represented by (*name of former representative*), has appointed (*name of new representative*) as representative of record.

(Date)

(*Name, address, telephone number, fax number and e-mail address of new representative*)

TO: (*Name and address of former representative*)

AND TO: (*Names and addresses of representatives for all other parties and non-party participants, or names and addresses of all other parties and all non-party participants)*

FORM 4B – NOTICE OF APPOINTMENT OF REPRESENTATIVE

(*General heading*)

NOTICE OF APPOINTMENT OF REPRESENTATIVE

(*Name of the party OR non-party participant*) has appointed (*name*) as representative of record.

(Date)

(Name, address, telephone number, fax number and e-mail address of representative of record)

TO: (*Names and addresses of representatives for all other parties and non-party participants or names and addresses of all parties and non-party participants*)

FORM 4C - NOTICE OF INTENTION TO ACT IN PERSON

(*General heading*)

NOTICE OF INTENTION TO ACT IN PERSON

(*Name of the party OR non-party participant*), formerly represented by (*name*) as representative of record, intends to act in person

(Date)

(Signature of party/non-party participant)
(Print name of party/non-party participant)

(Complete the following if filed by the representative of record)

I *(name of representative of record)* confirm that I have explained the purpose of this form to *(name of the party OR non-party participant)* and have confirmed (*his/her*) intention to act in person in place of me. (*Name of the party OR non-party participant)* signed this form at the time (*he/she*) consented to act in person.

(Date)

(Signature of representative of record)
(Print name of representative of record)

(Date)

(Name, address for service, telephone number, fax number and e-mail address of party/non-party participant intending to act in person)

TO: (*Name and address of former representative of record*)

AND TO: (*Names and addresses of representatives for all other parties and non-party participants, or names and addresses of all parties and non-party participants)*

FORM 9A - NOTICE OF APPLICATION

(*General heading*)

NOTICE OF APPLICATION

TO THE RESPONDENT:

A (*CONDUCT OR CAPACITY OR COMPETENCE OR NON-COMPLIANCE OR REINSTATEMENT OR TERMS DISPUTE*) PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

YOU ARE REQUIRED TO ATTEND at a proceeding management conference on (*day*), (*date*) at (*time*) at the ~~offices of The Law Society of Upper Canada~~Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario. You may elect to attend by your representative.

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IF YOU OR YOUR REPRESENTATIVE FAIL TO ATTEND AT THE PROCEEDING MANAGEMENT CONFERENCE, THE PANELIST CONDUCTING THE CONFERENCE MAY PROCEED IN YOUR ABSENCE.

(*OR*
THIS APPLICATION will come on for a hearing on (day), (date) at (time) at the ~~offices of The Law Society of Upper Canada~~Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario.)

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Date of issue:

TO: (*Name and address of respondent*)

APPLICATION

1. The applicant makes application for:

2. The grounds for the application are:

3. The particulars of the application are:

(*Name, address for service, telephone number, fax number and e-mail address of applicant or*

applicant's representative)

FORM 9B - NOTICE OF REFERRAL FOR HEARING

(*General heading*)

NOTICE OF REFERRAL FOR HEARING

TO THE APPLICANT:

YOUR APPLICATION (*FOR A LICENCE OR TO HAVE YOUR LICENCE RESTORED*) HAS BEEN REFERRED FOR HEARING TO THE LAW SOCIETY ~~HEARING PANEL~~TRIBUNAL HEARING DIVISION, thereby resulting in the commencement of a (*licensing OR restoration*) proceeding.

YOU ARE REQUIRED TO ATTEND at a proceeding management conference on (*day*), (*date*) at (*time*) at the ~~offices of The Law Society of Upper Canada~~Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario. You may elect to attend by your representative.

IF YOU OR YOUR REPRESENTATIVE FAIL TO ATTEND AT THE PROCEEDING MANAGEMENT CONFERENCE, THE PANELIST CONDUCTING THE CONFERENCE MAY PROCEED IN YOUR ABSENCE.

Date of issue:

TO: (*Name and address of applicant*)

(*Name, address for service, telephone number, fax number and e-mail address of the representative for The Law Society of Upper Canada*)

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FORM 9C - NOTICE OF ABANDONMENT (CONDUCT, CAPACITY, COMPETENCE, NON-COMPLIANCE, REINSTATEMENT, TERMS DISPUTE PROCEEDING)

(*General heading*)

NOTICE OF ABANDONMENT (CONDUCT, CAPACITY, COMPETENCE, NON-COMPLIANCE, REINSTATEMENT, TERMS DISPUTE PROCEEDING)

THE APPLICANT hereby abandons this (*conduct OR capacity OR competence OR non-compliance OR reinstatement OR terms dispute*) proceeding.

(*Date*)

(*Name, address, telephone number, fax number and e-mail address of applicant's representative or applicant*)

TO: (*Name and address of respondent's respresentative or respondent*)

FORM 9D - NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

(*General heading*)

NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

THE LAW SOCIETY OF UPPER CANADA hereby withdraws the referral for hearing of the applicant's application (*for a licence OR to have her/his licence restored*), thereby abandoning this (*licensing OR restoration*) proceeding.

(*Date*)

(*Name, address, telephone number, fax number and e-mail address of the representative for The Law Society of Upper Canada*)

TO: (*Name and address of applicant's representative or applicant*)

FORM 9E - NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

(*General heading*)

NOTICE OF ABANDONMENT (LICENSING OR RESTORATION PROCEEDING)

THE APPLICANT hereby abandons (*her OR his*) application (*for a licence OR to have her/his licence restored*), thereby abandoning this (*licensing OR restoration*) proceeding.

(*Date*)

(*Name, address, telephone number, fax number and e-mail address of applicant's representative or applicant*)

TO: (*Name and address of the representative of The Law Society of Upper Canada*)

FORM 13A - NOTICE OF MOTION

(General heading)

NOTICE OF MOTION

The *(identify moving party)* will make a motion to the Law Society ~~Hearing Panel~~Tribunal Hearing Division on *(day)*, *(date)* at *(time)*, or as soon after that time as the motion can be heard, at the ~~offices of The Law Society of Upper Canada~~Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario *(or name place)*.

PROPOSED METHOD OF HEARING: The motion is to be heard *(choose appropriate option)*:

- ☐ Electronically under subrule 16.02 (1) because it is *(on consent OR for an adjournment).*
- ☐ In writing under subrule 16.03 (1) because it is for an order that a hearing be held as an electronic hearing.
- ☐ In writing under subrule 16.03 (2) because it is *(on consent OR for an adjournment)*.
- ☐ Orally.

THE MOTION IS FOR: *(Set out precise relief sought)*.

THE GROUNDS FOR THE MOTION ARE: *(Set out the grounds to be argued)*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:
(List the affidavits or other documentary evidence to be relied on).

(Date)

(*Name, address, telephone number, fax number and e-mail address of moving party's representative or moving party*)

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TO: (*Name and address of responding party's representative or responding party*)

FORM 13B - NOTICE OF ABANDONMENT (MOTION)

(General heading)

NOTICE OF ABANDONMENT (MOTION)

(Name of moving party) hereby abandons (*its/his/her*) motion for *(insert nature of motion).*

(Date)

(Name, address, telephone number, fax number and e-mail address of moving party's representative or moving party)

TO: (*Name, address and telephone number of responding party's representative or responding party*)

FORM 20A – REQUEST TO ADMIT

(General heading)

REQUEST TO ADMIT

YOU ARE REQUESTED TO ADMIT, for the purposes of this proceeding only, the truth of the following facts: (*Set out facts in consecutively numbered paragraphs*.)

YOU ARE REQUESTED TO ADMIT, for the purposes of this proceeding only, the authenticity (see Rule 20 of the Rules of Practice and Procedure of the Law Society Tribunal Hearing Division~~Hearing Panel~~) of the following documents: (*Number each document and give particulars sufficient to identify each. Specify whether the document is an original or a copy and, where the document is a copy of a letter, telegram or telecommunication, state the nature of the document.*)

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Attached to this request is a copy of each of the documents referred to above. *(Where it is not practicable to attach a copy or where the party already has a copy, state which documents are not attached and give the reason for not attaching them.*)

YOU MUST RESPOND TO THIS REQUEST by serving a response to the request to admit in Form 20B WITHIN TWENTY DAYS after this request is served on you. If you fail to do so, you will be deemed to admit, for the purposes of this proceeding only, the truth of the facts and the authenticity of the documents set out above. If you serve a response within these time limits but do not provide a response to each fact and document listed above, you will be deemed to admit, for the purposes of this proceeding only, the truth of the facts and the authenticity of the documents for which you have not provided a response.

(Date)

(Name, address, telephone number, fax number and e-mail address of representative of party or of party serving request)

TO: *(Name and address of representative of party or of party on whom request is served)*

FORM 20B – RESPONSE TO REQUEST TO ADMIT

(General heading)

RESPONSE TO REQUEST TO ADMIT

In response to your request to admit dated *(date)*, *(name of party serving response)*:

1. Admits the truth of facts numbers *(set out facts numbers)*

2. Admits the authenticity of documents numbers *(set out documents numbers).*

3. Denies the truth of facts numbers *(set out facts numbers).*

4. Denies the authenticity of documents numbers *(set out documents numbers).*

5. Refuses to admit the truth of facts numbers *(set out facts numbers)* for the following reasons: *(Set out reason for refusing to admit each fact.)*

6. Refuses to admit the authenticity of documents numbers *(set out the documents numbers)* for the following reasons: *(Set out reason for refusing to admit each document.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of representative of party or of party serving response)

TO: *(Name and address of representative of party or of party on whom response is served)*

FORM 23A – CONSENT TO HEARING BY ONE PANELIST

(General heading)

CONSENT TO HEARING BEFORE ONE PANELIST

(Name of party other than The Law Society of Upper Canada) and The Law Society of Upper Canada hereby consent to the merits of this proceeding being heard and determined by one panelist.

(Date)

(Signature of party other than The Law Society of Upper Canada)
(Print name of party)

(Date)

(Signature of representative for The Law Society of Upper Canada)
(Print name of representative for The Law Society of Upper Canada)

FORM 24A – SUMMONS

(General heading)

SUMMONS TO A WITNESS BEFORE THE LAW SOCIETY TRIBUNAL HEARING DIVISION ~~HEARING PANEL~~

TO *(Name and address of witness)*

(For oral hearing)

YOU ARE REQUIRED TO ATTEND TO GIVE EVIDENCE at the hearing of this proceeding on *(day)* , *(date)* at *(time)* at the ~~offices of The Law Society of Upper Canada~~Law Society Tribunal, Osgoode Hall, 130 Queen Street West, Toronto, Ontario *(or name place)* and to remain until your attendance is no longer required.

YOU ARE REQUIRED TO BRING WITH YOU and produce at the hearing the following documents and things: *(Set out the nature and date of each document and give particulars sufficient to identify each document and thing.)*

IF YOU FAIL TO ATTEND OR TO REMAIN IN ATTENDANCE AS THIS SUMMONS REQUIRES, THE SUPERIOR COURT OF JUSTICE MAY ORDER THAT A WARRANT FOR YOUR ARREST BE ISSUED, OR THAT YOU BE PUNISHED IN THE SAME WAY AS FOR CONTEMPT OF THAT COURT

(For electronic hearing)

YOU ARE REQUIRED TO PARTICIPATE IN AN ELECTRONIC HEARING on *(day), (date) at (time)* in the following manner: *(Give sufficient particulars to enable witness to participate.)*

IF YOU FAIL TO PARTICIPATE IN THE HEARING IN ACCORDANCE WITH THE SUMMONS, THE SUPERIOR COURT OF JUSTICE MAY ORDER THAT A WARRANT FOR YOUR ARREST BE ISSUED, OR THAT YOU BE PUNISHED IN THE SAME WAY AS FOR CONTEMPT OF THAT COURT.

(Date)

Law Society ~~Hearing Panel~~Tribunal

_____

~~Senior Counsel and Manager, Tribunals Office~~Registrar

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NOTE: You are entitled to be paid the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice.

FORM 26A – FORMAL ORDER

(Law Society ~~Hearing Panel~~ Tribunal file no.)

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LAW SOCIETY TRIBUNAL
HEARING DIVISION~~HEARING PANEL~~

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(Names of panelists comprising the panel)

(Day and date order made)

(Title of proceeding)

ORDER

(Order after hearing of application)

THIS APPLICATION was heard on *(date(s))*, *(at name place OR electronically)*, *(in the presence of the representatives for all parties* (*and non-party participants) OR in the presence of the representative(s) for (name party(ies) and non-party participant(s)), (add as applicable: (name party(ies) and non-party participant(s)) appearing in person; no one appearing for (name party(ies) and non-party participant(s)) although properly notified as appears from (indicate proof of notice of hearing on the merits of the application)).*

ON READING *(THE NOTICE OF APPLICATION AND APPLICATION OR THE NOTICE OF REFERRAL FOR HEARING)* AND THE EVIDENCE FILED BY THE PARTIES *(and non-party participants), (on hearing the oral evidence presented by the parties (and non-party participants)*, and on hearing the submissions of *(the representatives of the parties (and non-party participants) OR the representative(s) for (name party(ies) and non-party participant(s)) and (name party(ies) and non-party participant(s) appearing in person)),*

(AND HAVING DETERMINED THAT (specify determination made giving rising to authority to make order),

(Order after hearing of motion)

THIS MOTION, made by *(name moving party)* for *(state the relief sought in the notice of motion)* was heard on *(date(s)*, *(at name place OR electronically OR in writing).*

ON READING *(give particulars of the material filed on the motion)* and on hearing the submissions of representative*(s)* for *(name parties and non-party participants), (add as applicable: (name parties and non-party participants) appearing in person; no one appearing for (name parties and non-party participants), although properly served as appears from (indicate proof of service)),*

IT IS ORDERED THAT:

1. …

2. …

(Signature of chair of panel that made order)

FORM 26B - FORMAL DECISION AND ORDER

(Law Society ~~Hearing Panel~~Tribunal file no.)

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LAW SOCIETY TRIBUNAL
HEARING DIVISION ~~HEARING PANEL~~

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(Names of panelists comprising the panel)

(Day and date order made)

(Title of proceeding)

DECISION AND ORDER

THIS APPLICATION was heard on *(date(s))*, *(at name place OR electronically)*, *(in the presence of the representatives for all parties* (*and non-party participants) OR in the presence of the representative(s) for (name party(ies) and non-party participant(s)), (add as applicable: (name party(ies) and non-party participant(s)) appearing in person; no one appearing for (name party(ies) and non-party participant(s)) although properly notified as appears from (indicate proof of notice of hearing on the merits of the application)).*

ON READING *(THE NOTICE OF APPLICATION AND APPLICATION OR THE NOTICE OF REFERRAL FOR HEARING)* AND THE EVIDENCE FILED BY THE PARTIES *(and non-party participants), (on hearing the oral evidence presented by the parties (and non-party participants)*, and on hearing the submissions of *(the representatives of the parties (and non-party participants) OR the representative(s) for (name party(ies) and non-party participant(s)) and (name party(ies) and non-party participant(s) appearing in person)),*

IT IS DETERMINED THAT *(specify determination made giving rising to authority to make order).*

AND IT IS ORDERED THAT:

1. …

2. …

(Signature of chair of panel that made order)

LAW SOCIETY TRIBUNAL
TARIFFS UNDER THE RULES OF PRACTICE AND PROCEDURE

~~(applicable to proceedings before the Law Society Hearing Panel)~~

Made: February 26, 2009
Amended: June 25, 2009
June 29, 2010
January 27, 2011
April 28, 2011
February 28, 2013
April 25, 2013

~~TARIFFS~~

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TARIFF A

FEES FOR SERVICES TO BE CONSIDERED UNDER RULE 25.01

PART I -- LAWYERS' FEES

Lawyer (20 years and over)	Up to $350 per hour
Lawyer (12 to 20 years)	Up to $325 per hour
Lawyer (11 to 12 years)	Up to $315 per hour
Lawyer (10 to 11 years)	Up to $300 per hour
Lawyer (9 to 10 years)	Up to $285 per hour
Lawyer (8 to 9 years)	Up to $270 per hour
Lawyer (7 to 8 years)	Up to $255 per hour
Lawyer (6 to 7 years)	Up to $240 per hour
Lawyer (5 to 6 years)	Up to $225 per hour
Lawyer (4 to 5 years)	Up to $215 per hour
Lawyer (3 to 4 years)	Up to $205 per hour
Lawyer (2 to 3 years)	Up to $195 per hour
Lawyer (1 to 2 years)	Up to $180 per hour
Lawyer (less than 1 year)	Up to $165 per hour
Lawyer on staff with The Law Society of Upper Canada, other than Discipline Counsel	Up to $190 per hour

PART II -- FEES OTHER THAN LAWYERS' FEES

Licensed paralegal and paralegal on staff with The Law Society of Upper Canada (10 years and more of paralegal experience)	Up to $150 per hour
Licensed paralegal and paralegal on staff with The Law Society of Upper Canada (5 to 10 years of paralegal experience)	Up to $120 per hour
Licensed paralegal and paralegal on staff with The Law Society of Upper Canada (1 to 5 years of paralegal experience)	Up to $90 per hour
Student	Up to $90 per hour
Law Clerk	Up to $90 per hour
Forensic auditor on staff with The Law Society of Upper Canada	Up to $190 per hour
Investigator or Complaints Resolution Officer on staff with The Law Society of Upper Canada	Up to $90 per hour

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE
RÈGLES DE PRATIQUE ET DE PROCÉDURE
~~(visant les instances du Comité d'audition du Barreau)~~

~~Adoptées~~Prises le : 26 février 2009
Modifiées : 25 juin 2009
29 juin 2010
27 janvier 2011
28 avril 2011
28 février 2013
25 avril 2013
12 mars 2014

RÈGLE 1

CHAMP D'APPLICATION ET INTERPRÉTATION

Champ d'application

1.01 Les présentes règles ~~de pratique et de procédure, à l'exclusion de toute autre visant les audiences du Comité d'audition prises en application de l'article 61.2 de la Loi,~~ s'appliquent aux instances suivantes introduites devant la Section de première instance le 1er juillet 2009 ou par la suite :

1. Les instances portant sur la délivrance d'un permis.

2. Les instances en rétablissement visé à l'article 31 de la Loi.

3. Les instances portant sur la conduite.

4. Les instances portant sur l'incapacité.

5. Les instances portant sur la compétence professionnelle.

6. Les instances portant sur l'inobservation.

7. Les instances portant sur rétablissement visé à l'article 49.42 de la Loi.

8. Les instances portant sur un différend concernant des conditions.

Définitions et interprétation

1.02 (1) Sauf indication contraire du contexte, les définitions qui suivent s'appliquent aux présentes règles.

« audience » Sont exclues de la présente définition les conférences sur la résolution des causes avec consentement, les conférences de gestion de l'instance et les conférences préparatoires à l'audience~~.~~; (*« hearing »*)

« auteur de la motion » Personne qui présente une motion~~.~~; (*« moving party »*)

« document » S'entend en outre d'un livre, d'un écrit, d'un compte, d'un enregistrement sonore, d'une bande vidéo, d'un film, d'une photographie, d'un tableau, d'un graphique, d'une carte, d'un plan, d'un relevé topographique et de renseignements enregistrés ou stockés sur ordinateur ou sur tout autre dispositif~~.~~; (*« document »*)

« formation » Le membre ~~du Comité~~de la formation affecté à l'audience ou l'ensemble des membres ~~du Comité~~de la formation qui le sont~~.~~; (*« panel »*)

« instance portant sur la capacité » Instance visée à l'article 38 de la Loi~~.~~; (*« capacity proceeding »*)

« instance portant sur la compétence professionnelle » Instance visée à l'article 43 de la Loi~~.~~; (*« competence proceeding »*)

« instance portant sur la conduite » Instance visée à l'article 34 de la Loi~~.~~; (*« conduct proceeding »*)

« instance portant sur la délivrance d'un permis » Instance visée à l'article 27 de la Loi~~.~~; (*« licensing proceeding »*)

« instance portant sur l'inobservation » Instance visée à l'article 45 de la Loi~~.~~; (*« non-compliance proceeding »*)

« instance portant sur le rétablissement visé à l'article 31 de la Loi » Instance visée à l'article 31 de la Loi~~.~~; (*« restoration proceeding »*)

« instance portant sur le rétablissement visé à l'article 49.42 de la Loi » Instance visée à l'article 49.42 de la Loi~~.~~; (*« reinstatement proceeding »*)

« instance portant sur un différend concernant des conditions » Instance visée à l'article 49.43 de la Loi~~.~~; *(« terms dispute proceeding »)*

« jour férié » :

a) le samedi et le dimanche;

b) la veille du jour de l'An; si elle tombe un samedi ou un dimanche, le vendredi précédant;

c) le jour de l'An; s'il tombe un samedi ou un dimanche, le lundi suivant;

d) le jour de la Famille;

e) le Vendredi saint;

f) le lundi de Pâques;

g) la fête de Victoria;

h) la fête du Canada; si elle tombe un samedi ou un dimanche, le lundi suivant;

i) le Congé civique;

j) la fête du Travail;

k) le jour d'Action de grâce;

l) le jour du Souvenir; s'il tombe un samedi ou un dimanche, le lundi suivant;

m) la veille de Noël; si elle tombe un samedi ou un dimanche, le vendredi précédent;

n) le jour de Noël; s'il tombe un samedi ou un dimanche, le lundi et le mardi suivants et, s'il tombe un vendredi, le lundi suivant,

o) le 26 décembre;

p) le jour proclamé tel par le gouverneur général ou le lieutenant-gouverneur~~.~~; (« *holiday* »);

« Loi » La *Loi sur le Barreau*~~.~~; (« *Act* »)

« membre ~~du Comité~~de la formation » Membre ~~du Comité d'audition. («~~de la Section de première instance; (« *panelist* »)

« partie » S'entend notamment de l'auteur d'une motion et de la partie intimée~~.~~; (« *party* »)

« partie intimée » Personne contre laquelle une motion est présentée~~.~~; (« *respondent* »)

« président » Désigne le président du Tribunal du Barreau; (« *Chair* »)

« remettre » Signifier ~~quoi que ce soit au greffe du tribunal et le produire~~et déposer auprès ~~de lui~~du Tribunal avec la preuve de la signification~~.~~; (« *deliver* »)

« représentant » Personne autorisée en vertu de la *Loi sur le Barreau* à en représenter une autre dans le cadre d'une instance~~.~~; (« *representative* »)

« tiers » Personne qui, sans être partie à l'instance, est autorisée à intervenir dans tout ou partie de celle-ci~~.~~; (« *non-party participant* »)

« Tribunal » Désigne le Tribunal du Barreau établi en vertu de la *Loi sur le Barreau*, L.R.O. 1990, c. L.8; (« *Tribunal* »)

« vice-président » Désigne le vice-président de la Section de première instance; (« *Vice-Chair* »)

« visée par l'instance » S'entend des personnes suivantes :

a) dans le cadre d'une instance portant sur la délivrance d'un permis, celle appelée l'auteur de la demande au paragraphe 27 (5) de la Loi;

b) dans le cadre d'une instance portant sur le rétablissement visé à l'article 31 de la Loi, celle appelée la personne dont le permis est en suspens au paragraphe 31 (4) de la Loi;

c) dans le cadre d'une instance portant sur la conduite, celle appelée le titulaire de permis visé par la requête au paragraphe 34 (2) de la Loi;

d) dans le cadre d'une instance portant sur la capacité, celle appelée le titulaire de permis visé par la requête au paragraphe 38 (2) de la Loi;

e) dans le cadre d'une instance portant sur la compétence professionnelle, celle appelée le titulaire de permis visé par la requête au paragraphe 43 (2) de la Loi;

f) dans le cadre d'une instance portant sur l'inobservation, celle appelée le titulaire de permis visé par la requête au paragraphe 45 (2) de la Loi;

g) dans le cadre d'une instance portant sur le rétablissement visé à l'article 49.42 de la Loi, celle appelée le requérant au paragraphe 49.42 (4) de la Loi;

h) dans le cadre d'une instance portant sur un différend concernant les conditions, celle appelée le requérant au paragraphe 49.43 (3) de la Loi.

(2) Les termes qui figurent dans les présentes règles et qui sont définies dans la Loi s'entendent au sens de la Loi. *(« subject of the proceeding »)*

Interprétation des règles

1.03 (1) Les présentes règles doivent recevoir une interprétation large de façon à entraîner la résolution équitable sur le fond de chaque instance.

(2) En cas de silence des présentes règles, la pratique applicable est déterminée par analogie avec celles-ci.

RÈGLE 2

INOBSERVATION DES RÈGLES

Effet de l'inobservation

2.01 (1) L'inobservation d'une des règles de procédure énoncées dans les présentes règles constitue une irrégularité et n'est pas cause de nullité de l'instance ni d'une mesure prise ou d'un document donné dans le cadre de celle-ci.

Ordonnances suite à une contestation de la régularité

(2) Sur motion présentée par une partie pour contester la régularité d'une instance ou d'une mesure prise ou d'un document donné dans le cadre de celle-ci, la formation peut, par ordonnance :

a) soit accorder les mesures de redressement nécessaires afin d'assurer une résolution équitable des véritables questions en litige;

b) soit rejeter l'instance ou à annuler une mesure prise ou un document donné dans le cadre de celle-ci, en tout ou en partie, seulement si cela est nécessaire dans l'intérêt de la justice.

Contestation de la régularité

(3) La motion qui vise à contester la régularité d'une instance ou d'une mesure prise ou d'un document donné dans le cadre de celle-ci ne doit pas être présentée, sauf avec ~~l'~~autorisation ~~du Comité d'audition~~ :

a) après l'expiration d'un délai raisonnable après que l'auteur de la motion a pris ou aurait raisonnablement dû prendre connaissance de l'irrégularité;

b) si l'auteur de la motion a pris une autre mesure dans le cadre de l'instance après avoir pris connaissance de l'irrégularité;

c) si l'auteur de la motion a par ailleurs consenti à l'irrégularité.

Ordonnance de dispense de l'observation

2.02 (1) Sur motion d'une partie ou d'un tiers, ou de son propre chef, la formation peut, par ordonnance, dispenser de l'observation d'une règle de procédure énoncée dans les présentes règles lorsque cela est nécessaire dans l'intérêt de la justice.

Consentement à l'inobservation

(2) Une partie peut dispenser de l’observation d’une règle de procédure énoncée dans les présentes règles avec le consentement de toutes les autres parties.

RÈGLE 3

DÉLAIS

Calcul des délais

3.01 Le calcul des délais fixés par les présentes règles ou par une ordonnance rendue en vertu de celles-ci obéit aux règles suivantes :

a) si le délai est exprimé en nombre de jours séparant deux événements, il se calcule en excluant le jour où a lieu le premier événement, mais en incluant le jour ou a lieu le second;

b) si le délai fixé est inférieur à sept jours, les jours fériés ne sont pas comptés;

c) si le délai pour accomplir un acte expire un jour férié, l'acte peut être accompli le jour suivant qui n'est pas un jour férié;

d) tout document qui est réputé reçu un jour férié et toute signification qui est réputée faite un jour férié est réputé l'être le jour suivant qui n'est pas férié.

Prorogation ou abrègement des délais

3.02 (1) Sur motion d'une partie ou d'un tiers, la formation peut, à des conditions justes, rendre une ordonnance prorogeant ou abrégeant tout délai fixé par les présentes règles ou par une ordonnance rendue en vertu de celles-ci.

(2) La motion qui vise à obtenir la prorogation d'un délai peut être présentée avant ou après l'expiration du délai fixé.

RÈGLE 4

REPRÉSENTATION

Constitution de nouveau représentant

Avis de constitution de nouveau représentant

4.01 (1) La partie ou le tiers qui a un représentant commis ou une représentante commise au dossier peut en constituer un nouveau ou une nouvelle en lui signifiant à son représentant ou à sa représentante, à toutes les autres parties et à tous les autres tiers et en déposant auprès du ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, un avis de constitution de nouveau représentant qui précise les nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du nouveau représentant ou de la nouvelle représentante.

~~Formule~~**Formulaire 4A**

(2) L'avis visé au paragraphe (1) peut être rédigé selon ~~la formule~~le formulaire 4A.

Avis de constitution de représentant

(3) La partie ou le tiers qui agit en son propre nom peut nommer un représentant commis ou une représentante commise au dossier en remettant un avis de constitution de représentant qui précise les nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant ou de la représentante.

~~Formule~~**Formulaire 4B**

(4) L'avis visé au paragraphe (3) peut être rédigé selon ~~la formule~~le formulaire 4B.

Avis de l'intention d'agir en son propre nom

(5) La partie ou le tiers qui a un représentant commis ou une représentante commise au dossier peut choisir d'agir en son propre nom en lui signifiant, ainsi qu'à toutes les autres parties et à tous les autres tiers, et en déposant auprès du ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, un avis à cet effet qui précise son adresse aux fins de signification, son numéro de téléphone, ainsi que son numéro de télécopieur et son adresse électronique, s'il en a.

~~Formule~~**Formulaire 4C**

(6) L'avis visé au paragraphe (5) peut être rédigé selon ~~la formule~~le formulaire 4C.

Révocation du représentant commis au dossier

4.02 Sur motion d’un représentant ou d’une représentante, d’une partie ou d’une autre personne, la formation peut, par ordonnance, révoquer le représentant ou la représentante en qualité de représentant commis ou de représentante commise au dossier.

RÈGLE 5

COMMUNICATION AVEC ~~LE COMITÉ D'AUDITION~~LA FORMATION

~~**Communication avec la formation**~~

5.01 Les parties, les tiers, les représentants ou les personnes qui assistent ou participent à une audience ne doivent pas communiquer avec la formation à l'égard de l'objet de l'audience en dehors de celle-ci, sauf, selon le cas :

a) en présence de toutes les parties et de tous les tiers qui ont été autorisés à participer à l'audience à l'égard de l'objet de la communication, ou de leurs représentants;

b) par écrit, en envoyant la communication écrite au greffe du ~~tribunal~~Tribunal et sa copie à toutes les parties et à tous les tiers qui ont été autorisés à participer à l'audience à l'égard de l'objet de la communication, ou à leurs représentants.

RÈGLE 6

JONCTION DES PARTIES

Jonction des parties

6.01 (1) Sur motion d'une personne, la formation peut, par ordonnance, joindre toute personne comme partie à l'instance si la *Loi sur le Barreau* ou, par ailleurs, le droit, lui donne le droit de l'être.

Délai de présentation de la motion

(2) La motion visée à la présente règle est présentée avant l'audience sur le fond de l'instance.

RÈGLE 7

RÉUNION OU SÉPARATION DES INSTANCES

Réunion ou instruction consécutive d'instances

7.01 (1) Sur motion d'une partie, ~~le Comité d'audition peut, par~~une ordonnance~~,~~ peut disposer que plusieurs instances soient, en tout ou en partie, instruites sur le fond en même temps ou immédiatement l'une après l'autre si, selon le cas :

a) elles ont en commun une question de droit ou de fait ou des deux;

b) elles mettent en cause les mêmes parties;

c) elles naissent de la même opération ou du même événement ou de la même série d'opérations ou d'événements;

d) il est par ailleurs nécessaire de rendre une ordonnance en application de la présente règle.

Temps de présentation de la motion

(2) La motion visée à la présente règle est présentée :

a) soit avant l'instruction sur le fond de l'instance concernée;

b) en tout temps, avec ~~la permission du Comité d'audition~~autorisation.

Effet de l'instruction simultanée ou consécutive des instances

(3) ~~S'il rend~~Si une ordonnance ~~visée au~~est rendue en vertu du paragraphe (1), ~~le Comité d'audition~~la formation doit décider de l'effet de procéder à l'instruction simultanée ou consécutive des instances sur le fond et peut donner les directives qu'il estime justes à l'égard de cet effet.

Séparation des instances

(4) ~~Lorsqu'il rend~~Si une ordonnance ~~visée au~~est rendue en vertu du paragraphe (1), ~~le Comité d'audition~~la formation peut, sur motion d'une partie ou de son propre chef, ordonner des audiences distinctes pour tout ou partie des instances si leur instruction simultanée ou consécutive sur le fond les complique ou les retarde indûment ou cause un préjudice indu à une partie.

Scission de l'instance

7.02 (1) Sur motion d’une partie ou de son propre chef, la formation peut, par ordonnance, disposer qu’une instance soit scindée en plusieurs instances.

Effet de l’ordonnance

(2) ~~Lorsqu’il rend~~Si une ordonnance est rendue en vertu du paragraphe (1), ~~le Comité d’audition~~la formation détermine l’effet de l’ordonnance, notamment la manière d’instruire les instances distinctes sur le fond; il peut alors donner les directives qu’il estime justes à l’égard de la scission de l’instance.

RÈGLE 8

INTERVENTION DE TIERS

Intervention de tiers

8.01 (1) Sur motion d'une personne, ~~le Comité d'audition peut, par~~une ordonnance~~,~~ peut permettre à un tiers à l'instance d'intervenir dans tout ou partie de celle-ci si cette intervention est requise dans l'intérêt de la justice.

Étendue de la participation

(2) ~~Lorsqu'il rend~~Si une ordonnance est rendue en vertu du paragraphe (1), ~~le Comité d'audition~~la formation fixe l'étendue de l'intervention du tiers; il peut alors donner les directives qu'il estime justes à cet égard.

Intervention bénévole

8.02 À l'invitation d'une formation, quiconque peut, sans devenir partie à l'instance, intervenir dans tout ou partie de celle-ci aux fins d'aider le ~~Comité d'audition~~Tribunal en présentant une argumentation.

RÈGLE 9

INTRODUCTION ET MODIFICATION D'UNE INSTANCE ET DÉSISTEMENT

Mode d'introduction d'une instance

9.01 (1) Les instances sont introduites par la délivrance d'un acte introductif d'instance.

Avis de requête

(2) L'acte introductif d'instance est l'avis de requête (~~formule~~formulaire 9A) dans le cas des instances suivantes :

1. Les instances portant sur la conduite.

2. Les instances portant sur la capacité.

3. Les instances portant sur la compétence professionnelle.

4. Les instances portant sur l'inobservation.

5. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

6. Les instances portant sur un différend concernant des conditions.

Avis de renvoi à l'audience

(3) L'acte introductif d'instance est l'avis de renvoi à l'audience (~~formule~~formulaire 9B) dans le cas des instances suivantes :

1. Les instances portant sur la délivrance d'un permis.

2. Les instances portant sur le rétablissement visé à l'article 31 de la Loi.

Mode de délivrance d'un acte introductif d'instance

(4) L'acte introductif d'instance est délivré lorsque le greffe du ~~tribunal~~Tribunal lui attribue un numéro de dossier et le date.

Idem

(5) Un acte introductif d'instance peut être délivré :

a) si la partie qui en demande la délivrance ou son représentant ou sa représentante se présente en personne au greffe du ~~tribunal~~Tribunal;

b) par courrier ou messagerie, si la personne qui en demande la délivrance :

(i) en envoie l'original par courrier ordinaire ou recommandé au ~~greffe du tribunal~~Tribunal,

(ii) en envoie l'original par messagerie au ~~greffe du tribunal~~Tribunal.

Envoi d'une copie de l'acte introductif d'instance à la partie

(6) À la suite de la délivrance d'un acte introductif d'instance par courrier ou par messagerie, le ~~greffe du tribunal~~Tribunal envoie une copie de l'acte tel que délivré à la partie qui en a demandé la délivrance.

Dépôt d'une copie de l'acte introductif d'instance

(7) L'original de l'acte introductif d'instance délivré est déposé au ~~greffe du tribunal~~Tribunal lors de sa délivrance.

Signification de l'acte introductif d'instance

(8) Une copie de l'acte introductif d'instance délivré est signifiée par la partie qui en a demandé la délivrance à toutes les autres parties et la preuve de la signification est déposée auprès du ~~greffe du tribunal~~Tribunal dans les trente jours de la délivrance de l'acte.

Défaut réputé un désistement

(9) La partie qui a demandé la délivrance d'un acte introductif d'instance et qui ne dépose pas, dans les trente jours de sa délivrance, la preuve de sa signification à toutes les autres parties est réputée s'être désistée de l'instance introduite par cette délivrance.

Motion en annulation de désistement

(10) Sur motion de la personne qui est réputée s'être désistée d'une instance en application du paragraphe (9), ~~le Comité d'audition peut rendre, à des conditions justes,~~ une ordonnance d'annulation du désistement peut être rendue à des conditions justes.

Effet du désistement sur une instance subséquente

(11) Si une partie est réputée s'être désistée d'une instance en application du paragraphe (9), le désistement ne fait pas obstacle à une instance subséquente qu'elle introduira relativement au même objet.

Modification de l'acte introductif d'instance par une partie

9.02 (1) Une partie peut modifier son acte introductif d'instance :

a) avant le dixième jour qui précède l'audience sur le fond;

b) après le délai fixé à l'alinéa a), avec ~~l'~~autorisation ~~du Comité d'audition~~.

Autorisation de modifier

(2) Lorsqu'il examine s'il y a lieu d'autoriser une partie à modifier son acte introductif d'instance, ~~le Comité d'audition~~la Section de première instance tient compte de ce qui suit :

a) le préjudice causé à une personne;

b) la célérité de la notification de la partie adverse;

c) tout autre facteur pertinent.

Interdiction de joindre une partie

(3) La modification visée à la présente règle ne doit pas prévoir la jonction d'une partie.

Procédure de modification

(4) La partie qui modifie son acte introductif d'instance dépose, auprès du ~~greffe du tribunal~~Tribunal, une copie de l'acte modifié portant la date de l'acte initial et son intitulé suivi du mot « modifié ».

Indication des modifications

(5) La partie qui modifie son acte introductif d'instance indique les ajouts faits à l'acte initial en les soulignant et les suppressions, en les biffant.

Idem

(6) Si un acte introductif d'instance a été modifié à plusieurs reprises, chacune des modifications subséquentes est indiquée par autant de traits de soulignement ou de biffage qu'il y a eu de modifications.

Fonction du greffe du ~~tribunal~~Tribunal

(7) ~~Le greffe du tribunal indique sur les~~Quand des actes introductifs d'instance modifiés ~~qui~~ sont déposés ~~auprès de lui~~, le greffe du Tribunal y consigne la date de leur dépôt et la disposition en vertu de laquelle la modification a été faite.

Date de la modification

(8) La date du dépôt d'un acte introductif d'instance modifié auprès du ~~greffe du tribunal~~Tribunal est réputée la date de modification de l'acte initial.

Signification de l'acte introductif d'instance modifié

(9) La partie qui modifie son acte introductif d'instance signifie une copie de l'acte introductif d'instance modifié à toutes les autres parties immédiatement après l'avoir déposé auprès du ~~greffe du tribunal~~Tribunal.

Idem

(10) L'acte introductif d'instance modifié est signifié conformément au paragraphe 10.01 (1).

Preuve de la signification

(11) La preuve de la signification d'un acte introductif d'instance modifié est déposée après du ~~greffe du tribunal~~Tribunal immédiatement après sa signification.

Modification à l'instruction

(12) Si un acte introductif d'instance est modifié à l'audience sur le fond de l'instance, la modification est inscrite au dossier et les paragraphes (4) à (11) ne s'appliquent pas.

Désistement avant l'audience sur le fond

Instance portant sur la conduite, la capacité, la compétence professionnelle, l'inobservation, le rétablissement visé à l'article 49.42 de la Loi ou sur un différend concernant des conditions

9.03 (1) Avant l'instruction sur le fond des instances suivantes, le requérant ou la requérante peut se désister en remettant un avis de désistement (~~formule~~formulaire 9C) :

1. Les instances portant sur la conduite.

2. Les instances portant sur la capacité.

3. Les instances portant sur la compétence professionnelle.

4. Les instances portant sur l'inobservation.

5. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

6. Les instances portant sur un différend concernant des conditions.

Désistement du Barreau dans une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi

(2) Avant l'instruction sur le fond d'une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi, le Barreau peut se désister en remettant un avis de désistement (~~formule~~formulaire 9D).

Désistement du requérant dans une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi

(3) Avant l'instruction sur le fond d'une instance portant sur la délivrance d'un permis ou sur le rétablissement visé à l'article 31 de la Loi, le requérant ou la requérante peut se désister de la requête qui a été renvoyée à l'audience en remettant un avis de désistement (~~formule~~formulaire 9E).

RÈGLE 10

SIGNIFICATION DES DOCUMENTS

Mode de signification : acte introductif d'instance

10.01 (1) L'acte introductif d'instance est signifié à personne ou selon un autre mode de signification directe.

Mode de signification : autres documents

(2) Tout document autre qu'un acte introductif d'instance peut être signifié selon l'un ou l'autre des modes suivants :

a) à personne ou selon un autre mode de signification directe;

b) en en envoyant une copie par messager à la dernière adresse connue du ou de la destinataire ou de son représentant ou de sa représentante;

c) en le télécopiant au dernier numéro de télécopieur connu du ou de la destinataire ou de son représentant ou de sa représentante; toutefois, si le ou la destinataire est une partie, la signification effectuée conformément au présent alinéa n'est valide que si elle y consent au préalable;

d) en en envoyant une copie par courrier électronique à la dernière adresse connue du ou de la destinataire ou de son représentant ou de sa représentante; toutefois, la signification effectuée conformément au présent alinéa n'est valide que si les conditions suivantes sont réunies :

(i) si le ou la destinataire est une partie, elle consent à l'envoi par courrier électronique au préalable;

(ii) le ou la destinataire fournit une acceptation de la signification et la date de celle-ci par courrier électronique.

Signification par télécopie

(3) Le document qui est signifié par télécopie en vertu de l'alinéa (2) c) comprend une page de couverture qui indique :

a) les nom, adresse et numéro de téléphone de l'expéditeur ou de l'expéditrice;

b) le nom du ou de la destinataire de la signification;

c) les date et heure de la transmission;

d) le nombre total de pages transmises, y compris la page de couverture;

e) le numéro de télécopieur de l'expéditeur ou de l'expéditrice;

f) les nom et numéro de téléphone d'une personne à qui le ou la destinataire pourra s'adresser en cas de difficultés de transmission.

Signification par courrier électronique

(4) Le document qui est signifié par courrier électronique en vertu de l'alinéa (2) d) est joint à un message électronique qui comprend ce qui suit :

a) les nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique de l'expéditeur ou de l'expéditrice;

b) les date et heure de la transmission;

c) les nom et numéro de téléphone d'une personne à qui le ou la destinataire pourra s'adresser en cas de difficultés de transmission.

Signification à personne

(5) Le document qui doit être signifié à personne l'est comme suit :

a) s'il s'agit d'une personne, en lui laissant une copie du document;

b) s'il s'agit d'une personne autre que le Barreau, en laissant une copie du document à son établissement entre les mains d'une personne adulte qui semble assumer la direction de celui-ci;

(c) s'il s'agit du Barreau, en laissant une copie du document à un conseiller juridique ou à une conseillère juridique de son service de la discipline.

Autres modes de signification directe

(6) Le document qui peut être signifié selon un autre mode de signification directe l'est :

a) soit en laissant une copie du document au représentant ou à la représentante de la personne;

b) soit en envoyant une copie du document par courrier ordinaire ou recommandé à la dernière adresse connue de la personne.

Signification indirecte ou dispense de signification

(7) Sur motion d'une personne, ~~le Comité d'audition peut, par~~une ordonnance~~,~~ peut permettre la signification indirecte ou dispenser de la signification s'il semble difficile, pour quelque raison que ce soit, d'effectuer la signification comme l'exige la présente règle ou si l'intérêt de la justice l'exige.

Date de validité de la signification

10.02 (1) La signification effectuée en application de la règle 10.01 est réputée valide :

a) lorsqu'une copie du document est laissée à une personne :

(i) avant 16 heures, le jour de la remise,

(ii) après 16 heures, le jour suivant;

b) lorsqu'une copie du document est ~~envoyé~~envoyée par la poste à une personne, le cinquième jour qui suit son envoi;

c) lorsqu'une copie du document est envoyée par messager à une personne, le deuxième jour qui suit sa remise au service de messagerie;

d) lorsqu'une copie du document est transmise par télécopieur à une personne :

(i) avant 16 heures, le jour de la transmission,

(ii) après 16 heures, le jour suivant;

e) lorsqu'une copie du document est envoyée par courrier électronique à une personne :

(i) si l'acceptation électronique de la signification est reçue avant 16 heures, le jour de cette réception,

(ii) si l'acceptation électronique de la signification est reçue entre 16 heures et minuit, le jour suivant cette réception.

Date de validité de la signification : signification indirecte

(2) L'ordonnance qui permet la signification indirecte précise la date à laquelle est valide la signification qui lui est conforme.

Date de validité de la signification : dispense de la signification

(3) Si l’ordonnance dispense de la signification d’un document, celui-ci est réputé, aux fins de la computation des délais aux termes des présentes règles, signifié à la date à laquelle l’ordonnance prend effet.

Preuve de la signification

10.03 (1) La signification d’un document peut être établie :

a) soit par un affidavit de la personne qui l’a effectuée;

b) soit, si le document est signifié à un représentant ou à une représentante ou à un conseiller juridique ou à une conseillère juridique du service de discipline du Barreau, par sa reconnaissance ou son acceptation écrite de la signification.

(2) L’affidavit ou la reconnaissance ou l’acceptation écrite de la signification peut être imprimé sur la feuille arrière du document signifié, ou sur une estampille ou une vignette apposée sur la feuille arrière.

RÈGLE 11

FIXATION DES DATES

Audience sur le fond de l'instance

~~**Fixation de la date par un membre du Comité**~~

11.01 (1) ~~Sous réserve du paragraphe (2), un membre du Comité fixe la date de chaque audience sur le fond d'une instance.~~Un membre de la formation ou le greffe du Tribunal peuvent fixer les dates des audiences.

~~**Fixation de la date par le greffe du tribunal**~~

~~(2) Le greffe du tribunal peut fixer la date d'une audience sur le fond d'une instance si, selon le cas :~~

~~a) l'audience vise à établir si un ou une titulaire de permis a contrevenu à l'article 33 de la Loi de l'une ou plusieurs des façons suivantes :~~

~~i. il ou elle a pratiqué le droit en Ontario ou s'est présenté comme étant une personne qui peut pratiquer le droit en Ontario, ou s'est fait passer pour telle, pendant que son permis était suspendu,~~

~~ii. il ou elle a fourni des services juridiques en Ontario ou s'est présenté comme étant une personne qui peut fournir des services juridiques en Ontario, ou s'est fait passer pour telle, pendant que son permis était suspendu,~~

~~iii. il ou elle n'a pas respecté un engagement envers le Barreau,~~

~~iv. il ou elle n'a pas conservé les registres financiers, contrairement à ce qu'exigent les règlements administratifs,~~

~~v. il ou elle n'a pas répondu à des questions posées par le Barreau,~~

~~vi. il ou elle n'a pas collaboré avec la personne qui procède à une vérification, enquête, inspection, perquisition ou saisie aux termes de la partie II de la Loi,~~

~~vii. il ou elle n'a pas payé les frais adjugés au Barreau par le Comité d'audition ou le Comité d'appel,~~

~~viii. il n'a pas communiqué une adresse au Barreau ou ne l'a pas informé de tout changement d'adresse, contrairement à ce qu'exigent les règlements administratifs,~~

~~ix. il n'a pas fourni au Barreau des renseignements ou n'a pas déposé auprès de celui-ci des certificats, des rapports ou d'autres documents, contrairement à ce qu'exigent les règlements administratifs,~~

~~x. s'il s'agit d'une personne pourvue d'un permis l'autorisant à pratiquer le droit en Ontario en qualité d'avocat, il n'a pas présenté, à l'assureur qui fournit une assurance-responsabilité professionnelle aux termes de l'article 61 de la Loi, de rapport sur une demande, ou sur les circonstances d'une erreur, d'une omission ou d'un acte de négligence qui, selon une personne raisonnable, pourrait donner lieu à une demande, comme il y est tenu aux termes d'une police d'assurance-responsabilité professionnelle,~~

~~xi. s'il s'agit d'une personne pourvue d'un permis l'autorisant à fournir des services juridiques en Ontario, il n'a pas présenté à l'assureur de rapport sur une demande, ou sur les circonstances d'une erreur, d'une omission ou d'un acte de négligence qui, selon une personne raisonnable, pourrait donner lieu à une demande, comme il y est tenu aux termes d'une police d'assurance-responsabilité professionnelle,~~

~~xii. il n'a pas honoré une obligation financière envers le Barreau,~~

~~xiii. il n'a pas conservé une autorisation de placement ou un rapport sur un placement, contrairement à ce qu'exigent les règlements administratifs;~~

~~b) il s'agit d'une instance portant sur l'inobservation;~~

~~c) la nature même de l'instance exige que l'audition soit accélérée;~~

~~d) les parties s'entendent sur la date de l'audience, laquelle ne tombe pas plus de 90 jours après la date à laquelle l'acte introductif d'instance est réputé avoir été signifié par la partie qui a délivré l'acte introductif d'instance à toutes les autres parties, et elles avisent par écrit le greffe du tribunal de leur entente.~~

Inscription

(~~3~~2) La date de chaque audience sur le ~~fonds~~fond de l'instance est inscrite sur l'acte introductif d'instance par le membre ~~du Comité~~de la formation ou par le greffe du ~~tribunal~~Tribunal, selon celui ou celle qui l'a inscrite au calendrier.

Avis de l'audience sur le fond de l'instance

11.02 (1) Le ~~greffe du tribunal~~Tribunal envoie à toutes les parties et à tous les tiers qui ont été autorisés à y participer un avis de l'audience sur le fond de l'instance.

Audience orale

(2) L'avis d'audience orale comprend :

a) l'indication de l'heure, de la date, du lieu et de l'objet de l'audience;

b) un avertissement précisant que, si la personne recevant l'avis ne comparaît pas à l'audience, la formation peut procéder sans elle et qu'elle n'aura pas droit à d'~~autre~~autres avis dans le cadre de l'instance.

Audience électronique

(3) L'avis d'audience électronique comprend :

a) l'indication de l'heure, de la date, du lieu et de l'objet de l'audience, ainsi que des détails sur la manière dont l'audience sera tenue;

b) un avertissement précisant que, si la personne recevant l'avis ne participe pas à l'audience conformément à l'avis, la formation peut procéder sans elle et qu'elle n'aura pas droit à d'~~autre~~autres avis dans le cadre de l'instance.

Défaut de comparution

(4) Si un avis d'audience est donné à une personne conformément au paragraphe (2) ou (3) et qu'elle n'y comparaît pas ou n'y participe pas, la formation peut procéder sans elle et elle n'a pas droit à d'~~autre~~autres avis dans le cadre de l'instance.

Audition des motions

11.03 La date d'audition d'une motion peut être fixée :

a) soit à n'importe quel jour où l'instance à laquelle elle se rapporte doit être entendue sur le fond;

b) soit à une date obtenue du greffe du ~~tribunal~~Tribunal.

RÈGLE 12

GESTION DES INSTANCES

Conférence de gestion de l'instance

12.01 (1) Un membre ~~du Comité~~de la formation mène une conférence de gestion de l'instance à la date précisée dans l'acte introductif d'instance sauf si les conditions suivantes sont réunies à ce moment-là :

a) ~~le greffe du tribunal a fixé~~ la date d'une audience sur le fond de l'instance a été fixée;

b) ~~le greffe du tribunal a fixé~~ la date de la conférence préparatoire à l'audience exigée dans le cas prévu à l'alinéa 22.02 a) a été fixée, le cas échéant.

Demande de conférence de gestion de l'instance

(2) Toute partie à une instance peut demander de comparaître devant un membre ~~du Comité~~de la formation dans le cadre d'une conférence de gestion de l'instance.

Présentation de la demande au greffe du ~~tribunal~~Tribunal

(3) La demande de comparution devant un membre ~~du Comité~~de la formation dans le cadre d'une conférence de gestion de l'instance est présentée au greffe du ~~tribunal~~Tribunal.

Avis de conférence de gestion de l'instance

(4) Lorsqu'il reçoit une demande de comparution devant un membre ~~du Comité~~de la formation dans le cadre d'une conférence de gestion de l'instance, le ~~greffe du tribunal~~Tribunal avise toutes les parties de la date et de l'heure de la conférence.

Conférence de gestion de l'instance : modalités

12.02 La conférence de gestion de l'instance peut avoir lieu en présence des parties, par conférence téléphonique, par échange de documents ou par une combinaison de ces modalités.

Comparution lors d'une conférence de gestion de l'instance

12.03 (1) À moins que le membre ~~du Comité~~de la formation qui mène la conférence de gestion de l'instance n'ordonne le contraire ou que les parties n'y consentent, toutes les parties à l'instance ou leurs représentants sont tenus de comparaître ou de participer à la conférence.

Défaut de comparaître ou de participer

(2) Le membre ~~du Comité~~de la formation qui mène la conférence de gestion de l'instance peut procéder en l'absence de quiconque est tenu de comparaître ou de participer à la conférence, mais ne le fait pas, ou sans sa participation.

Pouvoirs

12.04 (1) Dans le cadre de la conférence de gestion de l'instance, le membre ~~du Comité~~de la formation peut :

a) fixer la date d'une autre conférence de gestion de l'instance;

b) ordonner aux parties de comparaître à une conférence préparatoire à l'instance;

c) fixer la date d'une conférence préparatoire à l'instance ou en fixer une autre;

d) fixer la date d'une audience ou l'ajourner;

e) donner des directives.

Résultats de la conférence de gestion de l'instance

(2) À la conclusion de la conférence de gestion de l'audience, le membre ~~du Comité~~de la formation qui l'a menée en inscrit les résultats sur l'acte introductif d'instance, notamment toute conférence de gestion de l'instance ultérieure qu'il a prévue ou toute directive qu'il a donnée.

RÈGLE 13

MOTIONS

Présentation des motions

13.01 (1) Les motions suivantes sont présentées par voie d'avis de motion (~~formule~~formulaire 13A) :

1. Les motions portant sur la compétence ~~du Comité d'audition~~de la Section de première instance.

2. Les motions en suspension ou rejet de l'instance.

3. Les motions soulevant des questions constitutionnelles, notamment dans le cadre de la *Charte canadienne des droits et libertés*;

4. Les motions portant sur la divulgation.

5. Les motions visant à obtenir que tout ou partie d'une audience tenue dans le cadre d'une instance se déroule à huis clos.

6. Les motions visant à interdire la divulgation de renseignements rendus publics au cours d'une audience.

Idem

(2) Les motions qui ne figurent pas au paragraphe (1) sont présentées par voie d'avis de motion (~~formule~~formulaire 13A) sauf si l'avis n'est pas nécessaire en raison des circonstances ou de la nature de la motion.

Teneur de l'avis de motion : motion visant à obtenir une ordonnance de huis clos ou de non-divulgation

(3) Sur motion visant à obtenir une ordonnance disposant que tout ou partie d'une audience tenue dans le cadre d'une instance se déroule à huis clos ou interdisant la divulgation de renseignements rendus publics au cours d'une audience, l'auteur de la motion précise, dans l'avis de motion, les motifs à l'appui de celle-ci, sans toutefois faire mention des questions, des communications ou des documents particuliers visés par l'ordonnance.

Obligations de l'auteur de la motion

Application

13.02 (1) La présente règle s'applique si une motion est présentée par voie d'avis de motion.

Signification du dossier de motion

(2) L'auteur de la motion signifie un dossier de motion à chaque partie intimée au moins dix jours avant l'audition de la motion.

(3) Le dossier de motion de l'auteur de la motion comprend, dans des pages numérotées consécutivement :

a) une table des matières décrivant chaque document, y compris les pièces, selon leur nature et leur date et, dans le cas d'une pièce, selon sa nature et son numéro ou sa lettre;

b) l'avis de motion;

c) les affidavits et les autres documents que l'auteur de la motion entend invoquer à l'appui de celle-ci.

Signification du mémoire et du recueil des éléments de doctrine et de jurisprudence

(4) L'auteur de la motion signifie un mémoire, le cas échéant, et un recueil des éléments de doctrine et de jurisprudence, le cas échéant, à toutes les parties intimées au moins sept jours avant l'audition de la motion.

Dépôt des documents ~~auprès du greffe du tribunal~~

(5) L'auteur de la motion dépose auprès du ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification, au moins sept jours avant l'audition de la motion, tous les documents signifiés aux parties intimées en application de la présente règle.

Idem

(6) L'auteur de la motion dépose les documents auprès du ~~greffe du tribunal~~Tribunal :

a) en deux ~~copies~~exemplaires, si la motion doit être entendue par un seul membre ~~du Comité~~de la formation;

b) en quatre ~~copies~~exemplaires, si la motion doit être entendue par une formation de trois membres ~~du Comité~~.

Obligations de la partie intimée

Application

13.03 (1) La présente règle s'applique si la motion est présentée par voie d'avis de motion.

Signification du dossier de motion, du mémoire et du recueil des éléments de doctrine et de jurisprudence

(2) La partie intimée signifie à l'auteur de la motion et à toutes les personnes à qui le dossier de motion de l'auteur de la motion a été signifié, au moins trois jours avant l'audition de la motion, son dossier de motion, le cas échéant, son mémoire, le cas échéant, et son recueil des éléments de doctrine et de jurisprudence, le cas échéant.

Dossier de motion de la partie intimée

(3) Le dossier de motion de la partie intimée comprend, dans des pages numérotées consécutivement :

a) une table des matières décrivant chaque document, y compris les pièces, selon leur nature et leur date et, dans le cas d'une pièce, selon sa nature et son numéro ou sa lettre;

b) les documents que la partie intimée entend invoquer à l'appui de la motion et qui ne figurent pas au dossier de motion de l'auteur de celle-ci.

Dépôt des documents ~~auprès du greffe du tribunal~~

(4) La partie intimée dépose auprès du ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification, au moins sept jours avant l'audition de la motion, tous les documents signifiés à quiconque en application de la présente règle.

Idem

(5) La partie intimée dépose les documents auprès du ~~greffe du tribunal~~Tribunal :

a) en deux ~~copies~~exemplaires, si la motion doit être entendue par un seul membre ~~du Comité~~de la formation;

b) en quatre ~~copies~~exemplaires, si la motion doit être entendue par une formation de trois membres ~~du Comité~~.

Désistement de la motion

13.04 (1) Avant l'audition de la motion, son auteur peut s'en désister en remettant un avis de désistement (~~formule~~formulaire 13B).

(2) L'auteur de la motion qui signifie un dossier de motion et qui ne le dépose pas ou qui ne se présente pas à l'audition de la motion est réputé d'être désisté de la motion.

(3) Si la motion a fait ou est réputée avoir fait l'objet d'un désistement, la partie intimée qui a reçu signification du dossier de motion ont droit aux dépens de la motion.

Motion sur consentement

13.05 Si la motion est présentée sur consentement, son auteur dépose auprès du ~~greffe du tribunal~~Tribunal, avec le dossier de motion, le consentement de toutes les personnes qui ont reçu signification de ce dossier et un projet d'ordonnance.

Décision sur la motion

13.06 Après l'audition de la motion, la formation peut, selon le cas :

a) rendre l'ordonnance demandée;

b) rejeter la motion, en totalité ou en partie;

c) ajourner l'audition de la motion, en totalité ou en partie;

d) si la motion est entendue avant l'audience sur le fond de l'instance dans le cadre de laquelle elle a été présentée ou à laquelle elle se rapporte, la renvoyer à la formation qui préside cette audience.

RÈGLE 14

AJOURNEMENTS

Présentation de la demande

Avant la date de l'audience

14.01 (1) La partie qui, avant la date prévue de l'audience, souhaite en obtenir l'ajournement :

a) soit présente une demande d'ajournement au membre ~~du Comité~~de la formation lors de la conférence de gestion de l'instance qui, à moins que ce ne soit pas possible, est tenue au moins dix jours avant la date de l'audience;

b) soit, si le greffe du ~~tribunal~~Tribunal l'informe qu'il est impossible d'inscrire une conférence de gestion de l'instance au calendrier avant cette date, présente à la formation une motion visant à obtenir une ordonnance d'ajournement de l'audience;

c) soit, dans le cas de l'audition d'une motion, présente une demande d'ajournement au greffe du ~~tribunal~~Tribunal si toutes les parties et tous les tiers qui ont été autorisés à participer à l'audience y consentent.

À la date de l'audience ou pendant celle-ci

(2) La partie qui, à la date prévue de l'audience ou pendant celle-ci, souhaite en obtenir l'ajournement, en totalité ou pour ce qu'il en reste, présente à la formation une motion visant à obtenir l'ordonnance d'ajournement pertinente.

Ajournement par le greffe du ~~tribunal~~Tribunal

14.02 Le greffe du ~~tribunal~~Tribunal peut accéder à une demande d'ajournement de l'audition d'une motion si les conditions suivantes sont réunies :

a) toutes les parties et tous les tiers qui ont été autorisés à participer à l'audience y consentent;

b) les parties et les tiers ~~l'~~avisent le Tribunal par écrit de leur consentement.

Ajournement : facteurs

14.03 Lorsqu'il ou elle examine s'il y a lieu d'accorder l'ajournement, le membre ~~du Comité~~de la formation ou la formation, selon le cas, peut tenir compte des facteurs suivants :

a) le préjudice causé à quiconque;

b) le moment de la présentation de la demande d'ajournement ou de la motion visant à obtenir l'ajournement;

c) le nombre de fois qu'une demande d'ajournement ou une motion visant à obtenir l'ajournement a déjà été présentée;

d) le nombre d'ajournements déjà accordés;

e) les directives ou les ordonnances antérieures visant l'inscription au calendrier des audiences ultérieures;

f) l'intérêt public;

g) les dépens qui découlent de l'ajournement;

h) la possibilité pour les témoins d'être présents à l'audience;

i) les efforts faits pour éviter l'ajournement;

j) le principe de l'instruction équitable;

k) tout autre facteur pertinent.

RÈGLE 15

LANGUE DES AUDIENCES

Audience en français ou en anglais

15.01 (1) L'audience d'une instance est instruite en français ou en anglais.

Audience en anglais

(2) L'audience d'une instance est instruite en anglais, sauf si une partie à l'instance exige qu'elle soit instruite en français.

Demande d'audience en français : Barreau

(3) Si la personne visée par l'audience est francophone, le Barreau peut exiger que toutes les audiences des instances suivantes soient instruites en français en déposant l'acte introductif d'instance en français auprès du ~~greffe du tribunal~~Tribunal :

1. Les instances portant sur la délivrance d'un permis.

2. Les instances portant sur le rétablissement visé à l'article 31 de la Loi.

3. Les instances portant sur la conduite.

4. Les instances portant sur la capacité.

5. Les instances portant sur la compétence professionnelle.

6. Les instances portant sur l'inobservation.

Demande d'audience en français : personne visée par l'instance

(4) ~~Le~~La ou ~~la~~le francophone qui est visé par l'instance peut exiger que toutes les audiences des instances suivantes soient instruites en français en en avisant le ~~greffe du tribunal~~Tribunal dans les 30 jours qui suivent le moment où il ou elle est réputé avoir reçu signification de l'acte introductif d'instance :

1. Les instances portant sur la délivrance d'un permis.

2. Les instances portant sur le rétablissement visé à l'article 31 de la Loi.

3. Les instances portant sur la conduite.

4. Les instances portant sur la capacité.

5. Les instances portant sur la compétence professionnelle.

6. Les instances portant sur l'inobservation.

Demande d'audience en français : personne visée par l'instance

(5) ~~Le~~La ou ~~la~~le francophone qui est visé par l'instance peut exiger que toutes les audiences des instances suivantes soient instruites en français en déposant l'acte introductif d'instance en français auprès du ~~Bureau du tribunal~~Tribunal :

1. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

2. Les instances portant sur un différend concernant des conditions.

Observation du paragraphe (4) non obligatoire

(6) La personne visée par l'instance n'est pas tenue d'observer le paragraphe (4) si elle a reçu signification de l'acte introductif d'instance en français.

Audience en anglais

15.02 Les règles suivantes s'appliquent si l'audience d'une instance se déroule en anglais :

a) les témoignages présentés dans une autre langue que l'anglais à l'audience sont traduits en anglais;

b) les documents se rapportant à l'audience qui sont déposés auprès du ~~greffe du tribunal~~Tribunal, ou qui sont reçus par la formation qui préside l'audience, en application des présentes règles sont soit rédigés en anglais, soit accompagnés d'une traduction en langue anglaise certifiée conforme par un affidavit du traducteur.

Audience en français

15.03 Les règles suivantes s'appliquent si l'audience d'une instance se déroule en français :

a) les témoignages et les observations présentés en français ou en anglais sont reçus, enregistrés et transcrits dans la langue dans laquelle ils sont présentés;

b) les documents se rapportant à l'audience qui sont déposés auprès du ~~greffe du tribunal~~Tribunal, ou qui sont reçus par la formation qui préside l'audience, en application des présentes règles peuvent être rédigés en

français et ne doivent pas nécessairement être accompagnés de leur traduction en anglais;

c) à la demande de la personne visée par l'instance qui parle français, mais pas anglais, la formation qui préside l'audience fournit l'interprétation en français de tout ce qui est donné oralement dans une autre langue que le français à l'audience;

d) à la demande de la personne visée par l'instance qui parle français, mais pas anglais, le ~~greffe du tribunal ou la formation qui préside l'audience~~Tribunal fait faire traduire en français tout document se rapportant à l'audience qui lui est déposé ~~auprès du greffe du tribunal~~ ou qui est reçu par la formation en anglais;

e) le ~~greffe du tribunal~~Tribunal fait traduire en français les inscriptions, les décisions, les ordonnances ou les motifs d'une décision ou d'une ordonnance se rapportant à l'audience qui sont rédigés en anglais, à moins que les parties à l'instance ne conviennent autrement.

RÈGLE 16

MÉTHODE D'INSTRUCTION

Audience orale

16.01 Sous réserve des règles 16.02 et 16.03, les audiences se tiennent oralement, en présence des parties, des tiers, le cas échéant, et de leurs représentants respectifs, le cas échéant.

Audience électronique

Motions

16.02 (1) Les motions suivantes sont, sans motion ni ordonnance, entendues par voie d'audience électronique :

1. Les motions sur consentement.

2. Les motions visant à obtenir un ajournement.

Ordonnance pour tenue d'une audience électronique

(2) Sur motion d'une partie ou de son propre chef, la formation peut ordonner que tout ou partie de l'audience se tienne électroniquement.

Facteurs à prendre en considération

(3) Lorsqu'elle décide s'il convient de tenir une audience électroniquement, la formation peut peser ce qui suit :

a) la pertinence de l'objet de l'audience;

b) la nature de la preuve et la question de savoir si la crédibilité est en litige;

c) la question de savoir si les questions en litige sont des questions de droit;

d) la facilité pour les parties de se conformer à l'ordonnance;

e) le coût et l'efficience de l'instance dans le cadre de laquelle se tient l'audience, ainsi que le respect des délais;

f) le fait d'éviter les retards ou toute prolongation inutile de l'instance;

g) l'équité du processus;

h) l'accès du public à l'audience;

i) le fait que le Barreau puisse remplir la mission que lui confie la Loi;

j) toute autre question qu'elle considère comme pertinente dans ses efforts visant à en arriver à un règlement juste et rapide de l'instance dans le cadre de laquelle se tient l'audience.

Méthode d'instruction électronique

(4) L'audience électronique se tient au téléphone ou par le biais d'un autre moyen électronique. Toutes les parties, tous les tiers qui ont été autorisés à participer à l'audience et la formation doivent pouvoir s'entendre les uns les autres ainsi que les témoins tout au long de l'audience.

Prise de dispositions en vue d'une audience électronique

(5) Le ~~greffe du tribunal~~Tribunal prend toutes les dispositions nécessaires à la tenue de l'audience électronique et avise de ces dispositions toutes les personnes qui y participent et leurs représentants, le cas échéant.

Audience sur pièces

16.03 (1) Sous réserve du paragraphe (3) et des paragraphes 16.02 (1) et (2), les audiences suivantes se tiennent sur pièces :

1. Les audiences portant sur une motion présentée en vue d'obtenir une ordonnance disposant qu'une audience se tienne électroniquement.

Audition de motions sur pièces

(2) Les motions suivantes sont entendues sur pièces :

1. Les motions sur consentement.

2. Les motions visant à obtenir un ajournement.

Ordonnance prévoyant la tenue d'une audience orale

(3) Sur motion d'une partie ou de son propre chef, la formation peut ordonner qu'une audience visée au paragraphe (1) se tienne oralement.

Méthode d'instruction sur pièces

(4) L’audience sur pièces se tient par voie d’échange de documents. Toutes les parties et tous les tiers qui ont été autorisés à participer à l’audience ont le droit de recevoir dans le cadre de celle-ci les mêmes documents que la formation.

Prise de dispositions en vue d’une audience sur pièces

(5) Le ~~greffe du tribunal~~Tribunal prendre toutes les dispositions nécessaires à la tenue de l’audience sur pièces et avise de ces dispositions toutes les personnes qui y participent et leurs représentants, le cas échéant.

Motion présentée en vertu de la règle 21

Avis non obligatoire

16.04 L’obligation de donner un avis, prévue aux paragraphes 16.02 (5) et 16.03 (5) ne vaut pas dans le cas de l’audition d’une motion visant à obtenir une ordonnance visée à la règle 21.01 s’il a été rendu une ordonnance dispensant de la signification d’un dossier de motion.

RÈGLE 17

LIEU DES AUDIENCES

Lieu des audiences

17.01 (1) Sous réserve des paragraphes (2) et (3), toutes les audiences se tiennent dans les bureaux du Barreau à Toronto.

(2) Si toutes les parties y consentent, l'audience se tient ailleurs que dans les bureaux du Barreau à Toronto, à l'endroit dont elles ont convenu.

(3) Sur motion d'une partie, la formation peut ordonner que l'audience se tienne ailleurs que dans les bureaux du Barreau à Toronto.

(4) Lorsqu'elle décide s'il convient d'ordonner qu'une audience se tienne ailleurs que dans les bureaux du Barreau à Toronto, la formation peut peser ce qui suit :

a) la facilité pour les parties de se conformer à l'ordonnance;

b) le coût et l'efficience de l'instance dans le cadre de laquelle se tient l'audience, ainsi que le respect des délais;

c) le fait d'éviter les retards ou toute prolongation inutile de l'instance;

d) l'équité du processus;

e) l'accès du public à l'audience;

f) le fait que le Barreau puisse remplir la mission que lui confie la Loi;

g) toute autre question qu'elle considère comme pertinente dans ses efforts visant à en arriver à un règlement juste et rapide de l'instance dans le cadre de laquelle se tient l'audience.

(5) L'ordonnance disposant qu'une audience se tienne ailleurs que dans les bureaux du Barreau à Toronto ne doit être rendue qu'après consultation du greffe du ~~tribunal~~Tribunal.

RÈGLE 18

ACCÈS AUX AUDIENCES

Audiences publiques

18.01 Sous réserve de la règle 18.02, toutes les audiences sont publiques.

Audiences à huis clos

18.02 Sur motion d'une partie, la formation peut ordonner que tout ou partie d'une audience d'une instance se tienne à huis clos si, selon le cas :

a) des questions intéressant la sécurité publique pourraient être révélées;

b) il est nécessaire de préserver le secret d'un document ou d'une communication protégé;

c) des questions financières ou personnelles de nature intime ou d'autres questions pourraient être révélées, qui sont telles qu'eu égard aux circonstances, l'avantage qu'il y a à ne pas les révéler dans l'intérêt de la personne concernée ou dans l'intérêt public l'emporte sur le principe de la publicité des audiences;

d) dans le cas d'une audience tenue en totalité ou en partie électroniquement, il n'est pas commode de le faire publiquement.

Audience à huis clos

18.03 Sauf si ~~le Comité d'audience~~la formation en décide autrement, les personnes suivantes peuvent être présentes à l'audience qui se tient, en totalité ou en partie, à huis clos :

a) sous réserve de la règle 24.01, tout témoin dont, par sa nature, le témoignage a donné naissance à l'ordonnance de huis clos;

b) les parties et leurs représentants;

c) les tiers qui ont été autorisés à participer à tout ou partie de l'audience et leurs représentants;

d) les autres personnes que la formation juge indiquées.

Interdiction de divulgation : audiences à huis clos

18.04 (1) Sous réserve du paragraphe (2), si tout ou partie d'une audience se tient à huis clos, nul ne doit divulguer ce qui suit à quiconque, si ce n'est son représentant, sa représentante ou une autre personne qui assiste ou participe à l'audience ou à la partie de celle-ci qui se tient à huis clos :

a) les renseignements divulgués à l'audience ou à la partie de celle-ci qui s'est tenue à huis clos;

b) si la formation le précise et dans la mesure où elle le fait, les motifs de la décision ou de l'ordonnance qu'elle rend à la suite de l'audience ou de la partie de celle-ci qui s'est tenue à huis clos, à l'exclusion de ceux de l'ordonnance disposant qu'une audience ultérieure se tienne en totalité ou en partie à huis clos.

Ordonnance de publication : audience à huis clos

(2) Sur motion d'une personne, la formation peut, par ordonnance, permettre à une personne de divulguer des renseignements visés au paragraphe (1).

Ordonnance de non-publication : audience publique

18.05 Sur motion d'une partie ou de son propre chef, la formation, en cas d'application de l'un ou l'autre des alinéas 18.02 a), b) et c), peut, par ordonnance, interdire à quiconque assiste ou participe à une audience publique de divulguer les renseignements divulgués au cours de tout ou partie de l'audience à quiconque, si ce n'est son représentant ou sa représentante ou une autre personne qui y assiste ou y participe.

Révision de l'ordonnance

18.06 ~~Le Comité d'audition~~La formation peut, sur motion d'une personne, réviser tout ou partie d'une ordonnance rendue à l'égard de toute question visée à la présente règle et confirmer, modifier, suspendre ou annuler l'ordonnance.

Interdiction de prendre des photographies, etc. à l'audience

18.07 (1) Sous réserve des paragraphes (2) et (3), nul ne peut,

a) faire ou tenter de faire une reproduction susceptible de donner, par procédé électronique ou autre, des représentations visuelles ou sonores, notamment par photographie, par film ou par enregistrement sonore,

(i) à une audience,

(ii) d'une personne qui entre dans la salle où se tient ou doit se tenir l'audience, ou en sort,

(iii) d'une personne qui se trouve dans l'édifice où se tient ou doit se tenir l'audience, s'il existe des motifs valables de croire que la personne se rend à la salle d'audience ou la quitte;

b) publier, diffuser, reproduire ou distribuer autrement les photographies, les films ou les enregistrements sonores ou autres reproductions faits contrairement à l'alinéa a);

c) diffuser ou reproduire un enregistrement sonore fait de la manière décrite à l'alinéa (2) b).

Exceptions

(2) Le paragraphe (1) n'empêche pas,

a) une personne de prendre discrètement des notes par écrit ou de faire des croquis discrètement, à l'audience;

b) une partie, le représentant d'une partie ou un journaliste de faire, discrètement et de la manière approuvée par ~~le comité d'audition~~la formation, un enregistrement sonore au cours de l'audience destiné uniquement à compléter ou à remplacer des notes manuscrites.

Exceptions

(3) Le paragraphe (1) ne s'applique pas à la photographie, au film, à l'enregistrement sonore ni à l'autre reproduction établie avec l'autorisation ~~du comité d'audition~~de la formation présidant l'audience,

a) aux fins de l'audience, et notamment pour la présentation de la preuve ou pour servir d'archives;

b) aux fins éducatives ou autres approuvées par ~~le comité~~la formation, avec le consentement des parties et des témoins.

RÈGLE 19

DIVULGATION

Obligations du Barreau

19.01 (1) Dans toute instance, le Barreau, en tant que partie, divulgue à la personne visée par l'instance tout ce qu'exige la loi et, notamment, il lui fournit ce qui suit, au plus tard 10 jours avant l'audience sur le fond de l'instance :

a) une copie de tout document sur lequel il se propose de s'appuyer en plus de donner à la personne l'occasion d'examiner tout autre document pertinent;

b) une déclaration écrite signée de chaque témoin ou, à défaut, un résumé du témoignage oral prévu du témoin;

c) la liste des témoins que le Barreau se propose d'appeler.

Obligations de la personne visée par l'instance

(2) Dans les instances portant sur la délivrance d'un permis, sur le rétablissement visé à l'article 31 de la Loi, sur le rétablissement visé à l'article 49.42 de la Loi ou sur un différend concernant des conditions, la personne visée par l'instance fournit ce qui suit au Barreau, au plus tard 10 jours avant l'audience sur le fond de l'instance :

a) une copie de tout document sur lequel elle se propose de s'appuyer;

b) une déclaration écrite signée de chaque témoin sur lequel elle se propose de s'appuyer ou, à défaut, un résumé du témoignage oral prévu du témoin;

c) la liste des témoins qu'elle se propose d'appeler.

Résumé des témoignages

(3) Le résumé du témoignage oral d'un témoin est écrit et comprend ce qui suit :

a) la teneur du témoignage;

b) la liste des documents ou objets, le cas échéant, auxquels le témoin renverra;

c) les nom et adresse du témoin ou, à défaut de l'adresse, les nom et adresse d'une personne par l'intermédiaire de laquelle il est possible de communiquer avec lui.

Rapports d'experts

19.02 (1) Chaque partie et chaque tiers ~~fournit~~fournissent ce qui suit à toutes les autres parties et à tous les autres tiers :

a) au plus tard 90 jours avant l'audience sur le fond de l'instance :

(i) la liste des experts que la personne se propose d'appeler,

(ii) une copie du *curriculum vitae* de chaque expert figurant dans la liste prévue au sous-alinéa (i),

(iii) un résumé du témoignage oral prévu de chaque expert figurant dans la liste prévue au sous-alinéa (i);

b) au plus tard 30 jours avant l'audience sur le fond de l'instance, une copie du rapport écrit de chaque expert figurant dans la liste prévue au sous-alinéa a) (i), si la personne se propose de s'appuyer sur ce rapport à l'audience.

Résumé des témoignages

(2) Le résumé du témoignage oral d'un expert est écrit et comprend ce qui suit :

a) la teneur du témoignage de l'expert;

b) la liste des documents ou objets, le cas échéant, auxquels l'expert renverra;

c) les noms et adresse de l'expert.

Défaut de divulguer : conséquences

Preuve inadmissible

19.03 Les éléments de preuve qui ne sont pas divulgués comme l'exige la règle 19.01 ou 19.02 sont inadmissibles dans une instance, sauf avec la permission de la formation.

RÈGLE 20

AVEUX

Interprétation

20.01 La définition qui suit s'applique à la présente règle.

«authenticité» L'authenticité d'un document comprend les cas où :

a) un document présenté comme un original a été produit, notamment par impression ou rédaction, et signé ou passé comme il paraît l'avoir été;

b) un document présenté comme une copie est une copie conforme de l'original;

c) si le document est la copie d'une lettre, d'un télégramme ou d'un document transmis par télécommunication, l'original a été envoyé comme il paraît l'avoir été et il a été reçu par la personne à qui il est adressé.

Demande d'aveux relatifs à un fait ou à un document

20.02 (1) Dans une instance, une partie peut, au moins 30 jours avant l'audience sur le fond de l'instance, demander à une autre partie de reconnaître, aux fins de l'audience uniquement, la véracité d'un fait ou l'authenticité d'un document.

~~Formule~~Formulaire de demande d'aveux

(2) La demande d'aveux est rédigée selon ~~la formule~~le formulaire 20A.

Signification de la demande d'aveux

(3) La partie qui présente une demande d'aveux à une autre partie lui signifie :

a) d'une part, la demande d'aveux;

b) d'autre part, une copie du document mentionné dans la demande d'aveux, à moins que l'autre partie ne l'ait déjà en sa possession.

Réponse à la demande d'aveux

20.03 (1) La partie à laquelle une demande d'aveux est signifiée y répond dans les 20 jours suivant la signification en signifiant une réponse à la demande d'aveux à la partie qui l'a présentée.

~~Formule~~Formulaire et contenu de la réponse

(2) La réponse à une demande d'aveux est rédigée selon ~~la formule~~le formulaire 20B et, selon le cas :

a) reconnaît la véracité du fait ou l'authenticité du document mentionné dans la demande;

b) nie expressément la véracité du fait ou l'authenticité du document mentionné dans la demande;

c) refuse de reconnaître la véracité du fait ou l'authenticité du document mentionné dans la demande d'aveux en exposant les motifs du refus.

Effet de la demande d'aveux

Défaut de répondre assimilé à un aveu

20.04 (1) La partie qui reçoit signification d'une demande d'aveux et qui ne signifie pas sa réponse dans le délai prescrit au paragraphe 20.03 (1) est réputée, aux fins de l'instance uniquement, reconnaître la véracité des faits ou l'authenticité des documents mentionnés dans la demande.

Réponse insuffisante assimilée à un aveu

(2) Sous réserve du paragraphe (3), la partie qui reçoit signification d'une demande d'aveux et qui signifie sa réponse dans le délai prescrit au paragraphe 20.03 (1) sans toutefois se conformer au paragraphe 20.03 (2) à l'égard d'un fait ou d'un document mentionné dans la demande est réputée, aux fins de l'instance uniquement, reconnaître la véracité de ce fait ou l'authenticité de ce document.

Absence de l'audience ou non-participation à celle-ci assimilée à un aveu

(3) La partie qui reçoit signification d'une demande d'aveux et qui n'assiste pas ou ne participe pas à l'audience sur le fonds de l'instance, est réputée, aux fins de l'instance uniquement, qu'elle ait ou non signifié une réponse, reconnaître la véracité des faits ou l'authenticité des documents mentionnés dans la demande.

Dépens en cas de dénégation ou de refus

20.05 Si une partie nie ou refuse de reconnaître la véracité d'un fait ou l'authenticité d'un document après avoir reçu une demande d'aveux et que la véracité de ce fait ou l'authenticité de ce document est par la suite établie dans le cadre de l'instance, la ~~Comité d'audition~~formation peut prendre la dénégation ou le refus en considération dans l'exercice de son pouvoir discrétionnaire d'adjudication des dépens que lui confèrent l'article 49.28 de la *Loi sur le Barreau* et la règle 25.01.

Rétractation de l’aveu

20.06 (1) Sur motion de la partie qui reconnaît ou est réputée reconnaître la véracité d’un fait ou l’authenticité d’un document, ~~le Comité d’audition peut ordonner la rétractation des~~une ordonnance peut être rendue pour rétracter les aveux.

Délai de présentation de la motion

(2) La motion prévue à la présente règle est présentée :

a) soit avant l’audience sur le fond de l’instance;

b) soit en tout temps, avec ~~la permission du Comité d’audition~~autorisation.

RÈGLE 21

ORDONNANCES DE SUSPENSION OU DE RESTRICTION

Pouvoir de rendre une ordonnance

21.01 Sur motion du Barreau, ~~le Comité d'audition~~la Section de première instance peut rendre une ordonnance interlocutoire ayant pour effet de suspendre le permis du ou de la titulaire de permis ou de restreindre la manière dont un ou une titulaire de permis peut pratiquer le droit ou fournir des services juridiques.

Disposition générale

21.02 (1) Sous réserve de la présente règle, la règle 13 s'applique, ~~ave~~avec les adaptations nécessaires, aux motions présentées en vue d'obtenir une ordonnance prévue à la règle 21.01.

Autorisation nécessaire dans certains cas

(2) Le Barreau doit obtenir l'autorisation du Comité d'autorisation des instances avant de présenter une motion en vue d'obtenir une ordonnance prévue à la règle 21.01 si la motion se rapporte à une instance dont l'instruction n'a pas commencé ou qu'elle est présentée dans le cadre d'une instance sur le fond de laquelle ~~le Comité d'audition~~la Section de première instance n'a pas commencé d'audience.

Présentation de la motion

21.03 Les motions présentées en vue d'obtenir une ordonnance prévue à la règle 21.01 le sont par voie d'avis de motion (~~formule~~formulaire 13A).

Obligations du Barreau

Signification du dossier de motion

21.04 (1) Le Barreau signifie un dossier de motion au ou à la titulaire de permis au moins trois jours avant la date d'audition de la motion.

Mode de signification

(2) Le dossier de motion est signifié conformément au paragraphe 10.01 (1) comme s'il s'agissait d'un acte introductif d'instance.

Dispense de la signification

(3) Sur motion du Barreau, ~~le Comité d'audition peut, par~~une ordonnance~~,~~ peut dispenser de la signification du dossier de motion si, selon le cas :

a) les circonstances rendent la signification peu pratique ou inutile;

b) le délai nécessaire à la signification risque d'avoir des conséquences graves.

Signification du mémoire et du recueil des éléments de doctrine et de jurisprudence

(4) En cas de signification du dossier de motion, le Barreau signifie, s'il en a, son mémoire et son recueil des éléments de doctrine et de jurisprudence au ou à la titulaire de permis au moins trois jours avant la date d'audition de la motion.

Dépôt des documents ~~auprès du greffe du tribunal~~

(5) En cas de signification du dossier de motion, le Barreau dépose les documents signifiés au ou à la titulaire de permis en application de la présente règle, avec la preuve de leur signification, auprès du ~~greffe du tribunal~~Tribunal au plus tard à 16 heures, la veille de l'audition de la motion.

Dépôt des documents auprès de la formation

(6) En cas d'ordonnance dispensant de la signification du dossier de motion, le Barreau dépose, s'il en a, un dossier de motion, son mémoire et son recueil des éléments de doctrine et de jurisprudence auprès de la formation chargée de l'audition de la motion.

Obligations du titulaire de permis

Signification du dossier de motion, du mémoire et du recueil des éléments de doctrine et de jurisprudence

21.05 (1) En cas de signification du dossier de motion en application de la règle 21.04, le ou la titulaire de permis signifie au Barreau, au plus tard à 14 heures, la veille de l'audition de la motion, son dossier de motion, s'il en a, son mémoire, s'il en a, et son recueil des éléments de doctrine et de jurisprudence, s'il en a.

Dépôt des documents ~~auprès du greffe du tribunal~~

(2) Le ou la titulaire de permis dépose les documents signifiés au Barreau en application de la présente règle, avec la preuve de leur signification, auprès du ~~greffe du tribunal~~Tribunal au plus tard à 16 heures, la veille de l'audition de la motion.

Ce qui est admissible en preuve

21.06 (1) Malgré les règles 24.02, 24.06 et 24.07, et sous réserve du paragraphe (2), les éléments suivants peuvent être admis en preuve et servir de fondement à une décision lors de l'audition d'une motion présentée en vue d'obtenir une ordonnance prévue à la

règle 21.01, même s'ils ne sont pas donnés ou prouvés sous serment ou affirmation solennelle et même s'ils sont inadmissibles en preuve devant un tribunal judiciaire :

1. Les preuves testimoniales qui sont pertinentes à l'objet de l'audience.

2. Les écrits et les objets qui sont pertinents à l'objet de l'audience.

Ce qui est inadmissible en preuve

(2) Sauf dans la mesure permise par la Loi, est inadmissible en preuve au cours de l'audience :

a) ce qui serait inadmissible en preuve devant un tribunal judiciaire en raison d'un privilège reconnu en droit de la preuve;

b) ce qui est inadmissible en vertu de n'importe quelle loi.

Ordonnance

21.07 (1) La formation qui rend une ordonnance prévue à la règle 21.01 précise dans l'ordonnance que celle-ci a effet jusqu'au premier en date des événements suivants :

1. En cas d'ordonnance dispensant de la signification du dossier de motion, une formation la modifie ou l'annule en se fondant sur des preuves que le ou la titulaire de permis lui présente dans les 30 jours de celui où il ou elle a reçu signification de l'ordonnance.

2. Une formation modifie ou annule l'ordonnance sur consentement du Barreau et du ou de la titulaire de permis avant l'audience sur le fond de l'instance à laquelle se rapporte la motion.

3. Une formation modifie ou annule l'ordonnance en se fondant sur de nouvelles preuves ou un changement important que le Barreau ou le ou la titulaire de permis lui présente avant l'audience sur le fond de l'instance à laquelle se rapporte la motion.

4. La formation qui préside l'audience sur le fond de l'instance à laquelle se rapporte la motion modifie ou annule l'ordonnance avant de rendre une décision définitive dans l'instance.

5. La formation qui préside l'audience sur le fond de l'instance à laquelle se rapporte la motion rend une décision définitive dans l'instance.

(2) En cas d'ordonnance dispensant de la signification du dossier de motion, le Barreau signifie au ou à la titulaire de permis toute ordonnance de la formation, ainsi

qu’une copie du dossier de motion et de tous les autres documents utilisés au cours de l’audition de la motion.

(3) Sur motion du Barreau, ~~le Comité d’audition peut, par~~une ordonnance~~,~~ peut dispenser de l’observation d’une exigence visée au paragraphe (2).

RÈGLE 22

CONFÉRENCES PRÉPARATOIRES À L'AUDIENCE

Objet de la conférence préparatoire à l'audience

22.01 (1) L'objet de la conférence préparatoire à l'audience est de faciliter une résolution équitable de l'instance, de la façon la plus expéditive.

(2) Sans préjudice de la portée générale du paragraphe (1), la personne, notamment un membre ~~du Comité~~de la formation, qui préside une conférence préparatoire à l'audience peut discuter de ce qui suit avec les parties :

a) la définition, la restriction ou la simplification des questions en litige;

b) la précision de la preuve, le choix des témoins et la restriction de l'une ou des autres;

c) la possibilité de transiger sur une partie ou la totalité des questions en litige dans l'instance;

d) la possibilité pour les parties de s'entendre sur un exposé conjoint de tout ou partie des faits en litige dans l'instance;

e) les directives à donner aux parties relativement au déroulement de l'instance ou à une motion dans l'instance.

Obligation de tenir une conférence préparatoire à l'audience

22.02 Il est tenu une conférence préparatoire à l'audience dans une instance si, selon le cas :

a) une partie à l'instance estime que l'audience sur le fond de celle-ci durera plus de deux jours;

b) un membre ~~du Comité~~de la formation ordonne aux parties à une instance de s'y présenter;

c) les parties conviennent de s'y présenter.

Présidence de la conférence préparatoire à l'audience

22.03 La conférence préparatoire à l'audience est présidée par la personne, notamment un membre ~~du Comité~~de la formation, que nomme le président ou ~~la présidente du Comité d'audition~~le vice-président.

Temps des conférences préparatoires à l'audience

22.04 Toutes les conférences préparatoires à l'audience tenues dans le cadre d'une instance le sont avant la fin de l'audience sur le fond de l'instance et, à moins ~~que le Comité d'audition n'en dispose autrement~~de directive contraire, avant le début de cette audience.

Présence à la conférence préparatoire à l'audience

22.05 (1) Sous réserve du paragraphe (2), la conférence préparatoire à l'audience se tient en présence des parties.

Tenue de la conférence préparatoire à l'audience par conférence téléphonique

(2) La conférence préparatoire à l'audience peut se tenir par conférence téléphonique si, selon le cas :

a) les parties y consentent;

b) le membre ~~du Comité~~de la formation ou la personne qui préside la conférence le permet.

Fixation de la date de la conférence préparatoire à l'audience : par le membre ~~du Comité~~de la formation

22.06 (1) ~~Sous réserve du paragraphe (2), un membre du Comité fixe la date de chaque conférence préparatoire à l'audience lors d'une conférence de gestion de l'instance~~Un membre de la formation ou le greffe du Tribunal peuvent fixer les dates des conférences préparatoires à l'audience.

~~**Fixation de la date de la conférence préparatoire à l'audience : par le greffe du tribunal**~~

~~(2) Le greffe du tribunal peut fixer la date de la conférence préparatoire à l'audience si les conditions suivantes sont réunies :~~

~~a) les parties s'entendent sur la date et l'heure de la conférence;~~

~~b) les parties l'avisent par écrit de leur entente.~~

Inscription

(~~3~~2) Chaque conférence préparatoire à l'audience est inscrite à l'acte introductif d'instance par un membre ~~du Comité~~de la formation ou par le greffe du ~~tribunal~~Tribunal, selon celui qui en fixe la date.

Avis de la conférence préparatoire à l'audience

(~~4~~3) Le ~~greffe du tribunal~~Tribunal avise toutes les parties de la date et de l'heure de chaque conférence préparatoire à l'audience tenue dans le cadre d'une instance en précisant le nom de la personne, notamment le membre ~~du Comité~~de la formation, qui la présidera.

Avis facultatif

(~~5~~4) Le paragraphe (4) ne s'applique pas si les conditions suivantes sont réunies :

a) une formation ordonne aux parties à une instance de se présenter à une conférence préparatoire à l'audience;

b) un membre de la formation qui a donné l'ordre présidera la conférence préparatoire à l'audience;

c) la conférence préparatoire à l'audience suivra immédiatement l'ordre.

Préparation de la conférence préparatoire à l'audience

22.07 (1) Le Barreau prépare un mémoire et le remet aux autres parties et à la personne, notamment le membre ~~du Comité~~de la formation, qui préside la conférence préparatoire à l'audience au moins sept jours avant la tenue de celle-ci.

Non-application du paragraphe (1)

(2) Le paragraphe (1) ne s'applique pas si les conditions suivantes sont réunies :

a) une formation ordonne aux parties à une instance de se présenter à une conférence préparatoire à l'audience;

b) un membre de la formation qui a donné l'ordre présidera la conférence préparatoire à l'audience;

c) la conférence préparatoire à l'audience suivra immédiatement l'ordre.

Présence à la conférence préparatoire à l'audience

22.08 À moins que la personne, notamment un membre ~~du Comité~~de la formation, qui préside la conférence préparatoire à l'audience n'ordonne le contraire, les parties à l'instance ou leurs représentants sont tenus d'assister en personne à la conférence et d'y participer.

Résultats de la conférence préparatoire à l'audience

22.09 (1) À l'issue de la conférence préparatoire à l'audience, la personne, notamment le membre ~~du Comité~~de la formation, qui la préside inscrit ce qui suit à l'acte introductif d'instance :

a) le nom des personnes qui ont assisté en personne à la conférence ou qui y ont participé, et celui de celles qui ne l'ont pas fait;

b) les transactions conclues;

c) toute directive donnée aux parties relativement au déroulement de l'instance ou à une motion dans l'instance.

(2) Les transactions conclues lors d'une conférence préparatoire à l'audience et inscrites à l'acte introductif d'instance lient les parties.

Non-divulgation à la formation

22.10 (1) Aucun renseignement relatif à la conférence préparatoire à l'audience n'est communiqué à la formation qui préside l'audience sur le fond de l'instance ou l'audition d'une motion dans l'instance, sauf dans la mesure prévue par l'inscription faite en application de la règle 22.09.

Deux membres ~~du Comité~~ différents pour présider les audiences

(2) Le membre ~~du Comité~~de la formation qui préside la conférence préparatoire à l'audience ne préside pas l'audience sur le fond de l'instance, sauf avec le consentement des parties à l'instance.

RULE 22.1

DÉPÔT DE DOCUMENTS DE CONSENTEMENT AVANT L'AUDIENCE

Documents à déposer

22.1.01 (1) Avant la date de l'audience, les parties déposent auprès du ~~greffe du tribunal~~Tribunal tous les documents, y compris tout exposé conjoint des faits, qui du consentement des parties, peuvent être utilisés ou mentionnés au cours de l'audience.

Moment du dépôt

(2) À moins de circonstances exceptionnelles, les parties déposent les documents auprès du ~~greffe du tribunal~~Tribunal en application de la présente règle au moins deux jours avant la date de l'audience.

Confirmation de l'accord à déposer

(3) Lors du dépôt de tout document auprès du ~~greffe du tribunal~~Tribunal en application de la présente règle, les parties déposent, en même temps que le document, une confirmation écrite de leur accord à l'utilisation ou à la mention de celui-ci au cours de l'audience.

Nombre de copies à déposer

(4) Lors du dépôt d'un document auprès du ~~greffe du tribunal~~Tribunal en application de la présente règle, les parties déposent selon le cas :

a) deux ~~copies~~exemplaires du document si l'audience se tient devant une formation composée d'un seul membre ~~du Comité~~de la formation;

b) quatre ~~copies~~exemplaires du document si l'audience se tient devant une formation composée de trois membres ~~du Comité~~.

Documents à mettre à la disposition de la formation

(5) Autant que possible, tous les documents déposés auprès du ~~greffe du tribunal~~Tribunal en application de la présente règle sont mis à la disposition de la formation qui préside l'audience avant le début de celle-ci.

Aucune dispense des autres exigences

(6) La présente règle n'a pas pour effet de dispenser une partie des exigences prévues aux Règles ou des conséquences du non-respect de ces exigences.

Dépôt de documents auprès de la formation durant l'audience

(7) La présente règle n’a pas pour effet d’empêcher une partie de déposer un document auprès de la formation qui préside l’audience en application des présentes Règles.

RÈGLE 23

DÉROULEMENT DES AUDIENCES

Consentement à l'instruction de l'instance par un seul membre

23.01 Pour l'application de la disposition 2 du paragraphe 2 (1) du Règlement de l'Ontario 167/07, les parties à une instance portant sur la conduite peuvent consentir à ce qu'un seul membre ~~du Comité~~de la formation préside l'audience sur le fond de l'instance en déposant leur consentement (~~formule~~formulaire 23A) :

a) soit auprès du ~~greffe du tribunal~~Tribunal, le plus tôt possible, mais au moins trois jours avant la date de l'audience;

b) soit auprès du membre ~~du Comité~~de la formation, avant le début de l'audience.

Transcriptions

Production des transcriptions

23.02 (1) Le ~~greffe du tribunal~~Tribunal fait enregistrer toutes les audiences orales et électroniques par un service de sténographie de façon à permettre la production d'une transcription.

Commande d'une transcription

(2) La personne qui souhaite avoir une transcription de l'audience la commande auprès du service de sténographie qui a enregistré l'audience.

Coût de la transcription

(3) Le coût de la transcription d'une audience est à la charge exclusive de la personne qui souhaite l'avoir.

Obligation de déposer la transcription

(4) La première partie qui obtient la transcription d'une audience en dépose une copie auprès du ~~greffe du tribunal~~Tribunal.

Interprètes

23.03 (1) Le ~~greffe du tribunal~~Tribunal fournit l'interprète dont a besoin un témoin qui ne comprend pas la ou les langues dans lesquelles doit se dérouler un interrogatoire pendant l'audience.

Avis au ~~greffe du tribunal~~Tribunal

(2) La personne qui a l'intention d'appeler un témoin qui a besoin d'interprétation en avise le ~~greffe du tribunal~~Tribunal le plus tôt possible, mais au moins cinq jours avant l'audience à laquelle le témoin subira un interrogatoire.

Compétence de l'interprète

(3) L'interprète est compétent et indépendant.

Serment ou affirmation solennelle

(4) L'interprète requis en application du paragraphe (1) s'engage, sous serment ou affirmation solennelle, avant que le témoin soit appelé, à traduire fidèlement le serment ou l'affirmation solennelle du témoin ainsi que les questions qui lui sont posées et ses réponses.

Besoins particuliers

23.05 Les parties ou les tiers informent le plus tôt possible le greffe du ~~tribunal~~Tribunal de leurs besoins particuliers ou de ceux de leurs témoins.

Limite imposée à l'interrogatoire

23.06 La formation peut imposer des limites raisonnables à la poursuite de l'interrogatoire ou du contre-interrogatoire d'un témoin si elle est convaincue que l'interrogatoire ou le contre-interrogatoire a déjà fait toute la lumière sur tout ce qui touche aux questions en litige dans le cadre de l'instance.

RÈGLE 24

PREUVE

Exclusion de témoins

24.01 (1) Sous réserve du paragraphe (2), sur motion d'une partie, la formation peut, par ordonnance, exclure un témoin de la salle d'audience jusqu'à ce qu'il soit appelé à témoigner.

Restriction

(2) L'ordonnance visée au paragraphe (1) ne peut être rendue à l'égard d'une partie ou d'un témoin dont la présence est essentielle pour renseigner le représentant ou la représentante de la personne qui l'a appelé à témoigner. La formation peut toutefois, par ordonnance, exiger que cette partie ou ce témoin témoigne avant que d'autres témoins soient appelés à témoigner pour cette partie ou cette personne.

Interdiction de communiquer avec un témoin exclu

(3) Sous réserve du paragraphe (4), nul ne peut communiquer au témoin exclu d'une audience par suite d'une ordonnance le contenu des témoignages entendus pendant son absence, avant que ce témoin soit lui-même appelé et témoigne.

Ordonnance permettant la communication avec un témoin exclu

(4) Sur motion de la personne qui appelle à témoigner le témoin exclu de l'audience, la formation peut, par ordonnance, permettre de communiquer au témoin des témoignages entendus pendant son absence.

Règles d'administration de la preuve

24.02 Sous réserve de la présente règle, les règles d'administration de la preuve applicables dans les instances civiles s'appliquent aux audiences.

Preuve par affidavit : audience sur le fond de l'instance

24.03 (1) Lors de l'audience sur le fond de l'instance, la déposition d'un témoin ou la preuve de l'existence d'un fait ou d'un document donné peut être faite au moyen d'un affidavit, sous réserve de toute ordonnance à l'effet contraire ~~du Comité d'audition~~de la formation.

Contre-interrogatoire

(2) Lorsque la déposition d'un témoin ou la preuve de l'existence d'un fait ou d'un document donné est faite au moyen d'un affidavit, le déposant ou la déposante qu'une

partie opposée à la partie qui présente la preuve ainsi faite souhaite ~~contre-interroger~~contreinterroger :

a) soit assiste en personne à l'audience sur le fond de l'instance aux fins du contre-interrogatoire;

b) soit se présente devant un auditeur officiel aux fins du contre-interrogatoire, la transcription de celui-ci pouvant alors être ~~admis~~admise en preuve à l'audience sur le fond de l'instance.

(3) Le contre-interrogatoire mené en application de l'alinéa (2) b) l'est conformément aux dispositions des Règles de procédure civile applicables aux interrogatoires oraux et, au besoin, les parties peuvent demander des directives à la formation.

Accord sur les faits

24.04 Lors de l'audience sur le fond de l'instance, la formation peut recevoir les faits sur lesquels les parties se sont mises d'accord sans autre preuve ni témoignage, et agir en conséquence.

Admissibilité de la preuve admise à l'égard d'une autre instance

Interprétation

24.05 (1) La définition suivante s'applique à la présente règle.

«preuve déjà admise» Preuve qui a été admise dans le cadre d'une autre instance devant un ~~tribunal~~Tribunal judiciaire ou administratif, qu'il soit situé ou non en Ontario, lors d'une audience tenue avant celle dans laquelle son admission est maintenant demandée.

Moment de l'admission

(2) La preuve déjà admise peut être admise lors de l'audience sur le fond de l'instance si, selon le cas :

a) les parties à l'instance y consentent;

b) les conditions suivantes sont réunies :

(i) la formation est convaincue qu'il existe une transcription raisonnablement fidèle de l'audience antérieure,

(ii) la preuve déjà admise est pertinente dans le cadre de l'audience en cours,

(iii) la partie à laquelle la preuve dont l'admission est demandée est défavorable était ou est une partie à l'autre instance,

(iv) la partie à laquelle la preuve dont l'admission est demandée est défavorable a eu l'occasion de ~~contre-interroger~~contreinterroger le témoin à l'audience antérieure si elle n'y a pas elle-même témoigné,

(v) une question importante en litige dans l'autre instance est semblable sur le fond à une question importante en litige dans l'instance en cours.

Preuve d'une infraction antérieure

24.06 (1) La preuve qu'une personne a été déclarée par un organisme juridictionnel du Canada coupable d'avoir commis une infraction constitue la preuve, en l'absence de preuve contraire, que l'infraction a été commise par la personne si, selon le cas :

a) il n'a pas été interjeté appel de la déclaration de culpabilité et le délai d'appel est expiré;

b) il a été interjeté appel de la déclaration de culpabilité, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Le paragraphe (1) s'applique que la personne soit partie à l'instance ou non.

(3) Pour l'application du paragraphe (1), un document attestant la déclaration de culpabilité, qui se présente comme étant signé par l'officier ayant la garde des archives de l'organisme juridictionnel, constitue une preuve suffisante de la déclaration de culpabilité.

Preuve de faits antérieurs

24.07 (1) Les constatations de fait précises qui figurent dans les motifs de la décision d'un organisme juridictionnel du Canada constituent la preuve, en l'absence de preuve contraire, des faits en cause si, selon le cas :

a) il n'a pas été interjeté appel de la décision et le délai d'appel est expiré;

b) il a été interjeté appel de la décision, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Si les constatations de fait visées au paragraphe (1) concernent un particulier, ce paragraphe ne s'applique que si celui-ci est ou était partie à l'instance qui a donné lieu à la décision.

Transcription de l'instance

24.08 (1) Une transcription de l'audience devant un organisme juridictionnel peut être admise en preuve à l'audience.

Motifs

(2) Les motifs de la décision d'un organisme juridictionnel peuvent être admis en preuve à l'audience.

Connaissance des faits

24.09 ~~Le Comité d'audition~~La formation peut :

a) prendre connaissance des faits qu'un tribunal judiciaire peut connaître d'office;

b) prendre connaissance des données, renseignements ou opinions techniques qui sont généralement reconnus dans le domaine de sa spécialité.

Dossiers bancaires et commerciaux

24.10 Toute preuve qui doit être faite ou toute exigence qui doit être remplie avant qu'un dossier bancaire ou commercial puisse être reçu ou admis en preuve en application d'une règle de common law ou d'origine législative peut être faite ou remplie au moyen du témoignage oral ou d'un affidavit d'un particulier qui énonce les faits au mieux de sa connaissance et de ce qu'il tient pour véridique.

Éléments de preuve documentaire

24.11 Lors d'une audience, la partie ou le tiers qui présente un écrit comme élément de preuve en fournit :

a) d'une part, ~~une copie~~un exemplaire à chacune des autres parties et à chacun des autres tiers;

b) d'autre part, quatre ~~copies~~exemplaires à la formation, si elle est composée de trois membres ~~du Comité~~, et trois, si elle est composée d'un seul membre ~~du Comité~~.

Copies

24.12 Est admissible en preuve au cours d'une audience la copie d'un écrit ou d'un objet dont la formation est convaincue de l'authenticité.

Assignation

24.13 (1) Le ~~Comité d'audition~~Tribunal peut assigner une personne à comparaître à une audience pour l'obliger :

a) d'une part, à témoigner sous serment ou affirmation solennelle;

b) d'autre part, à produire des écrits ou des objets précisés comme éléments de preuve.

~~Formule~~Formulaire de l'assignation

(2) L'assignation est rédigée selon ~~la formule~~le formulaire 24A.

Signature de l'assignation

(3) L'assignation peut porter la signature de la ~~personne qui occupe le poste de conseiller juridique principal et directeur du greffe du tribunal~~greffière ou du greffier.

Possibilité de délivrer des assignations en blanc

(4) À la demande d'une personne, le ~~greffe du tribunal~~Tribunal peut lui délivrer une assignation en blanc. La personne peut remplir l'assignation et y inscrire le nom des témoins.

Signification de l'assignation

(5) Sous réserve du paragraphe (7), la personne qui a obtenu l'assignation la signifie au témoin.

Indemnité de présence

(6) Sous réserve du paragraphe (7), la personne qui a obtenu l'assignation verse l'indemnité de présence au témoin, au moment où elle la lui signifie, conformément au tarif A des *Règles de procédure civile.*

Signification et indemnité de présence facultatives

(7) Il n'est pas nécessaire que la personne qui a obtenu l'assignation la signifie à un témoin qui est présent à l'audience ni qu'elle lui verse une indemnité de présence pour le faire comparaître comme témoin à l'audience.

Non-admissibilité de certains renseignements

24.14 Malgré toute règle, les renseignements obtenus par le conseiller ou la conseillère juridique en matière de discrimination et de harcèlement dans l'exercice des fonctions que

lui attribue l'alinéa 19 (1) a) du ~~règlement~~Règlement administratif n^{o} 11 ne doivent pas être utilisés au cours d'une audience et y sont inadmissibles.

RÈGLE 25

DÉPENS

Dépens

Condamnation aux dépens du Barreau

25.01 (1) Le Barreau ne peut être condamné aux dépens :

a) dans une instance portant sur la délivrance d'un permis, la conduite, la capacité, la compétence professionnelle ou l'inobservation :

(i) soit que si l'instance était injustifiée;

(ii) soit que s'il les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission;

b) dans une instance non visée à l'alinéa a), que s'il les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission.

Condamnation aux dépens de la personne visée par l'instance

(2) La personne visée par l'instance peut être condamnée aux dépens si, selon le cas :

a) la décision rendue lui est défavorable;

b) elle les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission.

Condamnation aux dépens d'un tiers

(3) Un tiers peut être condamné aux dépens s'il les a fait engager sans raison valable ou les a fait augmenter inutilement par des retards abusifs, par négligence ou par une autre omission.

Conférence sur la résolution de la cause avec consentement : pas de condamnation aux dépens

(4) Malgré les paragraphes (1) et (2), ni le Barreau ni la personne visée par l'instance ne doit être condamné aux dépens pour l'un ou l'autre des motifs suivants :

a) le refus de l'une ou l'autre partie de participer à une conférence sur la résolution de la cause avec consentement ou son retrait d'une telle conférence;

b) le fait qu'une conférence sur la résolution de la cause avec consentement ne s'est pas soldée par un règlement soit quant à la décision et à l'ordonnance ~~que le Comité d'audition doit rendre~~ dans l'instance portant sur la conduite, soit quant à la décision ~~qu'il doit~~à rendre et à l'éventail des ordonnances ~~qu'il peut rendre~~qui peuvent être rendues dans une telle instance.

Montant des dépens : tarif des honoraires relatifs aux services

(5) Lorsque ~~le Comité d'audition~~la formation adjuge les dépens, ~~il~~elle tient compte du tarif des honoraires relatifs aux services, sans toutefois être ~~lié~~liée par celui-ci.

Cautionnement pour dépens

Champ d'application

25.02 (1) La présente règle d'applique aux instances suivantes :

1. Les instances portant sur la délivrance d'un permis, si la personne visée en l'espèce a déjà été titulaire d'un permis l'autorisant à pratiquer le droit en Ontario en qualité d'avocat ou à fournir des services juridiques en Ontario.

2. Les instances portant sur le rétablissement visé à l'article 31 de la Loi.

3. Les instances portant sur le rétablissement visé à l'article 49.42 de la Loi.

4. Les instances portant sur un différend concernant des conditions.

Applicabilité

(2) Sur motion du Barreau, la formation peut rendre une ordonnance de cautionnement pour dépens juste s'il est établi que :

a) la personne visée par l'instance fait l'objet d'une ordonnance de condamnation aux dépens dans la même instance ou dans une autre prévue par la Loi et que ceux-ci n'ont pas encore été acquittés, en totalité ou en partie;

b) dans le cas d'une instance portant sur le rétablissement visé à l'article 49.42 de la Loi ou un différend concernant des conditions, il existe de bonnes raisons de croire que l'instance est injustifiée et que la personne qu'elle vise n'a pas suffisamment de biens en Ontario pour payer les dépens du Barreau si cela lui était ordonné;

c) dans le cas d'une instance portant sur la délivrance d'un permis ou le rétablissement visé à l'article 31 de la Loi, il existe de bonnes raisons de croire que la personne qu'elle vise n'a pas suffisamment de biens en Ontario pour payer les dépens du Barreau si cela lui était ordonné.

Effet de l'ordonnance

(3) Sous réserve du paragraphe (4), la personne visée par l'instance contre qui est rendue une ordonnance de cautionnement pour dépens ne peut prendre d'autres mesures dans l'instance tant que le cautionnement n'a pas été versé.

Ordonnance permettant de prendre une mesure

(4) Sur motion d'une partie ou de son propre chef, la formation peut, par ordonnance, permettre à la personne visée par l'instance de prendre une mesure dans celle-ci.

Défaut de la personne visée par l'instance

(5) Si la personne visée par l'instance ne verse pas le cautionnement imposé par l'ordonnance de cautionnement pour dépens, la formation peut, sur motion du Barreau, ordonner le rejet de l'instance.

RÈGLE 26

DÉCISIONS, ORDONNANCES ET MOTIFS

Décisions

Date de prise d'effet

26.01 (1) La décision prend effet à compter de la date à laquelle elle est rendue.

Inscription

(2) Le président ou la présidente de la formation inscrit chaque décision :

a) soit à l'acte introductif d'instance;

b) soit à une feuille de papier distincte annexée à l'acte introductif d'instance.

Cas où des motifs écrits sont rendus

(3) Si des motifs écrits sont rendus, l'inscription peut consister en un renvoi à ces motifs.

Ordonnances

Ordonnances rendues par une formation d'un membre ~~du Comité~~de la formation

26.02 (1) Il est interdit à une formation composée d'un seul membre ~~du Comité~~de la formation de rendre une ordonnance révoquant le permis d'un ou d'une titulaire de permis ou autorisant le ou la titulaire de permis à remettre son permis.

Ordonnance infligeant une amende

(2) La formation qui rend une ordonnance infligeant une amende à la personne visée par l'instance y précise ce qui suit :

a) le montant du principal;

b) si des intérêts sont payables, le taux d'intérêt, lequel est le taux d'intérêt postérieur au jugement au sens de la *Loi sur les tribunaux judiciaires* en vigueur à la date de prise d'effet de l'ordonnance, et la date à partir de laquelle ils doivent être calculés.

Ordonnance d'adjudication des dépens

(3) La formation qui rend une ordonnance d'adjudication des dépens y précise ce qui suit :

a) le montant du principal;

b) le taux d'intérêt, lequel est le taux d'intérêt postérieur au jugement au sens de la *Loi sur les tribunaux judiciaires* en vigueur à la date de prise d'effet de l'ordonnance, et la date à partir de laquelle il doit être calculé.

Date de prise d'effet

(4) L'ordonnance, à moins qu'elle ne contienne une disposition contraire, prend effet à compter de la date à laquelle elle est rendue.

Inscription

(5) L'ordonnance est inscrite par le président ou la présidente de la formation qui la rend :

a) soit à l'acte introductif d'instance ou à une feuille de papier distincte qui lui est annexée;

b) soit, si l'ordonnance se rapporte à une motion, au dossier de motion ou à une feuille de papier distincte qui lui est annexée.

Cas où des motifs écrits sont rendus

(6) Si des motifs écrits sont rendus, l'inscription peut consister en un renvoi à ces motifs.

Ordonnance définitive ou décision et ordonnance ~~définitives~~définitive

Rédaction du projet d'ordonnance ou de décision et d'ordonnance

26.03 (1) La partie sur laquelle une ordonnance ou une décision et une ordonnance ~~a~~ont une incidence peut rédiger un projet d'ordonnance ou d'ordonnance et de décision.

Forme de l'ordonnance définitive ou de la décision et de l'ordonnance ~~définitives~~définitive

(2) L'ordonnance définitive est rédigée selon ~~la formule~~le formulaire 26A et la décision et l'ordonnance définitives sont rédigées selon ~~la formule~~le formulaire 26B.

Signature de l'ordonnance ou de la décision et de l'ordonnance

(3) La partie qui a rédigé un projet d'ordonnance ou de décision et d'ordonnance peut le remettre à la formation qui a rendu l'ordonnance ou la décision et l'ordonnance à la fin de l'audience.

(4) La formation examine tous les projets qui lui sont remis en application du paragraphe (3) et son président ou sa présidente signe l'un d'eux en le modifiant ou non.

(5) Si aucune des parties ne rédige de projet d'ordonnance ou de décision et d'ordonnance, le greffe du ~~tribunal~~Tribunal en rédige un et un membre ~~du Comité~~de la formation qui fait partie de la formation qui a rendu l'ordonnance ou la décision et l'ordonnance le signe.

Motifs écrits

Motifs obligatoires

26.04 La formation motive par écrit :

a) sa décision et son ordonnance dans une instance portant sur la capacité;

b) son ordonnance ou sa décision et son ordonnance si, selon le cas :

(i) une partie le demande oralement immédiatement après le prononcé de l'ordonnance,

(ii) une partie le demande par écrit ~~au greffe du tribunal~~ dans les 60 jours qui suivent le prononcé de l'ordonnance.

Correction d'erreurs

26.05 ~~Le greffe du tribunal~~La greffière ou le greffier ou la formation ~~peut~~peuvent en tout temps corriger une erreur typographique, une erreur de calcul ou une erreur mineure semblable dans une décision, une ordonnance, une décision et ~~une~~ ordonnance ~~définitives~~définitive, une ordonnance définitive ou les motifs de la formation.

Avis des décisions

26.06 (1) Le ~~greffe du tribunal~~Tribunal envoie à chaque partie, ou au représentant ou à la représentante de chaque partie :

a) qui a participé à une instance :

(i) une copie de la décision et de l'ordonnance définitives,

(ii) une copie des motifs écrits, le cas échéant, de la décision, de l'ordonnance ou de la décision et de l'ordonnance,

(iii) une copie de la décision corrigée, de l'ordonnance corrigée, de la décision et des ordonnances définitives corrigées ou des motifs corrigés;

b) qui a participé à l'audition d'une motion dans une instance :

(i) une copie de l'ordonnance définitive,

(ii) une copie des motifs écrits, le cas échéant, de l'ordonnance,

(iii) une copie de l'ordonnance corrigée, de l'ordonnance définitive corrigée ou des motifs corrigés.

Mode d'envoi de l'avis

(2) Tout document qui doit être envoyé en application du paragraphe (1) l'est :

a) soit par courrier ordinaire à la dernière adresse de la partie ou de son représentant ou de sa représentante connue du ~~greffe du tribunal~~Tribunal;

b) soit par livraison en personne au Barreau;

~~c) avec le consentement préalable de son ou de sa destinataire :(i)~~ soit par télécopie au dernier numéro de télécopieur de la partie ou de son représentant ou de sa représentante connu du ~~greffe du tribunal~~Tribunal,

~~(ii~~d) soit par courrier électronique à la dernière adresse électronique de la partie ou de son représentant ou de sa représentante connue du ~~greffe du tribunal~~Tribunal.

Idem

(3) Si un document qui doit être envoyé en application du paragraphe (1) l'est à un ou à une titulaire de permis, la mention au paragraphe (2) de la dernière adresse, du dernier numéro de télécopieur ou de la dernière adresse électronique connu du ~~greffe du tribunal~~Tribunal vaut mention de celui ou de celle qui figure au registre que le Barreau est tenu de créer et de tenir à jour en application de l'article 27.1 de la Loi.

Courrier

(4) Tout document envoyé par courrier ordinaire est réputé reçu le cinquième jour qui suit la date de sa mise à la poste.

Télécopie ou courrier électronique

(5) Tout document envoyé par télécopie ou par courrier électronique est réputé reçu le lendemain de son envoi.

RÈGLE 27

DOSSIER DE L'INSTANCE

Obligation d'établir un dossier

27.01 (1) Le ~~greffe du tribunal établir~~Tribunal établit un dossier de toutes les instances.

Teneur du dossier

(2) Le dossier de l'instance comprend ce qui suit :

1. Tous les documents déposés auprès du ~~greffe du tribunal~~Tribunal en application des présentes règles à l'égard de l'instance ou d'une de ses étapes.

2. Tous les documents reçus par une formation en application des présentes règles à l'égard de l'instance ou d'une de ses étapes.

3. L'avis de l'audience sur le fond de l'instance.

4. L'inscription de la décision et de l'ordonnance ~~rendues~~rendue dans l'instance et de l'ordonnance rendue à la suite d'une motion présentée dans l'instance.

5. La décision et l'ordonnance définitives rendues dans l'instance ou l'ordonnance définitive rendue à la suite d'une motion présentée dans l'instance.

6. Les motifs, le cas échéant, de la décision ou de l'ordonnance rendue dans l'instance ou de l'ordonnance rendue à la suite d'une motion présentée dans l'instance.

7. La transcription de l'audience tenue dans l'instance ou de l'audition d'une motion présentée dans l'instance qu'obtient le ~~greffe du tribunal~~Tribunal.

Domaine public

(3) Sous réserve du paragraphe (4), le dossier d'une instance est du domaine public.

Documents soustraits au public

(4) Les documents ou parties de document versés au dossier de l’instance dont la divulgation est interdite en application de la règle 18.04 ou 18.05 ne sont pas mis à la disposition du public.

RÈGLE 28

RÉPRIMANDES

Temps de l’administration

28.01 (1) Une réprimande ne doit pas être administrée avant l’expiration du délai de signification d’un avis d’appel à moins que les parties ne renoncent au droit d’appel.

Habileté à administrer

(2) N’importe quel membre ~~du Comité~~de la formation qui fait partie de la formation qui a ordonné la réprimande peut l’administrer.

Administration pendant une audience

(3) Sous réserve du paragraphe (4), la réprimande est administrée lors d’une séance publique.

Administration par écrit

(4) La réprimande peut être administrée par écrit.

(5) Le document qui contient la réprimande écrite est considéré comme faisant partie du dossier de l’instance dans le cadre de laquelle son administration a été ordonnée.

RÈGLE 29

CONFÉRENCE SUR LA RÉSOLUTION DE LA CAUSE AVEC CONSENTEMENT

Définitions

29.01 Les définitions qui suivent s'appliquent à la présente règle.

« conférence sur la résolution de la cause avec consentement » Conférence à laquelle participent le Barreau et la personne visée par une instance éventuelle, qui est présidée par une formation de résolution de la cause avec consentement et qui se tient avant l'introduction de l'instance portant sur la conduite en vue d'en arriver à un règlement :

a) soit quant à la décision et à l'~~'~~ordonnance ~~que le Comité d'audition doit~~à rendre dans une telle instance;

b) soit quant à la décision ~~que le Comité d'audition doit~~à rendre et à l'éventail des ordonnances ~~qu'il peut rendre~~qui peuvent être rendues dans une telle instance. (*« consent resolution conference »*)

« formation de résolution de la cause avec consentement » Le ou, collectivement, les membres ~~du Comité~~de la formation nommés à la présidence d'une conférence sur la résolution de la cause avec consentement. (*« consent resolution panel »*)

«instance éventuelle» Instance portant sur la conduite qui n'a pas encore été introduite. (*« potential proceeding »*)

« personne visée par une instance éventuelle » Personne qui sera visée par une instance portant sur la conduite quand elle aura été introduite. (*« subject of a potential proceeding »*)

Moment de la tenue d'une conférence sur la résolution de la cause avec consentement

29.02 (1) Le président ou ~~la présidente ou, en son absence,~~ le vice-président ~~ou la vice-présidente du Comité d'audition~~ ordonne la tenue d'une conférence sur la résolution de la cause avec consentement si les conditions suivantes sont réunies :

1. Le Barreau a obtenu du Comité d'autorisation des instances l'autorisation :

   i. d'une part, d'introduire une instance portant sur la conduite,

   ii. d'autre part, de demander ~~au Comité d'audition~~à la Section de première instance d'ordonner la tenue d'une conférence sur la résolution de la cause avec consentement.

2. L'instance portant sur la conduite n'a pas été introduite.

3. Le Barreau et la personne visée par l'instance éventuelle ont convenu :

   i. soit de la décision et de l'ordonnance ~~que le Comité d'audition doit~~à rendre dans l'instance portant sur la conduite;

   ii. soit de la décision ~~que le Comité d'audition doit~~à rendre et de l'éventail des ordonnances ~~qu'il peut rendre~~qui peuvent être rendues dans l'instance portant sur la conduite.

4. La personne visée par l'instance éventuelle a consenti à participer à une conférence sur la résolution de la cause avec consentement.

5. Le Barreau a demandé la tenue d'une conférence sur la résolution de la cause avec consentement.

Présidence de la conférence sur la résolution de la cause avec consentement

(2) La conférence sur la résolution de la cause avec consentement est présidée par une formation ~~de~~ d'un ou de trois membres ~~du Comité~~ que nomme le président ou ~~la présidente ou, en son absence,~~ le vice-président ~~ou la vice-présidente du Comité d'audition~~ lorsqu'il ou elle en ordonne la tenue en application du paragraphe (1).

Présentation d'une demande ~~au greffe du tribunal~~

29.03 (1) Le Barreau peut demander la tenue d'une conférence sur la résolution de la cause avec consentement en présentant une demande écrite au ~~greffe du tribunal~~Tribunal.

Renseignements sur les conditions

(2) Le Barreau donne, dans la demande écrite qu'il présente pour obtenir la tenue d'une conférence sur la résolution de la cause avec consentement, des renseignements suffisants pour convaincre le président ou ~~la présidente ou, en son absence,~~ le vice-président ~~ou la vice-présidente du Comité d'audition~~ de l'existence des conditions énoncées à la règle 29.02.

Coordonnées de la personne visée par l'instance éventuelle

(3) Le Barreau donne également, dans la demande écrite qu'il présente pour obtenir la tenue d'une conférence sur la résolution de la cause avec consentement, le nom de la personne visée par l'instance éventuelle de même que son adresse aux fins de signification, son numéro de téléphone ainsi que, si elle en a, son numéro de télécopieur et son adresse électronique.

Avis de la tenue d'une conférence sur la résolution de la cause avec consentement : Barreau

29.04 Si le président ou ~~la présidente ou, en son absence,~~ le vice-président ~~ou la vice-présidente du Comité d'audition~~ ordonne la tenue d'une conférence sur la résolution de la cause avec consentement, le ~~greffe du tribunal~~Tribunal avise le Barreau et la personne visée par l'instance éventuelle des date, heure et endroit fixés pour la tenue de la conférence.

Procédure de la conférence sur la résolution de la cause avec consentement

29.05 (1) Les règles de pratique et de procédure applicables aux instances tenues devant ~~le Comité d'audition~~la Section de première instance qui sont énoncées aux règles 2 à 20 et 22 à 28 ne s'appliquent pas aux conférences sur la résolution des causes avec consentement.

(2) Sous réserve de la présente règle, les règles de pratique et de procédure applicables à la conférence sur la résolution de la cause avec consentement sont fixées par la formation de résolution de la cause avec consentement qui la préside.

Huis clos

(3) La conférence sur la résolution de la cause avec consentement se tient à huis clos.

Retrait de la conférence sur la résolution de la cause avec consentement

29.06 (1) Le Barreau ou la personne visée par l'instance éventuelle peut se retirer de la conférence sur la résolution de la cause avec consentement en tout temps avant ou pendant la conférence.

Avis de retrait

(2) Qu'il s'agisse du Barreau ou de la personne visée par l'instance éventuelle, la partie qui souhaite se retirer de la conférence sur la résolution de la cause avec consentement en vertu du paragraphe (1) en avise par écrit l'autre partie et le ~~greffe du tribunal~~Tribunal.

Règlement lors de la conférence sur la résolution de la cause avec consentement : introduction d'une instance portant sur la conduite

29.07 (1) Lorsque la conférence sur la résolution de la cause avec consentement se solde par un règlement soit quant à la décision et à l'ordonnance ~~que le Comité d'audition doit~~à rendre dans l'instance portant sur la conduite, soit quant à la décision ~~qu'il doit~~à rendre et à l'éventail des ordonnances ~~qu'il peut rendre~~qui peuvent être rendues dans une telle instance, le Barreau :

a) d'une part, introduit cette instance;

b) d'autre part, avise par écrit le ~~greffe du tribunal~~Tribunal de ce fait et de la teneur générale du règlement atteint lors de la conférence sur la résolution de la cause avec consentement au plus tard le jour de l'introduction de l'instance.

Règlement lors de la conférence sur la résolution de la cause avec consentement : non-application de certaines règles

(2) Lorsque la conférence sur la résolution de la cause avec consentement se solde par un règlement quant à la décision et à l'ordonnance ~~que le Comité d'audition doit~~à rendre dans l'instance portant sur la conduite, malgré la règle 1.01, les règles suivantes ne s'appliquent pas à cette instance :

1. La règle 6.

2. La règle 7.

3. La règle 8.

4. La règle 12.

5. La règle 13.

6. La règle 14.

7. La règle 16.

8. La règle 19.

9. La règle 20.

10. La règle 21.

11. La règle 22.

Absence de règlement ou retrait lors d'une conférence sur la résolution de la cause avec consentement : audiences ultérieures

29.08 Si la conférence sur la résolution de la cause avec consentement ne se solde pas par un règlement soit quant à la décision et à l'ordonnance ~~que le Comité d'audition doit~~à rendre dans l'instance portant sur la conduite, soit quant à la décision ~~qu'il doit~~à rendre et à l'éventail des ordonnances ~~qu'il peut rendre~~qui peuvent être rendues dans une telle instance, ou si le Barreau ou la partie visée par l'instance éventuelle se retire de la conférence en vertu de la règle 29.06 :

a) d'une part, rien ne doit être communiqué à aucun membre ~~du Comité d'audition~~de la Section de première instance nommé à la présidence d'une audience tenue dans le cadre de l'instance portant sur la conduite de tout document créé spécifiquement ni de toute déclaration faite lors de la conférence sur la résolution de la cause avec consentement;

b) d'autre part, aucun membre de la formation de résolution de la cause avec consentement ne doit être nommé à la présidence d'une audience tenue dans le cadre de l'instance portant sur la cause.

~~TITRE DES DOCUMENTS~~
~~(INSTANCES PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)~~

~~*(N^o^ du dossier du Comité d'audition du Barreau)*~~

~~COMITÉ D'AUDITION DU BARREAU~~

~~ENTRE :~~

~~*(nom)*~~
~~requérant(e)~~

~~et~~

~~*(nom)*~~
~~intimé(e)~~

~~REQUÊTE PRÉSENTÉE AUX TERMES DE *(disposition législative aux termes desquelles la requête est présentée).*~~

~~*(Intitulé du document)*~~

~~*(Corps du document)*~~

TITRE DES DOCUMENTS
(INSTANCES PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(N° du dossier du Comité d'audition du Barreau)

COMITÉ D'AUDITION DU BARREAU

ENTRE :

(nom)
requérant(e)

et

Le Barreau du Haut-Canada
intimé

REQUÊTE PRÉSENTÉE AUX TERMES DE *(disposition législative aux termes desquelles la requête est présentée)* renvoyée à l'audience aux termes de *(disposition législative aux termes de laquelle la requête doit être entendue).*

(Intitulé du document)

(Corps du document)

FORMULE 4A – AVIS DE CONSTITUTION DE NOUVEAU REPRÉSENTANT

(titre)

AVIS DE CONSTITUTION DE NOUVEAU REPRÉSENTANT

(*Nom de la partie OU du tiers*), jusqu'ici représenté(e) par (*nom de l'ancien représentant*), a constitué (*nom du nouveau représentant*) son(sa) représentant(e) commis(e) au dossier.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du nouveau représentant*)

DESTINATAIRES : (*nom et adresse de l'ancien représentant)*

(*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

FORMULE 4B – AVIS DE CONSTITUTION DE REPRÉSENTANT

(*titre*)

AVIS DE CONSTITUTION DE REPRÉSENTANT

(*nom de la partie OU du tiers*) a constitué (*nom*) son(sa) représentant(e) commis(e) au dossier.

(date) _____

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant commis au dossier*)

DESTINATAIRES : (*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

FORMULE 4C – AVIS D'INTENTION D'AGIR EN SON PROPRE NOM

(titre)

AVIS D'INTENTION D'AGIR EN SON PROPRE NOM

(*nom de la partie OU du tiers*), jusqu'ici représenté(e) par (*nom*) à titre de représentant(e) commis(e) au dossier, a l'intention d'agir en son propre nom.

(date)

(Signature de la partie/du tiers)
(Indiquer en caractères d'imprimerie le nom de la partie/du tiers)

(Remplir ce qui suit si c'est le représentant commis au dossier qui dépose la présente formule.)

Je *(nom du représentant commis au dossier)* confirme que j'ai expliqué l'objet de la présente formule à *(nom de la partie OU du tiers)* et que j'ai confirmé son intention d'agir en son propre nom à ma place. (*nom de la partie OU du tiers)* a signé la présente formule au moment où il (*elle*) a consenti à agir en son propre nom.

(date)

(Signature du représentant commis au dossier)
(Indiquer en caractères d'imprimerie le nom du représentant commis au dossier)

(date)

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique de la partie/du tiers qui a l'intention d'agir en son propre nom)*

DESTINATAIRES : (*nom et adresse de l'ancien représentant)*

(noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)

FORMULE 9A – AVIS DE REQUÊTE

(*titre*)

AVIS DE REQUÊTE

À L'INTIMÉ(E)

UNE INSTANCE PORTANT SUR (*LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS*) A ÉTÉ INTRODUITE par le(la) requérant(e). La demande présentée par le(la) requérant(e) est exposée dans la page suivante.

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER à une conférence de gestion de l'instance le (*jour*) (*date*), à (*heure*), dans les bureaux du Barreau du Haut-Canada, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario). Vous pouvez choisir de comparaître par ministère de représentant.

SI VOUS OU VOTRE REPRÉSENTANT(E) NE VOUS PRÉSENTEZ PAS À LA CONFÉRENCE DE GESTION DE L'AUDIENCE, LE MEMBRE DU COMITÉ QUI LA PRÉSIDE POURRA PROCÉDER EN VOTRE ABSENCE.

(OU
LA PRÉSENTE REQUÊTE sera entendue le (jour) (date), à (heure), dans les bureaux du Barreau du Haut-Canada, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario).)

Date :

DESTINATAIRE : (*nom et adresse de l'intimé)*

REQUÊTE

1. L'objet de la requête est le suivant :

2. Les moyens à l'appui de la requête sont les suivants :

3. Les détails de la requête sont les suivants :

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)*

FORMULE 9B – AVIS DE RENVOI À L'AUDIENCE

(*titre*)

AVIS DE RENVOI À L'AUDIENCE

AU(À LA) REQUÉRANT(E) :

VOTRE DEMANDE DE (*PERMIS OU RÉTABLISSEMENT DE VOTRE PERMIS EN APPLICATION DE L'ARTICLE 31 DE LA LOI*) A ÉTÉ RENVOYÉE À L'AUDIENCE DEVANT LE COMITÉ D'AUDITION DU BARREAU, ce qui entraîne l'introduction d'une instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER à une conférence de gestion de l'instance le (*jour*) (*date*), à (*heure*), dans les bureaux du Barreau du Haut-Canada, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario). Vous pouvez choisir de comparaître par ministère de représentant.

SI VOUS OU VOTRE REPRÉSENTANT(E) NE VOUS PRÉSENTEZ PAS À LA CONFÉRENCE DE GESTION DE L'AUDIENCE, LE MEMBRE DU COMITÉ QUI LA PRÉSIDE POURRA PROCÉDER EN VOTRE ABSENCE.

Date :

DESTINATAIRE : (*nom et adresse du requérant)*

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant du Barreau du Haut-Canada)*

FORMULE 9C – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

(*titre*)

AVIS DE DÉSISTEMENT
(INSTANCE PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

LE(LA) REQUÉRANT(E) se désiste de l'instance portant sur (*la conduite, la capacité, la compétence professionnelle, l'inobservation, le rétablissement visé à l'article 49.42 de la Loi ou un différend concernant des conditions*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant*)

DESTINATAIRE : (*nom et adresse du représentant de l'intimé ou de l'intimé*)

FORMULE 9D – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(*titre*)

AVIS DE DÉSISTEMENT
(INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

LE BARREAU DU HAUT-CANADA retire le renvoi à l'audience de la demande (*de permis OU de rétablissement de son permis en application de l'article 31 de la Loi*) présentée par le(la) requérant(e) et, de ce fait, se désiste de l'instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant du Barreau du Haut-Canada)*

DESTINATAIRE : (*nom et adresse du représentant du requérant ou du requérant*)

FORMULE 9E – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(*titre*)

AVIS DE DÉSISTEMENT
(INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

LE(LA) REQUÉRANT(E) retire sa demande (*de permis OU de rétablissement de son permis en application de l'article 31 de la Loi*) et, de ce fait, se désiste de l'instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)*

DESTINATAIRE : (*nom et adresse du représentant du Barreau du Haut-Canada*)

FORMULE 13A – AVIS DE MOTION

(titre)

AVIS DE MOTION

Le/La/L' *(désigner l'auteur de la motion)* présentera auprès du Comité d'audition du Barreau une motion le *(jour) (date)*, à *(heure)*, ou dès que possible par la suite, dans les bureaux du Barreau du Haut-Canada, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario) *(ou préciser l'endroit)*.

TYPE D'AUDIENCE PROPOSÉ : Je propose que la motion soit entendue *(cocher la case appropriée)* :

- ☐ par voie d'audience électronique en vertu du paragraphe 16.02 (1) parce *(qu'elle est présentée sur consentement OU qu'il s'agit d'une motion d'ajournement)*.
- ☐ sur pièces en vertu du paragraphe 16.03 (1) parce qu'il s'agit d'une motion présentée en vue d'obtenir une ordonnance disposant qu'une audience se tienne électroniquement.
- ☐ sur pièces en vertu du paragraphe 16.03 (2) parce *(qu'elle est présentée sur consentement OU qu'il s'agit d'une motion d'ajournement)*.
- ☐ oralement.

L'OBJET DE LA MOTION EST LE SUIVANT : *(indiquer ici la mesure de redressement précise demandée)*.

LES MOYENS À L'APPUI DE LA MOTION SONT LES SUIVANTS : *(préciser les moyens qui seront plaidés)*.

LA PREUVE DOCUMENTAIRE SUIVANTE sera utilisée lors de l'audition de la motion :
(indiquer les affidavits ou les autres preuves documentaires à l'appui de la motion).

(date)

(nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant de l'auteur de la motion ou de l'auteur de la motion)

~~DESTINATAIRE : (*nom et adresse du représentant de l'intimé ou de l'intimé*)~~

~~FORMULE 13B – AVIS DE DÉSISTEMENT (MOTION)~~

~~*(titre)*~~

~~AVIS DE DÉSISTEMENT (MOTION)~~

~~*(nom de l'auteur de la motion)* se désiste de sa motion visant *(indiquer la nature de la motion).*~~

~~*(date)*~~

~~(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant de l'auteur de la motion ou de l'auteur de la motion)*~~

~~DESTINATAIRE : (*nom, adresse et numéro de téléphone du représentant de l'intimé ou de l'intimé*)~~

FORMULE 20A – DEMANDE D'AVEUX

(titre)

DEMANDE D'AVEUX

VOUS ÊTES PRIÉ(E), aux fins de l'instance uniquement, DE RECONNAÎTRE la véracité des faits suivants : (*indiquer les faits sous forme de dispositions numérotées consécutivement)*

VOUS ÊTES PRIÉ(E), aux fins de l'instance uniquement, DE RECONNAÎTRE l'authenticité (voir la règle 20 des Règles de pratique et de procédure du Comité d'audition du Barreau) des documents suivants : (*Numéroter chaque document et donner suffisamment de précisions pour permettre de l'identifier. Préciser si le document constitue l'original ou une copie et, s'il s'agit de la copie d'une lettre, d'un télégramme ou d'une télécommunication, préciser la nature du document.)*

Une copie de chacun des documents susmentionnés est annexée à la présente demande. *(s'il n'est pas pratique d'annexer une copie ou si la partie en a déjà une en sa possession, préciser les documents qui ne sont pas annexés et donner les motifs à l'appui)*

VOUS DEVEZ RÉPONDRE À LA PRÉSENTE DEMANDE en signifiant une réponse à la demande d'aveux, rédigée selon la formule 20B, DANS LES VINGT JOURS après que vous recevez signification de la présente demande. À défaut de ce faire, vous serez réputé (e), aux fins de l'instance uniquement, reconnaître la véracité des faits et l'authenticité des documents susmentionnés. Si vous signifiez une réponse dans le délai prescrit ci-dessus sans vous prononcer sur chaque fait ou document susmentionné, vous serez réputé (e), aux fins de l'instance uniquement, reconnaître la véracité des seuls faits et l'authenticité des seuls documents pour lesquels vous n'avez pas fourni de réponse.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant ou de la partie qui signifie la demande)*

DESTINATAIRE : (*nom et adresse du représentant ou de la partie à qui est signifiée la demande)*

FORMULE 20B – RÉPONSE À LA DEMANDE D'AVEUX

(titre)

RÉPONSE À LA DEMANDE D'AVEUX

En réponse à votre demande d'aveux du *(date)*, *(nom de la partie qui signifie la réponse) :*

1. reconnaît la véracité des faits portant les numéros *(indiquer les numéros des faits)*

2. reconnaît l'authenticité des documents portant les numéros *(indiquer les numéros des documents)*

3. nie la véracité des faits portant les numéros *(indiquer les numéros des faits)*

4. nie l'authenticité des documents portant les numéros *(indiquer les numéros des documents)*

5. refuse de reconnaître la véracité des faits portant les numéros *(indiquer les numéros des faits)* pour les motifs suivants : *(indiquer le motif de votre refus pour chacun des faits)*

6. refuse de reconnaître l'authenticité des documents portant les numéros *(indiquer les numéros des documents)* pour les motifs suivants : *(indiquer le motif de votre refus pour chacun des documents)*

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant ou de la partie qui signifie la réponse)*

DESTINATAIRE : (*nom et adresse du représentant ou de la partie à qui est signifiée la réponse)*

FORMULE 23A – CONSENTEMENT À LA TENUE D'UNE AUDIENCE DEVANT UN SEUL MEMBRE DU COMITÉ

(titre)

CONSENTEMENT À LA TENUE D'UNE AUDIENCE DEVANT UNE SEUL MEMBRE DU COMITÉ

(nom de la partie autre que le Barreau du Haut-Canada) et le Barreau du Haut-Canada consentent à ce que l'instance soit instruite sur le fond et tranchée par un seul membre du Comité.

(date)

(signature de la partie autre que le Barreau du Haut-Canada)
(Indiquer en caractères d'imprimerie le nom de la partie)

(date)

(signature du représentant du Barreau du Haut-Canada)
(Indiquer en caractères d'imprimerie le nom du représentant du Barreau du Haut-Canada)

FORMULE 24A – ASSIGNATION

(titre)

ASSIGNATION À TÉMOIGNER DEVANT LE COMITÉ D'AUDITION DU BARREAU

À – *(nom et adresse du témoin)*

(audience orale)

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER DEVANT LE COMITÉ D'AUDITION AFIN D'Y TÉMOIGNER lors de l'instruction de la présente instance le *(jour)*, *(date)*, à *(heure)*, dans les bureaux du Barreau du Haut-Canada, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario) *(ou indiquer l'endroit)* et d'y demeurer jusqu'à ce que votre présence ne soit plus requise.

VOUS ÊTES REQUIS(E) D'APPORTER AVEC VOUS et de produire, lors de l'instruction, les documents et objets suivants : *(indiquer la nature et la date de chaque document et donner suffisamment de précisions pour permettre d'identifier chaque document et objet)*

SI VOUS NE VOUS PRÉSENTEZ PAS OU NE DEMEUREZ PAS PRÉSENT(E) COMME LE REQUIERT LA PRÉSENTE ASSIGNATION, LA COUR SUPÉRIEURE DE JUSTICE PEUT ORDONNER QU'UN MANDAT D'ARRÊT SOIT DÉCERNÉ CONTRE VOUS OU QUE VOUS SOYEZ SANCTIONNÉ(E) DE LA MÊME FAÇON QUE POUR OUTRAGE AU TRIBUNAL.

(audience électronique)

VOUS ÊTES REQUIS(E) DE PARTICIPER À UNE AUDIENCE ÉLECTRONIQUE le *(jour)* *(date)*, à *(heure)*, de la manière suivante : *(donner suffisamment de précisions pour permettre au témoin de participer)*

SI VOUS NE PARTICIPEZ PAS À L'AUDIENCE COMME LE REQUIERT LA PRÉSENTE ASSIGNATION, LA COUR SUPÉRIEURE DE JUSTICE PEUT ORDONNER QU'UN MANDAT D'ARRÊT SOIT DÉCERNÉ CONTRE VOUS OU QUE VOUS SOYEZ SANCTIONNÉ(E) DE LA MÊME FAÇON QUE POUR OUTRAGE AU TRIBUNAL.

(date)

Comité d'audition du Barreau

~~Conseiller(ère) juridique principal(e) et directeur(trice), greffe du tribunal~~

~~REMARQUE : Vous avez le droit de toucher la même indemnité pour votre présence ou votre participation à l'audience que celle que toucherait une personne assignée à comparaître devant la Cour supérieure de justice.~~

~~FORMULE 26A – ORDONNANCE DÉFINITIVE~~

~~*(N^o^ du dossier du Comité d'audition du Barreau)*~~

~~COMITÉ D'AUDITION DU BARREAU~~

~~*(noms des membres du Comité dont est composée la formation)*~~

~~*(jour et date du prononcé de l'ordonnance)*~~

~~*(titre de l'instance)*~~

~~ORDONNANCE~~

~~*(Ordonnance faisant suite à l'audition d'une requête)*~~

~~LA REQUÊTE a été entendue le ou les *(jour(s)), (*à *indiquer l'endroit OU par voie électronique), (en présence des représentants de toutes les parties (et de tous les tiers) OU en présence du(des) représentant(s) de (désigner la ou les parties et le ou les tiers), (ajouter au besoin : (désigner la ou les parties et le ou les tiers) comparaissant en personne, personne ne représentant (désigner la ou les parties et le ou les tiers), bien que remise appropriée de l'avis lui(leur) ait été faite comme l'atteste (indiquer la preuve de la remise de l'avis de l'audience sur le fond de la requête)).*~~

~~APRÈS AVOIR LU *(L'AVIS DE REQUÊTE ET LA REQUÊTE OU L'AVIS DE RENVOI À L'AUDIENCE)* ET LES ÉLÉMENTS DE PREUVE DÉPOSÉS PAR LES PARTIES *(et les tiers), (Après avoir entendu les témoignages présentés par les parties (et les tiers),* et après avoir entendu les plaidoiries *(des représentants des parties (et des tiers) OU du(des) représentant(s) de (désigner la ou les parties et le ou les tiers) et de (désigner la ou les parties et le ou les tiers comparaissant en personne)),*~~

~~*(ET AYANT CONCLU QUE (préciser la conclusion habilitant à rendre l'ordonnance),*~~

~~*(Ordonnance faisant suite à l'audition d'une motion)*~~

~~LA MOTION présentée par *(désigner l'auteur de la motion)* en vue d'obtenir *(indiquer la mesure de redressement demandée dans l'avis de motion)* a été entendue le(*s*) *(jour(s), (*à *indiquer l'endroit OU par voie électronique OU sur pièces).*~~

~~APRÈS AVOIR LU *(préciser les documents déposés à l'appui de la motion)* et après avoir entendu les plaidoiries du(*des*) représentant(*s*) de *(désigner les parties et les tiers), (ajouter au besoin : (désigner les parties et les tiers) comparaissant en personne, personne ne représentant (désigner les parties et les tiers), bien que la signification appropriée de l'avis lui(leur) ait été faite (indiquer la preuve de la signification)),~~

~~IL EST ORDONNÉ QUE :~~

~~1. …~~

~~2. …~~

~~*(signature du président ou de la présidente de la formation qui a rendu l'ordonnance)*~~

~~FORMULE 26B – DÉCISION ET ORDONNANCE DÉFINITIVES~~

~~*(N^o^ du dossier du Comité d'audition du Barreau)*~~

~~COMITÉ D'AUDITION DU BARREAU~~

~~*(noms des membres du Comité dont est composée la formation)*~~

~~*(jour et date du prononcé de l'ordonnance)*~~

~~*(titre de l'instance)*~~

~~DÉCISION ET ORDONNANCE~~

~~LA REQUÊTE a été entendue le ou les *(jour(s)), (à indiquer l'endroit OU par voie électronique), (en présence des représentants de toutes les parties (et de tous les tiers) OU en présence du(des) représentant(s) de (désigner la ou les parties et le ou les tiers), (ajouter au besoin : (désigner la ou les parties et le ou les tiers) comparaissant en personne, personne ne représentant (désigner la ou les parties et le ou les tiers), bien que remise appropriée de l'avis lui(leur) ait été faite comme l'atteste (indiquer la preuve de la remise de l'avis de l'audience sur le fond de la requête)).*~~

~~APRÈS AVOIR LU *(L'AVIS DE REQUÊTE ET LA REQUÊTE OU L'AVIS DE RENVOI À L'AUDIENCE)* ET LES ÉLÉMENTS DE PREUVE DÉPOSÉS PAR LES PARTIES *(et les tiers), (Après avoir entendu les témoignages présentés par les parties (et les tiers),* et après avoir entendu les plaidoiries *(des représentants des parties (et des tiers) OU du(des) représentant(s) de (désigner la ou les parties et le ou les tiers) et de (désigner la ou les parties et le ou les tiers comparaissant en personne)),*~~

~~IL EST CONCLU QUE *(préciser la conclusion habilitant à rendre l'ordonnance),*~~

~~ET IL EST ORDONNÉ QUE :~~

~~1. …~~

~~2. …~~

~~*(signature du président ou de la présidente de la formation qui a rendu l'ordonnance)*~~

Document comparison by Workshare Compare on 10 février 2014 10:55:42

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Description	HP Rules (fr) (apr 25-13)
Document 2 ID	file://M:\Services en Français-French Language Services\Tribunal\HP Rules (fr) (Jan 23-14).doc
Description	HP Rules (fr) (Jan 23-14)
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Insertion	
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Statistics:	
	Count
Insertions	283
Deletions	562
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	845

TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE
FORMULAIRES PRÉVUS PAR LES RÈGLES DE PRATIQUE ET DE PROCÉDURE

~~(visant les instances du Comité d'audition du Barreau)~~

~~Adoptée~~Prises le : 26 février 2009
~~Modifiée~~Modifiées : 25 juin 2009
29 juin 2010
27 janvier 2011
28 avril 2011
28 février 2013
25 avril 2013
2014

~~FORMULES~~

TITRE DES DOCUMENTS (INSTANCES PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

(N^{o} du dossier du ~~Comité d'audition~~Tribunal du Barreau)

~~COMITÉ D'AUDITION~~TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

ENTRE :

(nom)
requérant(e)

et

(nom)
intimé(e)

REQUÊTE PRÉSENTÉE AUX TERMES DE *(disposition législative aux termes desquelles la requête est présentée).*

(Intitulé du document)

(Corps du document)

TITRE DES DOCUMENTS
(INSTANCES PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(N^{o} du dossier du ~~Comité d'audition~~Tribunal du Barreau)

~~COMITÉ D'AUDITION~~TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

ENTRE :

(nom)

requérant(e)

et

Le Barreau du Haut-Canada

intimé

REQUÊTE PRÉSENTÉE AUX TERMES DE *(disposition législative aux termes desquelles la requête est présentée)* renvoyée à l'audience aux termes de *(disposition législative aux termes de laquelle la requête doit être entendue).*

(Intitulé du document)

(Corps du document)

~~FORMULE~~FORMULAIRE 4A ~~-~~– AVIS DE CONSTITUTION DE NOUVEAU REPRÉSENTANT

(*titre*)

AVIS DE CONSTITUTION DE NOUVEAU REPRÉSENTANT

(*Nom de la partie OU du tiers*), jusqu'ici représenté(e) par (*nom de l'ancien représentant*), a constitué (*nom du nouveau représentant*) son(sa) représentant(e) commis(e) au dossier.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du nouveau représentant*)

DESTINATAIRES : (*nom et adresse de l'ancien représentant)*

(*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

~~FORMULE~~FORMULAIRE 4B – AVIS DE CONSTITUTION DE REPRÉSENTANT

(*titre*)

AVIS DE CONSTITUTION DE REPRÉSENTANT

(*nom de la partie OU du tiers*) a constitué (*nom*) son(sa) représentant(e) commis(e) au dossier.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant commis au dossier*)

DESTINATAIRES : (*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

~~FORMULE~~FORMULAIRE 4C ~~–~~ – AVIS D'INTENTION D'AGIR EN SON PROPRE NOM

(*titre*)

AVIS D'INTENTION D'AGIR EN SON PROPRE NOM

(*nom de la partie OU du tiers*), jusqu'ici représenté(e) par (*nom*) à titre de représentant(e) commis(e) au dossier, a l'intention d'agir en son propre nom.

(date)

(Signature de la partie/du tiers)
(Indiquer en caractères d'imprimerie le nom de la partie/du tiers)

(Remplir ce qui suit si c'est le représentant commis au dossier qui dépose ~~la présente formule~~le présent formulaire.)

Je *(nom du représentant commis au dossier)* confirme que j'ai expliqué l'objet ~~de la présente formule~~du présent formulaire à *(nom de la partie OU du tiers)* et que j'ai confirmé son intention d'agir en son propre nom à ma place. (*nom de la partie OU du tiers)* a signé ~~la présente formule~~le présent formulaire au moment où il (*elle*) a consenti à agir en son propre nom.

(date)

(Signature du représentant commis au dossier)
(Indiquer en caractères d'imprimerie le nom du représentant commis au dossier)

(date)

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique de la partie/du tiers qui a l'intention d'agir en son propre nom)*

DESTINATAIRES : (*nom et adresse de l'ancien représentant)*

(*noms et adresses des représentants des autres parties et des autres tiers, ou noms et adresses des autres parties et des autres tiers)*

~~FORMULE~~FORMULAIRE 9A ~~–~~ = AVIS DE REQUÊTE

(*titre*)

AVIS DE REQUÊTE

À L'INTIMÉ(E)

UNE INSTANCE PORTANT SUR (*LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS*) A ÉTÉ INTRODUITE par le(la) requérant(e). La demande présentée par le(la) requérant(e) est exposée dans la page suivante.

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER à une conférence de gestion de l'instance le (*jour*) (*date*), à (*heure*), ~~dans les bureaux~~au Tribunal du Barreau ~~du Haut Canada~~, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario). Vous pouvez choisir de comparaître par ministère de représentant.

SI VOUS OU VOTRE REPRÉSENTANT(E) NE VOUS PRÉSENTEZ PAS À LA CONFÉRENCE DE GESTION DE L'AUDIENCE, LE MEMBRE ~~DU COMITÉ~~DE LA FORMATION QUI LA PRÉSIDE POURRA PROCÉDER EN VOTRE ABSENCE.

(*OU*
LA PRÉSENTE REQUÊTE sera entendue le (jour) (date), à (heure), ~~dans les bureaux~~au Tribunal du Barreau ~~du Haut Canada~~, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario).)

Date :

DESTINATAIRE : (*nom et adresse de l'intimé)*

REQUÊTE

1. L'objet de la requête est le suivant :

2. Les ~~moyens à l'appui~~motifs de la requête sont les suivants :

3. Les ~~???~~allégations de la requête sont les suivantes :

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur*

et adresse électronique du requérant ou du représentant du requérant)

~~FORMULE~~FORMULAIRE 9B ~~–~~ – AVIS DE RENVOI À L'AUDIENCE

(*titre*)

AVIS DE RENVOI À L'AUDIENCE

AU(À LA) REQUÉRANT(E) :

VOTRE DEMANDE DE (*PERMIS OU RÉTABLISSEMENT DE VOTRE PERMIS EN APPLICATION DE L'ARTICLE 31 DE LA LOI*) A ÉTÉ RENVOYÉE À L'AUDIENCE DEVANT ~~LE COMITÉ D'AUDITION~~LA SECTION DE PREMIÈRE INSTANCE DU TRIBUNAL DU BARREAU, ce qui entraîne l'introduction d'une instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER à une conférence de gestion de l'instance le (*jour*) (*date*), à (*heure*), ~~dans les bureaux~~au Tribunal du Barreau ~~du Haut-Canada~~, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario). Vous pouvez choisir de comparaître par ministère de représentant.

SI VOUS OU VOTRE REPRÉSENTANT(E) NE VOUS PRÉSENTEZ PAS À LA CONFÉRENCE DE GESTION DE L'AUDIENCE, LE MEMBRE ~~DU COMITÉ~~DE LA FORMATION QUI LA PRÉSIDE POURRA PROCÉDER EN VOTRE ABSENCE.

Date :

DESTINATAIRE : (*nom et adresse du requérant)*

(*nom, adresse aux fins de signification, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant du Barreau du Haut-Canada)*

~~FORMULE~~FORMULAIRE 9C – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

(*titre*)

AVIS DE DÉSISTEMENT
(INSTANCE PORTANT SUR LA CONDUITE, LA CAPACITÉ, LA COMPÉTENCE PROFESSIONNELLE, L'INOBSERVATION, LE RÉTABLISSEMENT VISÉ À L'ARTICLE 49.42 DE LA LOI OU UN DIFFÉREND CONCERNANT DES CONDITIONS)

LE(LA) REQUÉRANT(E) se désiste de l'instance portant sur (*la conduite, la capacité, la compétence professionnelle, l'inobservation, le rétablissement visé à l'article 49.42 de la Loi ou un différend concernant des conditions*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)*

DESTINATAIRE : (*nom et adresse du représentant de l'intimé ou de l'intimé*)

~~FORMULE~~FORMULAIRE 9D ~~–~~ = AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(*titre*)

AVIS DE DÉSISTEMENT
(INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

LE BARREAU DU HAUT-CANADA retire le renvoi à l'audience de la demande (*de permis OU de rétablissement de son permis en application de l'article 31 de la Loi*) présentée par le(la) requérant(e) et, de ce fait, se désiste de l'instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant du Barreau du Haut-Canada)*

DESTINATAIRE : (*nom et adresse du représentant du requérant ou du requérant*)

~~FORMULE~~FORMULAIRE 9E ~~–~~ – AVIS DE DÉSISTEMENT (INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

(*titre*)

AVIS DE DÉSISTEMENT
(INSTANCE PORTANT SUR LA DÉLIVRANCE D'UN PERMIS OU LE RÉTABLISSEMENT VISÉ À L'ARTICLE 31 DE LA LOI)

LE(LA) REQUÉRANT(E) retire sa demande (*de permis OU de rétablissement de son permis en application de l'article 31 de la Loi*) et, de ce fait, se désiste de l'instance (*portant sur la délivrance d'un permis OU le rétablissement visé à l'article 31 de la Loi*).

(*date*)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du requérant ou du représentant du requérant)*

DESTINATAIRE : (*nom et adresse du représentant du Barreau du Haut-Canada*)

~~FORMULE~~FORMULAIRE 13A – AVIS DE MOTION

(titre)

AVIS DE MOTION

Le/La/L' *(désigner l'auteur de la motion)* présentera auprès ~~du Comité d'audition~~de la Section de première instance du Tribunal du Barreau une motion le *(jour) (date)*, à *(heure)*, ou dès que possible par la suite, ~~dans les bureaux~~au Tribunal du Barreau ~~du Haut-Canada~~, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario) *(ou préciser l'endroit)*.

TYPE D'AUDIENCE PROPOSÉ : Je propose que la motion soit entendue *(cocher la case appropriée)* :

- ☐ par voie d'audience électronique en vertu du paragraphe 16.02 (1) parce *(qu'elle est présentée sur consentement OU qu'il s'agit d'une motion d'ajournement).*
- ☐ sur pièces en vertu du paragraphe 16.03 (1) parce qu'il s'agit d'une motion présentée en vue d'obtenir une ordonnance disposant qu'une audience se tienne électroniquement.
- ☐ sur pièces en vertu du paragraphe 16.03 (2) parce *(qu'elle est présentée sur consentement OU qu'il s'agit d'une motion d'ajournement)*.
- ☐ oralement.

L'OBJET DE LA MOTION EST LE SUIVANT : *(indiquer ici la mesure de redressement précise demandée)*.

LES MOYENS À L'APPUI DE LA MOTION SONT LES SUIVANTS : *(préciser les moyens qui seront plaidés)*.

LA PREUVE DOCUMENTAIRE SUIVANTE sera utilisée lors de l'audition de la motion : *(indiquer les affidavits ou les autres preuves documentaires à l'appui de la motion).*

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant de l'auteur de la motion ou de l'auteur de la motion)*

DESTINATAIRE : (*nom et adresse du représentant de l'intimé ou de l'intimé*)

~~FORMULE~~FORMULAIRE 13B – AVIS DE DÉSISTEMENT (MOTION)

(titre)

AVIS DE DÉSISTEMENT (MOTION)

(nom de l'auteur de la motion) se désiste de sa motion visant *(indiquer la nature de la motion).*

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant de l'auteur de la motion ou de l'auteur de la motion)*

DESTINATAIRE : (*nom, adresse et numéro de téléphone du représentant de l'intimé ou de l'intimé*)

~~FORMULE~~FORMULAIRE 20A – DEMANDE D'AVEUX

(titre)

DEMANDE D'AVEUX

VOUS ÊTES PRIÉ(E), aux fins de l'instance uniquement, DE RECONNAÎTRE la véracité des faits suivants : (*indiquer les faits sous forme de dispositions numérotées consécutivement)*

VOUS ÊTES PRIÉ(E), aux fins de l'instance uniquement, DE RECONNAÎTRE l'authenticité (voir la règle 20 des Règles de pratique et de procédure ~~du Comité d'audition~~de la Section de première instance du Tribunal du Barreau) des documents suivants : (*Numéroter chaque document et donner suffisamment de précisions pour permettre de l'identifier. Préciser si le document constitue l'original ou une copie et, s'il s'agit de la copie d'une lettre, d'un télégramme ou d'une télécommunication, préciser la nature du document.)*

Une copie de chacun des documents susmentionnés est annexée à la présente demande. *(s'il n'est pas pratique d'annexer une copie ou si la partie en a déjà une en sa possession, préciser les documents qui ne sont pas annexés et donner les motifs à l'appui)*

VOUS DEVEZ RÉPONDRE À LA PRÉSENTE DEMANDE en signifiant une réponse à la demande d'aveux, rédigée selon ~~la formule~~le formulaire 20B, DANS LES VINGT JOURS après que vous recevez signification de la présente demande. À défaut de ce faire, vous serez réputé (e), aux fins de l'instance uniquement, reconnaître la véracité des faits et l'authenticité des documents susmentionnés. Si vous signifiez une réponse dans le délai prescrit ci-dessus sans vous prononcer sur chaque fait ou document susmentionné, vous serez réputé (e), aux fins de l'instance uniquement, reconnaître la véracité des seuls faits et l'authenticité des seuls documents pour lesquels vous n'avez pas fourni de réponse.

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant ou de la partie qui signifie la demande)*

DESTINATAIRE : (*nom et adresse du représentant ou de la partie à qui est signifiée la demande)*

~~FORMULE~~FORMULAIRE 20B – RÉPONSE À LA DEMANDE D'AVEUX

(titre)

RÉPONSE À LA DEMANDE D'AVEUX

En réponse à votre demande d'aveux du *(date)*, *(nom de la partie qui signifie la réponse)* :

1. reconnaît la véracité des faits portant les numéros *(indiquer les numéros des faits)*

2. reconnaît l'authenticité des documents portant les numéros *(indiquer les numéros des documents)*

3. nie la véracité des faits portant les numéros *(indiquer les numéros des faits)*

4. nie l'authenticité des documents portant les numéros *(indiquer les numéros des documents)*

5. refuse de reconnaître la véracité des faits portant les numéros *(indiquer les numéros des faits)* pour les motifs suivants : *(indiquer le motif de votre refus pour chacun des faits)*

6. refuse de reconnaître l'authenticité des documents portant les numéros *(indiquer les numéros des documents)* pour les motifs suivants : *(indiquer le motif de votre refus pour chacun des documents)*

(date)

(*nom, adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du représentant ou de la partie qui signifie la réponse)*

DESTINATAIRE : (*nom et adresse du représentant ou de la partie à qui est signifiée la réponse)*

~~FORMULE~~FORMULAIRE 23A – CONSENTEMENT À LA TENUE D'UNE AUDIENCE DEVANT UN SEUL MEMBRE ~~DU COMITÉ~~DE LA FORMATION

(titre)

CONSENTEMENT À LA TENUE D'UNE AUDIENCE DEVANT ~~UNE~~UN SEUL MEMBRE ~~DU COMITÉ~~DE LA FORMATION

(nom de la partie autre que le Barreau du Haut-Canada) et le Barreau du Haut-Canada consentent à ce que l'instance soit instruite sur le fond et tranchée par un seul membre ~~du Comité~~de la formation.

(date)

(signature de la partie autre que le Barreau du Haut-Canada)
(Indiquer en caractères d'imprimerie le nom de la partie)

(date)

(signature du représentant du Barreau du Haut-Canada)
(Indiquer en caractères d'imprimerie le nom du représentant du Barreau du Haut-Canada)

~~FORMULE~~FORMULAIRE 24A – ASSIGNATION

(titre)

ASSIGNATION À TÉMOIGNER DEVANT ~~LE COMITÉ D'AUDITION~~DE LA SECTION DE PREMIÈRE INSTANCE DU TRIBUNAL DU BARREAU

À *(nom et adresse du témoin)*

(audience orale)

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER DEVANT ~~LE COMITÉ D'AUDITION~~LA SECTION DE PREMIÈRE INSTANCE AFIN D'Y TÉMOIGNER lors de l'instruction de la présente instance le *(jour), (date)*, à *(heure)*, ~~dans les bureaux~~au Tribunal du Barreau ~~du Haut-Canada~~, Osgoode Hall, 130, rue Queen Ouest, Toronto (Ontario) *(ou indiquer l'endroit)* et d'y demeurer jusqu'à ce que votre présence ne soit plus requise.

VOUS ÊTES REQUIS(E) D'APPORTER AVEC VOUS et de produire, lors de l'instruction, les documents et objets suivants : *(indiquer la nature et la date de chaque document et donner suffisamment de précisions pour permettre d'identifier chaque document et objet)*

SI VOUS NE VOUS PRÉSENTEZ PAS OU NE DEMEUREZ PAS PRÉSENT(E) COMME LE REQUIERT LA PRÉSENTE ASSIGNATION, LA COUR SUPÉRIEURE DE JUSTICE PEUT ORDONNER QU'UN MANDAT D'ARRÊT SOIT DÉCERNÉ CONTRE VOUS OU QUE VOUS SOYEZ SANCTIONNÉ(E) DE LA MÊME FAÇON QUE POUR OUTRAGE AU TRIBUNAL.

(audience électronique)

VOUS ÊTES REQUIS(E) DE PARTICIPER À UNE AUDIENCE ÉLECTRONIQUE le *(jour) (date)*, à *(heure)*, de la manière suivante : *(donner suffisamment de précisions pour permettre au témoin de participer)*

SI VOUS NE PARTICIPEZ PAS À L'AUDIENCE COMME LE REQUIERT LA PRÉSENTE ASSIGNATION, LA COUR SUPÉRIEURE DE JUSTICE PEUT ORDONNER QU'UN MANDAT D'ARRÊT SOIT DÉCERNÉ CONTRE VOUS OU QUE VOUS SOYEZ SANCTIONNÉ(E) DE LA MÊME FAÇON QUE POUR OUTRAGE AU TRIBUNAL.

(date)

~~Comité d'audition~~Tribunal du Barreau

_____

~~Conseiller(ère) juridique principal(e) et directeur(trice), greffe du tribunal~~
Greffier/Greffière

REMARQUE : Vous avez le droit de toucher la même indemnité pour votre présence ou votre participation à l'audience que celle que toucherait une personne assignée à comparaître devant la Cour supérieure de justice.

~~FORMULE~~FORMULAIRE 26A – ORDONNANCE DÉFINITIVE

(N^o^ du dossier du ~~Comité d'audition~~Tribunal du Barreau)

~~COMITÉ D'AUDITION~~TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

(noms des membres ~~du Comité~~de la Section dont est composée la formation)

(jour et date du prononcé de l'ordonnance)

(titre de l'instance)

ORDONNANCE

(Ordonnance faisant suite à l'audition d'une requête)

LA REQUÊTE a été entendue le ou les *(jour(s))*, *(*à *indiquer l'endroit OU par voie électronique)*, *(en présence des représentants de toutes les parties* (*et de tous les tiers) OU en présence du(des) représentant(s) de (désigner la ou les parties et le ou les tiers), (ajouter au besoin : (désigner la ou les parties et le ou les tiers) comparaissant en personne, personne ne représentant (désigner la ou les parties et le ou les tiers), bien que remise appropriée de l'avis lui(leur) ait été faite comme l'atteste (indiquer la preuve de la remise de l'avis de l'audience sur le fond de la requête)).*

APRÈS AVOIR LU *(L'AVIS DE REQUÊTE ET LA REQUÊTE OU L'AVIS DE RENVOI À L'AUDIENCE)* ET LES ÉLÉMENTS DE PREUVE DÉPOSÉS PAR LES PARTIES *(et les tiers), (Après avoir entendu les témoignages présentés par les parties (et les tiers)*, et après avoir entendu les plaidoiries *(des représentants des parties (et des tiers) OU du(des) représentant(s) de (désigner la ou les parties et le ou les tiers) et de (désigner la ou les parties et le ou les tiers comparaissant en personne)),*

(ET AYANT CONCLU QUE (préciser la conclusion habilitant à rendre l'ordonnance),

(Ordonnance faisant suite à l'audition d'une motion)

LA MOTION présentée par *(désigner l'auteur de la motion)* en vue d'obtenir *(indiquer la mesure de redressement demandée dans l'avis de motion)* a été entendue le(*s*) *(jour(s)*, *(*à *indiquer l'endroit OU par voie électronique OU sur pièces).*

APRÈS AVOIR LU *(préciser les documents déposés à l'appui de la motion)* et après avoir entendu les plaidoiries du(*des*) représentant*(s)* de *(désigner les parties et les tiers)*, *(ajouter au besoin : (désigner les parties et les tiers) comparaissant en personne, personne ne représentant (désigner les parties et les tiers), bien que la signification appropriée de l'avis lui(leur) ait été faite (indiquer la preuve de la signification))*,

IL EST ORDONNÉ QUE :

1. …

2. …

(signature du président ou de la présidente de la formation qui a rendu l'ordonnance)

~~FORMULE~~FORMULAIRE 26B – DÉCISION ET ORDONNANCE ~~DÉFINITIVES~~DÉFINITIVE

(N^o^ du dossier du ~~Comité d'audition~~Tribunal du Barreau)

~~COMITÉ D'AUDITION~~TRIBUNAL DU BARREAU
SECTION DE PREMIÈRE INSTANCE

(noms des membres ~~du Comité~~de la section dont est composée la formation)

(jour et date du prononcé de l'ordonnance)

(titre de l'instance)

DÉCISION ET ORDONNANCE

LA REQUÊTE a été entendue le ou les *(jour(s))*, ~~(~~à (*indiquer l'endroit OU par voie électronique)*, ~~(~~*en présence des représentants de toutes les parties* (*et de tous les tiers) OU en présence du(des) représentant(s) de (désigner la ou les parties et le ou les tiers), (ajouter au besoin : (désigner la ou les parties et le ou les tiers) comparaissant en personne, personne ne représentant (désigner la ou les parties et le ou les tiers), bien que remise appropriée de l'avis lui(leur) ait été faite comme l'atteste (indiquer la preuve de la remise de l'avis de l'audience sur le fond de la requête)*~~)~~.

APRÈS AVOIR LU *(L'AVIS DE REQUÊTE ET LA REQUÊTE OU L'AVIS DE RENVOI À L'AUDIENCE)* ET LES ÉLÉMENTS DE PREUVE DÉPOSÉS PAR LES PARTIES *(et les tiers), ~~(Après~~après avoir entendu les témoignages présentés par les parties (et les tiers)*, et après avoir entendu les plaidoiries *(des représentants des parties (et des tiers) OU du(des) représentant(s) de (désigner la ou les parties et le ou les tiers) et de (désigner la ou les parties et le ou les tiers comparaissant en personne)),*

IL EST CONCLU QUE *(préciser la conclusion habilitant à rendre l'ordonnance),*

ET IL EST ORDONNÉ QUE :

1. …

2. …

(signature du président ou de la présidente de la formation qui a rendu l'ordonnance)

Document comparison by Workshare Compare on 10 février 2014 12:53:24

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TRIBUNAL DU BARREAU
TARIFS EN VERTU DES RÈGLES DE PRATIQUE ET DE PROCÉDURE
~~(visant les instances du Comité d'audition du Barreau)~~

~~Adoptées~~Adoptés : 26 février 2009
~~Modifiées~~Modifiés : 25 juin 2009
29 juin 2010
27 janvier 2011
28 avril 2011
28 février 2013
25 avril 2013

~~TARIFS~~

TARIF A

HONORAIRES RELATIFS AUX SERVICES À PRENDRE EN ~~COMPTE~~CONSIDÉRATION EN VERTU DE LA RÈGLE 25.01

PREMIÈRE PARTIE – HONORAIRES DES AVOCATS

Avocat (20 ans et plus de pratique)	Jusqu'à concurrence de 350 $ l'heure
Avocat (12 à 20 ans)	Jusqu'à concurrence de 325 $ l'heure
Avocat (11 à 12 ans)	Jusqu'à concurrence de 315 $ l'heure
Avocat (10 à 11 ans)	Jusqu'à concurrence de 300 $ l'heure
Avocat (9 à 10 ans)	Jusqu'à concurrence de 285 $ l'heure
Avocat (8 à 9 ans)	Jusqu'à concurrence de 270 $ l'heure
Avocat (7 à 8 ans)	Jusqu'à concurrence de 255 $ l'heure
Avocat (6 à 7 ans)	Jusqu'à concurrence de 240 $ l'heure
Avocat (5 à 6 ans)	Jusqu'à concurrence de 225 $ l'heure
Avocat (4 à 5 ans)	Jusqu'à concurrence de 215 $ l'heure
Avocat (3 à 4 ans)	Jusqu'à concurrence de 205 $ l'heure
Avocat (2 à 3 ans)	Jusqu'à concurrence de 195 $ l'heure
Avocat (1 à 2 ans)	Jusqu'à concurrence de 180 $ l'heure
Avocat (moins d'un an)	Jusqu'à concurrence de 165 $ l'heure
Avocat employé du Barreau du Haut-Canada, auprès d'un service autre que le Service de la discipline	Jusqu'à concurrence de 190 $ l'heure

DEUXIÈME PARTIE – AUTRES HONORAIRES

Parajuriste titulaire de permis et parajuriste employé du Barreau du Haut-Canada (10 ans et plus d'expérience en tant que parajuriste)	Jusqu'à concurrence de 150 $ l'heure
Parajuriste titulaire de permis et parajuriste employé du Barreau du Haut-Canada (5 à 10 ans d'expérience en tant que parajuriste)	Jusqu'à concurrence de 120 $ l'heure
Parajuriste titulaire de permis et parajuriste employé du Barreau du Haut-Canada (1 à 5 ans d'expérience en tant que parajuriste)	Jusqu'à concurrence de 90 $ l'heure
Étudiant	Jusqu'à concurrence de 90 $ l'heure
Clerc	Jusqu'à concurrence de 90 $ l'heure
Vérificateur judiciaire employé du Barreau du Haut-Canada	Jusqu'à concurrence de 190 $ l'heure
Enquêteur ou agent au règlement des plaintes employé du Barreau du Haut-Canada	Jusqu'à concurrence de 90 $ l'heure

Document comparison by Workshare Compare on 10 février 2014 10:59:58

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Description	Tariffs (fr) (Jan 23-14)
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Format changed	0
Total changes	11

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE
(applicable to proceedings before the Law Society Appeal Division)
MADE UNDER
SECTION 61.2 OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2014

MOVED BY

SECONDED BY

THAT the rules of practice and procedure applicable to proceedings before the Law Society Appeal Panel, made by Convocation on February 23, 2012, be revoked, effective March 12, 2014, and the following substituted:

LAW SOCIETY TRIBUNAL
APPEAL DIVISION
RULES OF PRACTICE AND PROCEDURE

Made: February 23, 2012
Amended: March 12, 2014

RULE 1

APPLICATION AND INTERPRETATION

Application

1.1 These Rules, apply to proceedings before the Appeal Division that are commenced on or after July 1, 2012.

Application of Hearing Division Rules

1.2 (1) Except where otherwise provided by these Rules, the Hearing Division Rules, where appropriate and with necessary modifications, apply to proceedings before the Appeal Division.

(2) The following Hearing Division Rules do not apply to proceedings before the Appeal Division:

1. Rule 6 [Adding Parties].
2. Rule 7 [Joinder or Severance of Proceedings].
3. Rule 9 [Commencement, Amendment and Abandonment of Proceedings].
4. Rule 11 [Scheduling].
5. Rule 12 [Proceedings Management].
6. Rule 16.04 [Motion under Rule 21: no notice required].
7. Rule 19 [Disclosure].
8. Rule 20 [Admissions].
9. Rule 21 [Suspension or Restriction Order].
10. Rule 22 [Pre-Hearing Conferences].
11. Rule 23.01 [Consent to hearing by one panelist].
12. Rule 29 [Consent Resolution Conference].

Interpretation

1.3 In these Rules,

“appeal” includes, where appropriate, a cross-appeal;

“appellant” means a person who commences an appeal, including, where appropriate, a person who commences a cross-appeal;

“Hearing Division Rules” means the rules of practice and procedure applicable to proceedings before the Hearing Division that are commenced on or after July 1, 2009;

“panelist” means a member of the Appeal Division;

“respondent” includes, where appropriate, a respondent by cross-appeal;

“Vice-Chair” means the Vice-Chair of the Appeal Division.

RULE 2

APPEALS FROM INTERLOCUTORY ORDERS

Appeals from interlocutory orders

2.1 (1) Subject to this rule, there is no appeal from an interlocutory order of the Hearing Division.

Interlocutory suspension or restriction order

(2) A party to a motion for an interlocutory order of the Hearing Division suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services may appeal the Hearing Division's disposition of the motion to the Appeal Division.

Grounds

(3) An appeal under subrule (2) may be made on any grounds.

Contravention of rule 2.1

Appeal Division may quash appeal

2.2 On a motion by the respondent, the Appeal Division may quash an appeal that does not comply with rule 2.1

RULE 3

COMMENCEMENT OF APPEAL

Commencement of appeal

3. 1 (1) An appeal shall be commenced by,

(a) serving a notice of appeal (Form 3A), within the time prescribed by subrules (2) and (3),

(i) in the case of an appeal by the person who is the subject of a decision, an order or a disposition that may be appealed, on the Society, and

(ii) in the case of an appeal by the Society, on the subject of the decision, order or disposition that the Society is appealing; and

(b) filing the notice of appeal with the Tribunal, with proof of service, within the time prescribed by subrules (2) and (3).

Time for commencement of appeal: decision or order made in proceeding before Hearing Division

(2) Where the decision or order being appealed relates to the merits of a proceeding before the Hearing Division under section 27, 31, 34, 38, 43, 45, 49.42 or 49.43 of the Act, the notice of appeal shall be served on the respondent and filed with the Tribunal, with proof of service, within 30 days after notice of the formal decision and order, containing the decision, order or decision and order being appealed, is deemed to have been received by the appellant.

Time for commencement of appeal: order made on motion brought before Hearing Division

(3) Where the order or disposition being appealed relates to a motion brought in a proceeding or intended proceeding before the Hearing Division, the notice of appeal shall be served on the respondent and filed with the Tribunal, with proof of service, within 30 days after notice of the formal order, containing the order or disposition being appealed, is deemed to have been received by the appellant.

Method of service

(4) The notice of appeal shall be served in accordance with these Rules as if it were an originating process.

Extension of time for commencing appeal

3.2 (1) The notice of appeal may be served on the respondent and filed with the Tribunal, with proof of service, after the time prescribed by subrules 3.1 (2) and (3) with the written consent of the respondent.

Filing of consent

(2) Where the respondent has consented in accordance with subrule (1) to service and filing of the notice of appeal after the time prescribed by subrules 3.1 (2) and (3), the appellant shall file with the Tribunal the respondent's consent, together with the notice of appeal and proof of service of the notice of appeal.

Amendment of notice of appeal

3.3 The notice of appeal may be amended without leave before the appeal is perfected by serving a supplementary notice of appeal (Form 3B) on the respondent and filing it with the Tribunal, with proof of service.

RULE 4

TRANSCRIPTS

Certificate of reporting service to accompany notice of appeal

4.1 (1) An appellant shall, at the time the notice of appeal is filed, file with the Tribunala certificate of the reporting service, that recorded the proceeding of the Hearing Division resulting in the decision, order or disposition being appealed, stating that copies of the transcript as required by these Rules have been ordered.

Where certificate unavailable

(2) Where the appellant cannot through the exercise of reasonable diligence file a certificate of the reporting service as required by subrule (1), the appellant shall,

(a) at the time the notice of appeal is filed, file with the Tribunal proof that the copies of the transcript as required by these Rules have been ordered; and

(b) within fifteen days after the time the notice of appeal is filed, file the certificate of the reporting service.

Relief from compliance

(3) If it is in the interest of justice, a panelist may give special directions and vary the rules governing transcripts.

RULE 5

CROSS-APPEALS

Commencement of cross-appeal

5.1 (1) If an appeal from a decision, an order or a disposition has already been commenced, the respondent may commence a cross-appeal if the respondent is otherwise entitled under the Act or these Rules to commence an appeal.

Same

(2) A cross-appeal shall be commenced by,

(a) serving a notice of cross-appeal (Form 5A), within the time prescribed by subrule (3), on the appellant in the appeal; and

(b) filing the notice of cross-appeal with the Tribunal, with proof of service, within the time prescribed by subrule (3).

Time for commencement of cross-appeal

(3) The notice of cross-appeal shall be served on the appellant in the appeal and filed with the Tribunal, with proof of service, within fifteen days after the respondent has been served with the appellant's notice of appeal.

Method of service

(4) The notice of cross-appeal shall be served in accordance with these Rules as if it were an originating process.

Extension of time for commencing cross-appeal

5.2 (1) The notice of cross-appeal may be served on the appellant in the appeal and filed with the Tribunal, with proof of service, after the time prescribed by subrule 5.1 (3) with the written consent of the appellant in the appeal.

Filing of consent

(2) Where the appellant in the appeal has consented in accordance with subrule (1) to service and filing of the notice of cross-appeal after the time prescribed by subrule 5.1 (3), the respondent shall file with the Tribunal the appellant's consent, together with the notice of cross-appeal and proof of service of the notice of cross-appeal.

Amendment of notice of cross-appeal

5.3 The notice of cross-appeal may be amended without leave before the appeal is perfected by serving a supplementary notice of cross-appeal (Form 5B) on the appellant in the appeal and filing it with the Tribunal, with proof of service.

RULE 6

APPELLANT'S MATERIALS

Appeal book

6.1 (1) Subject to subrule (2), the appellant's appeal book shall be titled "Appellant's Appeal Book" and shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents, listing each document contained in the appeal book and describing each document by its nature and date;

(b) a copy of the notice of appeal and of any supplementary notice of appeal;

(c) a copy of the formal decision and order, containing the decision or order appealed from, or a copy of the formal order, containing the order or disposition appealed from;

(d) a copy of the reasons of the Hearing Division for the decision, order or disposition appealed from;

(e) a copy of the notice of application or of any other document that initiated the proceeding before the Hearing Division;

(f) a copy of any exhibits that are referred to in the appellant's factum;

(g) a copy of any other documents relevant to the hearing of the appeal that were filed with the Tribunal that are referred to in the appellant's factum;

(h) a copy of any directions given by a panelist at an appeal management conference in respect of the conduct of the appeal;

(i) a copy of any order of the Appeal Division made in respect of the conduct of the appeal; and

(j) where any of the materials mentioned in this subrule are subject to a non-publication order made by the Hearing Division, a copy of the non-publication order.

Appeal book: two volumes

(2) Where the appellant's appeal book, if prepared in compliance with subrule (1), will include a document that is not available for public inspection under subrule 27.01 (4) of the Hearing Division Rules, the appellant's appeal book shall be divided into two volumes titled

"Appellant's Appeal Book: Public Volume" and "Appellant's Appeal Book: Non-Public Volume", with "Appellant's Appeal Book: Public Volume" prepared in compliance with subrule (1) but excluding the documents that are not available for public inspection and "Appellant's Appeal Book: Non-Public Volume" prepared in compliance with subrule (1) but containing only the documents that are excluded from "Appellant's Appeal Book: Public Volume" and, at the end, a copy of the order of the Hearing Division resulting in documents contained in the appeal book being unavailable for public inspection.

Form of appeal book: binding

(3) The appellant's appeal book shall be bound front and back in blue cover stock.

Factum

Content

6.2 (1) The appellant's factum shall be titled "Appellant's Factum" and shall consist of,

(a) Part I, titled "Statement of the Case", containing a statement identifying the appellant, the nature of the proceeding before the Hearing Division, the disposition of the proceeding by the Hearing Division and whether the appeal is from a decision, a decision and order, an order or another disposition of the Hearing Division;

(b) Part II, titled "Overview of the Case", containing a concise overview statement describing the nature of the case and of the issues;

(c) Part III, titled "Summary of the Facts", containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the transcript of the proceeding before the Hearing Division and the exhibits as is necessary;

(d) Part IV, titled "Issues and the Law", containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, titled "Order Requested", containing a statement of the order that the Appeal Division will be asked to make;

(f) Schedule A, titled "Authorities to be Cited", containing a list of the authorities referred to, with citations, in the order in which they appear in Part IV or in alphabetical order; and

(g) Schedule B, titled "Relevant Legislative Provisions", containing the text of all relevant provisions of statutes, regulations, by-laws, rules of practice and procedure and rules of conduct.

References to transcript

(2) References to the transcript of the proceeding before the Hearing Division shall be by date, page number and line and references to exhibits shall be by tab and page number in the appeal book.

Arrangement of Parts I to V

(3) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum.

Length of factum

(4) The appellant's factum, excluding the schedules, shall not exceed thirty pages in length.

Form of factum: binding

(5) The appellant's factum shall be bound front and back in blue cover stock.

Form of factum: printing details

(6) The appellant's factum shall be printed on white paper 8 ½ inches by 11 inches in size and the text shall be printed, typewritten, written or reproduced legibly, using characters of at least 12 point or 10 pitch size, on one side only double spaced, except for quotations which may be single spaced, with margins of 1 ½ inches on the left-hand side.

Book of Authorities

6.3 (1) The appellant's book of authorities shall be titled "Appellant's Book of Authorities" and shall contain only those authorities intended to be referred to in oral argument.

(2) The authorities contained in the appellant's book of authorities shall be marked to indicate those passages intended to be referred to in oral argument.

(3) The appellant's book of authorities shall be bound front and back in blue cover stock.

Factum, supplementary appeal book and supplementary book of authorities: cross-appeal

6.4 (1) Where a respondent has served a notice of cross-appeal, the appellant shall prepare a factum as a respondent by cross-appeal.

(2) Subrules 8.2 (1) to (4) and (6) apply, with necessary modifications, to the appellant's factum as a respondent by cross-appeal.

(3) The appellant's factum as a respondent by cross-appeal shall be bound front and back in blue cover stock.

(4) The appellant as a respondent by cross-appeal may prepare a supplementary appeal book and a supplementary book of authorities if documents relevant to the hearing of the cross-appeal that are referred to in the appellant's factum as a respondent by cross-appeal are not already included in the appellant's or respondent's appeal book and authorities intended to be referred to in oral argument of the cross-appeal are not already included in the appellant's or respondent's book of authorities.

(5) Rules 5.1 and 5.3 apply, with necessary modifications, to the appellant's supplementary appeal book and supplementary book of authorities, respectively.

Tribunal Office may refuse documents

6.5 (1) Subject to subrule (2), the TribunalOffice may refuse to accept for filing an appellant's appeal book, an appellant's factum, an appellant's book of authorities, an appellant's factum as a respondent by cross-appeal, an appellant's supplementary appeal book or an appellant's supplementary book of authorities that does not comply with this Rule.

Relief from compliance

(2) If it is in the interest of justice, a panelist may give special directions and vary the rules governing the appellant's appeal book, the appellant's factum, the appellant's book of authorities, the appellant's factum as a respondent by cross-appeal, the appellant's supplementary appeal book and the appellant's supplementary book of authorities.

Date for filing appellant's materials as respondent by cross-appeal

6.6 (1) Where a respondent has commenced a cross-appeal, the appellant shall, by not later than fourteen days before the date on which the appeal is to be heard,

(a) serve on the respondent one copy of the appellant's supplementary appeal book, one copy of the appellant's factum as a respondent by cross-appeal and one copy of the appellant's supplementary book of authorities; and

(b) file with the Tribunal, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the appellant's supplementary appeal book, factum as a respondent by cross-appeal and supplementary book of authorities; and

(ii) in appeals to be heard by three panelists, four copies of the appellant's supplementary appeal book, factum as a respondent and supplementary book of authorities.

Confirmation of or update to estimated length of time for oral argument

(2) Where a respondent has commenced a cross-appeal, the appellant shall, by not later than ten days after being served with the respondent's materials, file with the Tribunal, a certificate,

(a) confirming that the estimated total length of time for the oral argument of the appellant stated in the certificate of perfection remains the same; or

(b) stating the new estimated total length of time for the oral argument of the appellant.

RULE 7

PERFECTING APPEALS

Service and filing of appellant's materials

7.1 (1) Subject to subrule (2), the appellant shall,

(a) serve on the respondent one copy of the appellant's appeal book, one copy of the appellant's factum, one copy of the appellant's book of authorities and one copy of the transcript; and

(b) file with the Tribunal, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the appellant's appeal book, factum and book of authorities and one copy of the transcript; and

(ii) in appeals to be heard by three panelists, four copies of the appellant's appeal book, factum and book of authorities and one copy of the transcript.

Exempt from requirement to serve and file transcript

(2) Where the appellant has made a motion to stay the decision, order or disposition being appealed and has served and filed with the Tribunal a copy of the transcript in the appellant's motion record, the appellant is not required to serve or file a further copy of the transcript.

Certificate of perfection

(3) The appellant shall file with the Tribunal a certificate of perfection stating,

(a) that the appellant's appeal book, factum and book of authorities have been served and filed in compliance with subrule (1);

(b) that the transcript has been served and filed in compliance with subrule (1) or (2);

(c) that the transcript is complete; and

(d) the estimated total length of time for the oral argument of the appellant.

Time for perfection

(4) The appellant shall perfect the appeal by complying with subrules (1) and (3),

(a) within 60 days after notice of the formal decision and order, containing the decision, order or decision and order appealed from, or the formal order, containing the order or disposition appealed from, is deemed to have been received by the appellant, if within the 60 days the appellant has received the transcript; or

(b) within 60 days after the appellant has received the transcript, if within the 60 days mentioned in clause (a) the appellant has not received the transcript.

RULE 8

RESPONDENT'S MATERIALS

Appeal book

8.1 (1) Subject to subrule (2), the respondent's appeal book shall be titled "Respondent's Appeal Book" and shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents, listing each document contained in the appeal book and describing each document by its nature and date;

(b) a copy of any notice of cross-appeal and of any supplementary notice of cross-appeal;

(c) a copy of any exhibits that are referred to in the respondent's factum that are not included in the appellant's appeal book; and

(d) a copy of any other documents relevant to the hearing of the appeal that were filed with the Hearing Division that are referred to in the respondent's factum that are not included in the appellant's appeal book.

Appeal book: two volumes

(2) Where the respondent's appeal book, if prepared in compliance with subrule (1), will include a document that is not available for public inspection under subrule 27.01 (4) of the Hearing Division Rules, the respondent's appeal book shall be divided into two volumes titled "Respondent's Appeal Book: Public Volume" and "Respondent's Appeal Book: Non-Public Volume", with "Respondent's Appeal Book: Public Volume" prepared in compliance with subrule (1) but excluding the documents that are not available for public inspection and "Respondent's Appeal Book: Non-Public Volume" prepared in compliance with subrule (1) but containing only the documents that are excluded from "Respondent's Appeal Book: Public Volume" and, at the end, a copy of the order of the Hearing Division resulting in the documents contained in the appeal book being unavailable for public inspection, if it is not included in the appellant's appeal book.

Form of appeal book: binding

(3) The respondent's appeal book shall be bound front and back in green cover stock.

Factum

Content

8.2 (1) The respondent's factum shall be titled "Respondent's Factum" and shall consist of,

(a) Part I, titled "Respondent's Overview of the Case", containing a concise overview statement describing the nature of the case and of the issues;

(b) Part II, titled "Respondent's Statement as to Facts", containing a statement of the facts in Part III of the appellant's factum that the respondent accepts as correct or substantially correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with such reference to the transcript of the proceeding before the Hearing Division and the exhibits as is necessary;

(c) Part III, titled "Response to Appellant's Issues", containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(d) Part IV, titled "Additional Issues", containing a statement of any additional issues raised by the respondent, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, titled "Order Requested", containing a statement of the order that the Appeal Division will be asked to make;

(f) Schedule A, titled "Authorities to be Cited", containing a list of the authorities referred to, with citations, in the order in which they appear in Parts III and IV or in alphabetical order; and

(g) Schedule B, titled "Relevant Legislative Provisions", containing the text of all relevant provisions of statutes, regulations, by-laws, rules of practice and procedure and rules of conduct.

References to transcript

(2) References to the transcript of the proceeding before the Hearing Division shall be by date, page number and line and references to exhibits shall be by tab and page number in the appropriate appeal book.

Arrangement of Parts I to V

(3) Parts I to V shall be arranged in paragraphs numbered consecutively throughout

the factum.

Length of factum

(4) The respondent's factum, excluding the schedules, shall not exceed thirty pages in length.

Form of factum: binding

(5) The respondent's factum shall be bound front and back in green cover stock.

Form of factum: printing details

(6) The respondent's factum shall be printed on white paper 8 ½ inches by 11 inches in size and the text shall be printed, typewritten, written or reproduced legibly, using characters of at least 12 point or 10 pitch size, on one side only double spaced, except for quotations which may be single spaced, with margins of 1 ½ inches on the left-hand side.

Factum: cross-appeal

8.3 (1) Where a respondent has commenced a cross-appeal, the respondent shall prepare a factum as an appellant by cross-appeal.

(2) The respondent's factum as an appellant by cross-appeal may be incorporated into the respondent's factum or may be a separate document.

(3) Subrules 6.2 (1) to (4) apply, with necessary modifications, to the respondent's factum as an appellant by cross-appeal.

(4) If the respondent's factum as an appellant by cross-appeal is prepared as a separate document, it shall be bound front and back in green cover stock.

(5) If the respondent's factum as an appellant by cross-appeal is prepared as a separate document, it shall be printed on white paper 8 ½ inches by 11 inches in size and the text shall be printed, typewritten, written or reproduced legibly, using characters of at least 12 point or 10 pitch size, on one side only double spaced, except for quotations which may be single spaced, with margins of 1 ½ inches on the left-hand side.

Book of Authorities

8.4 (1) The respondent's book of authorities shall be titled "Respondent's Book of Authorities" and shall contain only those authorities intended to be referred to in oral argument that are not included in the Appellant's Book of Authorities.

(2) The authorities contained in the respondent's book of authorities shall be marked to indicate those passages intended to be referred to in oral argument.

(3) The respondent's book of authorities shall be bound front and back in green

cover stock.

Tribunal Office may refuse documents

8.5 (1) Subject to subrule (2), the Tribunal Office may refuse to accept for filing a respondent's appeal book, a respondent's factum, a respondent's factum as an appellant by cross-appeal or a respondent's book of authorities that does not comply with this Rule.

Relief from compliance

(2) If it is in the interest of justice, a panelist may give special directions and vary the rules governing the respondent's appeal book, the respondent's factum, the respondent's factum as an appellant by cross-appeal and the respondent's book of authorities.

Date for filing respondent's materials: no cross-appeal

8.6 (1) Subject to subrule (2), a respondent shall, by not later than fourteen days before the date on which the appeal is to be heard,

(a) serve on the appellant one copy of the respondent's appeal book, one copy of the respondent's factum and one copy of the respondent's book of authorities; and

(b) file with the Tribunal, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the respondent's appeal book, factum and book of authorities; and

(ii) in appeals to be heard by three panelists, four copies of the respondent's appeal book, factum and book of authorities.

Date for filing respondent's material: cross-appeal

(2) A respondent who has commenced a cross-appeal shall, by not later than 30 days after being served with the appellant's materials,

(a) serve on the appellant one copy of the respondent's appeal book, one copy of the respondent's factum, one copy of the respondent's factum as appellant by cross-appeal, if any, and one copy of the respondent's book of authorities; and

(b) file with the Tribunal, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the respondent's appeal book, factum, factum as appellant by cross-appeal, if any, and book of authorities; and

(ii) in appeals to be heard by three panelists, four copies of the

respondent's appeal book, factum, factum as appellant by cross-appeal, if any, and book of authorities.

Estimated length of time for oral argument

(3) A respondent shall file with the Tribunal a certificate stating the estimated total length of time for the oral argument of the respondent,

(a) where the respondent has not commenced a cross appeal, by not later than 10 days after being served with the appellant's materials; or

(b) where the respondent has commenced a cross appeal, at the same time as the respondent files documents with the Tribunal under clause (2) (b).

RULE 9

COMPENDIUM

Compendium required

9.1 The appellant and the respondent shall each prepare a compendium.

Appellant's compendium

9.2 (1) The appellant's compendium shall be titled "Appellant's Compendium" and shall contain excerpts from the transcript intended to be referred to in oral argument and may contain any other documents or excerpts of any other documents contained in the appellant's appeal book, the appellant's supplementary appeal book, if any, or the respondent's appeal book intended to be referred to in oral argument.

(2) The appellant's compendium shall be bound front and back in blue cover stock.

Respondent's compendium

9.3 (1) The respondent's compendium shall be titled "Respondent's Compendium" and shall contain excerpts from the transcript intended to be referred to in oral argument and may contain any other documents or excerpts of any other documents contained in the appellant's appeal book, the appellant's supplementary appeal book, if any, or the respondent's appeal book intended to be referred to in oral argument.

(2) The respondent's compendium shall be bound front and back in green cover stock.

Date for filing compendium

9.4 The appellant and the respondent shall, by not later than five days before the date on which the appeal is to be heard, each,

(a) serve on the other one copy of their compendium; and

(b) file with the Tribunal, with proof of service,

(i) in appeals to be heard by five panelists, six copies of their compendium; and

(ii) in appeals to be heard by three panelists, four copies of their compendium.

Relief from compliance

9.5 If it is in the interest of justice, a panelist may give special directions and vary the rules governing the appellant's and respondent's compendia.

RULE 10

ABANDONMENT AND DISMISSAL FOR DELAY

Abandonment by appellant

10.1 An appellant may abandon an appeal or a cross-appeal by delivering a notice of abandonment (Form 10A).

Deemed abandonment

Appeal

10.2 (1) Where the appellant has not perfected the appeal within one year after the time for doing so has passed, the appeal shall be deemed to have been abandoned and the Tribunal shall send a notice to that effect to the appellant and the respondent.

Cross-appeal

(2) Where a respondent who has commenced a cross-appeal has not complied with subrule 8.6 (2), the cross-appeal shall be deemed to have been abandoned and the Tribunal shall send a notice to that effect to the appellant and the respondent.

Motion for dismissal for delay

Appeal

10.3 (1) Where an appellant has not perfected the appeal within the time prescribed by subrule 7.1 (4) or by an order of the Appeal Division, the respondent may make a motion to the Appeal Division to have the appeal dismissed for delay.

Cross-appeal

(2) Where a respondent who has commenced a cross-appeal has not complied with subrule 8.6 (2) or an order of the Appeal Division with respect to the time for filing the respondent's materials where the respondent has commenced a cross-appeal, the appellant may make a motion to the Appeal Division to have the cross-appeal dismissed for delay.

Order dismissing appeal or cross-appeal for delay

(3) On a motion by the respondent, the Appeal Division may dismiss an appeal or cross-appeal for delay.

Effect on cross-appeal where appeal abandoned or dismissed for delay

10.4 (1) Where an appeal is abandoned or dismissed for delay, a respondent who has cross-appealed and wishes to proceed with the cross-appeal shall, within fifteen days after the appeal is abandoned or dismissed for delay, deliver a notice of election to proceed (Form 10B).

Cross-appeal deemed abandoned

(2) Where a respondent does not deliver a notice of election to proceed under subrule (1), the respondent's cross-appeal shall be deemed to have been abandoned and the Tribunal shall send a notice to that effect to the respondent and the appellant.

Motion to set aside

10.5 (1) An appellant whose appeal is deemed to have been abandoned or a respondent whose cross-appeal is deemed to have been abandoned may make a motion to the Appeal Division to have the appeal or cross-appeal reinstated.

Order reinstating appeal or cross-appeal

(2) On a motion by the appellant, the Appeal Division may reinstate an appeal or a cross-appeal that is deemed to have been abandoned.

RULE 11

SCHEDULING

Hearing of appeal

11.1 (1) Subject to subrule (2), the Tribunal Office shall schedule the hearing of an appeal.

Hearing of cross-appeal

(2) Where a respondent has commenced a cross-appeal and the cross-appeal is not dismissed for delay or deemed to have been abandoned, the cross-appeal shall be heard on the same date as the appeal is heard.

Hearing of motion

11.2 Except where otherwise provided by these Rules, a motion may be scheduled for hearing on a date obtained from the Tribunal Office.

RULE 12

APPEAL MANAGEMENT

Appeal Management Conference

12.1 (1) An appeal management conference shall be conducted by a panelist.

Format

(2) An appeal management conference may be held in person, by telephone conference, by exchange of documents or by any combination of the aforementioned formats.

Attendance at or participation in appeal management conference

(3) Unless otherwise directed by the panelist conducting the appeal management conference, the appellant and the respondent, or their representatives, are required to attend at or participate in the appeal management conference.

Failure to attend or participate

(4) Where an appellant or a respondent is required to attend at or participate in an appeal management conference and the appellant or the respondent, or the appellant's or respondent's representative, does not attend at or participate in the conference, the panelist conducting the conference may proceed in the absence of the appellant or the respondent or without the appellant's or respondent's participation

Notice of endorsement of results where conference proceeds under subrule (4)

(5) Where a panelist conducts an appeal management conference in the absence of a person or without a person's participation under subrule (4), the Tribunal shall send to the person a copy of the endorsement of the results of the conference.

Matters to be dealt with

12.2 (1) At an appeal management conference, a panelist may,

(a) schedule a further appeal management conference;

(b) schedule or adjourn the hearing of an appeal;

(c) schedule or adjourn the hearing of a motion; and

(d) give directions with respect to the conduct of an appeal or a motion.

Endorsement of results

(2) At the conclusion of an appeal management conference, the panelist who conducted the conference shall endorse on the appellant's appeal book, if available, or on the notice of appeal the results of the conference.

Hearing of motions

(3) Despite rule 11.2, a panelist conducting an appeal management conference may convert the conference into the hearing of a motion made by the appellant or the respondent if,

(a) the motion was made by notice of motion;

(b) both the moving party and the responding party have complied with their respective obligations with respect to the delivery of motion records, facta and books of authority and have exercised or declined to exercise their respective rights with respect to the delivery of motion records, facta and books of authority;

(c) the panelist has already been assigned by the Chair or Vice-Chair to the hearing of the motion; and

(d) the moving party and the responding party consent to the hearing of the motion at that time.

Request for appeal management conference

12.3 (1) After an appeal has been commenced, the appellant or the respondent may, at any time, request to attend before a panelist for an appeal management conference.

Request to Tribunal Office

(2) A request to attend before a panelist for an appeal management conference shall be made to the Tribunal Office.

Notice of appeal management conference

(3) Where a request to attend before a panelist for an appeal management conference has been made, the Tribunal shall notify the appellant and the respondent of the date, time and, if applicable, location of the appeal management conference.

Direction to attend an appeal management conference

12.4 (1) After an appeal has been commenced, the Chair or Vice-Chair may, at any time, direct the appellant and respondent to attend before a panelist for an appeal management conference.

Notice of appeal management conference

(2) Where the Chair or Vice-Chair directs the appellant and respondent to attend before a panelist for an appeal management conference, the Tribunal shall notify the appellant and the respondent of the direction and of the date, time and, if applicable, location of the appeal management conference.

RULE 13

MOTIONS

Making motions

13.1 (1) Subject to subrule (2), a motion to the Appeal Division may not be made unless an appeal has been commenced.

Motion to extend time for commencing appeal

(2) A motion to extend the time for commencing an appeal may be made at any time, however, the moving party shall deliver, together with the motion record, a notice of appeal.

Motion to stay decision or order

13.2 A motion to stay a decision or order appealed from shall be made by notice of motion.

Motions to be heard by one panelist

13.3 Pursuant to subsection 4.2 (1) of the *Statutory Powers Procedure Act*, the Chair or Vice-Chair may assign one panelist to hear and determine procedural or interlocutory motions, including the following motions:

1. A motion to quash an appeal for failure to comply with rule 2.1.
2. A motion to dismiss an appeal or a cross-appeal for delay.
3. A motion to reinstate an appeal or a cross-appeal that is deemed to have been abandoned.
4. A motion to extend the time for commencing an appeal.
5. A motion to stay the decision or order appealed from.

RULE 14

FRESH EVIDENCE

Tendering fresh evidence

14.1 (1) Subject to rule 14.2, an appellant who wishes to introduce at the hearing of the appeal evidence that was not before the Hearing Division shall make a motion to the Appeal Division to do so.

Notice of motion

(2) A motion under subrule (1) shall be made by notice of motion.

Materials on motion

(3) The appellant who makes a motion under subrule (1) shall file with the Tribunal, together with the motion record,

(a) where the appeal is to be heard by a panel consisting of three panellists, four copies of the evidence, each copy in a separate sealed envelope; and

(b) where the appeal is to be heard by a panel consisting of five panellists, six copies of the evidence, each copy in a separate sealed envelope.

Exchange of evidence

(4) As soon as possible after service on the responding party of the motion record for a motion under subrule (1), the moving and responding parties shall consult to determine a timetable for the exchange of material related to the evidence and any cross-examination on that material.

Hearing of motion

(5) Despite rule 11.2, a motion under subrule (1) shall be heard on the date on which the appeal is scheduled to be heard.

Hearing of appeal in any event

(6) The appellant and the respondent shall be prepared to proceed with the hearing of the appeal regardless of the disposition of a motion under subrule (1).

Deemed abandonment of motion

(7) A motion under subrule (1) shall be deemed to have been abandoned if,

(a) the moving party does not comply with any requirement with respect to service of documents or filing of documents with respect to the motion;

(b) the moving party does not comply with any direction given by a panelist with respect to the conduct of the motion.

Documents not available for public inspection

(8) Materials filed with the Tribunal under subrule (3) are not available for public inspection

Respondent consents to introduction of fresh evidence

14.2 (1) Rule 14.1 does not apply where the respondent consents to the appellant introducing at the hearing of the appeal evidence that was not before the Hearing Division.

(2) Where the respondent consents to the appellant introducing at the hearing of the appeal evidence that was not before the Hearing Division, both the appellant and the respondent may include the evidence in their respective appeal books and compendia and may refer to the evidence in their respective facta, but the appellant and the respondent shall clearly identify the evidence as evidence that was not before the Hearing Division.

RULE 15

HEARING OF APPEAL

Time limits on oral argument

15.1 (1) The Chair or Vice-Chairshall specify the time to be allotted to the appellant and respondent for oral argument and reply on the appeal and any cross-appeal.

Notice of time limits

(2) The Tribunal shall notify the appellant and the respondent of the time allotted to them for oral argument and reply on the appeal and any cross-appeal as soon as practicable after it is specified by the Chair or Vice-Chair.

Complying with time limits

(3) The appellant and the respondent shall limit their oral argument and their reply on the appeal and any cross-appeal to the time allotted to them.

Varying time limits

(4) If it is in the interest of justice, a panelist may give special directions and vary the time limits imposed on the appellant or the respondent under this Rule.

RULE 16

REASONS

Written reasons: where required

16.1 (1) A panel shall give written reasons for,

(a) its decision to allow or dismiss an appeal; and

(b) any other decision or order made by the panel if a party requests written reasons in accordance with subrule (2).

Making request for written reasons

(2) For the purposes of subrule (1), a party may request written reasons for a decision or order made by a panel by,

(a) making an oral request for written reasons to the panel immediately after the decision or order is made; or

(b) making a written request for written reasons by submitting the written request to the Tribunal within sixty days after the decision or order is made.

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

FORMS UNDER THE
RULES OF PRACTICE AND PROCEDURE

GENERAL HEADING

(Law Society Tribunal file no.)

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

BETWEEN:

(name)
Applicant/*(*Appellant *or* Respondent in appeal*)*

and

(name)
Respondent/*(*Respondent in appeal *or* Appellant*)*

APPLICATION UNDER *(statutory provision under which the application is made)(add, if applicable,* referred for hearing under *(statutory provision under which application is required to be heard)).*

(Title of document)

(Text of document)

FORM 3A – NOTICE OF APPEAL

(General heading)

NOTICE OF APPEAL

THE *(identify party)* APPEALS to the Appeal Division from the *(*decision/order/decision and order/order/disposition*)* of the Hearing Division dated *(date)*.

THE APPELLANT ASKS that the *(*decision/order/decision and order/order/disposition*)* be set aside and a *(*decision/order/decision and order/order/disposition*)* be made as follows *(or* that the *(*decision/order/decision and order/order/disposition*)* be varied as follows: *(Set out briefly the relief sought.)*

THE GROUNDS OF APPEAL are as follows: *(Set out briefly the grounds of appeal.)*

THE BASIS OF THE APPEAL DIVISION'S JURISDICTION IS: *(State the basis for the Appeal Division's jurisdiction, including (i) any legislative provision establishing jurisdiction, (ii) whether the order appealed from is final or interlocutory and (iii) any other facts relevant to establishing jurisdiction.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of appellant or appellant's representative)

TO: *(Name and address of respondent or respondent's representative)*

FORM 3B – SUPPLEMENTARY NOTICE OF APPEAL

(General heading)

SUPPLEMENTARY NOTICE OF APPEAL

The appellant amends the notice of appeal dated *(date)* in the following manner: *(Give particulars of the amendment.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of appellant or appellant's representative)

TO: *(Name and address of respondent or respondent's representative)*

FORM 5A – NOTICE OF CROSS-APPEAL

(General heading)

NOTICE OF CROSS-APPEAL

THE RESPONDENT CROSS-APPEALS in this appeal and asks that the *(*decision/order/decision and order/order/disposition*)* be set aside and a *(*decision/order/decision and order/order/disposition*)* be made as follows *(or* that the *(*decision/order/decision and order/order/disposition*)* be varied as follows: *(Set out briefly the relief sought.)*

THE GROUNDS FOR THIS CROSS-APPEAL are as follows: *(Set out briefly the grounds of cross-appeal.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of respondent or respondent's representative)

TO: *(Name and address of appellant or appellant's representative)*

FORM 5B – SUPPLEMENTARY NOTICE OF CROSS-APPEAL

(General heading)

SUPPLEMENTARY NOTICE OF CROSS-APPEAL

The respondent amends the notice of cross-appeal dated *(date)* in the following manner: *(Give particulars of the amendment.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of respondent or respondent's representative)

TO: *(Name and address of appellant or appellant's representative)*

FORM 10A – NOTICE OF ABANDONMENT OF APPEAL OR CROSS-APPEAL

(General heading)

NOTICE OF ABANDONMENT

The appellant *(or* respondent*)* abandons this appeal *(or* cross-appeal*)*.

(Date)

(Name, address, telephone number, fax number and e-mail address of party serving notice or or of party's representative)

TO: *(Name and address of party on whom notice served or party's representative)*

FORM 10B – NOTICE OF ELECTION TO PROCEED WITH CROSS-APPEAL

(General heading)

NOTICE OF ELECTION TO PROCEED

The respondent elects to proceed with the cross-appeal

(Date)

(Name, address, telephone number, fax number and e-mail address of respondent or respondent's representative)

TO: *(Name and address of appellant or appellant's representative)*

BARREAU DU HAUT CANADA

RÈGLES DE PRATIQUE ET DE PROCÉDURE (applicables aux instances introduites devant la Section d'appel) PRISES EN VERTU DE L'ARTICLE 61.2 DE LA *LOI SUR LE BARREAU*

MOTION À PRÉSENTER À LA RÉUNION DU CONSEIL LE 27 FÉVRIER 2014

PROPOSÉE PAR

APPUYÉE PAR

QUE les Règles de pratique et de procédure applicables aux instances introduites devant le Comité d'appel, prises par le Conseil le 23 février 2012, soient abrogées, avec prise d'effet le 12 mars 2014, et remplacées par ce qui suit :

TRIBUNAL DU BARREAU

SECTION D'APPEL

RÈGLES DE PRATIQUE ET DE PROCÉDURE

Prises le 23 février 2012
Modifiées : 12 mars 2014

RÈGLE 1

APPLICATION ET INTERPRÉTATION

Application

1.1 Les présentes règles s'appliquent aux instances introduites devant la Section d'appel après le 1er juillet 2012.

Application des règles de la Section de première instance

1.2 (1) Sauf dispositions contraires des présentes règles, les règles de la Section de première instance, s'il y a lieu et avec les adaptations nécessaires, s'appliquent aux instances tenues devant la Section d'appel.

(2) Les règles suivantes de la Section de première instance ne s'appliquent pas aux instances tenues devant la Section d'appel :

1. Règle 6 [Jonction des parties].
2. Règle 7 [Réunion ou séparation des instances].
3. Règle 9 [Introduction, modification et désistement d'une instance].
4. Règle 11 [Fixation des dates].
5. Règle 12 [Gestion des instances].
6. Règle 16.04 [Motion présentée en vertu de la règle 21 : avis non obligatoire].
7. Règle 19 [Divulgation].
8. Règle 20 [Aveux].
9. Règle 21 [Ordonnances de suspension ou de restriction].
10. Règle 22 [Conférences préparatoires à l'audience].
11. Règle 23.01 [Consentement à l'instruction de l'instance par un seul membre].
12. Règle 29 [Conférence sur la résolution de la cause avec consentement].

Interprétation

1.3 Les définitions qui suivent s'appliquent aux présentes règles.

« appel » Comprend, s'il y a lieu, un appel incident; (*« appeal »*)

« appelant » Personne qui introduit un appel, y compris, s'il y a lieu, une personne qui introduit un appel incident; (*« appellant »*)

« intimé » Comprend, s'il y a lieu, l'intimé d'un appel incident; (*« respondent »*)

« membre de la formation » Membre de la Section d'appel; (*« panelist »*)

« règles de la Section de première instance » S'entend des Règles de pratique et de procédure visant les instances tenues devant la Section de première instance qui ont été introduites le 1er juillet 2009 ou par la suite; (*« Hearing Division Rules »*)

« Vice-président » Désigne le vice-président de la Section d'appel. (*« Vice-Chair »*)

RÈGLE 2

APPEL D’UNE ORDONNANCE INTERLOCUTOIRE

Appel d’une ordonnance interlocutoire

2.1 (1) Sous réserve de la présente règle, une ordonnance interlocutoire de la Section de première instance est sans appel.

Ordonnance de suspension interlocutoire ou de restriction

(2) Une partie à une motion demandant à la Section de première instance une ordonnance interlocutoire ayant pour effet de suspendre le permis du titulaire de permis ou de restreindre la manière dont un titulaire de permis peut exercer le droit ou fournir des services juridiques peut appeler à la Section d’appel de la décision rendue par la Section de première instance à l’égard de la motion.

Motifs

(3) Un appel peut être interjeté pour n’importe quel motif en vertu du paragraphe (2).

Contravention de la règle 2.1

La Section d’appel peut rejeter l’appel

2.2 Sur motion de l’intimé, la Section d’appel peut rejeter un appel qui n’est pas conforme à la règle 2.1.

RÈGLE 3

INTRODUCTION D'UN APPEL

Introduction de l'appel

3.1 (1) L'appel est introduit :

a) par la signification d'un avis d'appel (formulaire 3A), dans les délais prescrits par les paragraphes (2) et (3),

(i) au Barreau, dans le cas d'un appel interjeté par la personne assujettie à une décision, à une ordonnance ou à une mesure susceptible d'appel;

(ii) à la personne assujettie à la décision, à l'ordonnance ou à la mesure, dans le cas le cas d'un appel interjeté par le Barreau; et

b) par le dépôt de l'avis d'appel au Tribunal, avec la preuve de sa signification, dans les délais prescrits aux paragraphes (2) et (3).

Délai d'introduction de l'appel : décision ou ordonnance rendue dans une instance tenue devant la Section de première instance

(2) Si la décision ou l'ordonnance portée en appel porte sur le fond d'une instance tenue devant la Section de première instance conformément aux articles 27, 31, 34, 38, 43, 45, 49.42 ou 49.43 de la *Loi,* l'avis d'appel est signifié à l'intimé et déposé au Tribunal, avec la preuve de sa signification, dans un délai de 30 jours après que l'avis de la décision et de l'ordonnance officielle contenant la décision, l'ordonnance ou la décision et l'ordonnance qui est porté en appel est réputé avoir été reçu par l'appelant.

Délai d'introduction de l'appel : ordonnance rendue à l'égard d'une motion déposée devant la Section de première instance

(3) Si l'ordonnance ou la mesure portée en appel porte sur une motion présentée dans une instance ou une instance envisagée devant la Section de première instance, l'avis d'appel est signifié à l'intimé et déposé au Tribunal, avec la preuve de sa signification, dans les 30 jours après que l'avis de l'ordonnance officielle contenant l'ordonnance ou la mesure portée en appel et qui est réputée avoir été reçue par l'appelant.

Mode de signification

(4) L'avis d'appel est signifié conformément aux présentes règles comme s'il s'agissait d'un acte introductif d'instance.

Prolongation du délai d’introduction de l’appel

3.2 (1) L’avis d’appel peut être signifié à l’intimé et déposé au Tribunal, avec la preuve de sa signification, après le délai prescrit aux paragraphes 3.1 (2) et (3), avec le consentement écrit de l’intimé.

Dépôt du consentement

(2) Si l’intimé, conformément au paragraphe (1), a consenti à ce que l’avis d’appel soit signifié et déposé après le délai prescrit aux paragraphes 3.1 (2) et (3), l’appelant dépose au Tribunal le consentement de l’intimé, accompagné de l’avis d’appel et de la preuve de signification de l’avis d’appel.

Modification de l’avis d’appel

3.3 L’avis d’appel peut être modifié sans l’autorisation, avant la mise en état de l’appel, par la signification à l’intimé d’un avis supplémentaire d’appel (formulaire 3B) et son dépôt au Tribunal, avec la preuve de sa signification.

RÈGLE 4

TRANSCRIPTIONS

Certificat de service de sténographie accompagnant l'avis d'appel

4.1 (1) L'appelant dépose au Tribunal, au moment où il y dépose l'avis d'appel, un certificat du service de sténographie qui a enregistré les délibérations de la Section de première instance qui ont abouti à la décision, à l'ordonnance ou à la mesure portée en appel, attestant que les copies de la transcription qui sont exigées par les présentes règles ont fait l'objet d'une demande.

Non-disponibilité du certificat

(2) L'appelant qui, malgré l'exercice d'une diligence raisonnable, n'est pas en mesure de déposer le certificat du service de sténographie prescrit par le paragraphe (1) prend les mesures suivantes :

a) il dépose au Tribunal, au moment où il y dépose l'avis d'appel, la preuve que les copies de la transcription exigées par les présentes règles ont fait l'objet d'une demande;

b) il dépose le certificat du service de sténographie dans les 15 jours suivant le dépôt de l'avis d'appel.

Dispense

(3) Si cela est nécessaire dans l'intérêt de la justice, un membre de la formation peut donner des directives particulières et modifier les règles régissant les transcriptions.

RÈGLE 5

APPELS INCIDENTS

Introduction de l’appel incident

5.1 (1) Si l’appel d’une décision, d’une ordonnance ou d’une mesure a déjà été introduit, l’intimé peut introduire un appel incident s’il a le droit par ailleurs d’introduire un appel conformément à la *Loi* ou aux présentes règles.

Introduction

(2) L’appel incident est introduit :

a) par la signification d’un avis d’appel incident (formulaire 5A), dans les délais prescrits par le paragraphe (3), à l’auteur de l’appel;

b) par le dépôt de l’avis d’appel incident au Tribunal, avec la preuve de sa signification, dans les délais prescrits au paragraphe (3).

Délai d’introduction de l’appel incident

(3) L’avis d’appel incident est signifié à l’appelant et déposé au Tribunal, avec la preuve de sa signification, dans les 15 jours suivant la signification à l’intimé de l’avis d’appel de l’appelant.

Mode de signification

(4) L’avis d’appel incident est signifié conformément aux présentes règles comme s’il s’agissait d’un acte introductif d’instance.

Prolongation du délai d’introduction de l’appel incident

5.2 (1) L’avis d’appel incident peut être signifié à l’appelant et déposé au Tribunal, avec la preuve de sa signification, après le délai prescrit au paragraphe 5.01 (3), avec le consentement écrit de l’appelant.

Dépôt du consentement

(2) Si l’appelant, conformément au paragraphe (1), a consenti à ce que l’avis d’appel incident soit signifié et déposé après le délai prescrit au paragraphe 5.01 (3), l’intimé dépose au Tribunal le consentement de l’appelant, accompagné de l’avis d’appel incident et de la preuve de la signification de l’avis d’appel incident.

Modification de l’avis d’appel incident

5.3 L’avis d’appel incident peut être modifié sans autorisation, avant la mise en état de

l’appel, par la signification à l’appelant d’un avis supplémentaire d’appel incident (formulaire 5B) et son dépôt au Tribunal, avec la preuve de sa signification.

RÈGLE 6

DOCUMENTATION DE L'APPELANT

Cahier d'appel

6.1 (1) Sous réserve du paragraphe (2), le cahier d'appel de l'appelant s'intitule « Cahier d'appel de l'appelant » et comprend, dans des pages numérotées consécutivement, séparées par des onglets numérotés et disposés de la façon suivante :

a) une table des matières énumérant chaque document inclus dans le cahier d'appel et décrivant chaque document par sa nature et sa date;

b) une copie de l'avis d'appel et de tout avis supplémentaire d'appel;

c) une copie de la décision et de l'ordonnance officielles, comprenant la décision ou l'ordonnance portée en appel, ou une copie de l'ordonnance officielle, comprenant l'ordonnance ou la mesure portée en appel;

d) une copie des motifs de la Section de première instance à l'appui de la décision, de l'ordonnance ou de la mesure portée en appel;

e) une copie de l'avis de requête ou de tout autre document introductif de l'instance devant la Section de première instance;

f) une copie des pièces auxquelles il est fait référence dans le mémoire de l'appelant;

g) une copie des autres documents pertinents pour l'audition de l'appel qui ont été déposés auprès du Tribunal et auxquels il est fait référence dans le mémoire de l'appelant;

h) une copie des directives données par un membre de la formation à une conférence de gestion de l'appel au sujet de la conduite de l'appel;

i) une copie de toute ordonnance de la Section d'appel au sujet de la conduite de l'appel;

j) si des documents mentionnés au présent paragraphe font l'objet d'une ordonnance de non-publication rendue par la Section de première instance, une copie de cette ordonnance.

Cahier d'appel : deux volumes

(2) Dans le cas où le cahier d'appel de l'appelant, s'il était préparé conformément au paragraphe (1), inclurait un document soustrait au public en vertu du paragraphe 27.01 (4) des règles de la Section de première instance, le cahier d'appel de l'appelant est divisé en deux volumes intitulés « Cahier d'appel de l'appelant : Volume public » et « Cahier d'appel de l'appelant : Volume confidentiel ». Le « Cahier d'appel de l'appelant : Volume public » est préparé conformément au paragraphe (1), mais les documents soustraits au public en sont

exclus, et le « Cahier d'appel de l'appelant : Volume confidentiel » est préparé conformément au paragraphe (1), mais il contient seulement les documents qui sont exclus du « Cahier d'appel de l'appelant : Volume public ». À la fin, on y trouve une copie de l'ordonnance de la Section de première instance qui a soustrait au public certains des documents du cahier d'appel.

Présentation du cahier d'appel : reliure

(3) Le cahier d'appel de l'appelant est relié des deux côtés avec une couverture bleue.

Mémoire

Contenu

6.2 (1) Le mémoire de l'appelant s'intitule « Mémoire de l'appelant » et se compose des éléments suivants :

a) la partie I, intitulée « Exposé de la cause », qui indique le nom de l'appelant, la nature de l'instance devant la Section de première instance et la décision de la Section de première instance dans la cause, et qui précise si l'appel est formé à l'encontre d'une décision, d'une décision et d'une ordonnance, d'une ordonnance ou de toute autre mesure de la Section de première instance;

b) la partie II, intitulée « Aperçu de la cause », qui comprend un exposé décrivant de façon concise la nature de la cause et les questions en litige;

c) la partie III, intitulée « Résumé des faits », qui comprend un résumé des faits pertinents aux questions soulevées dans l'appel, avec les renvois nécessaires à la transcription des délibérations devant la Section de première instance et aux pièces;

d) la partie IV, intitulée « Questions soulevées en droit », qui comprend un énoncé des questions soulevées, chacune étant suivie immédiatement d'une plaidoirie concise renvoyant aux règles de droit et à la jurisprudence pertinentes;

e) la partie V, intitulée « Conclusions recherchées », qui énonce l'ordonnance demandée à la Section d'appel;

f) l'annexe A, intitulée « Textes à l'appui », qui comprend la liste des textes à l'appui applicables, avec les renvois, dans l'ordre où ils apparaissent à la partie IV ou par ordre alphabétique;

g) l'annexe B, intitulée « Dispositions législatives pertinentes », qui comprend le texte de toutes les dispositions pertinentes des lois, des règlements, des arrêtés, des règles de pratique et de procédure et du code de déontologie.

Renvois à la transcription

(2) Les renvois à la transcription des délibérations devant la Section de première instance indiquent la date, le numéro de page et la ligne, et les renvois aux pièces indiquent l'onglet et le numéro de page du cahier d'appel.

Présentation des parties I à V

(3) Les parties I à V sont présentées sous forme de paragraphes numérotés consécutivement dans l'ensemble du mémoire.

Longueur du mémoire

(4) Le mémoire de l'appelant, à l'exception des annexes, ne compte pas plus de 30 pages.

Présentation du mémoire : reliure

(5) Le mémoire de l'appelant est relié des deux côtés avec une couverture bleue.

Présentation du mémoire : détails de l'impression

(6) Le mémoire de l'appelant est imprimé sur papier blanc de 8 ½ pouces par 11 pouces, et le texte est imprimé, dactylographié, écrit à la main ou reproduit lisiblement en caractères ayant au moins un corps de 12 points ou un pas de 10, sur un seul côté à double interligne, sauf les citations, qui peuvent être à simple interligne, avec une marge de 1 ½ pouce à gauche.

Dossier des textes à l'appui

6.3 (1) Le dossier des textes à l'appui de l'appelant s'intitule « Dossier des textes à l'appui de l'appelant » et ne contient que les textes qui seront invoqués au cours de la plaidoirie orale.

(2) Dans les textes inclus dans le dossier des textes à l'appui de l'appelant, les passages qui seront invoqués au cours de la plaidoirie orale sont indiqués.

(3) Le dossier des textes à l'appui de l'appelant est relié des deux côtés avec une couverture bleue.

Mémoire, cahier supplémentaire d'appel et dossier supplémentaire des textes à l'appui : appel incident

6.4 (1) Si l'intimé a signifié un avis d'appel incident, l'appelant rédige un mémoire en tant qu'intimé de l'appel incident.

(2) Les paragraphes 8.2 (1) à (4) et (6) s'appliquent, avec les adaptations nécessaires, au mémoire de l'appelant en tant qu'intimé de l'appel

incident.

(3) Le mémoire de l’appelant en tant qu’intimé de l’appel incident est relié des deux côtés avec une couverture bleue.

(4) L’appelant en tant qu’intimé de l’appel incident peut rédiger un cahier supplémentaire d’appel et un dossier supplémentaire des textes à l’appui si des documents pertinents pour l’audition de l’appel incident auxquels renvoie le mémoire de l’appelant en tant qu’intimé de l’appel incident ne sont pas déjà inclus dans le cahier d’appel de l’appelant ou de l’intimé et si les textes à l’appui qui seront invoqués au cours de la plaidoirie orale de l’appel incident ne sont pas déjà inclus dans le dossier des textes à l’appui de l’appelant ou de l’intimé.

(5) Les règles 5.1 et 5.3 s’appliquent respectivement, avec les adaptations nécessaires, au cahier supplémentaire d’appel de l’appelant et à son dossier supplémentaire des textes à l’appui.

Le greffe du Tribunal peut refuser les documents

6.5 (1) Sous réserve du paragraphe (2), le greffe du Tribunal peut refuser le dépôt du cahier d’appel de l’appelant, de son mémoire, de son dossier des textes à l’appui, de son mémoire en tant qu’intimé de l’appel incident, de son cahier supplémentaire d’appel ou de son dossier supplémentaire des textes à l’appui lorsqu’ils ne sont pas conformes à la présente règle.

Dispense

(2) Si cela est nécessaire dans l’intérêt de la justice, un membre de la formation peut donner des directives particulières et modifier les règles régissant le cahier d’appel de l’appelant, son mémoire, son dossier des textes à l’appui, son mémoire en tant qu’intimé de l’appel incident, son cahier supplémentaire d’appel et son dossier supplémentaire des textes à l’appui.

Date de dépôt de la documentation de l’appelant en tant qu’intimé de l’appel incident

6.6 (1) Si l’intimé a introduit un appel incident, l’appelant, au plus tard 14 jours avant la date prévue d’audition de l’appel,

a) signifie à l’intimé une copie du cahier supplémentaire d’appel de l’appelant, une copie de son mémoire en tant qu’intimé de l’appel incident, et une copie de son dossier supplémentaire des textes à l’appui;

b) dépose au Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres de la formation, six copies du cahier supplémentaire d’appel de l’appelant, de son mémoire en tant qu’intimé de l’appel incident et de son dossier supplémentaire des textes à l’appui;

(ii) dans le cas des appels entendus par trois membres de la

formation, quatre copies du cahier supplémentaire d'appel de l'appelant, de son mémoire en tant qu'intimé de l'appel incident et de son dossier supplémentaire des textes à l'appui.

Confirmation ou modification de la durée estimative des plaidoiries orales

(2) Si l'intimé a introduit un appel incident, l'appelant, au plus 10 jours après avoir reçu la signification de la documentation de l'intimé, dépose au Tribunal l'un des deux certificats suivants :

a) un certificat confirmant que la durée estimative totale des plaidoiries orales de l'appelant, qui était indiquée dans le certificat de mise en état de l'appel, demeure inchangée;

b) un certificat indiquant la nouvelle durée estimative totale des plaidoiries orales de l'appelant.

RÈGLE 7

MISE EN ÉTAT DE L'APPEL

Signification et dépôt de la documentation de l'appelant

7.1 (1) Sous réserve du paragraphe (2), l'appelant :

a) signifie à l'intimé une copie du cahier d'appel de l'appelant, une copie de son mémoire, une copie de son dossier des textes à l'appui, et une copie de la transcription;

b) dépose au Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres de la formation, six copies du cahier d'appel de l'appelant, de son mémoire et de son dossier des textes à l'appui, et une copie de la transcription;

(ii) dans le cas des appels entendus par trois membres de la formation, quatre copies du cahier d'appel de l'appelant, de son mémoire et de son dossier des textes à l'appui, et une copie de la transcription.

Dispense de l'obligation de signifier et de déposer la transcription

(2) Si l'appelant a déposé une motion en suspension de la décision, de l'ordonnance ou de la mesure portée en appel et a signifié et déposé au Tribunal une copie de la transcription incluse dans son dossier de la motion, il n'est pas tenu de signifier ni de déposer une copie additionnelle de la transcription.

Certificat de mise en état

(3) L'appelant dépose au Tribunal un certificat de mise en état indiquant :

a) que le cahier d'appel, le mémoire et le dossier des textes à l'appui de l'appelant ont été signifiés et déposés conformément au paragraphe (1);

b) que la transcription a été signifiée et déposée conformément au paragraphe (1) ou (2);

c) que la transcription est complète;

d) la durée estimative totale de la plaidoirie orale de l'appelant.

Délai de mise en état

(4) L'appelant met l'appel en état conformément aux paragraphes (1) et (3) :

a) dans un délai de 60 jours après que l’avis de la décision et de l’ordonnance officielles contenant la décision, l’ordonnance ou la décision et l’ordonnance portées en appel, ou après que l’ordonnance officielle contenant l’ordonnance ou la mesure portée en appel est réputée avoir été reçue par l’appelant, si l’appelant a reçu la transcription dans le délai de 60 jours; ou

b) dans un délai de 60 jours après que l’appelant a reçu la transcription, s’il ne l’a pas reçue dans le délai de 60 jours mentionné à l’alinéa a).

RÈGLE 8

DOCUMENTATION DE L'INTIMÉ

Cahier d'appel

8.1 (1) Sous réserve du paragraphe (2), le cahier d'appel de l'intimé s'intitule « Cahier d'appel de l'intimé » et comprend, dans des pages numérotées consécutivement, séparées par des onglets numérotés et disposés de la façon suivante :

a) une table des matières énumérant chaque document inclus dans le cahier d'appel et décrivant chaque document par sa nature et sa date;

b) une copie, s'il y a lieu, de l'avis d'appel incident et de l'avis supplémentaire d'appel incident;

c) une copie des pièces auxquelles il est fait référence dans le mémoire de l'intimé et qui ne sont pas incluses dans le cahier d'appel de l'appelant;

d) une copie des autres documents pertinents pour l'audition de l'appel qui ont été déposés auprès de la Section de première instance, auxquels il est fait référence dans le mémoire de l'intimé et qui ne sont pas inclus dans le cahier d'appel de l'appelant.

Cahier d'appel : deux volumes

(2) Dans le cas où le cahier d'appel de l'intimé, s'il était préparé conformément au paragraphe (1), inclurait un document soustrait au public en vertu du paragraphe 27.01 (4) des règles de la Section de première instance, le cahier d'appel de l'intimé est divisé en deux volumes intitulés « Cahier d'appel de l'intimé : Volume public » et « Cahier d'appel de l'intimé : Volume confidentiel ». Le « Cahier d'appel de l'intimé : Volume public » est préparé conformément au paragraphe (1), mais les documents soustraits au public en sont exclus, et le « Cahier d'appel de l'intimé : Volume confidentiel » est préparé conformément au paragraphe (1), mais il contient seulement les documents qui sont exclus du « Cahier d'appel de l'intimé : Volume public ». À la fin, on y trouve une copie de l'ordonnance de la Section de première instance qui a soustrait au public certains des documents du cahier d'appel, si elle n'est pas incluse dans le cahier d'appel de l'appelant.

Présentation du cahier d'appel : reliure

(3) Le cahier d'appel de l'intimé est relié des deux côtés avec une couverture verte.

Mémoire Contenu

8.2 (1) Le mémoire de l'intimé s'intitule « Mémoire de l'intimé » et se compose des éléments suivants :

a) la partie I, intitulée « Exposé de la cause de l'intimé », qui comprend un exposé décrivant de façon concise la nature de la cause et les

questions en litige;

b) la partie II, intitulée « Résumé des faits », qui comprend un exposé des faits figurant dans la partie III du mémoire de l'appelant dont il reconnaît l'exactitude ou dont il reconnaît en grande partie l'exactitude, un exposé des faits qu'il conteste et un résumé des faits supplémentaires invoqués, avec les renvois nécessaires à la transcription des délibérations devant la Section de première instance et aux pièces;

c) la partie III, intitulée « Réponse aux questions soulevées par l'appelant », qui énonce la position de l'intimé à l'égard de chaque question soulevée par l'appelant, chacune étant suivie immédiatement d'une plaidoirie concise renvoyant aux règles de droit et à la jurisprudence pertinentes;

d) la partie IV, intitulée « Questions supplémentaires », qui comprend un énoncé des questions supplémentaires soulevées par l'intimé, chacune étant suivie immédiatement d'une plaidoirie concise renvoyant aux règles de droit et à la jurisprudence pertinentes;

e) la partie V, intitulée « Conclusions recherchées », qui énonce l'ordonnance demandée à la Section d'appel;

f) l'annexe A, intitulée « Textes à l'appui », qui comprend la liste des textes à l'appui applicables, avec les renvois, dans l'ordre où ils apparaissent aux parties III et IV ou par ordre alphabétique;

g) l'annexe B, intitulée « Dispositions législatives pertinentes », qui comprend le texte de toutes les dispositions pertinentes des lois, des règlements, des arrêtés, des règles de pratique et de procédure et du code de déontologie.

Renvois à la transcription

(2) Les renvois à la transcription des délibérations devant la Section de première instance indiquent la date, le numéro de page et la ligne, et les renvois aux pièces indiquent l'onglet et le numéro de page du cahier d'appel pertinent.

Présentation des parties I à V

(3) Les parties I à V sont présentées sous forme de paragraphes numérotés consécutivement dans l'ensemble du mémoire.

Longueur du mémoire

(4) Le mémoire, à l'exception des annexes, ne compte pas plus de 30 pages.

Présentation du mémoire : reliure

(5) Le mémoire de l'intimé est relié des deux côtés avec une couverture verte.

Présentation du mémoire : détails de l'impression

(6) Le mémoire de l'intimé est imprimé sur papier blanc de 8 ½ pouces par 11 pouces, et le texte est imprimé, dactylographié, écrit à la main ou reproduit lisiblement en caractères ayant au moins un corps de 12 points ou un pas de 10, sur un seul côté à double interligne, sauf les citations, qui peuvent être à simple interligne, avec une marge de 1 ½ pouce à gauche.

Mémoire : appel incident

8.3 (1) Si l'intimé a introduit un avis d'appel incident, il rédige un mémoire en tant qu'appelant de l'appel incident.

(2) Le mémoire de l'intimé en tant qu'appelant de l'appel incident peut être intégré à son mémoire ou constituer un document distinct.

(3) Les paragraphes 6.2 (1) à (4) s'appliquent, avec les adaptations nécessaires, au mémoire de l'intimé en tant qu'appelant de l'appel incident.

(4) Si le mémoire de l'intimé en tant qu'appelant de l'appel incident constitue un document distinct, il est relié des deux côtés avec une couverture verte.

(5) Si le mémoire de l'intimé en tant qu'appelant de l'appel incident constitue un document distinct, il est imprimé sur papier blanc de 8 ½ pouces par 11 pouces, et le texte est imprimé, dactylographié, écrit à la main ou reproduit lisiblement en caractères ayant au moins un corps de 12 points ou un pas de 10, sur un seul côté à double interligne, sauf les citations, qui peuvent être à simple interligne, avec une marge de 1 ½ pouce à gauche.

Dossier des textes à l'appui

8.4 (1) Le dossier des textes à l'appui de l'intimé s'intitule « Dossier des textes à l'appui de l'intimé » et ne contient que les textes qui seront invoqués au cours de la plaidoirie orale et qui ne sont pas inclus dans le dossier des textes à l'appui de l'appelant.

(2) Dans les textes inclus dans le dossier des textes à l'appui de l'intimé, les passages qui seront invoqués au cours de la plaidoirie orale sont indiqués.

(3) Le dossier des textes à l'appui de l'appelant est relié des deux côtés avec une couverture verte.

Le greffe du Tribunal peut refuser les documents

8.5 (1) Sous réserve du paragraphe (2), le greffe du Tribunal peut refuser le dépôt du cahier d'appel de l'intimé, de son mémoire, de son mémoire en tant qu'appelant de l'appel incident ou de son dossier des textes à l'appui lorsqu'ils ne sont pas conformes à

la présente règle.

Dispense

(2) Si cela est nécessaire dans l'intérêt de la justice, un membre de la formation peut donner des directives particulières et modifier les règles régissant le cahier d'appel de l'intimé, son mémoire, son mémoire en tant qu'appelant de l'appel incident et son dossier des textes à l'appui.

Date de dépôt de la documentation de l'intimé s'il n'y a pas d'appel incident

8.6 (1) Sous réserve du paragraphe (2), l'intimé, au plus tard 14 jours avant la date prévue d'audition de l'appel,

a) signifie à l'appelant une copie du cahier d'appel de l'intimé, une copie de son mémoire et une copie de son dossier des textes à l'appui;

b) dépose au Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres de la formation, six copies du cahier d'appel de l'intimé, de son mémoire et de son dossier des textes à l'appui;

(ii) dans le cas des appels entendus par trois membres de la formation, quatre copies du cahier d'appel de l'appelant, de son mémoire et de son dossier des textes à l'appui.

Date de dépôt de la documentation de l'intimé s'il y a appel incident

(2) L'intimé qui a introduit un appel incident, au plus tard 30 jours après avoir reçu la signification de la documentation de l'appelant,

a) signifie à l'appelant une copie du cahier d'appel de l'intimé, une copie de son mémoire, une copie, s'il y a lieu, de son mémoire en tant qu'appelant de l'appel incident et une copie de son dossier des textes à l'appui;

b) dépose au Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres de la formation, six copies du cahier d'appel de l'intimé, de son mémoire, de son mémoire en tant qu'appelant de l'appel incident s'il y a lieu, et de son dossier des textes à l'appui;

(ii) dans le cas des appels entendus par trois membres de la formation, quatre copies du cahier d'appel de l'intimé, de son mémoire, de son mémoire en tant qu'appelant de l'appel incident s'il y a lieu, et de son dossier des textes à l'appui.

Durée estimative des plaidoiries orales

(3) L’intimé dépose au Tribunal un certificat indiquant la durée estimative totale de ses plaidoiries orales :

a) s’il n’a pas introduit un appel incident, au plus tard 10 jours après avoir reçu la signification de la documentation de l’appelant;

b) s’il a introduit un appel incident, en même temps qu’il dépose au Tribunal les documents prescrits à l’alinéa (2) b).

RÈGLE 9

RECUEIL

Obligation

9.1 L'appelant et l'intimé préparent chacun un recueil.

Recueil de l'appelant

9.2 (1) Le recueil de l'appelant s'intitule « Recueil de l'appelant » et contient les extraits de la transcription qui seront invoqués au cours de sa plaidoirie orale; il peut aussi contenir d'autres documents ou des extraits d'autres documents inclus dans le cahier d'appel de l'appelant, dans son cahier supplémentaire s'il y a lieu, ou dans le cahier d'appel de l'intimé qui seront invoqués au cours de la plaidoirie orale.

(2) Le recueil de l'appelant est relié des deux côtés avec une couverture bleue.

Recueil de l'intimé

9.3 (1) Le recueil de l'intimé s'intitule « Recueil de l'intimé » et contient les extraits de la transcription qui seront invoqués au cours de sa plaidoirie orale; il peut aussi contenir d'autres documents ou des extraits d'autres documents inclus dans le cahier d'appel de l'appelant, dans son cahier supplémentaire s'il y a lieu, ou dans le cahier d'appel de l'intimé qui seront invoqués au cours de la plaidoirie orale.

(2) Le recueil de l'intimé est relié des deux côtés avec une couverture verte.

Date de dépôt du recueil

9.4 L'appelant et l'intimé, au plus tard cinq jours avant la date prévue d'audition de l'appel,

a) se signifient mutuellement une copie de leur recueil;

b) déposent au Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres de la formation, chacun six copies de son recueil;

(ii) dans le cas des appels entendus par trois membres de la formation, chacun quatre copies de son recueil.

Dispense

9.5 Si cela est nécessaire dans l'intérêt de la justice, un membre de la formation peut donner des directives particulières et modifier les règles régissant les recueils respectifs de l'appelant et de l'intimé.

RÈGLE 10

DÉSISTEMENT ET REJET POUR CAUSE DE RETARD

Désistement de l’appelant

10.1 L’appelant peut se désister d’un appel ou d’un appel incident en délivrant un avis de désistement (formulaire 10A).

Désistement réputé

Appel

10.2 (1) Si l’appelant n’a pas mis l’appel en état dans un délai d’un an après l’expiration du délai pour ce faire, il est réputé s’être désisté de l’appel, et le Tribunal envoie à l’appelant et à l’intimé un avis en ce sens.

Appel incident

(2) Si l’intimé qui a introduit un appel incident ne s’est pas conformé au paragraphe 8.6 (2), il est réputé s’être désisté de l’appel incident, et le Tribunal envoie à l’appelant et à l’intimé un avis en ce sens.

Motion de rejet pour cause de retard

Appel

10.3 (1) Si l’appelant n’a pas mis l’appel en état dans le délai prescrit par le paragraphe 7.1 (4) ou par une ordonnance de la Section d’appel, l’intimé peut présenter à la Section d’appel une motion demandant le rejet de l’appel pour cause de retard.

Appel incident

(2) Si l’intimé qui a introduit un appel incident ne s’est pas conformé au paragraphe 8.6 (2) ou à une ordonnance de la Section d’appel concernant le délai de dépôt de sa documentation lorsqu’il a introduit un appel incident, l’appelant peut présenter à la Section d’appel une motion demandant le rejet de l’appel incident pour cause de retard.

Ordonnance rejetant l’appel ou l’appel incident pour cause de retard

(3) Sur motion de l’intimé, la Section d’appel peut rejeter l’appel ou l’appel incident pour cause de retard.

Effet du désistement ou du rejet de l’appel pour cause de retard sur l’appel incident

10.4 (1) Si l’appel a fait l’objet d’un désistement ou d’un rejet pour cause de retard, l’intimé qui a introduit un appel incident et désire le faire instruire délivre, dans les 15 jours suivant le désistement ou le rejet de l’appel pour cause de retard, un avis de décision de faire instruire (formulaire 10B).

Désistement réputé de l’appel incident

(2) Si l’intimé ne délivre pas l’avis de décision de faire instruire prévu au paragraphe (1), il est réputé s’être désisté de l’appel incident, et le Tribunal envoie à l’intimé et à l’appelant un avis en ce sens.

Motion en annulation

10.5 (1) L’appelant qui est réputé s’être désisté de l’appel ou l’intimé qui est réputé s’être désisté de l’appel incident peuvent présenter une motion à la Section d’appel pour faire rétablir l’appel ou l’appel incident.

Ordonnance rétablissant l’appel ou l’appel incident

(2) Sur motion de l’appelant, la Section d’appel peut rétablir un appel ou un appel incident qui est réputé avoir fait l’objet d’un désistement.

RÈGLE 11

FIXATION DES DATES

Audition de l’appel

11.1 (1) Sous réserve du paragraphe (2), le greffe du Tribunal inscrit au calendrier l’audition de l’appel.

Audition de l’appel incident

(2) Si l’intimé a introduit un appel incident qui n’a pas été rejeté pour cause de retard et n’est pas réputé avoir fait l’objet d’un désistement, l’appel incident est entendu à la même date que l’appel.

Audition d’une motion

11.2 Sauf disposition contraire des présentes règles, l’audition d’une motion peut être inscrite au calendrier à une date fixée par le greffe du Tribunal.

RÈGLE 12

GESTION DES APPELS

Conférence de gestion de l’appel

12.1 (1) Une conférence de gestion de l’appel est dirigée par un membre de la formation.

Formule

(2) La conférence de gestion de l’appel peut avoir lieu en personne, par conférence téléphonique, par échange de documents ou par toute combinaison de ces moyens.

Présence ou participation à la conférence de gestion de l’appel

(3) Sauf directive contraire du membre de la formation qui dirige la conférence de gestion de l’appel, l’appelant et l’intimé, ou leurs représentants, sont tenus d’y assister ou d’y participer.

Défaut d’assister ou de participer

(4) Si l’appelant ou l’intimé est tenu d’assister ou de participer à une conférence de gestion de l’appel et si ni lui ni son représentant n’y assiste ou n’y participe, le membre de la formation qui dirige la conférence peut la tenir en son absence et sans sa participation.

Avis d’inscription des résultats d’une conférence tenue en vertu du paragraphe (4)

(5) Si un membre de la formation tient une conférence de gestion de l’appel en l’absence d’une personne et sans sa participation en vertu du paragraphe (4), le Tribunal envoie à cette personne une copie de l’inscription des résultats de la conférence.

Affaires traitées

12.2 (1) À une conférence de gestion de l’appel, un membre de la formation peut :

a) inscrire au calendrier une autre conférence de gestion de l’appel;

b) inscrire au calendrier ou ajourner l’audition de l’appel;

c) inscrire au calendrier ou ajourner l’audition d’une motion;

d) donner des directives sur la conduite de l’appel ou d’une motion.

Inscription des résultats

(2) À la fin d’une conférence de gestion de l’appel, le membre de la formation qui l’a dirigée inscrit les résultats de la conférence dans le cahier d’appel de l’appelant, s’il y a lieu, ou sur l’avis d’appel.

Audition des motions

(3) Par dérogation à la règle 11.2, le membre de la formation qui dirige une conférence de gestion de l'appel peut procéder séance tenante à l'audition d'une motion présentée par l'appelant ou l'intimé si toutes les conditions suivantes sont réalisées :

a) la motion a été faite par avis de motion;

b) l'auteur de la motion et la partie intimée se sont conformés à leurs obligations respectives concernant la remise des dossiers de motion, des mémoires et des dossiers des textes à l'appui et ont exercé ou refusé d'exercer leurs droits respectifs concernant la remise des dossiers de motion, des mémoires et des dossiers de textes à l'appui;

c) le membre de la formation a déjà été désigné par le président ou le vice-président pour entendre la motion;

d) l'auteur de la motion et la partie intimée consentent à l'audition de la motion séance tenante.

Demande de conférence de gestion de l'appel

12.3 (1) Après l'introduction de l'appel, l'appelant et l'intimé peuvent demander en tout temps à rencontrer un membre de la formation pour tenir une conférence de gestion de l'appel.

Demande au greffe du Tribunal

(2) La demande d'une rencontre avec un membre de la formation pour tenir une conférence de gestion de l'appel est soumise au greffe du Tribunal.

Avis de conférence de gestion de l'appel

(3) Si une demande de rencontre avec un membre de la formation a été faite en vue de la tenue d'une conférence de gestion de l'appel, le Tribunal avise l'appelant et l'intimé de la date et de l'heure de cette conférence et, s'il y a lieu, de l'endroit où elle sera tenue.

Ordre d'assister à une conférence de gestion de l'appel

12.4 (1) Après l'introduction de l'appel, le président ou le vice-président peut prescrire en tout temps à l'appelant et à l'intimé de se présenter devant un membre de la formation pour la tenue d'une conférence de gestion de l'appel.

Avis de conférence de gestion de l'appel

(2) Si le président ou le vice-président prescrit à l'appelant et à l'intimé de se présenter devant un membre de la formation pour la tenue d'une conférence de gestion de l'appel, le Tribunal avise l'appelant et l'intimé de cet ordre, de la date et de l'heure de la conférence et, s'il y a lieu, de l'endroit où elle sera tenue.

RÈGLE 13

MOTIONS

Présentation de motions

13.1 (1) Sous réserve du paragraphe (2), une motion ne peut être présentée à la Section d'appel que si un appel a été introduit.

Motion en prolongation du délai d'introduction de l'appel

(2) Une motion visant à prolonger le délai d'introduction d'un appel peut être présentée en tout temps; toutefois, l'auteur de la motion doit délivrer un avis d'appel en même temps que le dossier de la motion.

Motion en sursis d'une décision ou d'une ordonnance

13.2 Une motion en sursis d'une décision ou d'une ordonnance portée en appel se fait par avis de motion.

Motions entendues par un seul membre de la formation

13.3 Conformément au paragraphe 4.2 (1) de la *Loi sur l'exercice des compétences légales,* le président ou le vice-président peut désigner un seul membre de la formation pour instruire et trancher les motions interlocutoires ou de procédure suivantes :

1) une motion en rejet d'un appel pour cause d'inobservation de la règle 2.1;
2) une motion en rejet d'un appel ou d'un appel incident pour cause de retard;
3) une motion en rétablissement d'un appel ou d'un appel incident qui est réputé avoir fait l'objet d'un désistement;
4) une motion en prolongation du délai d'introduction d'un appel;
5) une motion en sursis d'une décision ou d'une ordonnance portée en appel.

RÈGLE 14

NOUVELLE PREUVE

Présentation d’une nouvelle preuve

14.1 (1) Sous réserve de la règle 14.2, l’appelant qui désire présenter à l’audition de l’appel une preuve dont la Section de première instance n’a pas été saisie présente une motion à la Section d’appel pour ce faire.

Avis de motion

(2) Une motion prévue au paragraphe (1) se fait par avis de motion.

Documentation relative à la motion

(3) L’appelant qui présente une motion conformément au paragraphe (1) dépose au Tribunal, en même temps que le dossier de la motion,

a) dans le cas des appels entendus par trois membres de la formation, quatre copies de la preuve, chacune dans une enveloppe scellée distincte;

b) dans le cas des appels entendus par cinq membres de la formation, six copies de la preuve, chacune dans une enveloppe scellée distincte.

Échange de preuves

(4) Le plus tôt possible après la signification à la partie intimée du dossier d’une motion visée par le paragraphe (1), l’auteur de la motion et la partie intimée se consultent pour fixer des échéances en vue de l’échange de la documentation relative à la preuve et des contre- interrogatoires sur cette documentation.

Audition de la motion

(5) Par dérogation à la règle 11.2, une motion visée par le paragraphe (1) est entendue à la date fixée pour l’audition de l’appel.

Audition de l’appel quelle que soit l’issue

(6) L’appelant et l’intimé doivent être prêts à procéder à l’instruction de l’appel quelle que soit la décision rendue à l’égard d’une motion visée par le paragraphe (1).

Motion faisant l’objet d’un désistement réputé

(7) Une motion visée par le paragraphe (1) est réputée avoir fait l’objet d’un

désistement :

a) si l’auteur de la motion ne s’est pas conformé à une exigence relative à la signification ou au dépôt des documents relatifs à la motion;

b) si l’auteur de la motion ne s’est pas conformé à une directive donnée par un membre de la formation au sujet de la conduite de la motion.

Documents soustraits au public

(8) Les documents déposés au Tribunal conformément au paragraphe (3) sont soustraits au public.

Consentement de l’intimé à la présentation d’une nouvelle preuve

14.2 (1) La règle 14.1 ne s’applique pas si l’intimé consent à ce que l’appelant présente pendant l’audition de l’appel une preuve dont la Section de première instance n’a pas été saisie.

(2) Si l’intimé consent à ce que l’appelant présente pendant l’audition de l’appel une preuve dont la Section de première instance n’a pas été saisie, l’appelant et l’intimé peuvent inclure cette preuve dans leurs cahiers d’appel et leurs recueils respectifs et invoquer cette preuve dans leurs mémoires respectifs, mais ils doivent indiquer clairement que la Section de première instance n’a pas été saisie de cette preuve.

RÈGLE 15

AUDITION DE L’APPEL

Durée maximale des plaidoiries orales

15.1 (1) Le président ou le vice-président prescrivent la durée allouée à l’appelant et à l’intimé pour leurs plaidoiries orales et leurs réponses à l’appel et, s’il y a lieu, à l’appel incident.

Avis des durées maximales

(2) Le Tribunal avise l’appelant et l’intimé de la durée qui leur est allouée pour les plaidoiries orales et la réponse à l’appel, ainsi qu’à un appel incident s’il y a lieu, le plus tôt possible après que cette durée a été fixée par le président ou le vice-président.

Respect des durées maximales

(3) L’appelant et l’intimé, dans les plaidoiries orales et dans la réponse à l’appel, ainsi qu’à un appel incident s’il y a lieu, ne dépassent pas la durée qui leur est allouée.

Modification de la durée maximale

(4) Si cela est nécessaire dans l’intérêt de la justice, un membre de la formation peut donner des directives particulières et modifier les durées maximales imposées à l’appelant ou à l’intimé en vertu de la présente règle

RÈGLE 16

MOTIFS

Motifs écrits obligatoires

16.1 (1) La Section rend des motifs écrits :

a) de sa décision d'accueillir ou de rejeter un appel;

b) de toute autre décision ou ordonnance qu'il rend, si une partie demande des motifs écrits conformément au paragraphe (2).

Demande de motifs écrits

(2) Aux fins du paragraphe (1), une partie peut demander des motifs écrits à l'égard d'une décision ou d'une ordonnance rendue par la Section :

a) en faisant oralement une demande de motifs écrits à la section immédiatement après qu'elle a rendu la décision ou l'ordonnance;

b) en faisant par écrit une demande de motifs écrits en soumettant la demande par écrit au Tribunal dans un délai de 60 jours après que la décision ou l'ordonnance a été rend

TRIBUNAL DU BARREAU
SECTION D'APPEL

FORMULAIRES PRÉVUS PAR LES RÈGLES DE PRATIQUE ET DE PROCÉDURE

TITRE DU DOCUMENT

(N^{o} de dossier du Tribunal du Barreau)

TRIBUNAL DU BARREAU
SECTION D'APPEL

ENTRE :

(nom)

Requérant / *(*Appelant *ou* Intimé en appel*)*

et

(nom)

Intimé / *(*Intimé en appel *ou* Appelant*)*

DEMANDE PRÉSENTÉE EN VERTU DE *(mesure législative en vertu de laquelle la requête est présentée) (ajouter, s'il y a lieu,* renvoyée à l'audience en vertu de *(mesure législative en vertu de laquelle la requête doit être entendue)).*

(Titre du document)

(Texte du document)

FORMULAIRE 3A – AVIS D'APPEL

(Titre du document)

AVIS D'APPEL

LE *(désigner la partie)* INTERJETTE APPEL à la Section d'appel à l'encontre de la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* de la Section de première instance datée du *(date)*.

L'APPELANT DEMANDE QUE LA *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit annulée et que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* suivante soit rendue *(ou* que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit modifiée comme suit : *(Énoncer brièvement la réparation recherchée.)*

LES MOTIFS DE L'APPEL sont les suivants : *(Énoncer brièvement les motifs de l'appel.)*

LES FONDEMENTS DE LA COMPÉTENCE DE LA SECTION D'APPEL SONT : *(Énoncer le fondement de la compétence de la Section d'appel, en indiquant (i) les dispositions législatives qui établissent la compétence, (ii) si l'ordonnance portée en appel est définitive ou interlocutoire, et (iii) tout autre fait pertinent pour établir la compétence.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'appelant ou de son représentant)

DEST. : *(Nom et adresse de l'intimé* ou de son représentant)

FORMULAIRE 3B – AVIS SUPPLÉMENTAIRE D'APPEL

(Titre du document)

AVIS SUPPLÉMENTAIRE D'APPEL

L'appelant modifie l'avis d'appel daté du *(date)* de la façon suivante : *(Énoncer les détails de la modification.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'appelant ou de son représentant)

DEST. : *(Nom et adresse de l'intimé*
ou de son représentant)

FORMULAIRE 5A – AVIS D'APPEL INCIDENT

(Titre du document)

AVIS D'APPEL INCIDENT

L'INTIMÉ INTERJETTE UN APPEL INCIDENT et demande que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit annulée et que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* suivante soit rendue *(ou* que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit modifiée de la façon suivante : *(Énoncer brièvement la réparation recherchée.)*

LES MOTIFS DE L'APPEL INCIDENT sont les suivants : *(Énoncer brièvement les motifs de l'appel incident.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'intimé ou de son représentant)

DEST. : *(Nom et adresse de l'appelant* ou de son représentant)

FORMULAIRE 5B – AVIS SUPPLÉMENTAIRE D'APPEL INCIDENT

(Titre du document)

AVIS SUPPLÉMENTAIRE D'APPEL INCIDENT

L'intimé modifie l'avis d'appel incident daté du *(date)* de la façon suivante : *(Énoncer les détails de la modification.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'intimé ou de son représentant)

DEST. : *(Nom et adresse de l'appelant*
ou de son représentant)

FORMULAIRE 10A – AVIS DE DÉSISTEMENT DE L'APPEL OU DE L'APPEL INCIDENT

(Titre du document)

AVIS DE DÉSISTEMENT

L'appelant *(ou* l'intimé*)* se désiste du présent appel *(ou* appel incident*)*.

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de la partie qui signifie l'avis ou de son représentant)

DEST. : (Nom et adresse de la partie à laquelle l'avis est signifié ou de son représentant)

FORMULAIRE 10B – AVIS DE DÉCISION DE FAIRE INSTRUIRE L'APPEL INCIDENT

(Titre du document)

AVIS DE DÉCISION DE FAIRE INSTRUIRE

L'intimé a décidé de faire instruire l'appel incident.

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'intimé ou de son représentant)

DEST. : *(Nom et adresse de l'appelant* ou de son représentant)

~~RULES OF PRACTICE AND PROCEDURE~~
~~(applicable to proceedings before the Law Society Appeal Panel)~~
LAW SOCIETY TRIBUNAL
APPEAL DIVISION
RULES OF PRACTICE AND PROCEDURE

Made: February 23, 2012
Amended:

RULE 1

APPLICATION AND INTERPRETATION

Application

1.1 These Rules~~, and no other rules of practice and procedure applicable to proceedings before the Appeal Panel~~ Division ~~made under section 61.2 of the Act~~, apply to proceedings before the Appeal ~~Panel~~ Division that are commenced on or after July 1, 2012.

Application of Hearing ~~Panel~~ Division Rules

1.2 (1) Except where otherwise provided by these Rules, the Hearing ~~Panel~~ Division Rules, where appropriate and with necessary modifications, apply to proceedings before the Appeal ~~Panel~~Division.

(2) The following Hearing ~~Panel~~ Division Rules do not apply to proceedings before the Appeal Division~~Panel~~:

1. Rule 6 [Adding Parties].
2. Rule 7 [Joinder or Severance of Proceedings].
3. Rule 9 [Commencement, Amendment and Abandonment of Proceedings].
4. Rule 11 [Scheduling].
5. Rule 12 [Proceedings Management].
6. Rule 16.04 [Motion under Rule 21: no notice required].
7. Rule 19 [Disclosure].
8. Rule 20 [Admissions].
9. Rule 21 [Suspension or Restriction Order].
10. Rule 22 [Pre-Hearing Conferences].
11. Rule 23.01 [Consent to hearing by one panelist].
12. Rule 29 [Consent Resolution Conference].

Interpretation

1.3 In these Rules,

"appeal" includes, where appropriate, a cross-appeal;

"appellant" means a person who commences an appeal, including, where appropriate, a person who commences a cross-appeal;

"Hearing ~~Panel~~ Division Rules" means the rules of practice and procedure applicable to proceedings before the Hearing ~~Panel~~ Division that are commenced on or after July 1, 2009;

"panelist" means a member of the Appeal ~~Panel~~Division;

"respondent" includes, where appropriate, a respondent by cross-appeal;~~.~~

"Vice-Chair" means the Vice-Chair of the Appeal Division.

RULE 2

APPEALS FROM INTERLOCUTORY ORDERS

Appeals from interlocutory orders

2.1 (1) Subject to this rule, there is no appeal from an interlocutory order of the Hearing Division~~Panel~~.

Interlocutory suspension or restriction order

(2) A party to a motion for an interlocutory order of the Hearing ~~Panel~~ Division suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services may appeal the Hearing ~~Panel's~~ Division's disposition of the motion to the Appeal ~~Panel~~Division.

Grounds

(3) An appeal under subrule (2) may be made on any grounds.

Contravention of rule 2.1

Appeal ~~Panel~~ Division may quash appeal

2.2 On a motion by the respondent, the Appeal ~~Panel~~ Division may quash an appeal that does not comply with rule 2.1

RULE 3

COMMENCEMENT OF APPEAL

Commencement of appeal

3. ~~0~~1 (1) An appeal shall be commenced by,

(a) serving a notice of appeal (Form 3A), within the time prescribed by subrules (2) and (3),

(i) in the case of an appeal by the person who is the subject of a decision, an order or a disposition that may be appealed, on the Society, and

(ii) in the case of an appeal by the Society, on the subject of the decision, order or disposition that the Society is appealing; and

(b) filing the notice of appeal with the Tribunal~~s Office~~, with proof of service, within the time prescribed by subrules (2) and (3).

Time for commencement of appeal: decision or order made in proceeding before Hearing ~~Panel~~Division

(2) Where the decision or order being appealed relates to the merits of a proceeding before the Hearing ~~Panel~~ Division under section 27, 31, 34, 38, 43, 45, 49.42 or 49.43 of the Act, the notice of appeal shall be served on the respondent and filed with the Tribunal~~s Office~~, with proof of service, within 30 days after notice of the formal decision and order, containing the decision, order or decision and order being appealed, is deemed to have been received by the appellant.

Time for commencement of appeal: order made on motion brought before Hearing Division~~Panel~~

(3) Where the order or disposition being appealed relates to a motion brought in a proceeding or intended proceeding before the Hearing ~~Panel~~Division, the notice of appeal shall be served on the respondent and filed with the Tribunal~~s Office~~, with proof of service, within 30 days after notice of the formal order, containing the order or disposition being appealed, is deemed to have been received by the appellant.

Method of service

(4) The notice of appeal shall be served in accordance with these Rules as if it were an originating process.

Extension of time for commencing appeal

3.2 (1) The notice of appeal may be served on the respondent and filed with the Tribunal~~s Office~~, with proof of service, after the time prescribed by subrules 3.1 (2) and (3) with the written consent of the respondent.

Filing of consent

(2) Where the respondent has consented in accordance with subrule (1) to service and filing of the notice of appeal after the time prescribed by subrules 3.1 (2) and (3), the appellant shall file with the Tribunal~~s Office~~ the respondent's consent, together with the notice of appeal and proof of service of the notice of appeal.

Amendment of notice of appeal

3.3 The notice of appeal may be amended without leave ~~of the Appeal Panel~~Tribunal before the appeal is perfected by serving a supplementary notice of appeal (Form 3B) on the respondent and filing it with the Tribunal~~s Office~~, with proof of service.

RULE 4

TRANSCRIPTS

Certificate of reporting service to accompany notice of appeal

4.~~0~~1 (1) An appellant shall, at the time the notice of appeal is filed ~~with the Tribunals Office~~, file with the Tribunal~~s Office~~ a certificate of the reporting service, that recorded the proceeding of the Hearing ~~Panel~~ Division resulting in the decision, order or disposition being appealed, stating that copies of the transcript as required by these Rules have been ordered.

Where certificate unavailable

(2) Where the appellant cannot through the exercise of reasonable diligence file a certificate of the reporting service as required by subrule (1), the appellant shall,

(a) at the time the notice of appeal is filed, file with the Tribunal~~s Office~~ proof that the copies of the transcript as required by these Rules have been ordered; and

(b) within fifteen days after the time the notice of appeal is filed, file the certificate of the reporting service.

Relief from compliance

(3) If it is in the interest of justice, a panelist may give special directions and vary the rules governing transcripts.

RULE 5

CROSS-APPEALS

Commencement of cross-appeal

5.1 (1) If an appeal from a decision, an order or a disposition has already been commenced, the respondent may commence a cross-appeal if the respondent is otherwise entitled under the Act or these Rules to commence an appeal.

Same

(2) A cross-appeal shall be commenced by,

(a) serving a notice of cross-appeal (Form 5A), within the time prescribed by subrule (3), on the appellant in the appeal; and

(b) filing the notice of cross-appeal with the Tribunal~~s Office~~, with proof of service, within the time prescribed by subrule (3).

Time for commencement of cross-appeal

(3) The notice of cross-appeal shall be served on the appellant in the appeal and filed with the Tribunal~~s Office~~, with proof of service, within fifteen days after the respondent has been served with the appellant's notice of appeal.

Method of service

(4) The notice of cross-appeal shall be served in accordance with these Rules as if it were an originating process.

Extension of time for commencing cross-appeal

5.2 (1) The notice of cross-appeal may be served on the appellant in the appeal and filed with the Tribunal~~s Office~~, with proof of service, after the time prescribed by subrule 5.1 (3) with the written consent of the appellant in the appeal.

Filing of consent

(2) Where the appellant in the appeal has consented in accordance with subrule (1) to service and filing of the notice of cross-appeal after the time prescribed by subrule 5.1 (3), the respondent shall file with the Tribunal~~s Office~~ the appellant's consent, together with the notice of cross-appeal and proof of service of the notice of cross-appeal.

Amendment of notice of cross-appeal

45.03 The notice of cross-appeal may be amended without leave ~~of the Appeal Panel Division~~ before the appeal is perfected by serving a supplementary notice of cross-appeal (Form 5B) on the appellant in the appeal and filing it with the Tribunal~~s Office~~, with proof of service.

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RULE 6

APPELLANT'S MATERIALS

Appeal book

6.1 (1) Subject to subrule (2), the appellant's appeal book shall be titled "Appellant's Appeal Book" and shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents, listing each document contained in the appeal book and describing each document by its nature and date;

(b) a copy of the notice of appeal and of any supplementary notice of appeal;

(c) a copy of the formal decision and order, containing the decision or order appealed from, or a copy of the formal order, containing the order or disposition appealed from;

(d) a copy of the reasons of the Hearing ~~Panel~~ Division for the decision, order or disposition appealed from;

(e) a copy of the notice of application or of any other document that initiated the proceeding before the Hearing Division~~Hearing Panel~~;

(f) a copy of any exhibits that are referred to in the appellant's factum;

(g) a copy of any other documents relevant to the hearing of the appeal that were filed with the ~~Hearing Panel~~Tribunal that are referred to in the appellant's factum;

(h) a copy of any directions given by a panelist at an appeal management conference in respect of the conduct of the appeal;

(i) a copy of any order of the Appeal Division~~Panel~~ made in respect of the conduct of the appeal; and

(j) where any of the materials mentioned in this subrule are subject to a non-publication order made by the Hearing ~~Panel~~Division, a copy of the non-publication order ~~made by the Hearing Panel~~.

Appeal book: two volumes

(2) Where the appellant's appeal book, if prepared in compliance with subrule (1), will include a document that is not available for public inspection under subrule

27.01 (4) of the Hearing ~~Panel~~ Division Rules, the appellant's appeal book shall be divided into two volumes titled "Appellant's Appeal Book: Public Volume" and "Appellant's Appeal Book: Non-Public Volume", with "Appellant's Appeal Book: Public Volume" prepared in compliance with subrule (1) but excluding the documents that are not available for public inspection and "Appellant's Appeal Book: Non-Public Volume" prepared in compliance with subrule (1) but containing only the documents that are excluded from "Appellant's Appeal Book: Public Volume" and, at the end, a copy of the order of the Hearing ~~Panel~~ Division resulting in documents contained in the appeal book being unavailable for public inspection.

Form of appeal book: binding

(3) The appellant's appeal book shall be bound front and back in blue cover stock.

Factum

Content

6.2 (1) The appellant's factum shall be titled "Appellant's Factum" and shall consist of,

(a) Part I, titled "Statement of the Case", containing a statement identifying the appellant, the nature of the proceeding before the Hearing ~~Panel~~Division, the disposition of the proceeding by the Hearing ~~Panel~~ Division and whether the appeal is from a decision, a decision and order, an order or another disposition of the Hearing ~~Panel~~Division;

(b) Part II, titled "Overview of the Case", containing a concise overview statement describing the nature of the case and of the issues;

(c) Part III, titled "Summary of the Facts", containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the transcript of the proceeding before the Hearing ~~Panel~~ Division and the exhibits as is necessary;

(d) Part IV, titled "Issues and the Law", containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, titled "Order Requested", containing a statement of the order that the Appeal ~~Panel~~ Division will be asked to make;

(f) Schedule A, titled “Authorities to be Cited”, containing a list of the authorities referred to, with citations, in the order in which they appear in Part IV or in alphabetical order; and

(g) Schedule B, titled “Relevant Legislative Provisions”, containing the text of all relevant provisions of statutes, regulations, by-laws, rules of practice and procedure and rules of conduct.

References to transcript

(2) References to the transcript of the proceeding before the Hearing ~~Panel~~ Division shall be by date, page number and line and references to exhibits shall be by tab and page number in the appeal book.

Arrangement of Parts I to V

(3) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum.

Length of factum

(4) The appellant’s factum, excluding the schedules, shall not exceed thirty pages in length.

Form of factum: binding

(5) The appellant’s factum shall be bound front and back in blue cover stock.

Form of factum: printing details

(6) The appellant’s factum shall be printed on white paper 8 ½ inches by 11 inches in size and the text shall be printed, typewritten, written or reproduced legibly, using characters of at least 12 point or 10 pitch size, on one side only double spaced, except for quotations which may be single spaced, with margins of 1 ½ inches on the left-hand side.

Book of Authorities

6.3 (1) The appellant’s book of authorities shall be titled “Appellant’s Book of Authorities” and shall contain only those authorities intended to be referred to in oral argument.

(2) The authorities contained in the appellant’s book of authorities shall be marked to indicate those passages intended to be referred to in oral argument.

(3) The appellant's book of authorities shall be bound front and back in blue cover stock.

Factum, supplementary appeal book and supplementary book of authorities: cross-appeal

6.4 (1) Where a respondent has served a notice of cross-appeal, the appellant shall prepare a factum as a respondent by cross-appeal.

(2) Subrules 8.2 (1) to (4) and (6) apply, with necessary modifications, to the appellant's factum as a respondent by cross-appeal.

(3) The appellant's factum as a respondent by cross-appeal shall be bound front and back in blue cover stock.

(4) The appellant as a respondent by cross-appeal may prepare a supplementary appeal book and a supplementary book of authorities if documents relevant to the hearing of the cross-appeal that are referred to in the appellant's factum as a respondent by cross-appeal are not already included in the appellant's or respondent's appeal book and authorities intended to be referred to in oral argument of the cross-appeal are not already included in the appellant's or respondent's book of authorities.

(5) Rules 5.1 and 5.3 apply, with necessary modifications, to the appellant's supplementary appeal book and supplementary book of authorities, respectively.

Tribunal~~s~~ Office may refuse documents

6.5 (1) Subject to subrule (2), the Tribunal~~s~~ Office may refuse to accept for filing an appellant's appeal book, an appellant's factum, an appellant's book of authorities, an appellant's factum as a respondent by cross-appeal, an appellant's supplementary appeal book or an appellant's supplementary book of authorities that does not comply with this Rule.

Relief from compliance

(2) If it is in the interest of justice, a panelist may give special directions and vary the rules governing the appellant's appeal book, the appellant's factum, the appellant's book of authorities, the appellant's factum as a respondent by cross-appeal, the appellant's supplementary appeal book and the appellant's supplementary book of authorities.

Date for filing appellant's materials as respondent by cross-appeal

6.6 (1) Where a respondent has commenced a cross-appeal, the appellant shall, by not later than fourteen days before the date on which the appeal is to be heard,

(a) serve on the respondent one copy of the appellant's supplementary appeal book, one copy of the appellant's factum as a respondent by cross-appeal and one copy of the appellant's supplementary book of authorities; and

(b) file with the Tribunal~~s Office~~, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the appellant's supplementary appeal book, factum as a respondent by cross-appeal and supplementary book of authorities; and

(ii) in appeals to be heard by three panelists, four copies of the appellant's supplementary appeal book, factum as a respondent and supplementary book of authorities.

Confirmation of or update to estimated length of time for oral argument

(2) Where a respondent has commenced a cross-appeal, the appellant shall, by not later than ten days after being served with the respondent's materials, file with the Tribunal~~s Office~~, a certificate,

(a) confirming that the estimated total length of time for the oral argument of the appellant stated in the certificate of perfection remains the same; or

(b) stating the new estimated total length of time for the oral argument of the appellant.

RULE 7

PERFECTING APPEALS

Service and filing of appellant's materials

7.1 (1) Subject to subrule (2), the appellant shall,

(a) serve on the respondent one copy of the appellant's appeal book, one copy of the appellant's factum, one copy of the appellant's book of authorities and one copy of the transcript; and

(b) file with the Tribunal~~s Office~~, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the appellant's appeal book, factum and book of authorities and one copy of the transcript; and

(ii) in appeals to be heard by three panelists, four copies of the appellant's appeal book, factum and book of authorities and one copy of the transcript.

Exempt from requirement to serve and file transcript

(2) Where the appellant has made a motion to stay the decision, order or disposition being appealed and has served and filed with the Tribunal~~s Office~~ a copy of the transcript in the appellant's motion record, the appellant is not required to serve ~~on the respondent~~ or file ~~with the Tribunal's Office~~ a further copy of the transcript.

Certificate of perfection

(3) The appellant shall file with the Tribunal~~s Office~~ a certificate of perfection stating,

(a) that the appellant's appeal book, factum and book of authorities have been served and filed in compliance with subrule (1);

(b) that the transcript has been served and filed in compliance with subrule (1) or (2);

(c) that the transcript is complete; and

(d) the estimated total length of time for the oral argument of the appellant.

Time for perfection

(4) The appellant shall perfect the appeal by complying with subrules (1) and (3),

(a) within 60 days after notice of the formal decision and order, containing the decision, order or decision and order appealed from, or the formal order, containing the order or disposition appealed from, is deemed to have been received by the appellant, if within the 60 days the appellant has received the transcript; or

(b) within 60 days after the appellant has received the transcript, if within the 60 days mentioned in clause (a) the appellant has not received the transcript.

RULE 8

RESPONDENT'S MATERIALS

Appeal book

8.1 (1) Subject to subrule (2), the respondent's appeal book shall be titled "Respondent's Appeal Book" and shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents, listing each document contained in the appeal book and describing each document by its nature and date;

(b) a copy of any notice of cross-appeal and of any supplementary notice of cross-appeal;

(c) a copy of any exhibits that are referred to in the respondent's factum that are not included in the appellant's appeal book; and

(d) a copy of any other documents relevant to the hearing of the appeal that were filed with the Hearing ~~Panel~~ Division that are referred to in the respondent's factum that are not included in the appellant's appeal book.

Appeal book: two volumes

(2) Where the respondent's appeal book, if prepared in compliance with subrule (1), will include a document that is not available for public inspection under subrule 27.01 (4) of the Hearing Division~~Panel~~ Rules, the respondent's appeal book shall be divided into two volumes titled "Respondent's Appeal Book: Public Volume" and "Respondent's Appeal Book: Non-Public Volume", with "Respondent's Appeal Book: Public Volume" prepared in compliance with subrule (1) but excluding the documents that are not available for public inspection and "Respondent's Appeal Book: Non-Public Volume" prepared in compliance with subrule (1) but containing only the documents that are excluded from "Respondent's Appeal Book: Public Volume" and, at the end, a copy of the order of the Hearing Division~~Panel~~ resulting in the documents contained in the appeal book being unavailable for public inspection, if it is not included in the appellant's appeal book.

Form of appeal book: binding

(3) The respondent's appeal book shall be bound front and back in green cover stock.

Factum

Content

8.2 (1) The respondent's factum shall be titled "Respondent's Factum" and shall consist of,

(a) Part I, titled "Respondent's Overview of the Case", containing a concise overview statement describing the nature of the case and of the issues;

(b) Part II, titled "Respondent's Statement as to Facts", containing a statement of the facts in Part III of the appellant's factum that the respondent accepts as correct or substantially correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with such reference to the transcript of the proceeding before the Hearing ~~Panel~~ Division and the exhibits as is necessary;

(c) Part III, titled "Response to Appellant's Issues", containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(d) Part IV, titled "Additional Issues", containing a statement of any additional issues raised by the respondent, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, titled "Order Requested", containing a statement of the order that the Appeal ~~Panel~~ Division will be asked to make;

(f) Schedule A, titled "Authorities to be Cited", containing a list of the authorities referred to, with citations, in the order in which they appear in Parts III and IV or in alphabetical order; and

(g) Schedule B, titled "Relevant Legislative Provisions", containing the text of all relevant provisions of statutes, regulations, by-laws, rules of practice and procedure and rules of conduct.

References to transcript

(2) References to the transcript of the proceeding before the Hearing ~~Panel~~ Division shall be by date, page number and line and references to exhibits shall be by tab and page number in the appropriate appeal book.

Arrangement of Parts I to V

(3) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum.

Length of factum

(4) The respondent's factum, excluding the schedules, shall not exceed thirty pages in length.

Form of factum: binding

(5) The respondent's factum shall be bound front and back in green cover stock.

Form of factum: printing details

(6) The respondent's factum shall be printed on white paper 8 ½ inches by 11 inches in size and the text shall be printed, typewritten, written or reproduced legibly, using characters of at least 12 point or 10 pitch size, on one side only double spaced, except for quotations which may be single spaced, with margins of 1 ½ inches on the left-hand side.

Factum: cross-appeal

8.3 (1) Where a respondent has commenced a cross-appeal, the respondent shall prepare a factum as an appellant by cross-appeal.

(2) The respondent's factum as an appellant by cross-appeal may be incorporated into the respondent's factum or may be a separate document.

(3) Subrules 6.2 (1) to (4) apply, with necessary modifications, to the respondent's factum as an appellant by cross-appeal.

(4) If the respondent's factum as an appellant by cross-appeal is prepared as a separate document, it shall be bound front and back in green cover stock.

(5) If the respondent's factum as an appellant by cross-appeal is prepared as a separate document, it shall be printed on white paper 8 ½ inches by 11 inches in size and the text shall be printed, typewritten, written or reproduced legibly, using characters of at least 12 point or 10 pitch size, on one side only double spaced, except for quotations which may be single spaced, with margins of 1 ½ inches on the left-hand side.

Book of Authorities

8.4 (1) The respondent's book of authorities shall be titled "Respondent's Book of Authorities" and shall contain only those authorities intended to be referred to in oral argument that are not included in the Appellant's Book of Authorities.

(2) The authorities contained in the respondent's book of authorities shall be marked to indicate those passages intended to be referred to in oral argument.

(3) The respondent's book of authorities shall be bound front and back in green cover stock.

Tribunals Office may refuse documents

8.5 (1) Subject to subrule (2), the Tribunals Office may refuse to accept for filing a respondent's appeal book, a respondent's factum, a respondent's factum as an appellant by cross-appeal or a respondent's book of authorities that does not comply with this Rule.

Relief from compliance

(2) If it is in the interest of justice, a panelist may give special directions and vary the rules governing the respondent's appeal book, the respondent's factum, the respondent's factum as an appellant by cross-appeal and the respondent's book of authorities.

Date for filing respondent's materials: no cross-appeal

8.6 (1) Subject to subrule (2), a respondent shall, by not later than fourteen days before the date on which the appeal is to be heard,

(a) serve on the appellant one copy of the respondent's appeal book, one copy of the respondent's factum and one copy of the respondent's book of authorities; and

(b) file with the Tribunals Office, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the respondent's appeal book, factum and book of authorities; and

(ii) in appeals to be heard by three panelists, four copies of the respondent's appeal book, factum and book of authorities.

Date for filing respondent's material: cross-appeal

(2) A respondent who has commenced a cross-appeal shall, by not later than 30 days after being served with the appellant's materials,

(a) serve on the appellant one copy of the respondent's appeal book, one copy of the respondent's factum, one copy of the respondent's factum as appellant by cross-appeal, if any, and one copy of the respondent's book of authorities; and

(b) file with the Tribunal~~s Office~~, with proof of service,

(i) in appeals to be heard by five panelists, six copies of the respondent's appeal book, factum, factum as appellant by cross-appeal, if any, and book of authorities; and

(ii) in appeals to be heard by three panelists, four copies of the respondent's appeal book, factum, factum as appellant by cross-appeal, if any, and book of authorities.

Estimated length of time for oral argument

(3) A respondent shall file with the Tribunal~~s Office~~ a certificate stating the estimated total length of time for the oral argument of the respondent,

(a) where the respondent has not commenced a cross appeal, by not later than 10 days after being served with the appellant's materials; or

(b) where the respondent has commenced a cross appeal, at the same time as the respondent files documents with the Tribunal~~s Office~~ under clause (2) (b).

RULE 9

COMPENDIUM

Compendium required

9.1 The appellant and the respondent shall each prepare a compendium.

Appellant's compendium

9.2 (1) The appellant's compendium shall be titled "Appellant's Compendium" and shall contain excerpts from the transcript intended to be referred to in oral argument and may contain any other documents or excerpts of any other documents contained in the appellant's appeal book, the appellant's supplementary appeal book, if any, or the respondent's appeal book intended to be referred to in oral argument.

(2) The appellant's compendium shall be bound front and back in blue cover stock.

Respondent's compendium

9.3 (1) The respondent's compendium shall be titled "Respondent's Compendium" and shall contain excerpts from the transcript intended to be referred to in oral argument and may contain any other documents or excerpts of any other documents contained in the appellant's appeal book, the appellant's supplementary appeal book, if any, or the respondent's appeal book intended to be referred to in oral argument.

(2) The respondent's compendium shall be bound front and back in green cover stock.

Date for filing compendium

9.4 The appellant and the respondent shall, by not later than five days before the date on which the appeal is to be heard, each,

(a) serve on the other one copy of their compendium; and

(b) file with the Tribunal~~s Office~~, with proof of service,

(i) in appeals to be heard by five panelists, six copies of their compendium; and

(ii) in appeals to be heard by three panelists, four copies of their compendium.

Relief from compliance

9.5 If it is in the interest of justice, a panelist may give special directions and vary the rules governing the appellant's and respondent's compendia.

RULE 10

ABANDONMENT AND DISMISSAL FOR DELAY

Abandonment by appellant

10.1 An appellant may abandon an appeal or a cross-appeal by delivering a notice of abandonment (Form 10A).

Deemed abandonment

Appeal

10.2 (1) Where the appellant has not perfected the appeal within one year after the time for doing so has passed, the appeal shall be deemed to have been abandoned and the Tribunal~~s Office~~ shall send a notice to that effect to the appellant and the respondent.

Cross-appeal

(2) Where a respondent who has commenced a cross-appeal has not complied with subrule 8.6 (2), the cross-appeal shall be deemed to have been abandoned and the Tribunal~~s Office~~ shall send a notice to that effect to the appellant and the respondent.

Motion for dismissal for delay

Appeal

10.3 (1) Where an appellant has not perfected the appeal within the time prescribed by subrule 7.1 (4) or by an order of the Appeal ~~Panel~~Division, the respondent may make a motion to the Appeal ~~Panel~~ Division to have the appeal dismissed for delay.

Cross-appeal

(2) Where a respondent who has commenced a cross-appeal has not complied with subrule 8.6 (2) or an order of the Appeal ~~Panel~~ Division with respect to the time for filing the respondent's materials where the respondent has commenced a cross-appeal, the appellant may make a motion to the Appeal ~~Panel~~ Division to have the cross-appeal dismissed for delay.

Order dismissing appeal or cross-appeal for delay

(3) On a motion by the respondent, the Appeal ~~Panel~~ Division may dismiss an appeal or cross-appeal for delay.

Effect on cross-appeal where appeal abandoned or dismissed for delay

10.4 (1) Where an appeal is abandoned or dismissed for delay, a respondent who has cross-appealed and wishes to proceed with the cross-appeal shall, within fifteen days after the appeal is abandoned or dismissed for delay, deliver a notice of election to proceed (Form 10B).

Cross-appeal deemed abandoned

(2) Where a respondent does not deliver a notice of election to proceed under subrule (1), the respondent's cross-appeal shall be deemed to have been abandoned and the Tribunal~~s Office~~ shall send a notice to that effect to the respondent and the appellant.

Motion to set aside

10.5 (1) An appellant whose appeal is deemed to have been abandoned or a respondent whose cross-appeal is deemed to have been abandoned may make a motion to the Appeal ~~Panel~~ Division to have the appeal or cross-appeal reinstated.

Order reinstating appeal or cross-appeal

(2) On a motion by the appellant, the Appeal ~~Panel~~ Division may reinstate an appeal or a cross-appeal that is deemed to have been abandoned.

RULE 11

SCHEDULING

Hearing of appeal

11.1 (1) Subject to subrule (2), the Tribunals Office shall schedule the hearing of an appeal.

Hearing of cross-appeal

(2) Where a respondent has commenced a cross-appeal and the cross-appeal is not dismissed for delay or deemed to have been abandoned, the cross-appeal shall be heard on the same date as the appeal is heard.

Hearing of motion

11.2 Except where otherwise provided by these Rules, a motion may be scheduled for hearing on a date obtained from the Tribunals Office.

APPEAL MANAGEMENT

RULE 12

Appeal Management Conference

12.1 (1) An appeal management conference shall be conducted by a panelist.

Format

(2) An appeal management conference may be held in person, by telephone conference, by exchange of documents or by any combination of the aforementioned formats.

Attendance at or participation in appeal management conference

(3) Unless otherwise directed by the panelist conducting the appeal management conference, the appellant and the respondent, or their representatives, are required to attend at or participate in the appeal management conference.

Failure to attend or participate

(4) Where an appellant or a respondent is required to attend at or participate in an appeal management conference and the appellant or the respondent, or the appellant's or respondent's representative, does not attend at or participate in the conference, the panelist conducting the conference may proceed in the absence of the appellant or the respondent or without the appellant's or respondent's participation

Notice of endorsement of results where conference proceeds under subrule (4)

(5) Where a panelist conducts an appeal management conference in the absence of a person or without a person's participation under subrule (4), the Tribunal~~s Office~~ shall send to the person a copy of the endorsement of the results of the conference.

Matters to be dealt with

12.2 (1) At an appeal management conference, a panelist may,

(a) schedule a further appeal management conference;

(b) schedule or adjourn the hearing of an appeal;

(c) schedule or adjourn the hearing of a motion; and

(d) give directions with respect to the conduct of an appeal or a motion.

Endorsement of results

(2) At the conclusion of an appeal management conference, the panelist who conducted the conference shall endorse on the appellant's appeal book, if available, or on the notice of appeal the results of the conference.

Hearing of motions

(3) Despite rule 11.2, a panelist conducting an appeal management conference may convert the conference into the hearing of a motion made by the appellant or the respondent if,

(a) the motion was made by notice of motion;

(b) both the moving party and the responding party have complied with their respective obligations with respect to the delivery of motion records, facta and books of authority and have exercised or declined to exercise their respective rights with respect to the delivery of motion records, facta and books of authority;

(c) the panelist has already been assigned~~-~~ by the Chair or Vice-Chair~~by the chair of the Appeal Panel~~ to the hearing of the motion; and

(d) the moving party and the responding party consent to the hearing of the motion at that time.

Request for appeal management conference

12.3 (1) After an appeal has been commenced, the appellant or the respondent may, at any time, request to attend before a panelist for an appeal management conference.

Request to Tribunal~~s~~ Office

(2) A request to attend before a panelist for an appeal management conference shall be made to the Tribunal~~s~~ Office.

Notice of appeal management conference

(3) Where a request to attend before a panelist for an appeal management conference has been made, the Tribunal~~s Office~~ shall notify the appellant and the respondent of the date, time and, if applicable, location of the appeal management conference.

Direction to attend an appeal management conference

12.4 (1) After an appeal has been commenced, the ~~chair or the vice-chair of the Appeal Panel~~ Chair or Vice-Chair may, at any time, direct the appellant and respondent to attend before a panelist for an appeal management conference.

Notice of appeal management conference

(2) Where the Chair or Vice-Chair~~chair or vice-chair of the Appeal Panel~~ directs the appellant and respondent to attend before a panelist for an appeal management conference, the Tribunal~~s Office~~ shall notify the appellant and the respondent of the direction and of the date, time and, if applicable, location of the appeal management conference.

RULE 13

MOTIONS

Making motions

13.1 (1) Subject to subrule (2), a motion to the Appeal ~~Panel~~ Division may not be made unless an appeal has been commenced.

Motion to extend time for commencing appeal

(2) A motion to extend the time for commencing an appeal may be made at any time, however, the moving party shall deliver, together with the motion record, a notice of appeal.

Motion to stay decision or order

13.2 A motion to stay a decision or order appealed from shall be made by notice of motion.

Motions to be heard by one panelist

13.3 Pursuant to subsection 4.2 (1) of the *Statutory Powers Procedure Act*, the ~~chair of the Appeal Panel~~ Chair or Vice-Chair may assign one panelist to hear and determine procedural or interlocutory motions, including the following motions:

1. A motion to quash an appeal for failure to comply with rule 2.1.
2. A motion to dismiss an appeal or a cross-appeal for delay.
3. A motion to reinstate an appeal or a cross-appeal that is deemed to have been abandoned.
4. A motion to extend the time for commencing an appeal.
5. A motion to stay the decision or order appealed from.

RULE 14

FRESH EVIDENCE

Tendering fresh evidence

14.1 (1) Subject to rule 14.2, an appellant who wishes to introduce at the hearing of the appeal evidence that was not before the Hearing ~~Panel~~ Division shall make a motion to the Appeal ~~Panel~~ Division to do so.

Notice of motion

(2) A motion under subrule (1) shall be made by notice of motion.

Materials on motion

(3) The appellant who makes a motion under subrule (1) shall file with the Tribunal~~s Office~~, together with the motion record,

(a) where the appeal is to be heard by a panel consisting of three panellists, four copies of the evidence, each copy in a separate sealed envelope; and

(b) where the appeal is to be heard by a panel consisting of five panellists, six copies of the evidence, each copy in a separate sealed envelope.

Exchange of evidence

(4) As soon as possible after service on the responding party of the motion record for a motion under subrule (1), the moving and responding parties shall consult to determine a timetable for the exchange of material related to the evidence and any cross-examination on that material.

Hearing of motion

(5) Despite rule 11.2, a motion under subrule (1) shall be heard on the date on which the appeal is scheduled to be heard.

Hearing of appeal in any event

(6) The appellant and the respondent shall be prepared to proceed with the hearing of the appeal regardless of the disposition of a motion under subrule (1).

Deemed abandonment of motion

(7) A motion under subrule (1) shall be deemed to have been abandoned if,

(a) the moving party does not comply with any requirement with respect to service of documents or filing of documents with respect to the motion;

(b) the moving party does not comply with any direction given by a panelist with respect to the conduct of the motion.

Documents not available for public inspection

(8) Materials filed with the Tribunal ~~s Office~~ under subrule (3) are not available for public inspection

Respondent consents to introduction of fresh evidence

14.2 (1) Rule 14.1 does not apply where the respondent consents to the appellant introducing at the hearing of the appeal evidence that was not before the Hearing Division~~Panel~~.

(2) Where the respondent consents to the appellant introducing at the hearing of the appeal evidence that was not before the Hearing ~~Panel~~Division, both the appellant and the respondent may include the evidence in their respective appeal books and compendia and may refer to the evidence in their respective facta, but the appellant and the respondent shall clearly identify the evidence as evidence that was not before the Hearing Division~~Panel~~.

RULE 15

HEARING OF APPEAL

Time limits on oral argument

15.~~0~~1 (1) The ~~chair or the vice-chair of the Appeal Panel~~ Chair or Vice-Chair shall specify the time to be allotted to the appellant and respondent for oral argument and reply on the appeal and any cross-appeal.

Notice of time limits

(2) The Tribunal~~s Office~~ shall notify the appellant and the respondent of the time allotted to them for oral argument and reply on the appeal and any cross-appeal as soon as practicable after it is specified by the C~~c~~hair or V~~v~~ice-C~~c~~hair ~~of the Appeal Panel~~.

Complying with time limits

(3) The appellant and the respondent shall limit their oral argument and their reply on the appeal and any cross-appeal to the time allotted to them ~~by the chair or vice-chair of the Appeal Panel~~.

Varying time limits

(4) If it is in the interest of justice, a panelist may give special directions and vary the time limits imposed on the appellant or the respondent under this Rule.

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RULE 16

REASONS

Written reasons: where required

16.1 (1) A panel shall give written reasons for,

(a) its decision to allow or dismiss an appeal; and

(b) any other decision or order made by the panel if a party requests written reasons in accordance with subrule (2).

Making request for written reasons

(2) For the purposes of subrule (1), a party may request written reasons for a decision or order made by a panel by,

(a) making an oral request for written reasons to the panel immediately after the decision or order is made; or

(b) making a written request for written reasons by submitting the written request to the Tribunal~~s Office~~ within sixty days after the decision or order is made.

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

FORMS UNDER THE
RULES OF PRACTICE AND PROCEDURE

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GENERAL HEADING

(Law Society ~~Appeal Panel~~Tribunal file no.)

LAW SOCIETY ~~APPEAL PANEL~~TRIBUNAL
APPEAL DIVISION

BETWEEN:

(name)
Applicant/*(*Appellant *or* Respondent in appeal*)*

and

(name)
Respondent/*(*Respondent in appeal *or* Appellant*)*

APPLICATION UNDER *(statutory provision under which the application is made)(add, if applicable,* referred for hearing under *(statutory provision under which application is required to be heard)).*

(Title of document)

(Text of document)

FORM 3A – NOTICE OF APPEAL

(General heading)

NOTICE OF APPEAL

THE *(identify party)* APPEALS to the ~~Law Society~~ Appeal ~~Panel~~ Division from the *(*decision/order/decision and order/order/disposition*)* of the ~~Law Society~~ Hearing Division ~~Panel~~ dated *(date)*.

THE APPELLANT ASKS that the *(*decision/order/decision and order/order/disposition*)* be set aside and a *(*decision/order/decision and order/order/disposition*)* be made as follows *(or* that the *(*decision/order/decision and order/order/disposition*)* be varied as follows: *(Set out briefly the relief sought.)*

THE GROUNDS OF APPEAL are as follows: *(Set out briefly the grounds of appeal.)*

THE BASIS OF THE APPEAL DIVISION~~PANEL~~'S JURISDICTION IS: *(State the basis for the Appeal Division~~Panel~~'s jurisdiction, including (i) any legislative provision establishing jurisdiction, (ii) whether the order appealed from is final or interlocutory and (iii) any other facts relevant to establishing jurisdiction.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of appellant or appellant's representative)

TO: *(Name and address of respondent or respondent's representative)*

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FORM 3B – SUPPLEMENTARY NOTICE OF APPEAL

(General heading)

SUPPLEMENTARY NOTICE OF APPEAL

The appellant amends the notice of appeal dated *(date)* in the following manner: *(Give particulars of the amendment.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of appellant or appellant's representative)

TO: *(Name and address of respondent or respondent's representative)*

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FORM 5A – NOTICE OF CROSS-APPEAL

(General heading)

NOTICE OF CROSS-APPEAL

THE RESPONDENT CROSS-APPEALS in this appeal and asks that the *(*decision/order/decision and order/order/disposition*)* be set aside and a *(*decision/order/decision and order/order/disposition*)* be made as follows *(or* that the *(*decision/order/decision and order/order/disposition*)* be varied as follows: *(Set out briefly the relief sought.)*

THE GROUNDS FOR THIS CROSS-APPEAL are as follows: *(Set out briefly the grounds of cross-appeal.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of respondent or respondent's representative)

TO: *(Name and address of appellant or appellant's representative)*

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FORM 5B – SUPPLEMENTARY NOTICE OF CROSS-APPEAL

(General heading)

SUPPLEMENTARY NOTICE OF CROSS-APPEAL

The respondent amends the notice of cross-appeal dated *(date)* in the following manner: *(Give particulars of the amendment.)*

(Date)

(Name, address, telephone number, fax number and e-mail address of respondent or respondent's representative)

TO: *(Name and address of appellant or appellant's representative)*

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FORM 10A – NOTICE OF ABANDONMENT OF APPEAL OR CROSS-APPEAL

(General heading)

NOTICE OF ABANDONMENT

The appellant *(or* respondent*)* abandons this appeal *(or* cross-appeal*)*.

(Date)

(Name, address, telephone number, fax number and e-mail address of party serving notice or or of party's representative)

TO: *(Name and address of party on whom notice served or party's representative)*

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FORM 10B – NOTICE OF ELECTION TO PROCEED WITH CROSS-APPEAL

(General heading)

NOTICE OF ELECTION TO PROCEED

The respondent elects to proceed with the cross-appeal

(Date)

(Name, address, telephone number, fax number and e-mail address of respondent or respondent's representative)

TO: *(Name and address of appellant or appellant's representative)*

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TRIBUNAL DU BARREAU
SECTION D'APPEL
RÈGLES DE PRATIQUE ET DE PROCÉDURE

~~**(applicables aux instances devant le Comité d'appel du Barreau)**~~

Prises le 23 février 2012
Modifiées :

RÈGLE 1

APPLICATION ET INTERPRÉTATION

Application

1.1 Les présentes règles~~, à l'exclusion de toutes autres règles de pratique et de procédure prises en application de l'article 61.2 de la *Loi* et visant les instances tenues devant le Comité d'appel,~~ s'appliquent aux instances introduites devant ~~le Comité~~la Section d'appel après le 1er juillet 2012.

Application des règles ~~du Comité d'audition~~de la Section de première instance

1.2 (1) Sauf dispositions contraires des présentes règles, les règles ~~du Comité d'audition~~de la Section de première instance, s'il y a lieu et avec les adaptations nécessaires, s'appliquent aux instances tenues devant ~~le Comité~~la Section d'appel.

(2) Les règles suivantes ~~du Comité d'audition~~de la Section de première instance ne s'appliquent pas aux instances tenues devant ~~le Comité~~la Section d'appel :

1. Règle 6 [Jonction des parties].
2. Règle 7 [Réunion ou séparation des instances].
3. Règle 9 [Introduction, modification et désistement d'une instance].
4. Règle 11 [Fixation des dates].
5. Règle 12 [Gestion des instances].
6. Règle 16.04 [Motion présentée en vertu de la règle 21 : avis non obligatoire].
7. Règle 19 [Divulgation].
8. Règle 20 [Aveux].
9. Règle 21 [Ordonnances de suspension ou de restriction].
10. Règle 22 [Conférences préparatoires à l'audience].
11. Règle 23.01 [Consentement à l'instruction de l'instance par un seul membre].
12. Règle 29 [Conférence sur la résolution de la cause avec consentement].

Interprétation

1.3 Les définitions qui suivent s'appliquent aux présentes règles.

« appel » Comprend, s'il y a lieu, un appel incident~~.~~; (*« appeal »*)

« appelant » Personne qui introduit un appel, y compris, s'il y a lieu, une personne qui introduit un appel incident~~.~~; (*« appellant »*)

« intimé » Comprend, s'il y a lieu, l'intimé d'un appel incident~~.~~; (*« respondent »*)

« membre ~~du Comité~~de la formation » Membre ~~du Comité~~de la Section d'appel~~.~~; (*« panelist »*)

« règles ~~du Comité d'audition »~~de la Section de première instance » S'entend des Règles de pratique et de procédure visant les instances tenues devant ~~le Comité d'audition~~la Section de première instance qui ont été introduites le 1er juillet 2009 ou par la suite~~.~~; (*« Hearing Division Rules »*)

« Vice-président » Désigne le vice-président de la Section d'appel. (*« Vice-Chair »*)

RÈGLE 2

APPEL D'UNE ORDONNANCE INTERLOCUTOIRE

Appel d'une ordonnance interlocutoire

2.1 (1) Sous réserve de la présente règle, une ordonnance interlocutoire ~~du Comité d'audition~~de la Section de première instance est sans appel.

Ordonnance de suspension interlocutoire ou de restriction

(2) Une partie à une motion demandant ~~au Comité d'audition~~à la Section de première instance une ordonnance interlocutoire ayant pour effet de suspendre le permis du titulaire de permis ou de restreindre la manière dont un titulaire de permis peut exercer le droit ou fournir des services juridiques peut appeler ~~au Comité~~à la Section d'appel de la décision rendue par ~~le Comité d'audition~~la Section de première instance à l'égard de la motion.

Motifs

(3) Un appel peut être interjeté pour n'importe quel motif en vertu du paragraphe (2).

Contravention de la règle 2.1

~~Le Comité~~La Section d'appel peut rejeter l'appel

2.2 Sur motion de l'intimé, ~~le Comité~~la Section d'appel peut rejeter un appel qui n'est pas conforme à la règle 2.1.

RÈGLE 3

INTRODUCTION D'UN APPEL

Introduction de l'appel

3.1 (1) L'appel est introduit :

a) par la signification d'un avis d'appel (~~formule~~formulaire 3A), dans les délais prescrits par les paragraphes (2) et (3),

(i) au Barreau, dans le cas d'un appel interjeté par la personne assujettie à une décision, à une ordonnance ou à une mesure susceptible d'appel;

(ii) à la personne assujettie à la décision, à l'ordonnance ou à la mesure, dans le cas le cas d'un appel interjeté par le Barreau; et

b) par le dépôt de l'avis d'appel au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, dans les délais prescrits aux paragraphes (2) et (3).

Délai d'introduction de l'appel : décision ou ordonnance rendue dans une instance tenue devant ~~le Comité d'audition~~la Section de première instance

~~(2) Si la décision ou l'ordonnance portée en appel porte sur le fond d'une instance tenue devant le Comité d'audition conformément aux articles 27, 31, 34, 38, 43, 45, 49.42 ou~~

(2) Si la décision ou l'ordonnance portée en appel porte sur le fond d'une instance tenue devant la Section de première instance conformément aux articles 27, 31, 34, 38, 43, 45, 49.42 ou 49.43 de la *Loi*, l'avis d'appel est signifié à l'intimé et déposé au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, dans un délai de 30 jours après que l'avis de la décision et de l'ordonnance ~~officielles~~officielle contenant la décision, l'ordonnance ou la décision et l'ordonnance qui ~~sont portées~~est porté en appel est réputé avoir été reçu par l'appelant.

Délai d'introduction de l'appel : ordonnance rendue à l'égard d'une motion déposée devant ~~le Comité d'audition~~la Section de première instance

(3) Si l'ordonnance ou la mesure portée en appel porte sur une motion présentée dans une instance ou une instance envisagée devant ~~le Comité d'audition~~la Section de première instance, l'avis d'appel est signifié à l'intimé et déposé au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, dans les 30 jours après que l'avis de l'ordonnance officielle contenant l'ordonnance ou la mesure portée en appel et qui est réputée avoir été reçue par l'appelant.

Mode de signification

(4) L'avis d'appel est signifié conformément aux présentes règles comme s'il s'agissait d'un acte introductif d'instance.

Prolongation du délai d'introduction de l'appel

3.2 (1) L'avis d'appel peut être signifié à l'intimé et déposé au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, après le délai prescrit aux paragraphes 3.1 (2) et (3), avec le consentement écrit de l'intimé.

Dépôt du consentement

(2) Si l'intimé, conformément au paragraphe (1), a consenti à ce que l'avis d'appel soit signifié et déposé après le délai prescrit aux paragraphes 3.1 (2) et (3), l'appelant dépose au ~~greffe du tribunal~~Tribunal le consentement de l'intimé, accompagné de l'avis d'appel et de la preuve de signification de l'avis d'appel.

Modification de l'avis d'appel

3.3 L'avis d'appel peut être modifié sans l'autorisation ~~du Comité d'appel~~, avant la mise en état de l'appel, par la signification à l'intimé d'un avis supplémentaire d'appel (~~formule~~formulaire 3B) et son dépôt au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification.

RÈGLE 4

TRANSCRIPTIONS

Certificat de service de sténographie accompagnant l'avis d'appel

4.1 (1) L'appelant dépose au ~~greffe du tribunal~~Tribunal, au moment où il y dépose l'avis d'appel, un certificat du service de sténographie qui a enregistré les délibérations ~~du Comité d'audition~~de la Section de première instance qui ont abouti à la décision, à l'ordonnance ou à la mesure portée en appel, attestant que les copies de la transcription qui sont exigées par les présentes règles ont fait l'objet d'une demande.

Non-disponibilité du certificat

(2) L'appelant qui, malgré l'exercice d'une diligence raisonnable, n'est pas en mesure de déposer le certificat du service de sténographie prescrit par le paragraphe (1) prend les mesures suivantes :

a) il dépose au ~~greffe~~Tribunal, au moment où il y dépose l'avis d'appel, la preuve que les copies de la transcription exigées par les présentes règles ont fait l'objet d'une demande;

b) il dépose le certificat du service de sténographie dans les 15 jours suivant le dépôt de l'avis d'appel.

Dispense

(3) Si cela est nécessaire dans l'intérêt de la justice, un membre ~~du Comité~~de la formation peut donner des directives particulières et modifier les règles régissant les transcriptions.

RÈGLE 5

APPELS INCIDENTS

Introduction de l'appel incident

5.1 (1) Si l'appel d'une décision, d'une ordonnance ou d'une mesure a déjà été introduit, l'intimé peut introduire un appel incident s'il a le droit par ailleurs d'introduire un appel conformément à la *Loi* ou aux présentes règles.

Introduction

(2) L'appel incident est introduit :

a) par la signification d'un avis d'appel incident (~~formule~~formulaire 5A), dans les délais prescrits par le paragraphe (3), à l'auteur de l'appel;

b) par le dépôt de l'avis d'appel incident au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, dans les délais prescrits au paragraphe (3).

Délai d'introduction de l'appel incident

(3) L'avis d'appel incident est signifié à l'appelant et déposé au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, dans les 15 jours suivant la signification à l'intimé de l'avis d'appel de l'appelant.

Mode de signification

(4) L'avis d'appel incident est signifié conformément aux présentes règles comme s'il s'agissait d'un acte introductif d'instance.

Prolongation du délai d'introduction de l'appel incident

5.2 (1) L'avis d'appel incident peut être signifié à l'appelant et déposé au ~~greffe du tribunal~~Tribunal, avec la preuve de sa signification, après le délai prescrit au paragraphe 5.01 (3), avec le consentement écrit de l'appelant.

Dépôt du consentement

(2) Si l'appelant, conformément au paragraphe (1), a consenti à ce que l'avis d'appel incident soit signifié et déposé après le délai prescrit au paragraphe 5.01 (3), l'intimé dépose au ~~greffe du tribunal~~Tribunal le consentement de l'appelant, accompagné de l'avis d'appel incident et de la preuve de la signification de l'avis d'appel incident.

Modification de l'avis d'appel incident

5.3 L'avis d'appel incident peut être modifié sans ~~l'~~autorisation ~~du Comité d'appel~~, avant la mise en état de l'appel, par la signification à l'appelant d'un avis supplémentaire d'appel incident (~~formule~~formulaire 5B) et son dépôt au ~~greffe du tribunal~~Tribunal, avec la preuve de sa

signification.

RÈGLE 6

DOCUMENTATION DE L'APPELANT

Cahier d'appel

6.1 (1) Sous réserve du paragraphe (2), le cahier d'appel de l'appelant s'intitule « Cahier d'appel de l'appelant » et comprend, dans des pages numérotées consécutivement, séparées par des onglets numérotés et disposés de la façon suivante :

a) une table des matières énumérant chaque document inclus dans le cahier d'appel et décrivant chaque document par sa nature et sa date;

b) une copie de l'avis d'appel et de tout avis supplémentaire d'appel;

c) une copie de la décision et de l'ordonnance officielles, comprenant la décision ou l'ordonnance portée en appel, ou une copie de l'ordonnance officielle, comprenant l'ordonnance ou la mesure portée en appel;

d) une copie des motifs ~~du Comité d'audition~~de la Section de première instance à l'appui de la décision, de l'ordonnance ou de la mesure portée en appel;

e) une copie de l'avis de requête ou de tout autre document introductif de l'instance devant ~~le Comité d'audition~~la Section de première instance;

f) une copie des pièces auxquelles il est fait référence dans le mémoire de l'appelant;

g) une copie des autres documents pertinents pour l'audition de l'appel qui ont été déposés auprès du ~~Comité d'audition~~Tribunal et auxquels il est fait référence dans le mémoire de l'appelant;

h) une copie des directives données par un membre ~~du Comité~~de la formation à une conférence de gestion de l'appel au sujet de la conduite de l'appel;

i) une copie de toute ordonnance ~~du Comité~~de la Section d'appel au sujet de la conduite de l'appel;

j) si des documents mentionnés au présent paragraphe font l'objet d'une ordonnance de non-publication rendue par ~~le Comité d'audition~~la Section de première instance, une copie de cette ordonnance.

Cahier d'appel : deux volumes

~~(2) Dans le cas où le cahier d'appel de l'appelant, s'il était préparé conformément au paragraphe (1), inclurait un document soustrait au public en vertu du paragraphe 27.01 (4) des~~

~~(2) règles du Comité d'audition, le cahier d'appel de l'appelant est divisé en deux volumes intitulés~~

(2) Dans le cas où le cahier d'appel de l'appelant, s'il était préparé conformément au paragraphe (1), inclurait un document soustrait au public en vertu du paragraphe 27.01 (4) des règles de la Section de première instance, le cahier d'appel de l'appelant est divisé en deux volumes intitulés « Cahier d'appel de l'appelant : Volume public » et « Cahier d'appel de l'appelant : Volume confidentiel ». Le « Cahier d'appel de l'appelant : Volume public » est préparé conformément au paragraphe (1), mais les documents soustraits au public en sont exclus, et le « Cahier d'appel de l'appelant : Volume confidentiel » est préparé conformément au paragraphe (1), mais il contient seulement les documents qui sont exclus du « Cahier d'appel de l'appelant : Volume public ». À la fin, on y trouve une copie de l'ordonnance ~~du Comité d'audition~~de la Section de première instance qui a soustrait au public certains des documents du cahier d'appel.

Présentation du cahier d'appel : reliure

(3) Le cahier d'appel de l'appelant est relié des deux côtés avec une couverture bleue.

Mémoire

Contenu

6.2 (1) Le mémoire de l'appelant s'intitule « Mémoire de l'appelant » et se compose des éléments suivants :

a) la partie I, intitulée « Exposé de la cause », qui indique le nom de l'appelant, la nature de l'instance devant ~~le Comité d'audition~~la Section de première instance et la décision ~~du Comité d'audition dans l'~~de la Section de première instance dans la cause, et qui précise si l'appel est formé à l'encontre d'une décision, d'une décision et d'une ordonnance, d'une ordonnance ou de toute autre mesure ~~du Comité d'audition~~de la Section de première instance;

b) la partie II, intitulée « Aperçu de la cause », qui comprend un exposé décrivant de façon concise la nature de la cause et les questions en litige;

c) la partie III, intitulée « Résumé des faits », qui comprend un résumé des faits pertinents aux questions soulevées dans l'appel, avec les renvois nécessaires à la transcription des délibérations devant ~~le Comité d'audition~~la Section de première instance et aux pièces;

d) la partie IV, intitulée « Questions soulevées en droit », qui comprend un énoncé des questions soulevées, chacune étant suivie immédiatement d'une plaidoirie concise renvoyant aux règles de droit et à la jurisprudence pertinentes;

e) la partie V, intitulée « Conclusions recherchées », qui énonce l'ordonnance demandée ~~au Comité~~à la Section d'appel;

f) l’annexe A, intitulée « Textes à l’appui », qui comprend la liste des textes à l’appui applicables, avec les renvois, dans l’ordre où ils apparaissent à la partie IV ou par ordre alphabétique;

~~a)~~

g) l’annexe B, intitulée « Dispositions législatives pertinentes », qui comprend le texte de toutes les dispositions pertinentes des lois, des règlements, des arrêtés, des règles de pratique et de procédure et du code de déontologie.

Renvois à la transcription

(2) Les renvois à la transcription des délibérations devant ~~le Comité d'audition~~la Section de première instance indiquent la date, le numéro de page et la ligne, et les renvois aux pièces indiquent l'onglet et le numéro de page du cahier d'appel.

Présentation des parties I à V

(3) Les parties I à V sont présentées sous forme de paragraphes numérotés consécutivement dans l'ensemble du mémoire.

Longueur du mémoire

~~pages.~~

(4) Le mémoire de l’appelant, à l’exception des annexes, ne compte pas plus de 30 pages.
~~(2)~~

Présentation du mémoire : reliure

(5) Le mémoire de l’appelant est relié des deux côtés avec une couverture bleue.

Présentation du mémoire : détails de l’impression

(6) Le mémoire de l’appelant est imprimé sur papier blanc de 8 ½ pouces par 11 pouces, et le texte est imprimé, dactylographié, écrit à la main ou reproduit lisiblement en caractères ayant au moins un corps de 12 points ou un pas de 10, sur un seul côté à double interligne, sauf les citations, qui peuvent être à simple interligne, avec une marge de 1 ½ pouce à gauche.

Dossier des textes à l’appui

6.3 (1) Le dossier des textes à l’appui de l’appelant s’intitule « Dossier des textes à l’appui de l’appelant » et ne contient que les textes qui seront invoqués au cours de la plaidoirie orale.

(2) Dans les textes inclus dans le dossier des textes à l’appui de l’appelant, les passages qui seront invoqués au cours de la plaidoirie orale sont indiqués.

(3) Le dossier des textes à l’appui de l’appelant est relié des deux côtés avec une couverture bleue.

Mémoire, cahier supplémentaire d’appel et dossier supplémentaire des textes à l’appui : appel incident

6.4 (1) Si l’intimé a signifié un avis d’appel incident, l’appelant rédige un mémoire en tant qu’intimé de l’appel incident.

(2) Les paragraphes 8.2 (1) à (4) et (6) s’appliquent, avec les adaptations nécessaires, au mémoire de l’appelant en tant qu’intimé de l’appel incident.

(3) Le mémoire de l’appelant en tant qu’intimé de l’appel incident est relié des deux côtés avec une couverture bleue.

(4) L’appelant en tant qu’intimé de l’appel incident peut rédiger un cahier supplémentaire d’appel et un dossier supplémentaire des textes à l’appui si des documents pertinents pour l’audition de l’appel incident auxquels renvoie le mémoire de l’appelant en tant qu’intimé de l’appel incident ne sont pas déjà inclus dans le cahier d’appel de l’appelant ou de l’intimé et si les textes à l’appui qui seront invoqués au cours de la plaidoirie orale de l’appel incident ne sont pas déjà inclus dans le dossier des textes à l’appui de l’appelant ou de l’intimé.

(5) Les règles 5.1 et 5.3 s’appliquent respectivement, avec les adaptations

nécessaires, au cahier supplémentaire d'appel de l'appelant et à son dossier supplémentaire des textes à l'appui.

Le greffe du ~~tribunal~~Tribunal peut refuser les documents

6.5 (1) Sous réserve du paragraphe (2), le greffe du ~~tribunal~~Tribunal peut refuser le dépôt du cahier d'appel de l'appelant, de son mémoire, de son dossier des textes à l'appui, de son mémoire en tant qu'intimé de l'appel incident, de son cahier supplémentaire d'appel ou de son dossier supplémentaire des textes à l'appui lorsqu'ils ne sont pas conformes à la présente règle.

Dispense

(2) Si cela est nécessaire dans l'intérêt de la justice, un membre ~~du Comité~~de la formation peut donner des directives particulières et modifier les règles régissant le cahier d'appel de l'appelant, son mémoire, son dossier des textes à l'appui, son mémoire en tant qu'intimé de l'appel incident, son cahier supplémentaire d'appel et son dossier supplémentaire des textes à l'appui.

Date de dépôt de la documentation de l'appelant en tant qu'intimé de l'appel incident

6.6 (1) Si l'intimé a introduit un appel incident, l'appelant, au plus tard 14 jours avant la date prévue d'audition de l'appel,

a) signifie à l'intimé une copie du cahier supplémentaire d'appel de l'appelant, une copie de son mémoire en tant qu'intimé de l'appel incident, et une copie de son dossier supplémentaire des textes à l'appui;

b) dépose au ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification :

~~a)~~

(i) dans le cas des appels entendus par cinq membres ~~du Comité~~de la formation, six copies du cahier supplémentaire d'appel de l'appelant, de son mémoire en tant qu'intimé de l'appel incident et de son dossier supplémentaire des textes à l'appui;

(ii) dans le cas des appels entendus par trois membres ~~du Comité~~de la formation, quatre copies du cahier supplémentaire d'appel de l'appelant, de son mémoire en tant qu'intimé de l'appel incident et de son dossier supplémentaire des textes à l'appui.

Confirmation ou modification de la durée estimative des plaidoiries orales

(2) Si l'intimé a introduit un appel incident, l'appelant, au plus 10 jours après avoir reçu la signification de la documentation de l'intimé, dépose au ~~greffe du tribunal~~Tribunal l'un des deux certificats suivants :

a) un certificat confirmant que la durée estimative totale des plaidoiries orales de

l’appelant, qui était indiquée dans le certificat de mise en état de l’appel, demeure inchangée;

b) un certificat indiquant la nouvelle durée estimative totale des plaidoiries orales de l’appelant.

RÈGLE 7

MISE EN ÉTAT DE L'APPEL

Signification et dépôt de la documentation de l'appelant

7.1 (1) Sous réserve du paragraphe (2), l'appelant :

a) signifie à l'intimé une copie du cahier d'appel de l'appelant, une copie de son mémoire, une copie de son dossier des textes à l'appui, et une copie de la transcription;

b) dépose au ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres ~~du Comité~~de la formation, six copies du cahier d'appel de l'appelant, de son mémoire et de son dossier des textes à l'appui, et une copie de la transcription;

(ii) dans le cas des appels entendus par trois membres ~~du Comité~~de la formation, quatre copies du cahier d'appel de l'appelant, de son mémoire et de son dossier des textes à l'appui, et une copie de la transcription.

Dispense de l'obligation de signifier et de déposer la transcription

(2) Si l'appelant a déposé une motion en suspension de la décision, de l'ordonnance ou de la mesure portée en appel et a signifié et déposé au ~~greffe du tribunal~~Tribunal une copie de la transcription incluse dans son dossier de la motion, il n'est pas tenu de signifier ~~à l'intimé~~ ni de déposer ~~au greffe du tribunal~~ une copie additionnelle de la transcription.

Certificat de mise en état

(3) L'appelant dépose au ~~greffe du tribunal~~Tribunal un certificat de mise en état indiquant :

a) que le cahier d'appel, le mémoire et le dossier des textes à l'appui de l'appelant ont été signifiés et déposés conformément au paragraphe (1);

b) que la transcription a été signifiée et déposée conformément au paragraphe (1) ou (2);

c) que la transcription est complète;

d) la durée estimative totale de la plaidoirie orale de l'appelant.

Délai de mise en état

(4) L'appelant met l'appel en état conformément aux paragraphes (1) et (3) :

a) dans un délai de 60 jours après que l’avis de la décision et de l’ordonnance officielles contenant la décision, l’ordonnance ou la décision et l’ordonnance portées en appel, ou après que l’ordonnance officielle contenant l’ordonnance ou la mesure portée en appel est réputée avoir été reçue par l’appelant, si l’appelant a reçu la transcription dans le délai de 60 jours; ou

b) dans un délai de 60 jours après que l’appelant a reçu la transcription, s’il ne l’a pas reçue dans le délai de 60 jours mentionné à l’alinéa a).

RÈGLE 8

DOCUMENTATION DE L'INTIMÉ

Cahier d'appel

8.1 (1) Sous réserve du paragraphe (2), le cahier d'appel de l'intimé s'intitule « Cahier d'appel de l'intimé » et comprend, dans des pages numérotées consécutivement, séparées par des onglets numérotés et disposés de la façon suivante :

a) une table des matières énumérant chaque document inclus dans le cahier d'appel et décrivant chaque document par sa nature et sa date;

b) une copie, s'il y a lieu, de l'avis d'appel incident et de l'avis supplémentaire d'appel incident;

c) une copie des pièces auxquelles il est fait référence dans le mémoire de l'intimé et qui ne sont pas incluses dans le cahier d'appel de l'appelant;

d) une copie des autres documents pertinents pour l'audition de l'appel qui ont été déposés auprès ~~du Comité d'audition~~de la Section de première instance, auxquels il est fait référence dans le mémoire de l'intimé et qui ne sont pas inclus dans le cahier d'appel de l'appelant.

Cahier d'appel : deux volumes

~~(2) Dans le cas où le cahier d'appel de l'intimé, s'il était préparé conformément au paragraphe (1), inclurait un document soustrait au public en vertu du paragraphe 27.01 (4) des règles du Comité d'audition, le cahier d'appel de l'intimé est divisé en deux volumes intitulés~~

(2) Dans le cas où le cahier d'appel de l'intimé, s'il était préparé conformément au paragraphe (1), inclurait un document soustrait au public en vertu du paragraphe 27.01 (4) des règles de la Section de première instance, le cahier d'appel de l'intimé est divisé en deux volumes intitulés « Cahier d'appel de l'intimé : Volume public » et « Cahier d'appel de l'intimé : Volume confidentiel ». Le « Cahier d'appel de l'intimé : Volume public » est préparé conformément au paragraphe (1), mais les documents soustraits au public en sont exclus, et le « Cahier d'appel de l'intimé : Volume confidentiel » est préparé conformément au paragraphe (1), mais il contient seulement les documents qui sont exclus du « Cahier d'appel de l'intimé : Volume public ». À la fin, on y trouve une copie de l'ordonnance ~~du Comité d'audition~~de la Section de première instance qui a soustrait au public certains des documents du cahier d'appel, si elle n'est pas incluse dans le cahier d'appel de l'appelant.

Présentation du cahier d'appel : reliure

(3) Le cahier d'appel de l'intimé est relié des deux côtés avec une couverture verte.

Mémoire

Contenu

8.2 (1) Le mémoire de l'intimé s'intitule « Mémoire de l'intimé » et se compose des éléments suivants :

~~**8.1**~~

a) la partie I, intitulée « Exposé de la cause de l'intimé », qui comprend un exposé décrivant de façon concise la nature de la cause et les questions en litige;

b) la partie II, intitulée « Résumé des faits », qui comprend un exposé des faits figurant dans la partie III du mémoire de l'appelant dont il reconnaît l'exactitude ou dont il reconnaît en grande partie l'exactitude, un exposé des faits qu'il conteste et un ~~bref~~ résumé des faits supplémentaires invoqués, avec les renvois nécessaires à la transcription des délibérations devant ~~le Comité d'audition~~la Section de première instance et aux pièces;

c) la partie III, intitulée « Réponse aux questions soulevées par l'appelant », qui énonce la position de l'intimé à l'égard de chaque question soulevée par l'appelant, chacune étant suivie immédiatement d'une plaidoirie concise renvoyant aux règles de droit et à la jurisprudence pertinentes;

d) la partie IV, intitulée « Questions supplémentaires », qui comprend un énoncé des questions supplémentaires soulevées par l'intimé, chacune étant suivie immédiatement d'une plaidoirie concise renvoyant aux règles de droit et à la jurisprudence pertinentes;

e) la partie V, intitulée « Conclusions recherchées », qui énonce l'ordonnance demandée ~~au Comité~~à la Section d'appel;

f) l'annexe A, intitulée « Textes à l'appui », qui comprend la liste des textes à l'appui applicables, avec les renvois, dans l'ordre où ils apparaissent aux parties III et IV ou par ordre alphabétique;

g) l'annexe B, intitulée « Dispositions législatives pertinentes », qui comprend le texte de toutes les dispositions pertinentes des lois, des règlements, des arrêtés, des règles de pratique et de procédure et du code de déontologie.

Renvois à la transcription

(2) Les renvois à la transcription des délibérations devant ~~le Comité d'audition~~la Section de première instance indiquent la date, le numéro de page et la ligne, et les renvois aux pièces indiquent l'onglet et le numéro de page du cahier d'appel pertinent.

Présentation des parties I à V

(3) Les parties I à V sont présentées sous forme de paragraphes numérotés consécutivement dans l'ensemble du mémoire.

Longueur du mémoire

(4) Le mémoire, à l’exception des annexes, ne compte pas plus de 30 pages.

Présentation du mémoire : reliure

(5) Le mémoire de l'intimé est relié des deux côtés avec une couverture verte.

Présentation du mémoire : détails de l'impression

(6) Le mémoire de l'intimé est imprimé sur papier blanc de 8 ½ pouces par 11 pouces, et le texte est imprimé, dactylographié, écrit à la main ou reproduit lisiblement en caractères ayant au moins un corps de 12 points ou un pas de 10, sur un seul côté à double interligne, sauf les citations, qui peuvent être à simple interligne, avec une marge de 1 ½ pouce à gauche.

Mémoire : appel incident

8.3 (1) Si l'intimé a introduit un avis d'appel incident, il rédige un mémoire en tant qu'appelant de l'appel incident.

(2) Le mémoire de l'intimé en tant qu'appelant de l'appel incident peut être intégré à son mémoire ou constituer un document distinct.

(3) Les paragraphes 6.2 (1) à (4) s'appliquent, avec les adaptations nécessaires, au mémoire de l'intimé en tant qu'appelant de l'appel incident.

(4) Si le mémoire de l'intimé en tant qu'appelant de l'appel incident constitue un document distinct, il est relié des deux côtés avec une couverture verte.

(5) Si le mémoire de l'intimé en tant qu'appelant de l'appel incident constitue un document distinct, il est imprimé sur papier blanc de 8 ½ pouces par 11 pouces, et le texte est imprimé, dactylographié, écrit à la main ou reproduit lisiblement en caractères ayant au moins un corps de 12 points ou un pas de 10, sur un seul côté à double interligne, sauf les citations, qui peuvent être à simple interligne, avec une marge de 1 ½ pouce à gauche.

Dossier des textes à l'appui

8.4 (1) Le dossier des textes à l'appui de l'intimé s'intitule « Dossier des textes à l'appui de l'intimé » et ne contient que les textes qui seront invoqués au cours de la plaidoirie orale et qui ne sont pas inclus dans le dossier des textes à l'appui de l'appelant.

(2) Dans les textes inclus dans le dossier des textes à l'appui de l'intimé, les passages qui seront invoqués au cours de la plaidoirie orale sont indiqués.

(3) Le dossier des textes à l'appui de l'appelant est relié des deux côtés avec une couverture verte.

Le greffe du ~~tribunal~~Tribunal peut refuser les documents

8.5 (1) Sous réserve du paragraphe (2), le greffe du ~~tribunal~~Tribunal peut refuser le dépôt du cahier d'appel de l'intimé, de son mémoire, de son mémoire en tant qu'appelant de

l'appel incident ou de son dossier des textes à l'appui lorsqu'ils ne sont pas conformes à la présente règle.

Dispense

(2) Si cela est nécessaire dans l'intérêt de la justice, un membre ~~du Comité~~de la formation peut donner des directives particulières et modifier les règles régissant le cahier d'appel de l'intimé, son mémoire, son mémoire en tant qu'appelant de l'appel incident et son dossier des textes à l'appui.

Date de dépôt de la documentation de l'intimé s'il n'y a pas d'appel incident

8.6 (1) Sous réserve du paragraphe (2), l'intimé, au plus tard 14 jours avant la date prévue d'audition de l'appel,

a) signifie à l'appelant une copie du cahier d'appel de l'intimé, une copie de son mémoire et une copie de son dossier des textes à l'appui;

b) dépose au ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres ~~du Comité~~de la formation, six copies du cahier d'appel de l'intimé, de son mémoire et de son dossier des textes à l'appui;

(ii) dans le cas des appels entendus par trois membres ~~du Comité~~de la formation, quatre copies du cahier d'appel de l'appelant, de son mémoire et de son dossier des textes à l'appui.

Date de dépôt de la documentation de l'intimé s'il y a appel incident

(2) L'intimé qui a introduit un appel incident, au plus tard 30 jours après avoir reçu la signification de la documentation de l'appelant,

a) signifie à l'appelant une copie du cahier d'appel de l'intimé, une copie de son mémoire, une copie, s'il y a lieu, de son mémoire en tant qu'appelant de l'appel incident et une copie de son dossier des textes à l'appui;

b) dépose au ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres ~~du Comité~~de la formation, six copies du cahier d'appel de l'intimé, de son mémoire, de son mémoire en tant qu'appelant de l'appel incident s'il y a lieu, et de son dossier des textes à l'appui;

~~(i)~~

(ii) dans le cas des appels entendus par trois membres ~~du Comité~~de la formation, quatre copies du cahier d'appel de l'intimé, de son mémoire, de son mémoire en tant qu'appelant de l'appel incident s'il y a lieu, et de son

dossier des textes à l'appui.

Durée estimative des plaidoiries orales

(3) L'intimé dépose au ~~greffe du tribunal~~Tribunal un certificat indiquant la durée estimative totale de ses plaidoiries orales :

a) s'il n'a pas introduit un appel incident, au plus tard 10 jours après avoir reçu la signification de la documentation de l'appelant;

b) s'il a introduit un appel incident, en même temps qu'il dépose au ~~greffe du tribunal~~Tribunal les documents prescrits à l'alinéa (2) b).

RÈGLE 9

RECUEIL

Obligation

9.1 L'appelant et l'intimé préparent chacun un recueil.

Recueil de l'appelant

9.2 (1) Le recueil de l'appelant s'intitule « Recueil de l'appelant » et contient les extraits de la transcription qui seront invoqués au cours de sa plaidoirie orale; il peut aussi contenir d'autres documents ou des extraits d'autres documents inclus dans le cahier d'appel de l'appelant, dans son cahier supplémentaire s'il y a lieu, ou dans le cahier d'appel de l'intimé qui seront invoqués au cours de la plaidoirie orale.

(2) Le recueil de l'appelant est relié des deux côtés avec une couverture bleue.

Recueil de l'intimé

9.3 (1) Le recueil de l'intimé s'intitule « Recueil de l'intimé » et contient les extraits de la transcription qui seront invoqués au cours de sa plaidoirie orale; il peut aussi contenir d'autres documents ou des extraits d'autres documents inclus dans le cahier d'appel de l'appelant, dans son cahier supplémentaire s'il y a lieu, ou dans le cahier d'appel de l'intimé qui seront invoqués au cours de la plaidoirie orale.

(2) Le recueil de l'intimé est relié des deux côtés avec une couverture verte.

Date de dépôt du recueil

9.4 L'appelant et l'intimé, au plus tard cinq jours avant la date prévue d'audition de l'appel,

a) se signifient mutuellement une copie de leur recueil;

b) déposent au ~~greffe du tribunal~~Tribunal, avec la preuve de leur signification :

(i) dans le cas des appels entendus par cinq membres ~~du Comité~~de la formation, chacun six copies de son recueil;

(ii) dans le cas des appels entendus par trois membres ~~du Comité~~de la formation, chacun quatre copies de son recueil.

Dispense

9.5 Si cela est nécessaire dans l'intérêt de la justice, un membre ~~du Comité~~de la formation peut donner des directives particulières et modifier les règles régissant les recueils respectifs de l'appelant et de l'intimé.

~~9.1~~

RÈGLE 10

DÉSISTEMENT ET REJET POUR CAUSE DE RETARD

Désistement de l'appelant

10.1 L'appelant peut se désister d'un appel ou d'un appel incident en délivrant un avis de désistement (~~formule~~formulaire 10A).

Désistement réputé

Appel

10.2 (1) Si l'appelant n'a pas mis l'appel en état dans un délai d'un an après l'expiration du délai pour ce faire, il est réputé s'être désisté de l'appel, et le ~~greffe du tribunal~~Tribunal envoie à l'appelant et à l'intimé un avis en ce sens.

Appel incident

(2) Si l'intimé qui a introduit un appel incident ne s'est pas conformé au paragraphe 8.6 (2), il est réputé s'être désisté de l'appel incident, et le ~~greffe du tribunal~~Tribunal envoie à l'appelant et à l'intimé un avis en ce sens.

Motion de rejet pour cause de retard

Appel

10.3 (1) Si l'appelant n'a pas mis l'appel en état dans le délai prescrit par le paragraphe 7.1 (4) ou par une ordonnance ~~du Comité~~de la Section d'appel, l'intimé peut présenter ~~au Comité~~à la Section d'appel une motion demandant le rejet de l'appel pour cause de retard.

Appel incident

(2) Si l'intimé qui a introduit un appel incident ne s'est pas conformé au paragraphe 8.6 (2) ou à une ordonnance ~~du Comité~~de la Section d'appel concernant le délai de dépôt de sa documentation lorsqu'il a introduit un appel incident, l'appelant peut présenter ~~au Comité~~à la Section d'appel une motion demandant le rejet de l'appel incident pour cause de retard.

Ordonnance rejetant l'appel ou l'appel incident pour cause de retard

(3) Sur motion de l'intimé, ~~le Comité~~la Section d'appel peut rejeter l'appel ou l'appel incident pour cause de retard.

Effet du désistement ou du rejet de l'appel pour cause de retard sur l'appel incident

10.4 (1) Si l'appel a fait l'objet d'un désistement ou d'un rejet pour cause de retard, l'intimé qui a introduit un appel incident et désire le faire instruire délivre, dans les 15 jours

suivant le désistement ou le rejet de l'appel pour cause de retard, un avis de décision de faire instruire (~~formule~~formulaire 10B).

Désistement réputé de l'appel incident

(2) Si l'intimé ne délivre pas l'avis de décision de faire instruire prévu au paragraphe (1), il est réputé s'être désisté de l'appel incident, et le ~~greffe du tribunal~~Tribunal envoie à l'intimé et à l'appelant un avis en ce sens.

Motion en annulation

10.5 (1) L'appelant qui est réputé s'être désisté de l'appel ou l'intimé qui est réputé s'être désisté de l'appel incident peuvent présenter une motion ~~au Comité~~à la Section d'appel pour faire rétablir l'appel ou l'appel incident.

Ordonnance rétablissant l'appel ou l'appel incident

(2) Sur motion de l'appelant, ~~le Comité~~la Section d'appel peut rétablir un appel ou un appel incident qui est réputé avoir fait l'objet d'un désistement.

RÈGLE 11

FIXATION DES DATES

Audition de l’appel

11.1 (1) Sous réserve du paragraphe (2), le greffe du ~~tribunal~~Tribunal inscrit au calendrier l’audition de l’appel.

Audition de l’appel incident

(2) Si l’intimé a introduit un appel incident qui n’a pas été rejeté pour cause de retard et n’est pas réputé avoir fait l’objet d’un désistement, l’appel incident est entendu à la même date que l’appel.

Audition d’une motion

11.2 Sauf disposition contraire des présentes règles, l’audition d’une motion peut être inscrite au calendrier à une date fixée par le greffe du ~~tribunal~~Tribunal.

GESTION DES

APPELS RÈGLE 12

Conférence de gestion de l'appel

12.1 (1) Une conférence de gestion de l'appel est dirigée par un membre ~~du Comité~~de la formation.

Formule

(2) La conférence de gestion de l'appel peut avoir lieu en personne, par conférence téléphonique, par échange de documents ou par toute combinaison de ces moyens.

Présence ou participation à la conférence de gestion de l'appel

(3) Sauf directive contraire du membre ~~du Comité~~de la formation qui dirige la conférence de gestion de l'appel, l'appelant et l'intimé, ou leurs représentants, sont tenus d'y assister ou d'y participer.

Défaut d'assister ou de participer

(4) Si l'appelant ou l'intimé est tenu d'assister ou de participer à une conférence de gestion de l'appel et si ni lui ni son représentant n'y assiste ou n'y participe, le membre ~~du Comité~~de la formation qui dirige la conférence peut la tenir en son absence et sans sa participation.

Avis d'inscription des résultats d'une conférence tenue en vertu du paragraphe (4)

(5) Si un membre ~~du Comité~~de la formation tient une conférence de gestion de l'appel en l'absence d'une personne et sans sa participation en vertu du paragraphe (4), le ~~greffe du tribunal~~Tribunal envoie à cette personne une copie de l'inscription des résultats de la conférence.

Affaires traitées

12.2 (1) À une conférence de gestion de l'appel, un membre ~~du Comité~~de la formation peut :

a) inscrire au calendrier une autre conférence de gestion de l'appel;

b) inscrire au calendrier ou ajourner l'audition de l'appel;

c) inscrire au calendrier ou ajourner l'audition d'une motion;

d) donner des directives sur la conduite de l'appel ou d'une motion.

Inscription des résultats

(2) À la fin d'une conférence de gestion de l'appel, le membre ~~du Comité~~de la formation qui l'a dirigée inscrit les résultats de la conférence dans le cahier d'appel de l'appelant, s'il y a lieu, ou sur l'avis d'appel.

~~(2)~~ **Audition des motions**

(3) Par dérogation à la règle 11.2, le membre ~~du Comité~~de la formation qui dirige une conférence de gestion de l'appel peut procéder séance tenante à l'audition d'une motion présentée par l'appelant ou l'intimé si toutes les conditions suivantes sont réalisées :

a) la motion a été faite par avis de motion;

b) l'auteur de la motion et la partie intimée se sont conformés à leurs obligations respectives concernant la remise des dossiers de motion, des mémoires et des dossiers des textes à l'appui et ont exercé ou refusé d'exercer leurs droits respectifs concernant la remise des dossiers de motion, des mémoires et des dossiers de textes à l'appui;

c) le membre ~~du Comité d'appel~~de la formation a déjà été désigné par le président ou le vice-président pour entendre la motion ~~par le président du Comité d'appel~~;

d) l'auteur de la motion et la partie intimée consentent à l'audition de la motion séance tenante.

Demande de conférence de gestion de l'appel

12.3 (1) Après l'introduction de l'appel, l'appelant et l'intimé peuvent demander en tout temps à rencontrer un membre ~~du Comité~~de la formation pour tenir une conférence de gestion de l'appel.

Demande au greffe du ~~tribunal~~Tribunal

(2) La demande d'une rencontre avec un membre ~~du Comité~~de la formation pour tenir une conférence de gestion de l'appel est soumise au greffe du ~~tribunal~~Tribunal.

Avis de conférence de gestion de l'appel

(3) Si une demande de rencontre avec un membre ~~du Comité~~de la formation a été faite en vue de la tenue d'une conférence de gestion de l'appel, le ~~greffe du tribunal~~Tribunal avise l'appelant et l'intimé de la date et de l'heure de cette conférence et, s'il y a lieu, de l'endroit où elle sera tenue.

Ordre d'assister à une conférence de gestion de l'appel

12.4 (1) Après l'introduction de l'appel, le président ou le vice-président ~~du Comité d'appel~~ peut prescrire en tout temps à l'appelant et à l'intimé de se présenter devant un membre ~~du Comité~~de la formation pour la tenue d'une conférence de gestion de l'appel.

Avis de conférence de gestion de l'appel

(2) Si le président ou le vice-président ~~du Comité d'appel~~ prescrit à l'appelant et à l'intimé de se présenter devant un membre ~~du Comité~~de la formation pour la tenue d'une conférence de gestion de l'appel, le ~~greffe du tribunal~~Tribunal avise l'appelant et l'intimé de cet ordre, de la date et de l'heure de la conférence et, s'il y a lieu, de l'endroit où elle sera tenue.

RÈGLE 13

MOTIONS

Présentation de motions

13.1 (1) Sous réserve du paragraphe (2), une motion ne peut être présentée ~~au Comité~~à la Section d'appel que si un appel a été introduit.

Motion en prolongation du délai d'introduction de l'appel

(2) Une motion visant à prolonger le délai d'introduction d'un appel peut être présentée en tout temps; toutefois, l'auteur de la motion doit délivrer un avis d'appel en même temps que le dossier de la motion.

Motion en sursis d'une décision ou d'une ordonnance

13.2 Une motion en sursis d'une décision ou d'une ordonnance portée en appel se fait par avis de motion.

Motions entendues par un seul membre ~~du Comité~~de la formation

13.3 Conformément au paragraphe 4.2 (1) de la *Loi sur l'exercice des compétences légales*, le président ~~du Comité d'appel~~ou le vice-président peut désigner un seul membre ~~du Comité~~de la formation pour instruire et trancher les motions interlocutoires ou de procédure suivantes :

1) une motion en rejet d'un appel pour cause d'inobservation de la règle 2.1;

2) une motion en rejet d'un appel ou d'un appel incident pour cause de retard;

3) une motion en rétablissement d'un appel ou d'un appel incident qui est réputé avoir fait l'objet d'un désistement;

4) une motion en prolongation du délai d'introduction d'un appel;

5) une motion en sursis d'une décision ou d'une ordonnance portée en appel.

RÈGLE 14

NOUVELLE PREUVE

Présentation d'une nouvelle preuve

14.1 (1) Sous réserve de la règle 14.2, l'appelant qui désire présenter à l'audition de l'appel une preuve dont ~~le Comité d'audition~~la Section de première instance n'a pas été ~~saisi~~saisie présente une motion ~~au Comité~~à la Section d'appel pour ce faire.

Avis de motion

(2) Une motion prévue au paragraphe (1) se fait par avis de motion.

Documentation relative à la motion

(3) L'appelant qui présente une motion conformément au paragraphe (1) dépose au ~~greffe du tribunal~~Tribunal, en même temps que le dossier de la motion,

a) dans le cas des appels entendus par trois membres ~~du Comité~~de la formation, quatre copies de la preuve, chacune dans une enveloppe scellée distincte;

b) dans le cas des appels entendus par cinq membres ~~du Comité~~de la formation, six copies de la preuve, chacune dans une enveloppe scellée distincte.

Échange de preuves

(4) Le plus tôt possible après la signification à la partie intimée du dossier d'une motion visée par le paragraphe (1), l'auteur de la motion et la partie intimée se consultent pour fixer des échéances en vue de l'échange de la documentation relative à la preuve et des contre-interrogatoires sur cette documentation.

Audition de la motion

(5) Par dérogation à la règle 11.2, une motion visée par le paragraphe (1) est entendue à la date fixée pour l'audition de l'appel.

Audition de l'appel quelle que soit l'issue

(6) L'appelant et l'intimé doivent être prêts à procéder à l'instruction de l'appel quelle que soit la décision rendue à l'égard d'une motion visée par le paragraphe (1).

Motion faisant l'objet d'un désistement réputé

(7) Une motion visée par le paragraphe (1) est réputée avoir fait l'objet d'un désistement :

~~(2)~~

a) si l'auteur de la motion ne s'est pas conformé à une exigence relative à la

signification ou au dépôt des documents relatifs à la motion;

b) si l'auteur de la motion ne s'est pas conformé à une directive donnée par un membre ~~du Comité~~de la formation au sujet de la conduite de la motion.

Documents soustraits au public

(8) Les documents déposés au ~~greffe du tribunal~~Tribunal conformément au paragraphe (3) sont soustraits au public.

Consentement de l'intimé à la présentation d'une nouvelle preuve

14.2 (1) La règle 14.1 ne s'applique pas si l'intimé consent à ce que l'appelant présente pendant l'audition de l'appel une preuve dont ~~le Comité d'audition~~la Section de première instance n'a pas été ~~saisi~~saisie.

(2) Si l'intimé consent à ce que l'appelant présente pendant l'audition de l'appel une preuve dont ~~le Comité d'audition~~la Section de première instance n'a pas été ~~saisi~~saisie, l'appelant et l'intimé peuvent inclure cette preuve dans leurs cahiers d'appel et leurs recueils respectifs et invoquer cette preuve dans leurs mémoires respectifs, mais ils doivent indiquer clairement que ~~le Comité d'audition~~la Section de première instance n'a pas été ~~saisi~~saisie de cette preuve.

RÈGLE 15

AUDITION DE L'APPEL

Durée maximale des plaidoiries orales

15.1 (1) Le président ou le vice-président ~~du Comité d'appel~~ prescrivent la durée allouée à l'appelant et à l'intimé pour leurs plaidoiries orales et leurs réponses à l'appel et, s'il y a lieu, à l'appel incident.

Avis des durées maximales

(2) Le ~~greffe du tribunal~~Tribunal avise l'appelant et l'intimé de la durée qui leur est allouée pour les plaidoiries orales et la réponse à l'appel, ainsi qu'à un appel incident s'il y a lieu, le plus tôt possible après que cette durée a été fixée par le président ou le vice-président ~~du Comité d'appel~~.

Respect des durées maximales

(3) L'appelant et l'intimé, dans les plaidoiries orales et dans la réponse à l'appel, ainsi qu'à un appel incident s'il y a lieu, ne dépassent pas la durée qui leur est allouée ~~par le président ou le vice-président du Comité d'appel~~.

Modification de la durée maximale

(4) Si cela est nécessaire dans l'intérêt de la justice, un membre ~~du Comité~~de la formation peut donner des directives particulières et modifier les durées maximales imposées à l'appelant ou à l'intimé en vertu de la présente règle.

RÈGLE 16

MOTIFS

Motifs écrits obligatoires

16.1 (1) ~~Le Comité~~La Section rend des motifs écrits :

a) de sa décision d'accueillir ou de rejeter un appel;

b) de toute autre décision ou ordonnance qu'il rend, si une partie demande des motifs écrits conformément au paragraphe (2).

Demande de motifs écrits

(2) Aux fins du paragraphe (1), une partie peut demander des motifs écrits à l'égard d'une décision ou d'une ordonnance rendue par ~~le Comité~~la Section :

a) en faisant oralement une demande de motifs écrits ~~au Comité~~à la section immédiatement après qu'~~il~~elle a rendu la décision ou l'ordonnance; ~~ou~~

b) en faisant par écrit une demande de motifs écrits en soumettant la demande par écrit au ~~greffe du tribunal~~Tribunal dans un délai de 60 jours après que la décision ou l'ordonnance a été rendue.

Document comparison by Workshare Compare on 10 février 2014 12:31:17

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TRIBUNAL DU BARREAU
SECTION D'APPEL

FORMULAIRES PRÉVUS PAR LES RÈGLES DE PRATIQUE ET DE PROCÉDURE

TITRE DU DOCUMENT

(N^o^ de dossier du ~~Comité d'appel~~Tribunal du Barreau)

~~COMITÉ D'APPEL~~TRIBUNAL DU BARREAU
SECTION D'APPEL

ENTRE :

(nom)
Requérant / *(*Appelant *ou* Intimé en appel*)*

et

(nom)
Intimé / *(*Intimé en appel *ou* Appelant*)*

DEMANDE PRÉSENTÉE EN VERTU DE *(mesure législative en vertu de laquelle la requête est présentée) (ajouter, s'il y a lieu,* renvoyée à l'audience en vertu de *(mesure législative en vertu de laquelle la requête doit être entendue)).*

(Titre du document)

(Texte du document)

~~FORMULE~~FORMULAIRE 3A – AVIS D'APPEL

(Titre du document)

AVIS D'APPEL

LE *(désigner la partie)* INTERJETTE APPEL ~~au Comité~~ à la Section d'appel ~~du Barreau~~ à l'encontre de la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* ~~du Comité d'audition du Barreau~~de la Section de première instance datée du *(date).*

L'APPELANT DEMANDE QUE LA *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit annulée et que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* suivante soit rendue *(ou* que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit modifiée comme suit : *(Énoncer brièvement la réparation recherchée.)*

LES MOTIFS DE L'APPEL sont les suivants : *(Énoncer brièvement les motifs de l'appel.)*

LES FONDEMENTS DE LA COMPÉTENCE ~~DU COMITÉ~~DE LA SECTION D'APPEL ~~EST~~SONT : *(Énoncer le fondement de la compétence ~~du Comité~~de la Section d'appel, en indiquant (i) les dispositions législatives qui établissent la compétence, (ii) si l'ordonnance portée en appel est définitive ou interlocutoire, et (iii) tout autre fait pertinent pour établir la compétence.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'appelant ou de son représentant)

DEST. : *(Nom et adresse de l'intimé ou de son représentant)*

~~FORMULE~~FORMULAIRE 3B – AVIS SUPPLÉMENTAIRE D'APPEL

(Titre du document)

AVIS SUPPLÉMENTAIRE D'APPEL

L'appelant modifie l'avis d'appel daté du *(date)* de la façon suivante : *(Énoncer les détails de la modification.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'appelant ou de son représentant)

DEST. : *(Nom et adresse de l'intimé ou de son représentant)*

~~FORMULE~~FORMULAIRE 5A – AVIS D'APPEL INCIDENT

(Titre du document)

AVIS D'APPEL INCIDENT

L'INTIMÉ INTERJETTE UN APPEL INCIDENT et demande que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit annulée et que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* suivante soit rendue *(ou* que la *(*décision / ordonnance / décision et ordonnance / ordonnance / mesure*)* soit modifiée de la façon suivante : *(Énoncer brièvement la réparation recherchée.)*

LES MOTIFS DE L'APPEL INCIDENT sont les suivants : *(Énoncer brièvement les motifs de l'appel incident.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'intimé ou de son représentant)

DEST. : *(Nom et adresse de l'appelant ou de son représentant)*

~~FORMULE~~FORMULAIRE 5B – AVIS SUPPLÉMENTAIRE D'APPEL INCIDENT

(Titre du document)

AVIS SUPPLÉMENTAIRE D'APPEL INCIDENT

L'intimé modifie l'avis d'appel incident daté du *(date)* de la façon suivante : *(Énoncer les détails de la modification.)*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'intimé ou de son représentant)

DEST. : *(Nom et adresse de l'appelant ou de son représentant)*

~~FORMULE~~FORMULAIRE 10A – AVIS DE DÉSISTEMENT DE L'APPEL OU DE L'APPEL INCIDENT

(Titre du document)

AVIS DE DÉSISTEMENT

L'appelant *(ou* l'intimé*)* se désiste du présent appel *(ou* appel incident*).*

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de la partie qui signifie l'avis ou de son représentant)

DEST. : *(Nom et adresse de la partie à laquelle l'avis est signifié ou de son représentant)*

~~FORMULE~~FORMULAIRE 10B – AVIS DE DÉCISION DE FAIRE INSTRUIRE L'APPEL INCIDENT

(Titre du document)

AVIS DE DÉCISION DE FAIRE INSTRUIRE

L'intimé a décidé de faire instruire l'appel incident.

(Date)

(Nom, adresse, numéro de téléphone, numéro de télécopieur et adresse de courriel de l'intimé ou de son représentant)

DEST. : *(Nom et adresse de l'appelant ou de son représentant)*

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The Law Society of Upper Canada | Barreau du Haut-Canada

ADJUDICATOR CODE OF CONDUCT

Law Society of Upper Canada
Adjudicator Code of Conduct

PART 1 INTRODUCTION

I. Purpose

1. The Law Society of Upper Canada Adjudicator Code of Conduct ("Code") is a guide to the conduct and the professional and ethical responsibilities of the Law Society's adjudicators. It is not intended as a legislative directive. Although there is some mandatory language in it, this is reflective of Convocation policies. The balance of the provisions is expressed in permissive language, but the purpose of the guide is to reflect accepted principles of behaviour. Law Society adjudicators should familiarize themselves with the content of this document in addition to the legislation, rules, practice directions and procedures established to ensure that the Law Society~~'s t~~Tribunal's processes are consistent, transparent and fair.

II. Definitions

2. In the Code,

Adjudicator includes all members of the Hearing and Appeal ~~Panels~~ Divisions, whether a bencher, a licensee, a person approved by the Attorney General of Ontario or a temporary panelist;

Appeal ~~Panel~~Division means the Law Society Appeal ~~Panel~~Division established under Part II of the *Law Society Act*;

Chair means the person appointed as Chair of the Tribunal under subsection 49.20.2 of Part II of the *Law Society Act.*

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~~**Chair of the Appeal Panel** means the member of the Appeal Panel appointed by Convocation as Chair of the Appeal Panel pursuant to the *Law Society Act*;~~

~~**Chair of the Hearing Panel** means the member of the Hearing Panel appointed by Convocation as Chair of the Hearing Panel pursuant to the *Law Society Act*;~~

~~**Chair of the Panel** means the individual member of a panel designated to ensure that a proceeding is conducted in an orderly fashion~~;

Chair of the Panel means the individual member of a panel designated to ensure that a proceeding is conducted in an orderly fashion;

Final disposition of a matter occurs when the panel assigned to hear and decide a matter on the merits renders a final decision, order and, where reasons are required or given, reasons;

Hearing ~~Panel~~Division means the Law Society Hearing ~~Panel~~Division established under Part II of the *Law Society Act*;

Investigation means an investigation pursuant to s.49.3 of the *Law Society Act* of which the adjudicator has received written notice from the Law Society;

Panel means a member or group of members of the Hearing ~~Panel~~Division or Appeal ~~Panel~~ Division assigned to hear and determine a matter pursuant to Part II of the *Law Society Act*;

Proceeding means a proceeding under the *Law Society Act* that commences with the service of an originating process;

Tribunal means the Law Society Tribunal ~~of Upper Canada Hearing Panel and/or Appeal Panel,~~ established ~~pursuant to the~~under Part II of the *Law Society Act*, to hear and determine matters in whole or in part.

Vice-Chair of the Appeal Division means the person appointed under subsection 49.30.1 of Part II of the *Law Society Act*;

Vice-Chair of the Hearing Division means the person appointed under subsection 49.22.1 of Part II of the *Law Society Act*;

III. Application

3. The Code applies to all Law Society adjudicators. The Code applies to the following areas of adjudicator responsibility: the conduct of proceeding management conferences, pre-hearing conferences, ~~hearings management (HM) and appeals management (AM) functions~~, hearings, appeal management conferences and appeals~~,~~ and timely decision-making and reason writing, as well as the institutional responsibilities of adjudicators to colleagues, the Chair, Tribunal staff, the Vice-~~c~~Chairs of the Hearing ~~Panel~~Division and Appeal ~~Panel~~ Division, and to the ~~t~~Tribunal. ~~itself.~~

4. Adjudicators are responsible for conducting themselves in a professional and ethical manner. The Code is a guide. It cannot anticipate all possible fact situations in which adjudicators may be called upon to exercise judgment about appropriate conduct.

5. The Code governs the conduct of adjudicators from the beginning of the term of membership ~~i~~on, or appointment to~~,~~, the Hearing ~~Panel~~Division or Appeal ~~Panel~~Division and includes continuing responsibilities after completion of the term of membership. The Code also governs temporary panelists appointed to the Hearing ~~Panel~~Division or Appeal ~~Panel~~Division pursuant to the *Law Society Act* from the time of the panelist's appointment and includes continuing responsibilities after the final disposition of the matter.

PART 2 CONFLICT OF INTEREST AND REASONABLE APPREHENSION OF BIAS

IV. Definitions

6. A **conflict of interest** is any interest, relationship, association or activity that is incompatible with an adjudicator's obligations to the ~~t~~Tribunal. Conflicts may be actual or perceived. In this Code, 'conflict of interest' includes both pecuniary and non-pecuniary conflicts.

7. A **pecuniary conflict of interest** will arise where an adjudicator has a financial interest that may be affected by the resolution or treatment of a matter before the ~~t~~Tribunal. The financial interest may be that of the adjudicator~~,~~ or of a relative or other person with whom the adjudicator has a relationship.

8. A **non-pecuniary conflict of interest** will arise where an adjudicator has a non-financial interest, relationship~~,~~ or association, or is involved in an activity, that is incompatible with an adjudicator's responsibilities as an impartial decision-maker. The interests, relationships~~,~~ or activities of a relative or associate may raise a potential conflict for adjudicators if they will be affected by the determinations of the ~~t~~Tribunal.

9. **Bias** exists where considerations extraneous to the evidence, law~~,~~ or submissions applicable to the matter before the ~~t~~Tribunal influence an adjudicator's ability to make a neutral and impartial decision. A reasonable apprehension of bias arising from an adjudicator's conduct or conflict of interest may be as detrimental to the public interest as actual bias.

10. A **significant professional relationship** may include, for example, employee/employer, solicitor/client, partnership/association~~,~~ or employee, associate or partner/law firm. Significant professional relationships may also arise outside the workplace as a result of, for example, the volunteer or charitable activities of an adjudicator.

11. A **personal relationship** may include, for example, a friendship or a spousal relationship.

V. Appropriate Conduct

12. Conflicts of interest and bias, actual or perceived, are incompatible with neutral adjudication. Where the circumstances surrounding a proceeding raise an allegation of conflict of interest or bias on the part of an adjudicator, the test for whether or not the adjudicator should be disqualified from adjudicating the matter is whether or not the facts or procedure could give rise to a reasonable apprehension of conflict of interest or bias in the mind of a reasonable and informed person.

13. Any conflict of interest, actual or perceived, arising from an adjudicator's professional or personal interests and the adjudicator's responsibilities as an adjudicator should be resolved in favour of the public interest.

14. Adjudicators should not allow their personal or professional activities to undermine the discharge of their responsibilities as Law Society adjudicators.

15. Adjudicators should minimize the likelihood of conflicts arising that may affect their neutrality or give rise to an allegation of bias.

16. Adjudicators are prohibited from representing a licensee or licensee applicant who is the subject of a complaint and/or an investigation by the Law Society, appearing as counsel before the ~~t~~Tribunal and from being retained as professional or legal consultants in the preparation of a matter before the ~~t~~Tribunal or in any matter relating to the work of the

~~t~~Tribunal. Adjudicators are prohibited from engaging in these activities for 12 months following the end of their term as a bencher or their appointment to the Hearing ~~Panel~~Division or Appeal ~~Panel~~ Division, or after the release of any outstanding decisions, orders or reasons, whichever is later. This does not preclude adjudicators from providing informational advice, without a fee, to licensees or licensee applicants who may be the subject of a complaint and/or an investigation or subject to disciplinary proceedings.

17. Adjudicators should not adjudicate in any proceeding, or participate in ~~t~~Tribunal discussions of any matter, in which they, or a business associate, have a financial interest that is neither remote nor trivial and may be affected by the resolution or treatment of a matter before the ~~t~~Tribunal.

18. Adjudicators should not adjudicate in any proceeding, or participate in ~~t~~Tribunal discussions with respect to any matter, in which a party or the party's representative appearing before the ~~t~~Tribunal or providing evidence (other than a written testimonial~~)~~ is from their current law firm. A similar prohibition applies where a party or a party's representative practises in association with the adjudicator.

19. Adjudicators will not normally be eligible to conduct a proceeding involving a party or the party's representative with whom they were formerly in a significant professional relationship until at least 12 months have elapsed from the termination of the relationship. In some circumstances it may never be appropriate for the adjudicator to conduct a proceeding involving that individual. When evaluating whether the adjudicator's participation in the proceeding would give rise to a reasonable apprehension of bias, the position of all parties, although not determinative, and the circumstances of the relationship should be carefully considered.

20. Adjudicators will not normally be eligible to conduct a proceeding involving a party or a party's representative with whom they have a personal relationship. When evaluating whether the adjudicator's participation in the proceeding would give rise to a reasonable apprehension of bias, the position of all parties, although not determinative, and the circumstances of the relationship should be carefully considered.

21. Adjudicators should not generally adjudicate in any proceeding in which they, a relative or a business associate, have had any prior involvement in the proceeding.

22. Adjudicators should not adjudicate in any proceeding in which the outcome may have an impact on any other legal proceeding in which they have a significant personal interest.

23. Adjudicators should not take improper advantage of information obtained through official ~~t~~Tribunal duties.

VI. Procedural Protocol

A. Overview

24. It is the responsibility of each adjudicator to consider any circumstance that might suggest a possible conflict of interest or bias in respect of any of the adjudicator's responsibilities. It may be that only the adjudicator is in a position to recognize a possible conflict or issue of bias.

25. As soon as grounds for a potential conflict of interest or allegation of bias are identified, an adjudicator should take appropriate steps as outlined in this Code. The particular procedure to follow will depend on whether the potential conflict of interest or bias is identified after accepting an appointment to a panel, but prior to hearing the matter, or is identified during a proceeding.

26. -Where an adjudicator is under investigation~~,~~ or the adjudicator is the subject of a Law Society proceeding, the adjudicator should follow the procedure articulated in the Code.

27. An adjudicator who is uncertain about the appropriate action to take should consult with the Chair ~~of the~~ Tribunal or, in his or her absence, the Vice-Chair of the Hearing ~~Panel~~Division or ~~the Chair of the~~ Appeal ~~Panel~~Division.

28. Where a party has made submissions challenging the neutrality of an adjudicator, the panel should provide reasons, in most cases in writing, for its decision on the issue.

B. After Accepting an Appointment to a Panel but Prior to Hearing the Matter

29. Where an adjudicator becomes aware of circumstances that suggest a possible conflict of interest or bias on the part of the adjudicator after being assigned to hear a matter, but prior to the commencement of the hearing, the adjudicator should inform the Chair, or in his or her absence, a Vice-Chair of the Hearing Division or Appeal Division, ~~Tribunals Office~~ immediately. The adjudicator should indicate to the ~~Tribunals Office~~ Chair or Vice-Chair that,

a. the adjudicator wishes to withdraw from the panel; or

b. the adjudicator is aware of circumstances that suggest a possible conflict of interest or bias on the part of the adjudicator but the adjudicator, having given the circumstances careful consideration, has determined that the adjudicator is able to proceed with hearing the matter objectively, and will advise the parties on the record at the hearing; and

c, the adjudicator consents to the Tribunal~~s~~ Office bringing the matter to the attention of the other panel members.

C. Arising During a Proceeding

30. During a proceeding, the panel shall determine issues of conflict of interest or bias.

31. Where, during a proceeding, an adjudicator becomes aware of circumstances that suggest a possible conflict of interest or bias and the related circumstances may be unknown to the parties, the adjudicator should request the panel to recess the proceedings. The panel should then consider the seriousness of the possible conflict of interest or bias and determine whether,

a. the adjudicator should withdraw from the panel; or

b. the parties should be informed of the circumstances, submissions heard and a determination on the issue made.

32. Where a panel hears submissions from the parties on the issue of conflict of interest or bias, the panel should make a determination of the issue before continuing with the proceeding.

33. Where an allegation of conflict of interest or bias is raised about an adjudicator by a party,

a. the adjudicator may immediately withdraw from the panel if appropriate, given the nature and the circumstances of the alleged conflict of interest or bias; or

b. the panel may hear submissions from the parties with respect to the alleged conflict of interest or bias and make a determination on the issue.

D. Adjudicator Under Investigation

34. To preserve the integrity of the ~~Law Society t~~Tribunal an adjudicator, subject to the provisions of paragraphs 35 and 36, should not sit as an adjudicator once a complaint has been instructed for investigation pursuant to s. 49.3 of the *Law Society Act* or a proceeding has been authorized by the Proceedings Authorization Committee or the adjudicator is the subject of an ongoing Law Society proceeding following the investigation.

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35. Once a complaint has been instructed for investigation pursuant to s. 49.3 of the *Law Society Act*, an adjudicator, subject to the discretion of the Treasurer, should decline to be scheduled to adjudicate when the Tribunals Office canvasses the adjudicator's availability. It is left to the discretion of each adjudicator to determine whether to disclose the reason for declining to be scheduled to adjudicate.

36. If an adjudicator is already assigned to a panel and a complaint has been instructed for investigation pursuant to s. 49.3 of the *Law Society Act*, the adjudicator should advise the Treasurer and, subject to the discretion of the Treasurer:

Prior to commencement of hearing:
Where the hearing has not yet commenced, the adjudicator should inform the Tribunals Office immediately that the adjudicator wishes to withdraw from the panel.

After the commencement of hearing
Where an adjudicator is a member of a seized panel, the adjudicator should consider the issue and determine whether the adjudicator should withdraw from the panel.

37. It is left to the discretion of each adjudicator to determine whether to disclose the reason for declining to adjudicate or withdrawing from the panel.

PART 3 ADJUDICATOR RESPONSIBILITIES

VII. Conduct During the Proceeding

38. Adjudicators are expected to conduct both themselves and the proceedings in a judicial manner. To this end, adjudicators should,
    a. approach every proceeding with an open mind with respect to every issue and avoid comments or conduct that could cause any person to think otherwise;
    b. listen carefully and respectfully to the views and submissions of the parties and their representatives; and
    c. show respect for the parties, their representatives, witnesses, their panel colleagues, and for the proceeding process itself, through their demeanour, timeliness, dress and conduct throughout the proceeding.

39. Other than for scheduling a further hearing of the matter before the panel, adjudicators should refrain from using personal communication devices during a proceeding.

40. Adjudicators should familiarize themselves with constitutional requirements and legislation, such as the Canadian Charter of Rights and Freedom and the Ontario Human Rights Code, to ensure that they conform to relevant requirements. In addition, they should also be sensitive to issues of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

41. Adjudicators should avoid undue interruption and interference in the examination and cross-examination of witnesses. To this end, adjudicators should be and appear to be

objective and should avoid the appearance of advocating on behalf of a party to the proceeding.

42. The Law Society does not provide counsel to its ~~t~~Tribunal~~s~~. Accordingly, adjudicators should request submissions on questions of procedure or law from all parties or their representatives. Where all parties or their representatives are not in attendance before the ~~t~~Tribunal, the request should be made of all parties through the Tribunal~~s~~ Office.

43. When attempting to ensure that unrepresented parties are not procedurally disadvantaged at a proceeding, adjudicators should do so in a manner that is not inconsistent with their role as impartial arbiters.

44. Communicating off the record with parties, their representatives or witnesses in respect of proceedings ~~may~~ give~~s~~ rise to an apprehension of bias. As a result, adjudicators should not, in respect of proceedings and before a decision is released,
    a. communicate with those persons, except in the presence of all parties and their representatives or with the consent of the parties;
    b. correspond with parties, or their representatives, by any means (email, facsimile, text message, etc.), except through the Tribunal~~s~~ Office. It is the responsibility of the Tribunal~~s~~ Office to forward the adjudicators' communications to all parties and their representatives; and
    c. when attending social occasions, discuss any matter in respect of the proceedings.

45. Hearing rooms and areas in which adjudicators convene may be accessible to others. It is essential that adjudicators not leave confidential materials, including their own notes taken during the proceeding, in plain view where others may have access to them.

VIII. Decision-Making Responsibilities

46. Adjudicators should make decisions on the merits and justice of the matter, based on the law and the evidence.

47. Adjudicators should apply the law to the evidence in good faith and to the best of their ability. The prospect of disapproval from any person, institution, or community must not deter adjudicators from making the decision that they believe is correct based on the law and the evidence.

48. Adjudicators should endeavour to ensure that decisions are rendered in a timely manner. Where written reasons are to be given, adjudicators should strive to ensure that they are prepared with reasonable promptness having regard to all the circumstances including, to the need to protect the public interest, as well as to the rights of the licensee, the urgency of the matter, the length of the proceeding and its complexity.

IX. Responsibilities To Other Panelists

49. Adjudicators should, through their conduct, promote civility among Law Society adjudicators and in the hearing process and be respectful of the views and opinions of colleagues.

X. Responsibilities When Sitting as a Panel

50. Adjudicators should make themselves available on a timely basis for discussions with their panel colleagues on the conduct of the proceeding and on the substance of the determinations to be made. When a draft decision is provided for comments, adjudicators should respond at the earliest opportunity. Adjudicators should follow the procedure for written reasons as determined by the ~~Tribunals Office in consultation with the~~ Chair~~s of the Hearing and Appeal Panels~~.

51. Adjudicators should consider carefully panel colleagues' reasons where there is a difference in their proposed determinations on an interim or final decision. However, adjudicators should not abandon strongly held views on an issue of substance, either for the sake of panel unanimity or in exchange for agreement on any other point.

52. In circumstances where adjudicators are unable to agree with the proposed decision of a majority of the panel after discussion and careful consideration, they should endeavour to ensure that a reasoned dissent is rendered with reasonable promptness.

XI. ~~**Responsibilities To the Chairs of the Hearing and Appeal Panels**~~

~~53. When adjudicators become aware of colleagues' conduct that may threaten the integrity of the tribunal or its processes, they have a duty to advise the Chair of the Hearing Panel or the Chair of the Appeal Panel of the circumstances as soon as reasonably practicable.~~

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~~**XII.**~~ **Responsibilities To the Tribunal**

~~54.~~53. Adjudicators should comply with the policies and procedures established for the ~~t~~Tribunal.

54. Where adjudicators have questions about the appropriateness of any hearing or appeal policy or procedure, they may consult with the Chair ~~of the~~ or, in his her absence, with the Vice-Chair of the Hearing ~~Panel~~Division or ~~the Chair of the~~ Appeal ~~Panel~~ Division.

55. When adjudicators become aware of colleagues' conduct that may threaten the integrity of the Tribunal or its processes, they have a duty to advise the Chair of the Tribunal or, in his or her absence, the Vice-Chair of the Hearing Division or Appeal Division of the circumstances as soon as reasonably practicable.

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56. Adjudicators should refrain from publicly taking a partisan position in respect of individual matters under consideration in a proceeding before the ~~t~~Tribunal.

57. Adjudicators should not make public comment, orally or in writing, on any aspect of a matter before them.

58. Adjudicators should exercise caution before publicly commenting on the decisions, procedures or structures of the ~~t~~Tribunal, a decision of colleagues, or on the manner in which other colleagues have conducted themselves during a proceeding.

~~59.~~ It is generally inappropriate for adjudicators to communicate with the media regarding a decision of the ~~t~~Tribunal or the ~~t~~Tribunal's conduct of a proceeding. All inquiries from the media should be referred to the ~~Law Society's Communications Department.~~ Law

Society's Communication Department.

59.

60. Adjudicators shall ~~attend~~ meet the adjudicator education program~~s~~ requirements of the Tribunal. ~~in accordance with policies adopted by Convocation~~.

61. Adjudicators should not divulge confidential information unless legally required to do so or appropriately authorized to release the information.

62. Adjudicators should not engage in conduct that exploits their position of authority.

63. No adjudicator~~,~~ or bencher or elected paralegal member of the Paralegal Standing Committee shall provide written or oral evidence as a character witness in support of a party before either the Hearing ~~Panel~~Division or Appeal ~~Panel~~Division unless the party demonstrates that the inability to put such evidence before the Panel would unfairly prejudice the party.

XIII. Post-Term Responsibilities

64. Adjudicators have an on-going duty of confidentiality after the expiry of their membership in, or appointment to, the Hearing ~~Panel~~Division or Appeal ~~Panel~~Division.

65. Adjudicators whose term of appointment has expired, but who have continuing responsibilities by virtue of on-going proceedings in which they participated as adjudicators continue to be guided by this Code.

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The Law Society of Upper Canada | Barreau du Haut-Canada

CODE DE DÉONTOLOGIE DES ARBITRES

PARTIE 1 – INTRODUCTION

PARTIE 2 – CONFLITS D'INTÉRÊTS ET CRAINTE RAISONNABLE DE PARTIALITÉ

PARTIE 3 – RESPONSABILITÉS DE L'ARBITRE

Barreau du Haut-Canada
Code de déontologie des arbitres

PARTIE 1 – INTRODUCTION

I. Objet

1. Le *Code de déontologie des arbitres* (le « code ») du Barreau du Haut-Canada est un guide régissant la conduite et les responsabilités professionnelles et déontologiques des arbitres du Barreau. Il n'est pas conçu pour servir de directive législative. Bien que certaines dispositions soient parfois libellées en termes impératifs, le *Code* ne fait que refléter les directives du Conseil. Les autres dispositions sont facultatives, mais l'objectif du guide est d'exprimer les principes de comportement reconnus. Les arbitres du Barreau devraient bien connaître le contenu du présent document en plus de la loi, des règles, des directives de pratique et des procédures établies pour veiller à ce que les procédures du ~~tribunal~~Tribunal du Barreau soient constantes, transparentes et équitables.

II. Définitions

2. Dans le code,

« arbitre » S'entend de tout membre ~~du Comité d'audition ou du Comité~~des sections de première instance et d'appel, qu'il soit conseiller, titulaire de permis, personne approuvée par le procureur général de l'Ontario ou membre temporaire d'~~un comité~~une formation; (« *Adjudicator* »)

« décision définitive » Désigne une décision rendue lorsque la formation chargée d'entendre et de trancher une affaire sur le fond rend une décision ou une ordonnance définitive, ainsi que les motifs, lorsqu'ils sont requis ou lorsqu'ils sont publiés; (« *Final disposition of a matter* »)

« enquête » S'entend d'une enquête tenue conformément à l'article 49.3 de la *Loi sur le Barreau*, dont l'arbitre a reçu un avis écrit du Barreau; (« *Investigation* »)

« ~~comité~~formation » S'entend du membre ou du groupe de membres ~~du Comité d'audition ou du Comité~~de la Section de première instance ou d'appel qui sont chargés d'entendre et de trancher une question conformément à la partie II de la *Loi sur le Barreau*; (« *Panel* »)

« instance » S'entend d'une instance tenue conformément à la *Loi sur le Barreau* qui est introduite par la signification d'un acte introductif d'instance; (« *Proceeding* »)

« président » S'entend de la personne nommée présidente du Tribunal en vertu du paragraphe 49.20.2 de la partie II de la *Loi sur le Barreau*; (« *Chair* »)

« président de la formation » S'entend du membre d'une formation qui est désigné pour veiller à ce qu'une instance soit tenue de façon ordonnée; (« *Chair of the Panel* »)

« ~~Comité~~Section d'appel » S'entend ~~d'un comité~~de la Section d'appel du Barreau ~~constitué~~constituée en vertu de la partie II de la *Loi sur le Barreau*; (« *Appeal ~~Panel~~Division* »)

« ~~Comité d'audition~~Section de première instance » Désigne ~~le Comité d'audition~~la Section de première instance du Barreau ~~constitué~~constituée en vertu de la partie II de la *Loi sur le Barreau*; (« *Hearing ~~Panel~~Division* »)

~~**« décision définitive »** Désigne une décision rendue lorsque le comité chargé d'entendre et de trancher une affaire sur le fond rend une décision ou une ordonnance définitive, ainsi que les motifs, lorsqu'ils sont requis ou lorsqu'ils sont publiés; (« *Final disposition of a matter* »)~~

~~**« enquête »** S'entend d'une enquête tenue conformément à l'article 49.3 de la *Loi sur le Barreau*, dont l'arbitre a reçu un avis écrit du Barreau; (« *Investigation* »)~~

~~**« instance »** S'entend d'une instance tenue conformément à la *Loi sur le Barreau* qui est introduite par la signification d'un acte introductif d'instance; (« *Proceeding* »)~~

~~**« président du Comité »** S'entend du membre d'un comité qui est désigné pour veiller à ce qu'une instance soit tenue de façon ordonnée; (« *Chair of the Panel* »)~~

« ~~président du Comité d'appel »~~ ~~S'entend d'un membre du Comité d'appel nommé président dudit comité par le Conseil conformément à la *Loi sur le Barreau*; (« *Chair of the Appeal Panel* »)~~

~~**« président du Comité d'audition »** S'entend d'un membre du Comité d'audition nommé président dudit comité par le Conseil conformément à la *Loi sur le Barreau*; (« *Chair of the Hearing Panel* »)~~**« ~~tribunal »~~** ~~S'entend du Comité d'audition ou Comité d'appel~~**Tribunal »** S'entend du Tribunal du Barreau ~~du Haut-Canada~~, constitué en vertu de la partie II de la *Loi sur le Barreau* pour entendre et trancher des questions en tout ou en partie. (« *Tribunal*»)

« vice-président de la Section d'appel » Désigne la personne nommée en vertu du paragraphe 49.30.1 de la partie II de la *Loi sur le Barreau*; (*« Vice-Chair of the Appeal »)*

« vice-président de la Section de première instance » Désigne la personne nommée en vertu du paragraphe 49.22.1 de la partie II de la *Loi sur le Barreau*; *(« Vice-Chair of the Hearing »)*

III. Application

3. Le code s'applique à tous les arbitres du Barreau. Il s'applique aux domaines de responsabilité suivants des arbitres : la tenue de conférences ~~avant les audiences, fonctions concernant la gestion des audiences et la gestion des appels, audiences et appels, prise de décisions~~de gestion des audiences, les conférences préparatoires à l'audience, les audiences, les conférences de gestion des appels et les appels, la prise de décisions et la rédaction de motifs en temps utile ainsi que les responsabilités institutionnelles des arbitres

envers les collègues, la présidence ~~du Comité d'audition et du Comité~~, le personnel du Tribunal, les vice-présidences des sections de première instance et d'appel et le ~~tribunal lui-même~~Tribunal.

4. Il incombe aux arbitres de se conduire de façon professionnelle et déontologique. Le code est un guide; il ne peut pas prévoir toutes les situations de fait possibles où les arbitres peuvent être appelés à exercer leur jugement sur ce qui constitue une conduite appropriée.

5. Le code régit la conduite des arbitres depuis le début de leur mandat ou le moment de leur nomination comme membres ~~du Comité d'audition ou du Comité~~des sections de première instance et d'appel ainsi que les responsabilités qu'ils continuent d'avoir après la fin de leur mandat. Le code régit aussi les membres temporaires nommés ~~au Comité d'audition ou au Comité~~aux sections de première instance et d'appel en vertu de la *Loi sur le Barreau* depuis le moment de leur nomination ainsi que les responsabilités qu'ils continuent d'avoir après la décision définitive sur une affaire.

PARTIE 2 – CONFLITS D'INTÉRÊTS ET CRAINTE RAISONNABLE DE PARTIALITÉ

IV. Définitions

6. **« Conflit d'intérêts »** Tout intérêt, relation, association ou activité qui est incompatible avec les obligations de l'arbitre envers le ~~tribunal~~Tribunal. Le conflit peut être réel ou apparent. Dans le code, un conflit d'intérêts peut être pécuniaire ou non pécuniaire.

7. **« Conflit d'intérêts pécuniaire »** Situation où un arbitre a un intérêt financier qui peut être touché par la résolution ou le traitement d'une affaire dont le ~~tribunal~~Tribunal est saisi. L'intérêt financier peut être celui de l'arbitre, d'un membre de sa parenté ou d'une autre personne avec qui l'arbitre a une relation.

8. **« Conflit d'intérêts non pécuniaire »** Situation où un arbitre a une relation, une association ou un intérêt non financier, ou s'adonne à une activité qui est incompatible avec ses responsabilités en tant que décideur impartial. Les intérêts, les relations ou les activités d'un membre de la parenté ou d'un associé peuvent engendrer une possibilité de conflit pour l'arbitre s'ils sont visés par les décisions du ~~tribunal~~Tribunal.

9. **« Partialité »** Situation où la capacité de l'arbitre de rendre une décision neutre ou impartiale est influencée par des facteurs extérieurs à la preuve, aux principes de droit et aux plaidoiries applicables à l'affaire dont le ~~tribunal~~Tribunal est saisi. Une crainte raisonnable de partialité causée par la conduite d'un arbitre ou par un conflit d'intérêts peut être aussi contraire à l'intérêt public qu'une partialité réelle.

10. **« Relation professionnelle étroite »** Comprend notamment une relation entre employeur et employé, entre avocat et client, entre société en nom collectif et association, ou entre un employé, un adjoint ou un associé et un cabinet d'avocats. Une relation professionnelle étroite peut également exister hors du milieu de travail, par exemple en raison des activités bénévoles ou de bienfaisance d'un arbitre.

11. **« Relation personnelle »** Comprend notamment une amitié ou une relation conjugale.

V. Conduite appropriée

12. Les conflits d'intérêts et une partialité réelle ou apparente sont incompatibles avec un processus décisionnel impartial. Si les circonstances entourant une instance donnent lieu à une allégation de conflit d'intérêts ou de partialité de la part d'un arbitre, le critère permettant de décider si l'arbitre devrait être déclaré inhabile à juger l'affaire consiste à savoir si les faits ou la procédure pourraient susciter une crainte raisonnable de conflit d'intérêts ou de partialité dans l'esprit d'une personne raisonnable et informée.

13. Tout conflit d'intérêts, réel ou apparent, découlant des intérêts professionnels ou personnels d'un arbitre et de ses responsabilités en tant qu'arbitre devrait être résolu en faveur de l'intérêt public.

14. Un arbitre ne doit pas permettre à ses activités personnelles ou professionnelles de compromettre l'exercice de ses responsabilités en tant qu'arbitre du Barreau.

15. Un arbitre doit réduire au minimum les possibilités que survienne un conflit d'intérêts qui pourrait porter atteinte à sa neutralité ou donner lieu à une allégation de partialité.

16. Il est interdit à un arbitre de représenter un titulaire de permis ou un candidat à l'obtention d'un permis qui fait l'objet d'une plainte au Barreau ou sur qui le Barreau fait enquête, de comparaître comme avocat devant le ~~tribunal~~Tribunal et de fournir des services comme professionnel ou expert-conseil juridique dans la préparation d'une affaire dont le ~~tribunal~~Tribunal est saisi ou dans toute affaire se rapportant aux travaux du ~~tribunal~~Tribunal. Il est interdit à un arbitre de s'adonner à de telles activités pendant les 12 mois suivant le dernier en date des faits suivants : la fin de son mandat de conseiller, la fin de son mandat ~~au Comité d'audition ou au Comité~~à la Section de première instance ou à la Section d'appel, ou la publication des décisions, ordonnances ou motifs pendants. Cependant, il n'est pas interdit à un arbitre de fournir sans honoraires des avis informatifs à un titulaire de permis ou à un candidat à l'obtention d'un permis qui ferait l'objet d'une plainte ou d'une enquête ou serait passible de mesures disciplinaires.

17. Un arbitre ne doit pas statuer sur une instance, ni participer aux discussions du ~~tribunal~~Tribunal sur une affaire, dans laquelle l'arbitre ou un partenaire d'affaires a un intérêt financier qui n'est ni ténu ni banal et qui peut être visé par la résolution ou le traitement d'une affaire dont le ~~tribunal~~Tribunal est saisi.

18. Un arbitre ne doit pas statuer sur une instance, ni participer aux discussions du ~~tribunal~~Tribunal sur une affaire, dans laquelle une partie ou son représentant qui comparaît devant le ~~tribunal~~Tribunal ou apporte une preuve (autre qu'un témoignage écrit) appartient au cabinet d'avocats actuel de l'arbitre. Une interdiction semblable s'applique si une partie ou son représentant pratique le droit en association avec l'arbitre.

19. Un arbitre est normalement inhabile à tenir une instance visant une partie ou son représentant avec qui il a eu antérieurement une relation professionnelle étroite, à moins qu'au moins 12 mois ne se soient écoulés depuis la fin de cette relation. Dans certains cas, il pourrait être inapproprié pour toujours qu'un arbitre tienne une instance visant cette

personne. Pour évaluer si la participation de l'arbitre à l'instance susciterait une crainte raisonnable de partialité, la position de toutes les parties, bien qu'elle ne soit pas décisive, et les circonstances de la relation devraient être examinées attentivement.

20. Un arbitre est normalement inhabile à tenir une instance visant une partie ou son représentant avec qui il a une relation personnelle. Pour évaluer si la participation de l'arbitre à l'instance susciterait une crainte raisonnable de partialité, la position de toutes les parties, bien qu'elle ne soit pas décisive, et les circonstances de la relation devraient être examinées attentivement.

21. En général, un arbitre ne doit pas statuer sur une instance si lui-même, un membre de sa parenté ou un partenaire d'affaires y a été mêlé dans le passé.

22. Un arbitre ne doit pas statuer sur une instance dont l'issue peut avoir des répercussions sur une autre instance dans laquelle il a un intérêt personnel important.

23. Un arbitre ne doit pas tirer un avantage illégitime de renseignements obtenus dans l'exercice de ses fonctions officielles au ~~tribunal~~Tribunal.

VI. Protocole de procédure

A. Aperçu

24. Il incombe à chaque arbitre d'envisager toute circonstance qui pourrait faire croire à une possibilité de conflit d'intérêts ou de partialité dans l'exercice de ses responsabilités. Il est possible que seul l'arbitre soit en mesure de reconnaître la possibilité de conflit d'intérêts ou de problème de partialité.

25. Aussitôt qu'il a reconnu les motifs pouvant donner lieu à un conflit d'intérêts ou à une allégation de partialité, l'arbitre devrait prendre les mesures appropriées qui sont décrites dans le code. La procédure spécifique à suivre diffère selon que la possibilité de conflit d'intérêts ou de partialité est reconnue après l'acceptation de la nomination à ~~un comité~~une formation, mais avant l'audition de l'affaire, ou qu'elle est reconnue pendant l'instance.

26. Si l'arbitre fait l'objet d'une enquête ou s'il est partie à une instance du Barreau, il devrait suivre la procédure décrite dans le code.

27. Si l'arbitre ne sait pas quelle est la ligne de conduite appropriée à prendre, il devrait consulter le président du ~~Comité d'audition~~Tribunal ou, en son absence, le vice-président ~~du Comité~~des sections de première instance ou d'appel.

28. Si une partie a formulé des assertions mettant en doute la neutralité d'un arbitre, ~~le comité~~la formation devrait fournir les motifs de sa décision sur cette question, par écrit la plupart du temps.

B. Après l'acceptation de la nomination à ~~un comité~~une formation, mais avant l'audition de l'affaire

29. Lorsqu'un arbitre prend conscience de circonstances laissant croire à une possibilité de conflit d'intérêts ou de partialité de sa part après avoir été chargé d'entendre une affaire, mais avant le début de l'audience, il devrait en informer immédiatement le ~~greffe du tribunal~~président, ou en son absence, un vice-président des sections de première instance ou d'appel. L'arbitre devrait informer le ~~greffe du tribunal~~président ou le vice-président :
    a) qu'il désire se retirer ~~du comité~~de la formation;
    b) qu'il est au courant de circonstances laissant croire à une possibilité de conflit d'intérêts ou de partialité de sa part, mais ~~que,~~ qu'après avoir soigneusement réfléchi aux circonstances, il a conclu qu'il est capable de procéder objectivement à l'audition de l'affaire, et qu'il avisera les parties du dossier pendant l'audience,
    c) qu'il consent à ce que le greffe du ~~tribunal~~Tribunal porte la question à l'attention des autres membres ~~du comité~~de la formation.

C. Pendant l'instruction de l'affaire

30. Au cours d'une instance, ~~le comité~~la formation statue sur les questions de conflit d'intérêts ou de partialité.

31. Si, au cours d'une instance, un arbitre prend conscience de circonstances laissant croire à une possibilité de conflit d'intérêts ou de partialité et si ces circonstances peuvent être inconnues des parties, l'arbitre devrait demander ~~au comité~~à la formation de suspendre l'instance. ~~Le comité~~La formation devrait alors examiner la gravité du conflit d'intérêts ou de la partialité éventuels et déterminer :
    a) si l'arbitre devrait se retirer ~~du comité~~de la formation;
    b) si les parties devraient être informées des circonstances, si leurs observations devraient être entendues et si une décision devrait être rendue sur la question.

32. Si ~~un comité~~une formation entend les observations des parties sur la question du conflit d'intérêts ou de la partialité, il devrait rendre une décision sur la question avant de continuer d'instruire l'instance.

33. Si une partie a porté une allégation de conflit d'intérêts ou de partialité contre un arbitre,
    a) l'arbitre peut se retirer immédiatement ~~du comité~~de la formation, si cela est approprié compte tenu de la nature et des circonstances du conflit d'intérêts ou de la partialité présumés;
    b) ~~le comité~~la formation peut entendre les observations des parties au sujet de la partialité ou du conflit d'intérêts présumé et rendre une décision à ce sujet.

D. Arbitre soumis à une enquête

34. Pour préserver l'intégrité du ~~tribunal du Barreau~~Tribunal, l'arbitre à qui s'appliquent les dispositions des paragraphes 35 et 36 ne devrait pas siéger en tant qu'arbitre une fois que la tenue d'une enquête a été ordonnée au sujet d'une plainte conformément à l'article 49.3 de la *Loi sur le Barreau* ou qu'une instance a été autorisée par le Comité d'autorisation des instances, ou si l'arbitre fait l'objet d'une instance du Barreau à la suite de l'enquête.

35. Une fois que la tenue d'une enquête a été ordonnée conformément à l'article 49.3 de la *Loi sur le Barreau*, un arbitre, sous réserve de la décision discrétionnaire du trésorier, devrait

refuser d'être inscrit au calendrier pour siéger à l'instance lorsque le greffe du ~~tribunal~~Tribunal s'informe de sa disponibilité. La décision de divulguer la raison de son refus d'être inscrit au calendrier pour siéger à l'instance est laissée à la discrétion de l'arbitre.

36. Si l'arbitre a déjà été nommé à ~~un comité~~une formation et si la tenue d'une enquête au sujet d'une plainte a été ordonnée conformément à l'article 49.3 de la *Loi sur le Barreau*, l'arbitre devrait en aviser le trésorier, et, sous réserve du pouvoir discrétionnaire du trésorier,

avant le début de l'audience,
l'arbitre devrait informer immédiatement le greffe du ~~tribunal~~Tribunal qu'il désire se retirer ~~du comité~~de la formation;

après le début de l'audience,
l'arbitre qui est membre d'~~un comité saisi~~une formation saisie devrait réfléchir à la question et décider s'il devrait se retirer ~~du comité~~de la formation.

37. La décision de divulguer la raison de son refus de siéger à l'instance ou de son retrait ~~du comité~~de la formation est laissée à la discrétion de l'arbitre.

PARTIE 3 – RESPONSABILITÉS DE L'ARBITRE

VII. Conduite pendant l'instance

38. Les arbitres sont censés se conduire et diriger l'instance de façon judiciaire. Pour ce faire, ils doivent :
   a) aborder chaque instance avec un esprit ouvert à l'égard de chaque question en litige, et éviter des propos ou une conduite qui pourraient inciter quiconque à croire que ce n'est pas le cas;
   b) écouter avec respect et attention les opinions et les observations des parties et de leurs représentants;
   c) faire preuve de respect envers les parties, leurs représentants, les témoins, leurs collègues ~~du comité~~de la formation et le processus même de l'instance par leur comportement, leur ponctualité, leur habillement et leur conduite pendant toute la durée de l'instance.

39. Sauf pour inscrire à l'horaire une audience ultérieure sur l'affaire dont ~~le comité~~la formation est ~~saisi~~saisie, les arbitres devraient s'abstenir d'utiliser des appareils de communication personnelle pendant l'instruction d'une instance.

40. Les arbitres devraient bien connaître les exigences constitutionnelles et la législation, telles que la *Charte canadienne des droits et libertés* et le *Code des droits de la personne* de l'Ontario, pour s'assurer de respecter les exigences pertinentes. De plus, ils devraient aussi être sensibles aux questions touchant la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression sexuelle, l'âge, l'état matrimonial, l'état familial ou un handicap.

41. Les arbitres devraient éviter les interruptions et l'ingérence dans l'interrogatoire et le contre-interrogatoire des témoins. Pour ce faire, les arbitres doivent être et sembler être objectifs et éviter toute apparence de promotion de la cause d'une partie à l'instance.

42. Le Barreau ne fournit pas de services d'avocats à ~~ses tribunaux~~son Tribunal. En conséquence, les arbitres devraient demander à toutes les parties ou à leurs représentants des observations sur les questions de procédure ou de droit. Si les parties ou leurs représentants ne sont pas tous présents au ~~tribunal~~Tribunal, la demande devrait être faite à toutes les parties par l'entremise du greffe du ~~tribunal~~Tribunal.

43. En tentant de s'assurer que les parties non représentées à l'instance ne sont pas désavantagées sur le plan de la procédure, les arbitres devraient procéder d'une manière qui n'est pas incompatible avec leur rôle d'arbitres impartiaux.

44. Des communications non officielles au sujet de l'instance avec les parties, leurs représentants ou les témoins ~~peuvent susciter~~suscitent une crainte de partialité. En conséquence, les arbitres, au sujet de l'instance et avant la publication de la décision, ne devraient pas :
    a) communiquer avec ces personnes, sauf en présence de toutes les parties et de leurs représentants ou avec le consentement des parties;
    b) correspondre d'aucune manière (courriel, télécopieur, message texte, etc.) avec les parties ou leurs représentants, sauf par l'entremise du greffe du ~~tribunal~~Tribunal, auquel il incombe de transmettre les messages des arbitres à toutes les parties et à leurs représentants;
    c) discuter quoi que ce soit qui se rapporte à l'instance à l'occasion de rencontres sociales.

45. Les salles d'audience et les lieux où se réunissent les arbitres peuvent être accessibles à d'autres. Il est essentiel que les arbitres ne laissent pas à la vue des documents confidentiels, y compris les notes qu'ils prennent pendant l'instance, à un endroit où d'autres peuvent y avoir accès.

VIII. Responsabilités décisionnelles

46. Les arbitres doivent rendre leurs décisions sur le fond de l'affaire, selon la justice et conformément au droit et à la preuve.

47. Les arbitres doivent appliquer le droit à la preuve, de bonne foi et au mieux de leurs capacités. L'éventualité d'être désapprouvés par toute personne, institution ou collectivité ne doit pas les dissuader de rendre la décision qu'ils croient correcte compte tenu du droit et de la preuve.

48. Les arbitres devraient s'efforcer de rendre leurs décisions dans les meilleurs délais. Si des motifs écrits doivent être rendus, les arbitres devraient s'efforcer de les préparer avec une promptitude raisonnable eu égard à toutes les circonstances, y compris le besoin de protéger l'intérêt public, les droits du titulaire de permis, l'urgence de l'affaire, la durée de l'instance et sa complexité.

IX. Responsabilités envers les autres membres ~~du comité~~de la formation

49. Les arbitres, par leur conduite, doivent promouvoir la politesse entre les arbitres du Barreau et au cours du processus d'audition, et respecter les idées et les opinions de leurs collègues.

X. Responsabilités pendant les séances ~~du comité~~la formation

50. Les arbitres devraient être disponibles en temps opportun pour discuter avec leurs collègues ~~du comité~~de la formation au sujet de la conduite de l'instance et des décisions à rendre sur le fond. Lorsqu'une version préliminaire de décision leur est fournie pour qu'ils fassent leurs observations, les arbitres devraient répondre le plus tôt possible. Les arbitres devraient suivre la procédure établie par ~~le greffe du tribunal pour la rédaction des motifs en consultation avec~~ la présidence ~~du Comité d'audition et du Comité d'appel~~.

51. Les arbitres doivent réfléchir attentivement aux motifs de leurs collègues ~~du comité~~de la formation s'il y a divergence entre les décisions provisoires ou définitives qu'ils envisagent. Toutefois, ils ne devraient pas renoncer à leurs convictions profondes sur une question de fond, que ce soit pour assurer l'unanimité ~~du comité~~de la formation ou en ~~retour~~échange d'un accord sur tout autre point.

52. Dans les cas où les arbitres sont incapables de souscrire à la décision proposée par la majorité ~~du comité~~de la formation après discussion et mûre réflexion, ils doivent s'efforcer de rendre leurs motifs de dissidence avec une promptitude raisonnable.

XI. Responsabilités envers ~~la présidence du Comité d'audition et du Comité d'appel~~le Tribunal

~~53. Si un arbitre s'aperçoit que la conduite de ses collègues peut menacer l'intégrité du tribunal ou de ses procédures, il a l'obligation d'aviser des circonstances la présidence du Comité d'audition ou du Comité d'appel aussitôt qu'il peut raisonnablement le faire.~~

~~XII. Responsabilités envers le tribunal~~

53. ~~54.~~ Les arbitres doivent observer les pratiques et les procédures établies pour le ~~tribunal~~Tribunal.

54. ~~55.~~ Si un arbitre a des questions sur le caractère approprié d'une pratique ou d'une procédure en audition ou en appel, il peut consulter ~~la présidence du Comité d'audition ou du Comité~~le président ou, en son absence, le vice-président des sections de première instance ou d'appel.

55. Si un arbitre s'aperçoit que la conduite de ses collègues peut menacer l'intégrité du Tribunal ou de ses procédures, il a l'obligation d'aviser le président du Tribunal ou, en son absence, le vice-président des sections de première instance ou d'appel des circonstances aussitôt qu'il peut raisonnablement le faire.

56. Les arbitres doivent s'abstenir d'exprimer publiquement des vues partisanes au sujet d'affaires en cours d'examen dans une instance dont le ~~tribunal~~Tribunal est saisi.

57. Les arbitres ne doivent faire publiquement aucune remarque orale ou écrite sur n'importe quel aspect d'une affaire dont ils sont saisis.

58. Les arbitres doivent faire preuve de prudence en commentant publiquement les décisions, les procédures ou les structures du ~~tribunal~~Tribunal, une décision de leurs collègues ou la manière dont leurs collègues se sont conduits pendant une instance.

59. Il est généralement inapproprié que les arbitres communiquent avec les médias au sujet d'une décision du ~~tribunal~~Tribunal ou de la manière dont il a dirigé une instance. Les questions des médias devraient être renvoyées au Service des communications du Barreau.

60. Les arbitres doivent ~~suivre des~~satisfaire aux programmes de formation des arbitres ~~conformément aux politiques adoptées par le Conseil~~du Tribunal.

61. Les arbitres ne doivent pas divulguer de renseignements confidentiels à moins que la loi ne les y oblige ou qu'ils aient reçu les autorisations requises pour ce faire.

62. Les arbitres ne devraient pas se conduire de façon à exploiter leur position d'autorité.

63. Aucun arbitre, conseiller ou parajuriste élu membre du Comité permanent des parajuristes ne doit fournir de preuve écrite ou orale à titre de témoignage de la bonne moralité à l'appui d'une partie devant ~~le Comité d'audition~~la Section de première instance ou ~~le Comité~~la Section d'appel, à moins que la partie ne démontre que l'incapacité de présenter une telle preuve au Comité lui causerait un préjudice indu.

XIII. Responsabilités après la fin du mandat

64. Les arbitres continuent d'avoir une obligation de confidentialité après l'expiration de leur mandat comme membres ~~du Comité d'audition~~de la Section de première instance ou ~~du Comité~~la Section d'appel.

65. Les arbitres dont le mandat a expiré, mais qui ont encore des responsabilités du fait des instances qui se poursuivent et auxquelles ils ont participé en tant qu'arbitres continuent d'être régis par le présent code.

[REPLACE LAW SOCIETY LOGO WITH TRIBUNAL LOGO]

PRACTICE DIRECTION
ADJOURNMENT REQUESTS TO HEARING DIVISION ~~PANEL~~

The Law Society Tribunal~~of Upper Canada~~ is committed to the just and expeditious determination of its ~~regulatory~~ proceedings. The Rules of Practice and Procedure ("Rules"), made pursuant to section 61.2 of the *Law Society Act*, govern the proceedings of the Hearing Division~~Law Society of Upper Canada's tribunals proceedings before the Hearing Panel~~.

The Law Society Tribunal has developed the following Practice Direction on a ~~a~~djournments to provide further guidance to parties. This Practice Direction does not replace the provisions respecting adjournments provided for by the Rules.

STRICT ADJOURNMENT POLICY

When hearing dates have been scheduled, adjournments can interfere with access to justice, waste resources and cause delay and cost to all parties and the ~~Hearing Panel~~Tribunal. As a result parties should use pre-hearing preparation to avoid unnecessary adjournments.

Once a hearing date is scheduled, parties are expected to prepare for hearing and be ready to proceed on the date that is set. This includes the preparation of any agreed statement of facts and document books, which should normally be filed at least two full business days prior to the hearing date so that they can be delivered to and reviewed by panel members before the commencement of the hearing.

The Rules require parties to follow various pre-hearing procedures, including those related to scheduling, proceedings management, disclosure, pre-hearing conferences and admissions, so that hearing time is used efficiently. Hearings are scheduled in consultation with the parties, either through a proceeding management conference (PMC) or~~, on certain matters specified in the Rules,~~ the Tribunal~~s~~ Office. In the normal course, dates for hearing will be scheduled on consent of the parties. Accordingly, adjournment requests are discouraged, particularly on short notice before the scheduled hearing date.

REQUESTS FOR ADJOURNMENTS PRIOR TO SCHEDULED HEARING DATES

In advance of scheduled hearing dates, a party seeking an adjournment should make a request ~~to the Tribunals Office~~ through the Tribunal Office for the matter to be added to the next regularly scheduled PMC. At the same time, the party seeking an adjournment must advise the Tribunal~~s~~ Office if the adjournment request is on consent, opposed or unopposed. The fact that an adjournment request is made on consent will be a factor to

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be considered, but will not be determinative of whether the Tribunal should grant the request, as broader institutional and public interests must also be considered.

The sooner a party makes an adjournment request before the date scheduled for hearing the fewer resources are wasted and prejudice to a party or parties is less likely to occur.

The closer to the scheduled hearings dates the adjournment request is made the less likely it is to be granted, except in exceptional circumstances such as illness of a party, witness or representative. If a regularly scheduled PMC is not available before the hearing date, a party may request a special PMC, but only in exceptional circumstances that must be disclosed ~~to the Tribunals Office~~ through the Tribunal Office at the time the request is made. Requests for special PMCs are strongly discouraged and the availability of a special PMC is not guaranteed. Parties are expected to make use of regularly scheduled PMCs.

Parties must attend a PMC at least ten days in advance of the scheduled hearing date(s) if either party intends to make an adjournment request or believes that the hearing may not be ready to proceed on the scheduled hearing date(s) in accordance with Rule of Practice and Procedure 14~~, formerly rule 1.14~~. At a PMC a panelist may hear a request for an adjournment and give directions, including imposing terms if the adjournment is granted. The provisions of Rule 14 apply to any adjournment request. Adjournments will not ordinarily be granted due to late retention of counsel and/or the unavailability of such counsel for the scheduled hearing dates or on the grounds that parties wish to engage in settlement discussions. Settlement discussions are encouraged, but should be part of the pre-hearing preparation process. The decision respecting an adjournment request will be endorsed on the record for future reference.

REQUESTS FOR ADJOURNMENTS ON OR AFTER THE COMMENCEMENT OF THE HEARING

Where an adjournment request is made too close to the scheduled hearing date and a PMC is not possible, the panel assigned to the hearing ~~Hearing Panel~~ may hear the request on the date scheduled for the hearing.

An adjournment request on or after the commencement of the hearing should only be brought in exceptional circumstances, such as illness of a party, witness or representative. Late retention of counsel and/or the unavailability of such counsel or the parties' wishes to engage in last minute settlement discussions may not be considered exceptional circumstances. The timing of the adjournment request will be considered in rendering a decision. Any adjournment granted at this stage will likely be made on terms.

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Directive sur la pratique relative aux demandes d'ajournement faites ~~au Comité d'audition~~à la Section de première instance

Le Tribunal du Barreau ~~du Haut-Canada~~ s'est engagé à régler ses instances de façon juste et rapide ~~les instances réglementaires~~. Les Règles de pratique et de procédure (les « Règles »), prises en application de l'article 61.2 de la *Loi sur le Barreau*, régissent les ~~instances administratives du Barreau du Haut-Canada devant le Comité d'audition~~procédures de la Section de première instance.

Le Tribunal du Barreau a élaboré la directive suivante sur la pratique relative aux demandes d'ajournement afin de mieux orienter les parties. Cette directive sur la pratique n'abolit pas les dispositions des Règles concernant les ajournements.

POLITIQUE STRICTE SUR LES AJOURNEMENTS

Lorsque des dates d'audience ont été fixées, les ajournements peuvent entraver l'accès à la justice, gaspiller des ressources et entraîner des retards et des frais pour toutes les parties et pour le ~~Comité d'audition~~Tribunal. En conséquence, les parties devraient faire des préparatifs avant les audiences pour éviter des ajournements inutiles.

Une fois qu'une date d'audience a été fixée, les parties doivent se préparer à l'audience et être prêtes à plaider à la date fixée. Cela inclut la préparation d'un exposé conjoint des faits et de cahiers de documents, qui devraient normalement être déposés au moins deux jours ouvrables entiers avant la date de l'audience pour pouvoir être remis aux membres ~~du Comité~~de la formation et examinés par eux avant le début de l'audience.

Les Règles exigent que les parties observent diverses procédures avant l'audience, notamment concernant la fixation des dates, la gestion des instances, la divulgation, les conférences préparatoires à l'audience et les aveux, de sorte que le temps réservé à l'audience soit utilisé efficacement. Les dates des audiences sont fixées en consultation avec les parties, soit par voie de conférence de gestion de l'instance (CGI), soit~~, pour certaines questions spécifiées dans les Règles,~~ par le greffe du ~~tribunal~~Tribunal. Normalement, les dates des audiences sont fixées sur consentement des parties. En conséquence, les demandes d'ajournement sont déconseillées, particulièrement dans un court délai avant la date fixée pour l'audience.

DEMANDES D'AJOURNEMENT AVANT LES DATES FIXÉES POUR L'AUDIENCE

Avant les dates fixées pour l'audience, une partie qui veut obtenir un ajournement devrait en faire la demande au greffe du ~~tribunal~~Tribunal, pour que ce point soit ajouté à la CGI suivante prévue. En même temps, la partie qui demande l'ajournement doit indiquer au greffe du ~~tribunal~~Tribunal si la demande d'ajournement est faite sur consentement, avec opposition ou sans opposition. Le fait que la demande d'ajournement est faite sur consentement est un facteur à considérer, mais ne suffit pas à décider si le ~~tribunal~~Tribunal devrait accueillir la demande, car il faut aussi tenir compte d'intérêts institutionnels et publics plus larges.

Plus la demande d'ajournement est faite en avance de la date fixée pour l'audience, moins on risque de gaspiller les ressources et de causer un préjudice à une ou à plusieurs parties.

Plus une demande d'ajournement est faite dans un court délai avant les dates fixées pour l'audience, moins elle a de chances d'être accueillie, sauf dans des circonstances exceptionnelles telles que la maladie d'une partie, d'un témoin ou d'un représentant.

Si aucune CGI n'est prévue avant la date de l'audience, une partie peut demander une CGI extraordinaire, mais seulement dans des circonstances exceptionnelles, lesquelles doivent être divulguées au greffe du ~~tribunal~~Tribunal au moment de la demande. Les demandes de CGI extraordinaire sont fortement déconseillées, et la possibilité d'obtenir une CGI extraordinaire n'est pas garantie. Les parties devraient se prévaloir des CGI régulières prévues.

Les parties doivent participer à une CGI au moins 10 jours avant la ou les dates d'audience fixées si l'une ou l'autre partie a l'intention de faire une demande d'ajournement ou croit qu'elle ne sera peut-être pas prête à procéder aux dates d'audience fixées, conformément à la Règle de pratique et de procédure ~~14, qui est l'ancienne règle 1.14.~~14. À une CGI, un membre ~~du Comité~~de la formation peut entendre une demande d'ajournement et donner des directives, notamment en imposant des conditions si l'ajournement est accordé. Les dispositions de la Règle 14 s'appliquent à toute demande d'ajournement.

Les ajournements ne sont habituellement pas accordés parce qu'une partie a tardé à retenir les services d'un avocat, ni parce que cet avocat n'est pas libre aux dates d'audience fixées, ni parce que les parties veulent entreprendre des discussions de règlement amiable. De telles discussions sont encouragées, mais elles devraient faire partie du processus de préparation à l'audience.

La décision rendue quant à la demande d'ajournement est déposée au dossier pour consultation future.

DEMANDES D'AJOURNEMENT AU DÉBUT DE L'AUDIENCE OU APRÈS

Si une demande d'ajournement est faite dans un trop bref délai avant la date d'audience fixée et qu'une CGI n'est pas possible, ~~le Comité d'audition~~la formation d'audience peut entendre la demande à la date fixée pour l'audience.

Une demande d'ajournement ne devrait être faite au début de l'audience ou après que dans des circonstances exceptionnelles telles que la maladie d'une partie, d'un témoin ou d'un représentant. Le fait qu'une partie a tardé à retenir les services d'un avocat, que cet avocat n'est pas libre ou que les parties désirent entreprendre à la dernière minute des discussions de règlement amiable ne peut pas être considéré comme une circonstance exceptionnelle. En rendant la décision, on tiendra compte du moment où la demande d'ajournement a été présentée.

THIS SECTION CONTAINS

IN CAMERA MATERIAL

TAB 3.3

INFORMATION

PRE-PROCEEDING CONSENT RESOLUTION PROCESS

16. The Pre-Proceeding Consent Resolution Conference (the Consent Process) is an alternative to the regular investigations and hearings stream. The Consent Process was approved by Convocation on January 28, 2010 as a pilot project, on a policy basis. Changes to the *Rules of Practice and Procedure* required to support the Consent Process were approved by Convocation on January 27, 2011. The Professional Regulation, Paralegal Standing and Tribunals Committee were all involved in the development of the proposal.

17. The pilot project was to be reviewed following two years to determine whether to continue, amend or end it. At its January 2014 Committee meeting the Professional Regulation Committee (PRC) approved the following recommendation:

> That Convocation approve continuation of the Pre-Proceeding Consent Resolution Conference pilot project for an additional two years, and that a report be provided prior to the end of the two year period with recommendations regarding the continuation of the Conference on a permanent basis.

18. Convocation deferred consideration of the report to enable the Tribunals Committee to consider the issue and the PRC recommendation as it had not had an opportunity to do so before the PRC Report was prepared.

19. Since the commencement of the pilot project it has been used in only two matters, both in the last six months of 2013. Given this, it would appear that at least in its first two years the process has not resulted in a significant amount of diversion of appropriate cases. Nonetheless the Professional Regulation Division has identified the process as a helpful tool, likely to be used more often in the future.

20. The PRC Report also raises a concern with Rule 29, which governs the process before the Tribunal, suggesting that the Tribunal Committee may wish to consider amendments to that Rule.

21. Tribunal staff has provide input to the Tribunal Committee on its limited experience with the process to date and has noted the following:

    a. Given how little experience there has been with the process, the panels that have been involved have been unfamiliar with it and somewhat unclear on the application of the Rule. For future applications it may be worth designating the same pool of adjudicators to conduct any conferences under the Rule.

    b. The Rule is somewhat cumbersome, particularly in denoting how panel composition following the conference will be determined.

    c. The extent to which the process is "accessible" to licensees is not clear. Given that the process is outlined in the Rules, would a licensee under investigation even be aware that he or she might explore its use to expedite a resolution of the matter?

22. In its discussion the Committee agreed generally with the PRC's recommendation, but noted three points that it considers important to be addressed during the continuation of the pilot project:

    a. The Chair of the Tribunal and the Tribunal Committee should be participants in the review process that will lead to the report on the pilot project after two years.

    b. The Tribunal Chair and Committee should undertake a review of Rule 29 as part of an overall review of the Rules of Practice and Procedure they will be undertaking.

    c. To enhance the use of the process, relevant stakeholders should be educated on its purpose and use.

TAB 3.4

INFORMATION

NATIONAL DSCIPLINE STANDARDS

23. The Federation has been working with the law societies to develop a set of national law society standards to address all stages of complaints against lawyers or paralegals, from intake through to investigation and adjudication.

24. A two-year pilot phase began on April 1, 2012 to test the standards. Staff across the country has been working with the standards, which have undergone two revisions as a result of feedback received. The revised standards will continue to be tested until they are approved by Council of the Federation in April 2014 and adopted by law societies effective January 2015.

25. The Committee has reviewed the proposed National Standards, which will be reported to Convocation for approval through the Professional Regulation Committee. The Tribunal is already largely compliant with the standards relevant to its mandate.

TAB 3.5

INFORMATION

TRIBUNAL MISSION STATEMENT

26. The Law Society Tribunal Mission Statement and Core Values has been finalized and distributed to adjudicators. The Mission Statement is set out at **TAB 3.5.1: Mission Statement and Core Values** for Convocation's information.

TAB 3.5.1

Who We Are

The Law Society Tribunal is an independent adjudicative tribunal within the Law Society of Upper Canada, consisting of staff and appointed adjudicators. Adjudicators include benchers and other lawyer, paralegal and lay appointees.

Mission Statement

The Law Society Tribunal processes, hears and decides regulatory cases about Ontario lawyers and paralegals in a manner that is fair, just and in the public interest.

Core Values

- *Fairness*: We will be fair and impartial in our processes and proceedings, treating all with respect, courtesy and dignity.
- *Quality*: We strive for excellence, acting with dedication and professionalism. We aim for continuous improvement, valuing diverse perspectives. We commit to an atmosphere that enables all to perform at their best.
- *Transparency*: We will act in a manner that bears the closest scrutiny. Our decisions, rules, processes and policies will be available to licensees and the public, accessible and easily understandable.
- *Timeliness*: We are guided by the importance of timely resolution of all matters. We will schedule hearing and continuation dates expeditiously and complete written reasons promptly.

TAB 3.6

INFORMATION

TRIBUNAL OFFICE QUARTERLY STATISTICS

27. The Tribunal Office's quarterly report for the third quarter of 2013 is set out at **TAB 3.6.1: 2013 Third Quarter Statistics** for Convocation's information.

TAB 3.6.1

Tribunals Office Statistics

2013

The Law Society of Upper Canada
July 1 to September 30

Third Quarter Report

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

TABLE OF CONTENTS

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

FILES OPENED

The Tribunals Office opens a file when it is issued upon the filing of an originating process that has been served on the parties. An originating process includes a notice of application, referral for hearing, motion for interlocutory suspension or practice restriction, and appeal.

Files related to the same lawyer or paralegal that are heard concurrently are counted as separate files.

	Q1	Q2	**Q3**	Q4	**Cumulative**
Total Files	48 (42)	41 (42)	**44** (23)[1]		**133** (107)
Lawyer	41	36	32		109
Paralegal	7	5	12		24
Hearing Files	41 (37)	38 (36)	**39** (20)		**118** (93)
Lawyer	35	33	27		95
Paralegal	6	5	12		23
Appeal Files	7 (5)	3 (6)	**5** (3)		**15** (14)
Lawyer	6	3	5		14
Paralegal	1	0	0		1

[1] Numbers in parentheses are 2012 figures.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

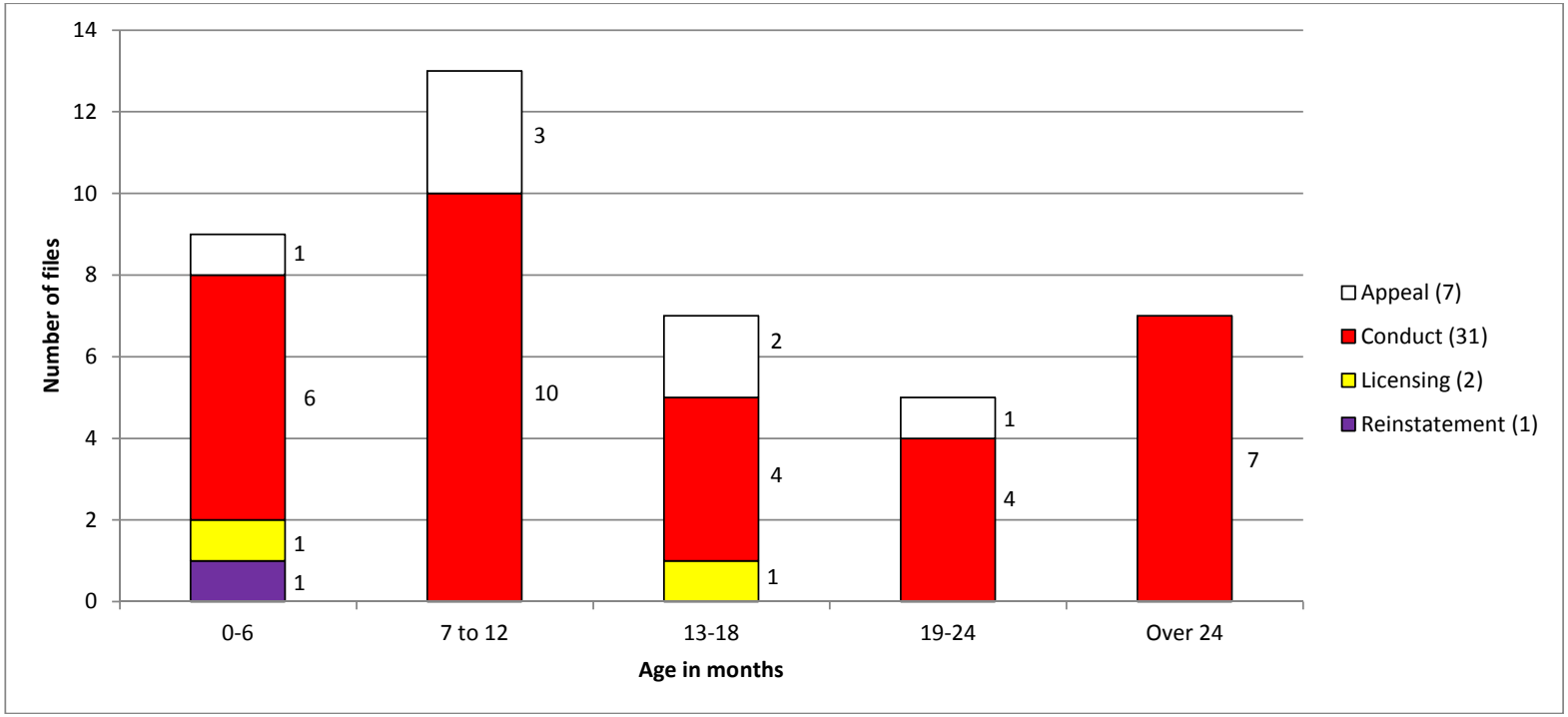
FILES CLOSED

The Tribunals Office closes a file after the final decision and order, and reasons if any, have been delivered or published. A file that is closed in a quarter may have been opened in that same quarter or anytime prior.

	Q1	Q2	**Q3**	Q4	**Cumulative**
Total Files	31 (43)	38 (29)	**41** (35)		**110** (107)
Lawyer	25	31	36		92
Paralegal	6	7	5		18
Hearing Files	26 (39)	34 (28)	**34** (30)		**94** (97)
Lawyer	22	28	29		79
Paralegal	4	6	5		15
Appeal Files	5 (4)	4 (1)	**7** (5)		**16** (10)
Lawyer	3	3	7		13
Paralegal	2	1	0		3

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

AGE OF FILES CLOSED



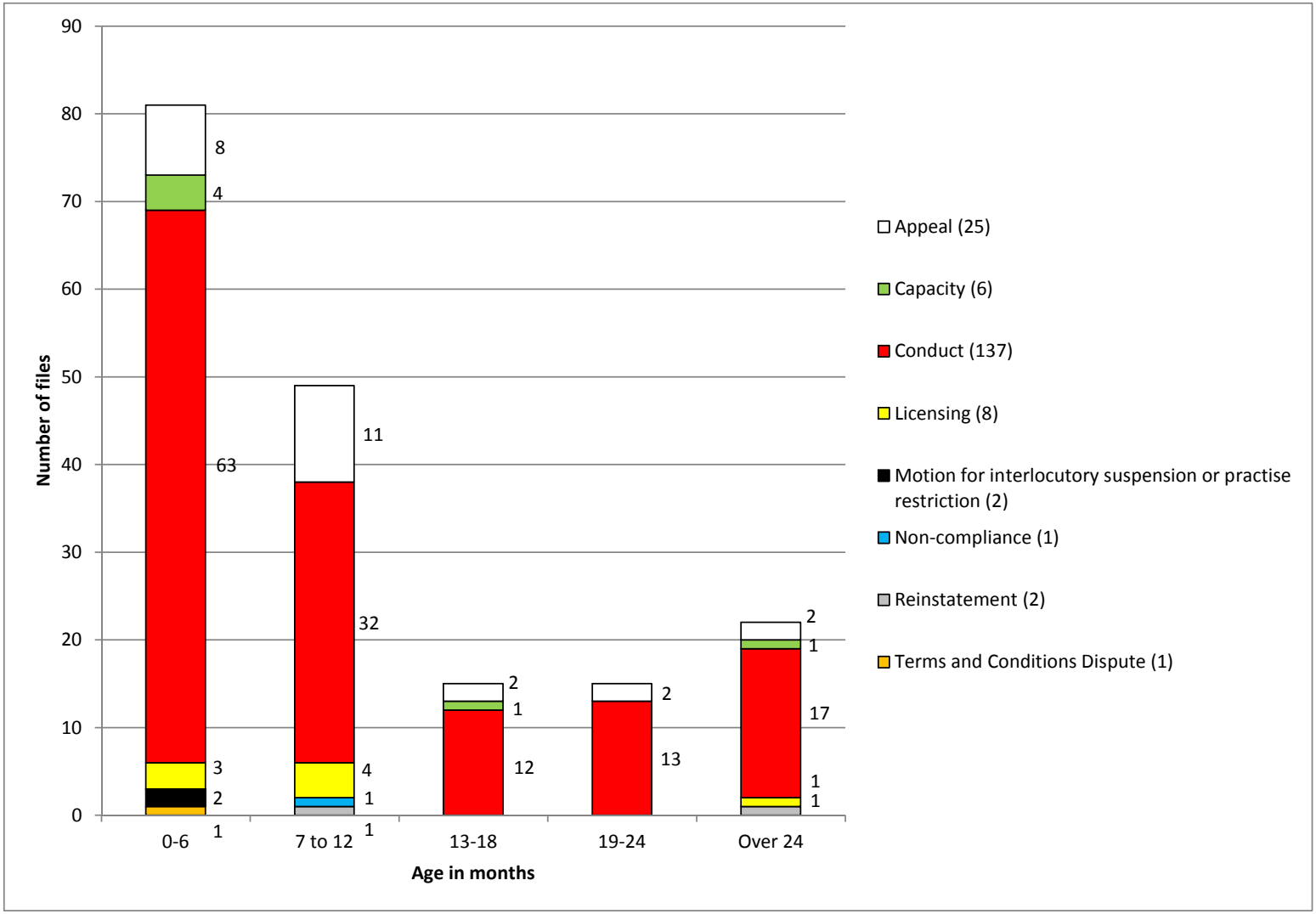
The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

OPEN FILES AT QUARTER END

	Q1	Q2	**Q3**	Q4
Total Files	173 (162)	179 (177)	**182** (162)	
Lawyer	152	159	155	
Paralegal	21	20	27	
Hearing Files	146 (146)	153 (155)	**157** (142)	
Lawyer	129	136	133	
Paralegal	17	17	24	
Appeal Files	27 (16)	26 (22)	**25** (20)	
Lawyer	23	23	22	
Paralegal	4	3	3	

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

OPEN FILES BY AGE



The Law Society of Upper Canada
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OPEN FILES BY AGE – OVER 24 MONTHS

1. File A, a reinstatement application, was filed in April 2000, but the licensee did not pursue the application until February 2008. The applicant has not yet filed materials. A further proceeding management conference ("PMC") is scheduled for December 2013. Age of file: 162 months.

2. File B, a conduct application, was filed in March 2007. The hearing panel heard a number of motions and began hearing the merits in 2009. A new hearing panel commenced hearings in May 2011 and heard several motions. The hearing on the merits occurred in October 2012. The panel's decision on finding was released in March 2013. A penalty hearing occurred in September. The parties are to provide written submissions in October. Age of file: 79 months.

3. File C, a conduct application, was filed in January 2009. The licensee brought a motion seeking to dismiss/stay the application permanently. The motion was dismissed in March 2010. The licensee brought a judicial review application to the Superior Court of Justice which was dismissed. The hearing on the merits commenced in October 2011 and concluded in January 2013. The panel's decision on finding was released in June 2013. A hearing on penalty and costs is scheduled for November 2013. Age of file: 57 months.

4. File D, a conduct application, was filed in May 2009. Several motions were heard. The hearing on the merits concluded in December 2012. The panel reserved its decision. Age of file: 53 months.

5. File E, a conduct application, was filed in May 2009. Several motions were heard. The hearing on the merits concluded in December 2012. The panel reserved its decision. Age of file: 53 months.

6. File F, a licensing application, was filed in June 2009. Several motions were heard. The hearing on the merits commenced in July 2011 and dates are scheduled into November 2013. Age of file: 52 months.

7. File G, a conduct application, was filed in September 2009. At the request of the parties, the hearing on the merits commenced in April 2011. The notice of application was dismissed in April 2013. A hearing on costs is scheduled for November 2013. Age of file: 49 months.

8. File H, a conduct application, was filed in January 2010. The hearing on the merits commenced in November 2010 and concluded in June 2012. A hearing on penalty and costs submissions occurred in April 2013. The panel's decision on penalty and costs was released in June 2013. A reprimand is to be administered. Age of file: 45 months.

9. File I, an appeal, was filed in March 2010. The parties appeared before the appeal management conference ("AMC") numerous times and a motion was heard. The appeal hearing occurred in July 2012. A further appeal hearing occurred in September 2013. The panel reserved its decision. Age of file: 42 months.

10. File J, a conduct application, was filed in May 2010. The hearing commenced in March 2011. A motion to quash the proceedings was filed in January 2012 and heard in March and April 2012. The panel delivered its decision on the motion in November 2012 recusing themselves from the hearing and received costs submissions. The panel's decision on costs was delivered in March 2013. In April 2013, the matter returned to the PMC and the licensee filed a motion for a stay of the proceedings pending the outcome of a court matter. The motion is scheduled to be heard in December 2013. Age of file: 40 months.

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11. File K, a conduct application, was filed in August 2010. A disclosure motion was heard on several dates in 2011 before being abandoned. The hearing on the merits commenced in February 2012 and concluded in May 2012. The panel's decision on finding was released in January 2013 and on penalty and costs in May 2013. The panel is to provide written reasons. Age of file: 38 months.

12. File L, a conduct application, was filed in October 2010. Several motions were heard. The hearing on the merits commenced in July 2012. The panel made a finding in September 2012 and penalty submissions were scheduled to be heard in January 2013 but a motion to dismiss the notice of application was filed. The motion was heard in April 2013 and the panel's decision was released in June 2013. A penalty hearing is scheduled for January 2014. Age of file: 36 months.

13. File M, a capacity application, was filed in November 2010. Several motions have been heard. Two further motions were filed in May 2013 and heard in June 2013. The hearing on the merits is scheduled for December 2013. Age of file: 35 months.

14. File N, a conduct application, was filed in December 2010. The hearing commenced in March 2011. Several motions were filed and dealt with throughout 2011 and 2012. The panel made a finding of professional misconduct in June 2012 and written reasons were released in January 2013. The panel requested written submissions on penalty. A penalty hearing date is to be scheduled. Age of file: 34 months.

15. File O, a conduct application, was filed in March 2011. Several motions were heard. The hearing on the merits commenced in August 2013 and continued in October 2013. The panel reserved its decision. Age of file: 31 months.

16. File P, a conduct application, was filed in March 2011. The initial hearing dates were vacated due to a change in representation. The hearing on the merits commenced in February 2012 and continued in August 2012. Written submissions were filed in October and December 2012 and January 2013. The panel's decision on finding was released in July 2013. A penalty hearing is scheduled for December 2013. Age of file: 31 months.

17. File Q, a conduct application, was filed in March 2011. The commencement of the hearing was delayed pending the outcome of a related court matter. The hearing commenced in October 2012 and continued in January 2013. The panel's decision on finding was released in May 2013. A penalty hearing occurred in October 2013. The panel reserved. Age of file: 31 months.

18. File R, a conduct application, was filed in March 2011. Two sets of hearing dates were vacated due to changes in representation and to provide sufficient time for review of an expert's report. The hearing commenced in May 2012 and continued into September 2012. Written submissions were provided and oral submissions heard in November 2012. The panel's decision on finding was released in April 2013 and on penalty and costs in June 2013. The panel is to provide written reasons. Age of file: 30 months.

19. File S, an appeal, was filed in September 2011. Several motions were filed by both parties. The appeal hearing and a motion for fresh evidence are scheduled to be heard in December 2013. Age of file: 25 months.

20. File T, a conduct application, was filed in September 2011. Earlier scheduled dates were vacated as another application was commenced before the first scheduled hearing dates for this application. The files were joined in March 2013. The hearing is scheduled to commence in October 2013. Age of file: 24 months.

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Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

21. File U, a conduct application, was filed in September 2011. The hearing commenced in March 2012. Earlier scheduled dates were vacated as other applications were commenced prior to the first scheduled hearing dates for this application. The panel ordered an interim suspension in March 2012 pending the conclusion of the hearing. The hearing continued in July 2012. The panel is currently awaiting further evidence. Age of file: 24 months.

22. File V, a conduct application, was filed in September 2011. Both parties filed motions, which were heard in 2012. The hearing on the merits commenced in March 2013 and continued through to September 2013. The panel reserved its decision in September 2013. Age of file: 24 months.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

SUMMARY[2] FILES OPENED AND CLOSED[3]

	Q1	Q2	**Q3**	Q4	**Cumulative**
Total Opened	9 (5)	5 (12)	**14** (10)		**28** (27)
Lawyer	8	5	9		22
Paralegal	1	0	5		6
Total Closed	7 (10)	11 (5)	**7** (11)		**25** (26)
Lawyer	5	10	7		22
Paralegal	2	1	0		3

OPEN SUMMARY FILES AT QUARTER END

	Q1	Q2	**Q3**	Q4
Total Files	23 (11)	17 (18)	**24** (17)	
Lawyer	22	17	19	
Paralegal	1	0	5	

[2] A summary file is a proceeding that is first returnable to a hearing panel and bypasses the PMC in accordance with Rules of Practice and Procedure R.11.01 (2). These files are heard by a single adjudicator.
[3] This is a subset of the information provided in the charts: “Files Opened” on page 3 and “Files Closed” on page 4.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

NUMBER OF LAWYERS AND PARALEGALS BEFORE THE TRIBUNALS

	Q1	Q2	**Q3**	Q4	**Yearly Total**
	No. of Lawyers / Paralegals	No. of Lawyers / Paralegals	No. of Lawyers / Paralegals	No. of Lawyers / Paralegals	No. of Lawyers / Paralegals
PMC	52 (75)	78 (69)	**67** (61)		**118** (110)
Lawyers	41	67	55		96
Paralegals	11	11	12		22
Hearing Panel	50 (53)	58 (64)	**43** (56)		**109** (125)
Lawyers	45	52	35		95
Paralegals	5	6	8		14
AMC	11 (3)	7 (10)	**7** (9)		**17** (15)
Lawyers	9	5	7		14
Paralegals	2	2	0		3
Appeal Panel	7 (5)	10 (4)	**8** (4)		**21** (12)
Lawyers	7	8	8		19
Paralegals	0	2	0		2

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

NUMBER OF FILES AND FREQUENCY BEFORE THE TRIBUNALS

Files heard on more than one occasion by a tribunal within a quarter are counted each time the file proceeds before the tribunal.

	Q1		Q2		**Q3**		Q4		**Yearly Total**	
	No. of Files	No. of Times Files Considered	No. of Files	No. of Times Files Considered	No. of Files	No. of Times Files Considered	No. of Files	No. of Times Files Considered	No. of Files	No. of Times Files Considered
PMC	55 (81)	91 (147)	83 (73)	162 (126)	**72** (63)	**114** (106)			**129** (122)	**367** (379)
Lawyer	44	72	72	140	60	96			107	308
Paralegal	11	19	11	22	12	18			22	59
Hearing Panel	56 (55)	72 (83)	65 (68)	93 (113)	**51** (62)	**69** (88)			**124** (139)	**234** (284)
Lawyer	51	62	58	81	42	55			108	198
Paralegal	5	10	7	12	9	14			16	36
AMC	11 (3)	13 (6)	7 (11)	9 (13)	**7** (10)	**11** (12)			**17** (16)	**33** (31)
Lawyer	9	11	5	7	7	11			14	29
Paralegal	2	2	2	2	0	0			3	4
Appeal Panel	7 (5)	9 (6)	11 (4)	12 (4)	**8** (4)	**10** (4)			**23** (12)	**31** (14)
Lawyer	7	9	9	9	8	10			21	28
Paralegal	0	0	2	3	0	0			2	3

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

TOTAL HEARINGS SCHEDULED AND VACATED

The number of hearings scheduled in each quarter is listed below. Files scheduled on more than one occasion within a quarter are counted each time the file is scheduled. A hearing is counted as scheduled when the date the hearing is to proceed falls within the quarter. A hearing is counted as vacated when it does not proceed on the scheduled date. Reasons for vacated hearings are noted on pages 15 - 16. The number of hearing calendar days scheduled is noted on page 17.

	Q1	Q2	**Q3**	Q4	**Cumulative**
Hearing Panel hearings scheduled	82 (100)	107 (131)	**88** (102)		**277** (333)
Lawyer	70	93	69		232
Paralegal	12	14	19		45
All Hearing Panel hearing time vacated	14 (25) 17% (25%)	23 (30) 22% (23%)	**24** (20) **27%** (20%)		**61** (75) **22%** (23%)
Lawyer	13	21	19		53
Paralegal	1	2	5		8
Some Hearing Panel hearing time vacated[4]	8 10%	10 9%	**10** **11%**		**28** **10%**
Lawyer	7	9	7		23
Paralegal	1	1	3		5
Appeal Panel hearings scheduled[5]	14 (8)	16 (5)	**13** (6)		**43** (19)
Lawyer	14	12	13		39
Paralegal	0	4	0		4
All Appeal Panel hearings vacated	1 (3) 7% (38%)	2 (1) 13% (20%)	**2** (1) **15%** (17%)		**5** (5) **12%** (26%)
Lawyer	1	2	2		5
Paralegal	0	0	0		0

[4] This is a new statistic, no prior comparator is available.
[5] This includes appeal management conference motion hearings.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

REASON FOR VACATED HEARINGS[6]

All hearing time vacated	Q1		Q2		**Q3**[7]		Q4	
	L	P	L	P	**L**[8]	**P**	L	P
Party / counsel / representative unavailable / ill	3		7	2	6	2		
Duty counsel unavailable	2							
Licensee representative / counsel removed from record	2				1			
Licensee counsel newly retained / to retain counsel	1	1	2		2	1		
Party to obtain / provide additional evidence	1		5		4	1		
Witness unavailable	1				1			
Request to have applications heard together	1							
Application abandoned	1							
Licensee is subject of other conduct / court matters	1		1		1			
Submissions to be made in writing	1				1			
Counsel unprepared			3					
Agreed statement of facts (“ASF”) expected / signed			2		1			
Hearing completed ahead of time estimated			2		1			
At parties’ request			1					
Seized panel member unavailable / ill			1					
Motion abandoned			1					
Disclosure to be reviewed					1			
Religious holiday					2	1		
Parties require more time to prepare					1			

[6] A hearing may have been vacated for more than one reason.
[7] This column represents the number of times the reason resulted in a vacated hearing.
[8] L = lawyer, P = paralegal.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

Some hearing time vacated	Q1		Q2		**Q3**		Q4	
	L	P	L	P	**L**	**P**	L	P
ASF expected / signed	3		3					
Hearing completed ahead of time estimated	2	1	2	1	2			
Party / counsel / representative unavailable / ill	1				1			
Seized panel member unavailable / ill	1		3					
Witness unavailable			1					
Licensee's counsel unprepared			1		1			
Party to obtain / provide additional evidence					1	2		
Licensee / applicant to bring motion					1	1		

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

CALENDAR DAYS SCHEDULED AND VACATED

The number of hearing calendar days scheduled is listed below. Multiple hearings are often scheduled on each calendar day. A vacated calendar day is a day on which no scheduled hearings or appearances before the PMC or AMC proceeded. The day an adjournment request is heard is not counted as a vacated calendar day. For example, if a request to adjourn a hearing was granted on the first day, only the remaining days are counted as vacated. Or, if one hearing was vacated, but other hearings proceeded, that day is not counted as vacated. Some hearings and appeals were heard on the same calendar day.

Reasons for vacated calendar days are noted on page 18.

	Q1	Q2	**Q3**	Q4	**Cumulative**
Number of available calendar days	61 (63)	64 (63)	**63** (62)		**188** (188)
Hearing Panel calendar days scheduled	55 (60)	59 (63)	**55** (57)		**169** (180)
Hearing Panel calendar days vacated	3 (7) 5% (12%)	7 (6) 12% (10%)	**6** (5) **11%** (9%)		**16** (18) **10%** (10%)
Appeal Panel calendar days scheduled	15 (9)	11 (11)	**11** (12)		**37** (32)
Appeal Panel calendar days vacated	1 (2) 7% (22%)	1 (1) 9% (9%)	**1** (1) **9%** (8%)		**3** (4) **8%** (13%)

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REASON FOR AND RESULTING VACATED CALENDAR DAYS

Reason	Q1	Q2	Q3[9]	Q4
ASF expected / signed	1-1			
Witness unavailable	1-1			
Party to bring motion	1-1			
Party / counsel / representative ill / unavailable	1-1	2-2	4-4	
Party to obtain / provide additional evidence	1-1		1-1	
Licensee counsel newly retained	1-1			
Duty counsel unavailable	1-1			
Seized panel member unavailable / ill		5-4		
Hearing completed ahead of time estimated		2-1		
Licensee's counsel unprepared		1-1	1-1	
Motion abandoned		1-1		
Parties require more time to prepare			1-1	
Hearing to continue in writing			1-1	

[9] The first figure in this column represents the number of times a panel accepted this reason. The second figure represents the resulting vacated calendar days. The number of calendar days vacated shown on this page may be greater than the calendar days vacated as reported on page 17 because more than one matter may have been scheduled to be heard on the same day and all were vacated; so one calendar day may have been vacated for more than one reason and for more than one matter.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

PARTIES' ADJOURNMENT REQUESTS

The following table lists the number of adjournment requests to Law Society tribunals in this quarter. Adjournment requests reported below may relate to matters scheduled to be heard during this quarter or in a subsequent quarter.

Adjournment request made to		**Requests**								
		Q1		Q2		**Q3**[10]		Q4		**Cumulative**
		L	P	L	P	**L**	**P**	L	P	
PMC	Granted	4 (10)	1 (2)	10 (16)	1 (2)	**13** (7)	**1** (0)			**30** (37)
	Denied	1 (1)	1 (0)	0 (2)	0 (0)	**1** (3)	**0** (0)			**3** (6)
Hearing Panel	Granted	6 (11)	0 (2)	11 (12)	2 (5)	**7** (12)	**2** (2)			**28** (44)
	Denied	2 (2)	0 (1)	0 (1)	1 (4)	**0** (1)	**0** (1)			**3** (10)
AMC	Granted	1 (1)	0 (0)	0 (1)	0 (1)	**2** (0)	**0** (0)			**3** (3)
	Denied	0 (0)	0 (0)	0 (0)	0 (0)	**0** (0)	**0** (1)			**0** (1)
Appeal Panel	Granted	0 (1)	0 (0)	0 (0)	0 (0)	**0** (0)	**0** (0)			**0** (1)
	Denied	0 (0)	0 (0)	0 (0)	0 (0)	**0** (0)	**0** (0)			**0** (0)

[10] L = lawyer, P = paralegal.

The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

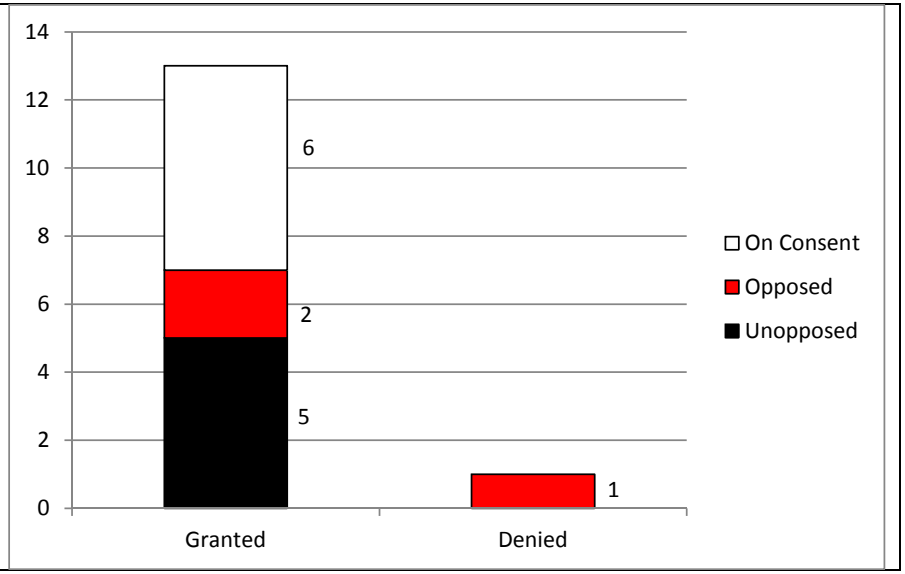
PARTIES' POSITION ON ADJOURNMENT REQUESTS (LAWYER MATTERS)

Adjournment Requests Granted by the PMC
Total: 13

On Consent	6
Opposed	2
Unopposed	5

Adjournment Requests Denied by the PMC
Total: 1

On Consent	0
Opposed	1
Unopposed	0

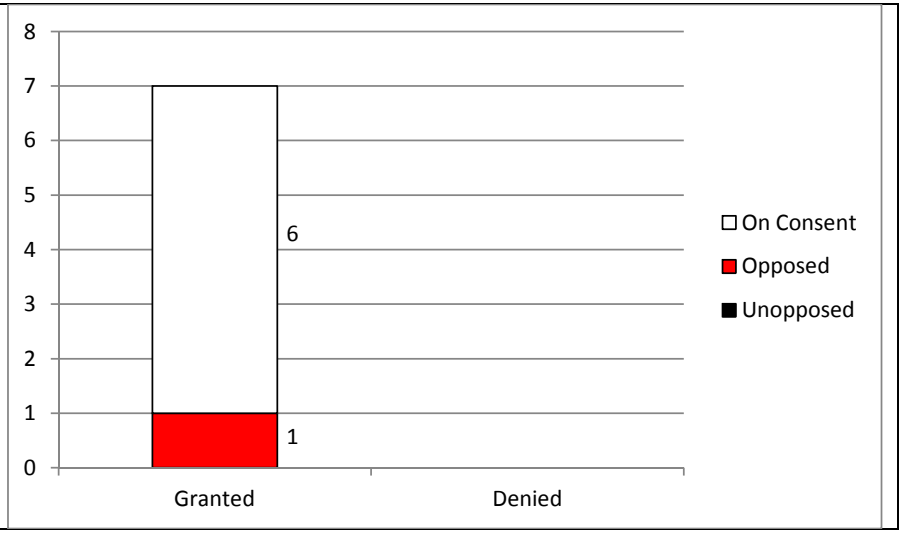


Adjournment Requests Granted by the Hearing Panel
Total: 7

On Consent	6
Opposed	1
Unopposed	0

Adjournment Requests Denied by the Hearing Panel
Total: 0

On Consent	0
Opposed	0
Unopposed	0



The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

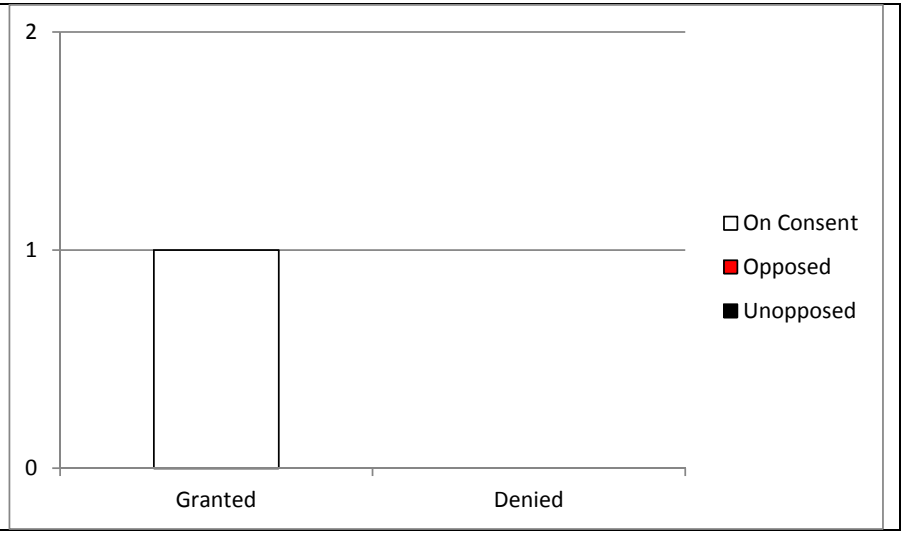
PARTIES' POSITION ON ADJOURNMENT REQUESTS (PARALEGAL MATTERS)

Adjournment Requests Granted by the PMC
Total: 1

On Consent	1
Opposed	0
Unopposed	0

Adjournment Requests Denied by the PMC
Total: 0

On Consent	0
Opposed	0
Unopposed	0

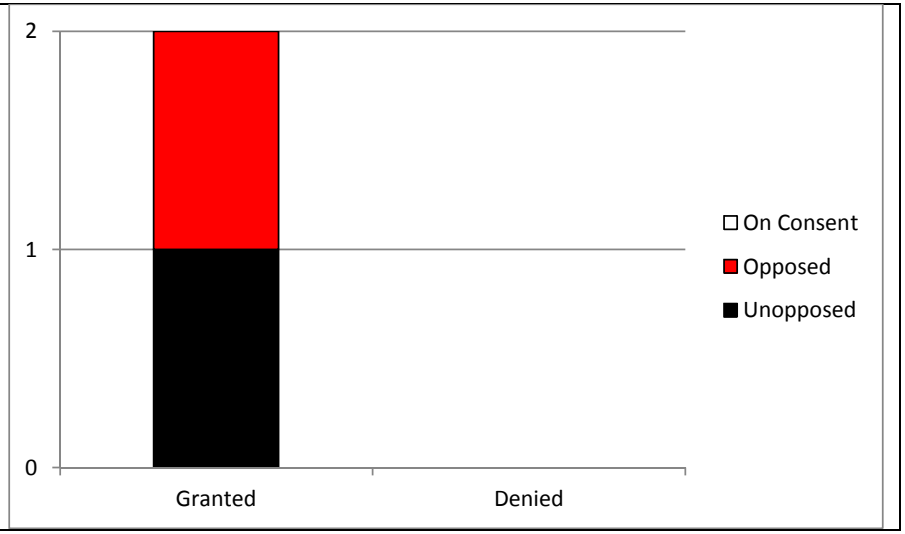


Adjournment Requests Granted by the Hearing Panel
Total: 2

On Consent	0
Opposed	1
Unopposed	1

Adjournment Requests Denied by the Hearing Panel
Total: 0

On Consent	0
Opposed	0
Unopposed	0



The Law Society of Upper Canada
Q3 2013 Tribunals Office Statistics (July 1 – September 30, 2013)

TRIBUNAL REASONS PRODUCED AND PUBLISHED[11]

	Q1	Q2	**Q3**	Q4	Cumulative
Written reasons produced	41 (35)	31 (38)	**34** (32)		**106** (105)
Lawyer	36	28	28		92
Paralegal	5	3	6		14
Written reasons published	37 (35)	36 (25)	**34** (36)		**107** (96)
Lawyer	33	32	30		95
Paralegal	4	4	4		12
Oral reasons produced	20 (24)	20 (23)	**16** (29)		**56** (76)
Lawyer	16	19	14		49
Paralegal	4	1	2		7
Oral reasons published	16 (23)	17 (7)	**0** (28)		**33** (58)
Lawyer	15	13	0		28
Paralegal	1	4	0		5

[11] The number of reasons produced does not equal the number of reasons published because some reasons produced in a quarter may not be published or will be published in a subsequent quarter.

TAB 3.7

INFORMATION

TRIBUNAL ADJUDICATOR EVALUATION PROCESS

28. The 2012 Report included a recommendation, which Convocation approved, for the Tribunal Chair to develop an evaluation system for all adjudicators. The Report noted:

> Developing the evaluation is a complex process. The Chair should be given a reasonable time frame to do so and the possibility of doing so in increments. The Committee recommends that within six months of the effective date of his or her appointment the Chair will present a proposal to Convocation for the evaluation system and a timeline for implementation.

29. The Chair determined a number of steps that needed to be in place before an evaluation system could be effectively designed, including the Tribunal mission statement and core values, the application process for adjudicators contemplated in the Report, and an enhanced scheduling process. These have been developed over the first six months of the Chair's tenure, with participation and input from adjudicators.

30. To ensure the evaluation system meets the needs of the Tribunal and allows for transparent and effective implementation, its development will be incremental. The Chair will provide the process and timeline for development of the system to the Committee and Convocation in the spring.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 4

Report to Convocation
February 27, 2014

Professional Regulation Committee

Committee Members
Malcolm Mercer (Chair)
Paul Schabas (Vice-Chair)
John Callaghan
Robert Evans
Julian Falconer
Janet Leiper
William C. McDowell
Kenneth Mitchell
Ross Murray
Jan Richardson
Susan Richer
Peter Wardle

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat
(Margaret Drent (416-947-7613)

TABLE OF CONTENTS

For Decision

For Information

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on February 13, 2014. In attendance were Malcolm Mercer (Chair), Paul Schabas (Vice-Chair), John Callaghan, Robert Evans, Janet Leiper, Ross Murray, and Jan Richardson. Stindar Lal, Complaints Resolution Commissioner, participated in the meeting. Staff members attending were Zeynep Onen, Jim Varro, Naomi Bussin, Miriam Weinfeld, and Margaret Drent.

ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT TO CONVOCATION

MOTION

2. That Convocation authorize

a. the Alternative Business Structures Working Group to formulate models for regulation based on

i. the ABS options recommended for further consultation in this report set out at paragraphs 162 to 179 of the report;

ii. regulation of law and paralegal firms;

iii. entities, other than firms described in ii, through which legal services may be provided;

iv. a compliance-oriented regulatory regime as part of firm or entity regulation;

v. criteria developed by the Working Group, as set out in the Report, by which the regulatory models may be evaluated;

b. a consultation with the professions and other interested stakeholders on the ABS options recommended for consultation in this report;

c. a report from the Working Group following the consultations with proposals for changes to licensee regulation;

d. the development of the regulation of entities providing legal services in addition to the Law Society's current authority to regulate individuals and professional corporations; and

e. the Working Group to consider potential revision of Law Society Rules and By-Laws regarding fee-sharing, referral fees, direct supervision, and ownership restrictions with a view to ensuring that they are proportionate to the risk they seek to mitigate and, if thought appropriate, to refer proposed revisions to the Professional Regulation and Paralegal Standing Committees.

ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT TO CONVOCATION

EXECUTIVE SUMMARY

The Working Group

The Alternative Business Structures Working Group was established by Convocation in September 2012 pursuant to its strategic priorities approved in December 2011.

The Working Group is chaired by Malcolm Mercer and Susan McGrath. Initially the Working Group membership consisted of Susan Elliott, Kenneth Mitchell, James Scarfone, Baljit Sikand, Alan Silverstein, Harvey Strosberg, and Peter Wardle. Since June 2013 Constance Backhouse, Marion Boyd, and Jacqueline Horvat have replaced Baljit Sikand and Harvey Strosberg as members of the Working Group.

The mandate of the Working Group is to explore various possible options available for the delivery of legal services, including structures, financing and the related regulatory processes, and to recommend specific models and arrangements it determines are suitable for the Canadian and Ontario contexts. The full text of the terms of reference is available at **Tab 4.1.2.1.**

The Issues Identified by the Working Group and its Conclusions

As the Working Group started its examination of the issues raised by alternative business structures (ABS), it became clear early on that the development of alternative business structures in other jurisdictions has necessarily included related issues focusing on changes to the regulation of legal services concerning ethical compliance and complaints. Changes in how legal services were delivered to the public, or how legal practices were structured, necessarily raised issues concerning how fundamental ethical obligations to the public, the courts and the legal services community could be ensured. Based on these early observations, the Working Group's work focused on four related issues:

1. Alternative business structures (ABS)

Clients in Ontario are overwhelmingly served by firms that are 100% licensee-owned and that provide only legal services. These firms have limited, if any, external economic relationships except for bank debt and for purchased goods and services. Licensees are required to directly supervise all tasks and functions assigned to non-licensees. This is the traditional business structure in Ontario for the delivery of legal services.

The Working Group extensively reviewed the experience of legal services regulation in other jurisdictions as well as experience of legal services regulation in Ontario and elsewhere. It studied structures within which legal services are delivered, the supply of such services with other consumer services, and options for ownership and financing legal services. The Working Group also reviewed the Ontario and Canadian experience to identify current gaps and risks, with a view to establishing what, if any, reason there is to amend the current regulatory foundation for business structures in Ontario.

Early in its work, the Working Group determined that the term "alternative business structures" may be used to refer to any form of non-traditional business structure, as well as alternative means of delivering legal services and may include, for example,

(a) alternative ownership structures, such as non-lawyer or non-paralegal investment or ownership of law firms, including equity financing;
(b) firms offering legal services together with other professionals; and
(c) firms offering an expanded range of products and services, such as "do it yourself" automated legal forms as well as more advanced applications of technology and business processes.

Conclusion and Recommendation: The Working Group concluded that there are negative consequences inherent in current regulatory limitations on the delivery of legal services in Ontario that could be addressed with the thoughtful liberalization of business structures and the related liberalization of what non-legal services can be provided by entities providing legal services. The Working Group identified four structural and services models as options for consideration as permissible regulatory structures, and for consultation:

(a) entities that provide legal services only, and in which non-licensee owners are permitted an ownership share of up to 49 percent;
(b) entities that provide legal services only, and in which there are no restrictions on non-licensee ownership;
(c) entities which may provide both legal services and non-legal services (except those identified by the Law Society as posing a regulatory risk), and in which non-licensee owners are permitted an ownership share of up to 49 percent; and
(d) entities which may provide legal services as well as non-legal services (except those identified by the Law Society as posing a regulatory risk), and in which there are no restrictions on non-licensee ownership.

The Working Group recommends that these four models be the subject of consultation with interested groups and individuals prior to a decision as to which is the preferred option for recommendation to Convocation. The four models are described in greater detail at paragraphs 162 to 179 of the report.

2. **Firm or entity based regulation**

As part of its consideration of ABS and outcomes based regulation, the Working Group considered the merits of firm or entity based regulation for Ontario. This is a necessary element of effective ABS regulation and it is already permitted in Ontario in part. The *Law Society Act* currently authorizes the full regulation of professional corporations including compliance requirements, investigations and discipline. The Working Group also considers that firm or entity based regulation is advisable whether or not ABS liberalization occurs.

Conclusion and Recommendation: The Working Group recommends that the Law Society seek statutory amendment granting express authority to regulate firms and other entities providing legal services in addition to its current authority to regulate individuals and professional corporations.

3. Compliance based regulation

Significant regulatory change was introduced in Australia beginning in 2001 and in England and Wales in 2007. These changes were introduced at the same time as alternative business structures were introduced in these jurisdictions. The changes introduced in these jurisdictions differed from one another in many ways; however they were alike in that forms of firm or entity regulation were introduced together with regulation with a view to requiring compliance and complaints response from firms where necessary. This is sometimes referred to as 'compliance based regulation'. A range of regulatory approaches are included in this term, however they have a general common methodology which sets out expected outcomes for firms and individuals and to which they must comply. Generally, in a compliance based approach, the licensees[1] have flexibility in how they meet those objectives (as compared to the proscriptive and detailed rules based regulation found in our primarily complaints driven system).

Conclusion and Recommendation: In conjunction with the implementation of both firm and entity regulation, the Working Group recommends the Law Society give further consideration to the implementation of compliance oriented regulation for existing and alternative business structures and that the issue be immediately referred to the Professional Regulation Committee, with input obtained from the Professional Development and Competence and Paralegal Standing Committees. The Working Group further recommends that compliance based regulation commence with a requirement that licensees and firms have in place a process for responding to complaints.

The Working Group recommends that the issue of compliance based regulation of existing licensees and firms be considered by Convocation to supplement the existing rule based regulation.

4. More immediate regulatory improvements

As part of its work, the Working Group reviewed the regulatory context in Ontario to consider gaps, risks and barriers to innovation and flexibility in the provision of legal services to the

public. The Working Group`s research showed that the legal services market in Ontario for retail or consumer services is very competitive. With some geographic and practice area exceptions, there are many lawyers and paralegals available to provide services to clients in areas such as family law, real estate and civil litigation. The Working Group noted however that there are constraints on innovation that prevent the development of more efficient and effective means to provide legal services. Some of these regulatory constraints are legislative and would require a shift in regulatory orientation such as the adoption of an ABS model. This would be a longer term solution to these issues.

However there may also be shorter term solutions. A review of current requirements (rules and by-laws) shows that there may be room for greater flexibility in how practice is organized by lawyers and paralegals and that these changes are within the authority of the Law Society to make. Amendments to some of the current requirements, where appropriate, could provide some greater flexibility to practitioners, permitting them to find more efficient ways to deliver their services to the public.

Conclusion and Recommendation: The Working Group recommends that Convocation authorize Working Group to continue consideration of the fee-sharing, fee-splitting and referral fees, supervision rules, and ownership restrictions in By-Law 7 and elsewhere.

The review of Law Society Rules and By-Laws would be conducted with a view to ensuring that the rules are proportionate to the regulatory risks which they seek to mitigate. Any changes to these rules would require the approval of Convocation.

ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP
REPORT TO CONVOCATION

BACKGROUND

3. The Alternative Business Structures Working Group was established by Convocation in September 2012 pursuant to its strategic priorities approved in December 2011.

4. The Working Group is chaired by Malcolm Mercer and Susan McGrath. Initially the Working Group membership consisted of Susan Elliott, Kenneth Mitchell, James Scarfone, Baljit Sikand, Alan Silverstein, Harvey Strosberg, and Peter Wardle. Since June 2013 Constance Backhouse, Marion Boyd, and Jacqueline Horvat have replaced Baljit Sikand and Harvey Strosberg as members of the Working Group.

5. The mandate of the Working Group is to explore various possible options available for the delivery of legal services, including structures, financing and the related regulatory processes, and to recommend specific models and arrangements it determines are suitable for the Canadian and Ontario contexts. The full text of the terms of reference is available at **Tab 4.1.2.1**.

Research and Consultations: The Working Group`s Activities September 2012 to January 2014

6. The Working Group's work during this period consisted of three distinct activities:
   a. Research: Included reviews of reports and papers, and in person and teleconference meetings with experts. It also included the analysis of information about business structures and the current status of legal practice in Ontario.

b. Consultation meetings with licensees: Held in August 2013 to find out the views of the professions generally about the information collected by the Working Group.

c. ABS Symposium: All day meeting with 70 attendees representing various aspects of the practice of law and legal services to hear from experts and to discuss the relative merits of alternative business structures.

Research

7. The Working Group initially embarked on a fact-finding exercise to inform itself on the subject of ABS. This included reviewing and collecting a significant amount of written material including reports and scholarly articles on the subject. At the same time the Working Group met with acknowledged experts on ABS and related subjects, from various jurisdictions including New South Wales, England and the United States. These individuals included academics, practitioners and representatives of the various regulators implementing change. The meetings took place in person as well as by teleconference, and were extensive, based on a pre-determined agenda and questions.

8. The meetings conducted by the ABS Working Group are summarized in **Tab 4.1.2.2** of this report.

9. In its June 2013 report, the Working Group set out the results of its research into ABS and the related issues. The following excerpt from the June 2013 report provides useful background for this report.

Results of Research: Excerpt from First Report to Convocation, June 2013

Canadian Approaches

10. In Canada, each of the fourteen Canadian law societies regulates their members in the public interest. Certain Law Societies restrict the delivery of legal services to sole practitioners and lawyers practicing in partnership or under the auspices of a professional corporation. It is beyond the scope of this report to review all regulatory practices in Canada; however, the Working Group found that developments in Quebec, British Columbia and Nova Scotia are of particular relevance to the Working Group, and some of these are highlighted below.

Quebec

11. The Barreau du Quebec, aside from traditional forms of practice, permits an advocate to practice law in a limited liability partnership, a professional corporation and a multidisciplinary practice. Regulations require law firms in these practices to provide a detailed undertaking, as follows:
    a. The entity must ensure that members who engage in professional activities within the firm have a working environment that permits compliance with any law applicable to the carrying out of professional activities.
    b. The entity must ensure that the partnership, corporation and all persons who comprise the partnership, corporation, or are employed there are in compliance with legislation and regulations.

12. In Quebec, ownership of professional corporations practicing law, for example, is open to members of other regulated professions and to others so long as at least 50% of the voting shares of the professional corporation are owned by lawyers or other regulated professionals.[1]

[1] *Regulation respecting the practice of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinarity*, RRQ, c B-1, r 9.

Nova Scotia

13. Since 2005, the Nova Scotia Barristers Society has had express statutory authority to regulate law firms. In Nova Scotia:

    a. Complaints may be made to the regulator regarding a law firm for professional misconduct.
    b. Law firms must designate a lawyer to receive communications from the Barristers Society and assist with investigations.
    c. A firm found guilty of professional misconduct may be fined, and if a Law Society discipline panel makes an adverse finding against a law firm, the panel may order any other condition as is appropriate; and,
    d. An inter-jurisdictional law firm must comply with all law firm regulations, and a practicing lawyer may only practice law as a member of an inter-jurisdictional law firm if the firm complies with the Nova Scotia Barristers' Society regulations.[2]

British Columbia

14. The Law Society of British Columbia permits multi-disciplinary practices ("MDPs"). In June 2012, the Society approved rules changes to allow paralegals (supervised by lawyers) to perform additional duties. The Law Society, B.C. Supreme Court and B.C. Provincial Court have also embarked upon a two-year pilot project to permit designated paralegals to appear in court.[3]

15. British Columbia has also given preliminary consideration to alternative business structures. In October 2011, its Independence and Self-Governance Advisory Committee presented Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations. At that time, this Committee concluded as follows:

[2] *Legal Profession Act*, S.N.S. 2004, c. 28.

[3] The term "designated paralegal" in this context refers to a paralegal who can perform additional duties under a lawyer's supervision (see http://www.lawsociety.bc.ca/newsroom/highlights.cfm#c2663).

> There are many calls for significant changes in the way that legal services are offered. The current model does not seem to be working in a way that allows people who need to access legal advice to obtain it in an affordable way. There will be considerable pressure to adopt new models for the delivery of legal services, and the Law Society as the regulator of lawyers and the body charged with the responsibility of protecting the public interest in the administration of justice in British Columbia must be prepared to give them serious consideration. However, core values of the legal profession and important rights that clients who need legal advice are entitled to expect must not be lost in a rush to adopt new ideas simply because business and competition models argue in their favour. Many of the protections that the legal profession offers clients have been obtained at significant cost over the centuries and to abandon them lightly would be undesirable for all concerned. However, where benefits to the consumer can be attained with proper regulation to ensure that professional values are not lost, the Law Society must develop proper regulation to allow for changes to the profession through which improved access to legal services can be attained.[4]

16. Since the release of the above report, statutory amendments have been made that confer new powers on the Law Society of B.C. to regulate law firms, similar to those available to the regulator in Nova Scotia. The Legal Profession Amendment Act, 2012 ("LPAA") provides that the Law Society of B.C. may:

    a. receive complaints against law firms;

    b. investigate law firms;

    c. commence a discipline hearing against a law firm; and

    d. if a Law Society discipline panel makes an adverse finding against a law firm, discipline the firm by reprimand, fine, or other order or condition as is appropriate.[5]

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[4] Law Society of British Columbia, *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations*, October 2011, pp. 21-22.

[5] *Legal Profession Act*, S.B.C. 1998, c. 9.

Australia and New South Wales

17. Australia was an early adopter of ABS regulation. Since 2000, New South Wales has permitted full incorporation as have other Australian states and territories. Legal practices may incorporate under ordinary company law without any restrictions on who may own shares or on what type of business may be carried on. [6] In May 2007, Australia was the first jurisdiction in the world to permit the public listing of a law firm. Slater & Gordon, a national firm listed on the Australian Stock Exchange.[7]

18. The New South Wales regulatory system is based in part on entity regulation. The Office of the Legal Services Commissioner (OLSC), New South Wales may audit Incorporated Legal Practices (ILPs) for their compliance pursuant to the Legal Profession Act 2004 and the Legal Profession Regulations 2005. ILPs are encouraged to complete annual voluntary self-assessments regarding the entity's ethical and management infrastructures. Each ILP must have a "Legal Practitioner Director" who is responsible for implementing "appropriate management systems". This term is not defined in the legislation, although the OLSC has developed ten objectives of a sound legal practice with which ILPs must comply.[8] Failure by the Legal Practitioner to implement appropriate management systems could be the basis of a finding of professional misconduct.[9]

[6] Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation", Hofstra University School of Law Legal Studies Research Paper No. 13-02 (2013).

[7] Integrated Legal Holdings became the second listed firm on the ASX on August 17, 2008.

[8] The ten areas are negligence, communication, delay, liens/file transfers, cost disclosure/billing practices/ termination of retainer, conflict of interests, records management, undertakings, supervision of practice and staff, and trust account regulations. Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation", Hofstra University School of Law Legal Studies Research Paper No. 13-02, (2013), p. 15.

[9] *Legal Profession Act 2004*, (NSW), s. 140(5).

19. The approach taken by New South Wales is outcomes-based – rather than requiring ILPs to adhere to proscriptive regulations and requirements, regulation is based on their systems. ILPs have the freedom to structure their practices in new and innovative ways that are suitable to them, as long as their systems comply with the ten principles of appropriate management systems.

20. In addition, the approach in New South Wales is based on an assessment of the risk posed by each ILP. The requirement to implement and maintain "appropriate management systems" is complemented by a comprehensive risk-profiling program and audit, or practice review program, that is conducted by the Office of the Legal Services Commissioner.[10]

England & Wales

21. England & Wales is experiencing rapid changes in how legal services are regulated and provided to the public. Following the Clementi Report, which recommended major reforms to the regulation of legal services in England & Wales, the *Legal Services Act 2007* ("LSA") was enacted. Under the LSA, the objectives of the regulation of legal services have been broadened. In addition to protecting the public interest and improving access to justice, the regulation of legal services is also founded on objectives such as protecting and promoting consumer interests and competition. The LSA expressly permits the provision of legal services through ABSs in furtherance of these objectives.

22. Under the LSA, "legal activities" are regulated by eight separate "approved regulators". ABSs may be approved by certain approved regulators. The first ABSs were approved by the Council of Licensed Conveyancers in October 2011, and by the Solicitors Regulatory Authority ("SRA") in early 2012. Since then,

[10] Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation", *supra* note 6 at 11.

the SRA has approved over 100 ABSs.

23. As in Australia, ABSs in England & Wales are regulated in part through entity regulation. For example, in order to be approved by the SRA, ABS applicants generally need to provide the SRA with the following information:
    a. the firm's regulatory history and the type of legal work to be conducted,
    b. business practices (including policies and procedures, the applicant's proposals to meet the regulatory objectives and proposed governance structure), details of personnel, indemnity insurance, client money (including how the applicant protects client money), and;
    c. a suitability declaration.

    The SRA assesses ABS applicants and maintains the authority to deny ABS licenses.

24. ABSs approved to date have varied in size, structure and expertise. Some of the entities include:
    a. ABSs in which non-lawyer staff have become equity partners.
    b. ABSs in which family members, including spouses, become part owners of a law firm.
    c. Co-operative Legal Services ("CLS"), part of the Co-Op Group, the UK's largest mutual business, whose businesses include, among others, a national chain of food stores, banking, insurance, pharmacy, and funeral services. The Co-Op Group operates 4,800 retail outlets, and employs over 106,000 people. CLS currently provides fixed fee legal services in conveyancing, family, wills and probate, personal injury, and employment law.
    d. Insurance defense firm (Keoghs LLP), which became an ABS and obtained a 22.5% private investment from LDC, a part of Lloyds Banking Group;

e. Russell Jones & Walker a 425 person, 10 location firm with most of its revenue earned from personal injury matters, which was acquired by Australia's Slater & Gordon, and converted into an ABS; and

f. Firms combining legal expertise with other expert services, such as an ABS firm providing human resources services together with related legal services.

25. It is important to note that new business structures were introduced in England and Wales as part of regulatory reform that included entity and outcomes-based regulation. The overall objective was to permit greater latitude for regulated entities to organize their delivery of legal services and their business models to permit flexibility to enhance competition. The regulatory model is based on principles and outcomes as requirements set out by the regulator. Firms are required to provide information to the SRA to enable that office to assess the risk posed by the firm to its regulatory objectives.[11] Firms are monitored to determine outcomes, and they are also risk rated to determine the nature of the monitoring. It is still too early to know whether this approach will reduce the number of complaints in England and Wales, and whether it will enhance competition such that access to legal services is improved.

<u>The United States</u>

26. In the United States, currently, only the District of Columbia permits limited non-lawyer ownership or management of law firms, similar to the Law Society's multi-disciplinary partnership model.

27. In 2009, the American Bar Association ("ABA") established the ABA Commission on Ethics 20/20 (the "Commission") to review the ABA Model Rules of Professional Conduct and American models of lawyer regulation in the

[11] Jane Hunter, "Outcomes-Focussed Regulation in England & Wales: The Compliance Officer Roles", Quality Assurance Review, Winter 2012, p. 10.

context of the globalization of legal services and technological advancements. In November 2009, the Commission's Preliminary Issues Outline noted that "core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures."[12]

28. The Commission established a Working Group on Alternative Business Structures (the "ABA Working Group") to study this issue. By June 2011, the ABA decided against certain forms of ABSs, including MDPs, publicly traded law firms, and passive non-lawyer investment or ownership of law firms. Although the ABA Working Group continued to consider a proposal to permit non-lawyer employees of a firm to have a minority financial interest in the firm and share in the firm's profits, in April 2012, the Commission announced that it would not propose changes to ABA policy prohibiting non-lawyer ownership of law firms.

29. Despite the current regulatory restrictions in law firm ownership structures, more aggressive efforts are being taken by several U.S. based companies seeking to reshape how certain legal products and legal services are delivered to consumers in the United States and globally. Such private corporate innovators include, for example:

    a. Rocket Lawyer and Legal Zoom, which are developing websites which combine "do-it-yourself" legal form services and traditional legal services, to serve individuals and corporate clients.

    b. Axiom Law, which offers in-house counsel legal secondments, legal outsourcing services, and project management expertise, recently obtained a further $28 million in funding from a growth equity firm.

[12] ABA Commission on Ethics 20/20, *Issues Paper Concerning Alternative Business Structures* (April 5, 2011).

30. There are also pressures by traditional law firms seeking to compete in broader legal services markets. For example, the New York firm of Jacoby & Myers commenced litigation in 2011 to challenge regulations in New York, New Jersey and Connecticut prohibiting non-lawyer ownership in law firms. In October 2012, the firm began marketing online legal forms in addition to providing traditional legal services provided by an attorney.

Information obtained about Compliance Based Regulation

31. As part of its research, the Working Group obtained information about compliance based regulation, which has flowed from ABS and entity regulation. A summary of this information is set out below.

32. The term "compliance based" refers to the regulation of law firms and other types of business structures that provide legal services.

33. In Ontario, lawyers and paralegals with whom the Working Group has spoken believe that the Society should carefully examine the potential benefits ABS may offer. One of these may be a reduction in the number of complaints received by the regulator. An analysis of the experience in the jurisdictions which have implemented ABS suggests that this may be one significant benefit.

34. This complaint reduction does not appear to be the result of the introduction of ABSs *per se* but rather the introduction of the entity-level regulation designed to ensure that ABSs provide legal services in a manner reflecting professional values. Two conclusions may be taken from this evidence. The first, independent of whether ABS are permitted, is that entity-based (or firm-based) regulation is a valuable complement to licensee-based regulation. The second is that the existing evidence does not indicate that permitting ABSs creates risk to the public. Indeed, the risk appears to be less than currently exists when introduction of ABSs is combined with entity-based regulation.

35. In England and Wales the *Legal Services Act 2007* created the Legal Services Board (LSB) as a new regulator with responsibility for overseeing the regulation of legal services in England and Wales. The LSB oversees eight approved regulators.

36. The LSB has published a series of reports monitoring the impact of reforms. In 2012, the LSB published a discussion paper on approaches to measuring access to justice. More recently, in October 2013, the LSB published a report assessing changes to competition in the legal services marketplace as a result of the introduction of ABS. This study, conducted between April and August 2013, suggests that alternative business structures have a better record regarding the resolution of complaints about service. During the period 2011-2013, which coincides with the issuance of the first ABS license in March 2012, the number of complaints received by the Legal Ombudsman, or LEO, which is the single organization for all customer complaints, fell by fifteen percent.[13]

37. The LSB's findings are similar to research regarding the impact of the introduction of ABS on complaints in Australia. In New South Wales, Australia, ILPs are required to implement and maintain "appropriate management systems". This term was not defined in the legislation, but the Office of the Legal Services Commissioner (OLSC) of New South Wales identified ten areas to focus regulatory attention. These include negligence, communications, delay, retainer and billing practices, conflicts of interest, management of records and undertakings and the management of books and records.

38. Once the OLSC has received notification that a practice has incorporated, a self-assessment form must be completed. The self-assessment form lists the ten objectives described above. Legal Practitioner Directors are required to rate the

[13] Legal Services Board, *Evaluation: Change in Competition in Different Legal Markets: An Empirical Analysis*, October 2013, online at https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf.

ILP's compliance with each of the ten objectives listed above. The Legal Practitioner Director then sends the form to the OLSC for review. The OLSC has developed an online portal to enable Legal Practitioner Directors to submit these forms online.[14]

39. The requirement to implement and maintain appropriate management systems is augmented by a comprehensive risk-profiling program and audit (practice review) program conducted by the OLSC. The regulator works with law practices that appear to be experiencing difficulties. The ultimate objective in conducting a practice review is compliance with ethical obligations under the law and ultimately a reduction in complaints.[15]

40. A study conducted in 2008 found that complaint rates for ILPs went down by two-thirds after the ILP conducts the self-assessment. The study concluded that "it appears to be the learning and changes prompted by the process of self-assessment that makes a difference, not the actual (self-assessed) level of implementation of management systems".[16]

41. A second study, conducted by Professor Susan Fortney of Hofstra University, New York, involved the use of an anonymous online questionnaire which asked ILPs with two or more solicitors to assess the impact of appropriate management systems and self-assessment on these firms. The survey results revealed that the majority of respondents recognized the value of requiring firms to implement and maintain appropriate management systems, as well as to engage in self-

[14] New South Wales Office of the Legal Services Commissioner, "Self-Assessment Process", online at http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_self_assessment_process.html.

[15] Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation", Hofstra University School of Law Legal Studies Research Paper No. 13-02 (2013), p. 11.

[16] Tahlia Gordon, Steve A. Mark, and Christine Parker, "Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW", J.L. & Soc. (2010), Legal Studies Research Paper No. 453.

assessment. Further, the process of self-assessment had a positive impact on firm management, risk management, and client services issues.

42. Professor Fortney concluded that "the results from this study and earlier research should inspire regulators to consider proactive partnerships with lawyers, rather than resorting to the traditional paradigm of reactive complaints-driven regulation of firms". [17]

43. The Law Society of Upper Canada currently engages in some proactive regulatory activity. An example is practice management review for lawyers and paralegals. Lawyers in private practice who have been practicing between one to eight years may be referred to the program either because of random selection by the Society, re-entry to practice, or as a regulatory response to a pattern of complaints. Paralegals holding a P1 license may also be referred to Practice Management Review.

44. In addition to the Practice Management Program, lawyers may be subject to a spot audit, which addresses financial record-keeping requirements.

45. In Ontario the regulatory scheme is predominantly reactive rather than proactive. Issues are more often identified through complaints rather than audits or reports by licensees. In contrast, in conjunction with the implementation of ABS, other regulators have adopted a compliance-based scheme. Compliance-based regulatory models are characterized by the imposition of mandatory affirmative duties and reporting obligations on professionals and monitoring and audits for compliance, with investigations and discipline in response to complaints.[18]

46. In addition to New South Wales, discussed above, the Solicitors Regulation Authority of England and Wales published a Handbook for Solicitors which took

[17] Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive", *supra* note 6, p. 43.

[18] Adam M. Dodek, "Regulating Law Firms in Canada", (2012), 90 C.B.R. 383 at 406.

effect on October 6, 2011 and uses an outcomes-based regulatory approach.[19] In Nova Scotia, benchers are considering the appropriateness of an outcomes-focused regulatory scheme.[20]

47. There has been activity in Canada concerning a more proactive approach to the management of ethical and related practice issues. The CBA Ethics and Professional Responsibility Committee has developed an ethical practices self-evaluation tool which may be accessed online.[21]

Meetings with Members of the Professions in August 2013

48. Following its report of June 2013, the Working Group held four consultation meetings with members of the lawyer and paralegal professions in August 2013. These meetings were intended to share the information the Working Group had collected as a result of its research, and to engage in dialogue concerning these emerging regulatory structures in other jurisdictions and their applicability in Ontario. The participants in the consultations included the Law Society's Equity Advisory Group, sole practitioners from a variety of practice and geographic areas, the managing partners or representatives of large and medium sized law firms, and representatives of lawyer and paralegal associations. The full list of these meetings is set at **Tab 4.1.2.2.**

Results of August 2013 Meetings

49. Participants in these meetings expressed support for the Law Society's study of alternative business structures.

[19] Laurel Terry, "Trends in Global and Canadian Lawyer Regulation", Sask. Law Rev. 2013 Vol. 76, p. 179.

[20] Nova Scotia Barristers Society, *Transforming Regulation and Governance in the Public Interest*, online at http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf, pp. 41-46.

[21] CBA Internet site at http://www.cba.org/CBA/activities/pdf/ethicalselfevaluation-e.pdf.

50. Lawyers from sole and small firms in particular indicated that in their view, alternative business structures could enable them to better focus on the practice of law. These lawyers also expressed an interest in enhanced administrative support that could be provided through franchising, as well as other ownership arrangements. They also liked the idea of offering valued employees a share in the firm.

51. Participants from large firms told the Working Group that that there were already extensive efforts underway to outsource legal services to other jurisdictions in order to reduce costs, subject to Law Society supervision rules.

52. The participants in the August 2013 meetings told the Working Group that traditional delivery of legal services, while necessary in some practice areas, is increasingly being replaced or enhanced by other means of delivering legal services. Legal services are being outsourced. Technology is being used to perform certain tasks formerly done by lawyers with faster, less expensive, and more accurate results. Lawyers and law firms are developing processes to bring efficiencies to the delivery of certain legal services.

53. In sharing their observations regarding the Ontario legal services marketplace, the participants in the summer meetings confirmed the Working Group's findings from its review of the literature. Author Richard Susskind describes a continuum of legal services, which he categorizes under five different headings ("bespoke", or customized, "standardized", "systematized", "packaged", and "commoditized").

54. According to Professor Susskind, "bespoke", or customized services are at one end of the legal services continuum. One example of a bespoke service is advocacy in the court room. Commoditized services are at the other end of the continuum; these services are offered online and are easily available in the

marketplace at very competitive prices. Material on legal websites often consists of legal commodities.[22]

55. Some participants in the summer meetings described a process of commoditization of certain legal services in Ontario. Others emphasized the highly bespoke nature of their work, for example certain specialized types of litigation, or criminal law.

56. The Working Group was also told that lawyers, and particularly sole and small practitioners, are spending a great deal of time on project management, law firm management, and supervision, rather than on purely legal tasks.

57. The requirements inherent in the delivery of some areas of law sometimes mean that lawyers must provide both legal services and services ancillary to law (for example, family lawyers told the Working Group that often, they are required to deploy non-legal skills, such as social work, to meet the needs of their clients).

58. Finally, the participants discussed issues with the Working Group regarding non-licensees who are offering various products, such as online legal forms, which may constitute the provision of legal services, despite disclaimers indicating otherwise.

The Symposium – October 2013

59. Together with the Treasurer of the Law Society of Upper Canada, the Working Group hosted a Symposium on alternative business structures in October 2013. The Symposium was a full day meeting attended by lawyers and paralegals with diverse practice areas from different regions of Ontario and representatives of lawyer and paralegal associations. Panels of experts provided presentations on ABS in other jurisdictions, the economic implications of practice structures and

[22] Richard Susskind, *The End of Lawyers: Rethinking the End of Legal Services* (Oxford: Oxford University Press, 2010), pp. 28-33, and *Tomorrow's Lawyers; An Introduction to Your Future* (Oxford: Oxford University Press, 2013), p. 25.

examined how ethical issues can be addressed in a changing environment. The purpose of the day was to engender a discussion among those attending as to the relative merits of the various new regulatory approaches to practice structures and legal services emerging in other jurisdictions. A Symposium agenda, including the list of speakers and their presentations is appended to this report at **Tab 4.1.2.3.**

60. The Symposium was an opportunity to exchange views, obtain new information, and examine the subject of ABS and alternative ways of delivering legal services. A significant feature of the Symposium was the presentation of a paper prepared for the Law Society by Professors Edward Iacobucci and Michael Trebilcock analysing current law practice in Ontario in the context of the economic theory of the firm, with a discussion as to the advantages and disadvantages of various models for permitting capital input for law firms or legal practices.

61. The Symposium was also an opportunity to examine how any structural changes to legal practice would affect client services, obligations to the administration of justice, services for clients and ethical obligations relating to these relationships. The Working Group was very interested in the results of these discussions. They clearly identified solicitor client privilege, confidentiality and conflict as central obligations that must be preserved in making any changes. Nevertheless, as those attending worked through various scenarios to test how ethical requirements could be met in alternative structures, they generally concluded that ethical issues are not barriers to making such changes.

62. As described earlier, approximately seventy lawyers, paralegals, representatives of legal organizations and others (including representatives from the Legal Futures project of the Canadian Bar Association as well as regulators and legal technology innovators) participated in this event.

63. The Symposium program included a series of panels on a range of subjects connected to ABS and the changing environment for the delivery of legal services. The panels were moderated by Professor Pamela Chapman of the University of Ottawa.

64. Following the panel presentations, the participants broke out into groups and considered four different ABS scenarios from the perspective of ethics and professional responsibility principles (competence, confidentiality, and conflicts of duty), the potential risks and benefits and appropriate regulatory approaches. Each of the groups reported back to the Symposium as a whole.[23]

65. The following summarizes the presentations of the three panels. The first panel featured Professors John Flood (University of Westminster), Paul Paton (Pacific McGeorge) and Laurel Terry (Penn State). Professor Flood discussed changes in England and Wales since 2007.

66. Professor Terry discussed legal innovation and the theory of "disruptive technologies" and its influence on the legal services marketplace.[24] The theory of "disruptive technologies" is concerned with why, and how, new firms and technologies drive incumbents out of the marketplace. During the symposium, Professor Terry asked the audience to consider whether this theory was applicable to the Canadian legal services marketplace.[25]

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[23] The symposium was described by Malcolm Mercer in a post on the Legal Ethics Listserv on October 5, 2013.

[24] Ray Worthy Campbell, "Rethinking Regulation and Innovation in the U.S. Legal Services Market" 9 N.Y.U.J.L & Bus. 1 (Fall 2012) online at papers.ssrn.com/sol3/papers.cfm?abstract_id=2018056 . Professor Terry published a blog post regarding this article which may be viewed at http://legalpro.jotwell.com/creative-destruction-and-the-legal-services-legal-education-markets/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Jotwell+%28Jotwell%29.

[25] The applicability of Campbell's article to the Canadian legal services marketplace is discussed by Malcolm Mercer in "Utopia, Dystopia and Alternative Business Structures", November 11, 2013, online at http://www.slaw.ca/2013/11/11/utopia-dystopia-and-alternative-business-structures/.

67. Professor Paton discussed the debate in the United States on ABS. He noted that the American Bar Association (ABA) announced in April 2012 that it would not pursue ABS, but the issue appears to still be under discussion based on a recent ethics opinion, published in August 2013 by the ABA Standing Committee on Ethics and Professional Responsibility, suggesting that the debate regarding ABS may be ongoing.

68. The information about the ABA is significant because although regulatory responsibility for U.S. lawyers lies with the judiciary in each of the states, the ABA has an important role in lawyer regulation with the ongoing development and review of its *Model Rules of Professional Conduct*.

69. Under the August 2013 ABA opinion, lawyers who are subject to the *Model Rules* may divide fees with other lawyers or law firms practicing in jurisdictions with rules that permit sharing legal fees with non-lawyers, provided that there is no interference with the lawyer's independent professional judgment.[26]

70. The second panel featured Professors Iacobucci and Trebilcock (University of Toronto), James Peters (Vice-President, New Market Initiatives at Legal Zoom) and Professor Jasminka Kalajdzic (University of Windsor).

71. Professors Edward Iacobucci and Michael Trebilcock discussed the economic implications of ABS and presented a paper they had prepared for the symposium. This paper provided an economic analysis of business structures with respect to the "theory of the firm" [27] and firm capital structure. The paper is at **Tab 4.1.2.4**.

[26] ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 464, "Division of Fees with Other Lawyers Who May Lawfully Share Fees with Nonlawyers", August 19, 2013, online at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_464.authcheckdam.pdf.

[27] Ronald Coase, "The Theory of the Firm" (1937) 4 Economica 386.

72. Professors Iacobucci and Trebilcock explained that the theory of the firm considers when it is economically more efficient for an entity to provide goods and services from within the firm and when it is more efficient to access goods and services from third parties in the market place. According to this analysis, expressly limiting what may be supplied by legal practices can create economic inefficiencies, as can effectively limiting the nature of expertise available within the firm. With respect to capital structure, limiting equity investment can constrain firm development and innovation. With debt financing, firm owners are limited by the security that they are willing and able to provide and by the personal risk that they are prepared to assume. In contrast, equity financing permits risk diversion; the potential prospects for the firm, rather than the current business of the firm, becomes more relevant as equity investors share in future growth.

73. During their presentation, Professors Iacobucci and Trebilcock reviewed the advantages and disadvantages of existing business structures. According to the theory of the firm, ABS should lead to greater efficiency because there will be lower transaction costs associated with the provision of complementary services within the firm, rather than referral arrangements between firms. Further, lawyers may benefit from the professional management skills of a non-lawyer owner.

74. The authors explained that some possible disadvantages of non-lawyer ownership include greater transaction and coordination costs within the firm, and a perception that referrals are not as credible because they are internal. From a capital structure perspective, an Alternative Business Structure can be advantageous because the innovation would be less constrained by the limited financial capacity and risk tolerance of the partners. On the other hand, an overly diminished financial stake in the firm can diminish incentives to invest in the firm.

75. There is no optimal structure for legal practice from an economic perspective. Different structures may be preferable depending upon, amongst other things, the

business of the firm, the context in which the firm operates and the strategy pursued by the firm. However, according to Professors Iacobucci and Trebilcock, there are potential gains from ABS that provide an economic justification for liberalization. Lawyers, clients and investors could experience these advantages. Further, greater efficiency and innovation in the delivery of service by lawyers and paralegals should lead to lower fees for clients while permitting profitable practices.

76. Although the focus of their paper was an economic analysis, Professors Iacobucci and Trebilcock noted the access to justice implications of their work.[28]

77. According to Professors Iacobucci and Trebilcock, due to the large number of lawyers and paralegals, the legal services market is highly competitive,[29] so that the liberalization of business structures would not have much impact on the extent of competition, although it could lead to greater economic efficiency.

78. Legal Zoom offers online legal services, including assistance from an attorney on a non-hourly fee basis. James Peters told the audience that in the United States, Legal Zoom is primarily interested in the legal services needs of individuals and small businesses, perceived as distinct from the legal services needs of large corporations. Mr. Peters described the proliferation of legal start-ups that do not

[28] The cited work of Gillian Hadfield and Noel Semple provide useful insight into some of these implications.

Gillian K. Hadfield, 2013. "The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law, The Selected Works of Gillian K. Hadfield. Available at http://works.bepress.com/ghadfield/49.

Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (July 30, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303987 or http://dx.doi.org/10.2139/ssrn.2303987.

[29] See Edward Iacobucci and Michael Trebilcock, "The Competition Bureau's Report on Competition and Self-Regulation in the Canadian Legal Profession: A Critical Evaluation", *Canadian Competition Record*, Winter 2009.

meet regulatory requirements to be a law firm but are increasingly providing services to in-house legal departments as well as to individuals. In the future, according to Mr. Peters, law firms will increasingly be forced to outsource to entities which are not law firms to respond to cost pressures. Mr. Peters observed that lawyers who want to be significant innovators often leave legal practice in order to do so.

79. Professor Jasminka Kalajdzic of the University of Windsor spoke about litigation funding, which she described as a form of ABS already present in Ontario. Litigation funding may in some cases include private sector funding of litigation for profit, but does not include contingency fee arrangements, legal aid plans, or funding provided by liability insurers. The litigation funding arrangements studied by Professor Kalajdzic are used in class actions, personal injury litigation, and commercial arbitration. Currently, these arrangements are unregulated, subject to supervision by the courts.

80. The third panel was comprised of Amy Salyzyn of the University of Ottawa and Noel Semple, post-doctoral research fellow of the Center for the Legal Profession, University of Toronto. Amy Salyzyn provided the symposium with a framework for analysis of the legal ethics implications of the ABSs and discussed entity regulation/ethical infrastructure as regulatory tools.[30] Noel Semple discussed the possible legal ethical advantages and disadvantages of the ABS liberalization.

81. Following the panel presentations, the participants broke out into groups and considered four different ABS scenarios from the perspective of ethics and professional responsibility principles (competence, confidentiality, and conflicts

[30] During her presentation, Ms. Salyzyn referred to the CBA's Ethical Practices Self-Evaluation Tool" which may be accessed at http://www.cba.org/cba/activities/code/ethical.aspx.

of duty), the potential risks and benefits and appropriate regulatory approaches. Each of the groups reported back to the Symposium as a whole.[31]

A Summary of the Ontario Context

Current Law Society Environment

82. In order to put the Working Group's conclusions and recommendations in context, it is instructive to review the current status of key information concerning the regulatory environment in Ontario.

83. In November 2013 there were 46,089 lawyers and 5,623 licensed paralegals in Ontario. The table below describes the practice settings of lawyers and paralegals in private practice.[32]

	Lawyers		Paralegals	
1 Sole	7,090	15%	1,348	24%
2 – 5 small	4,564	10%	621	11%
6-9	1,723	4%	134	2%
10-25	2,626	6%	128	2%
26-49	1,441	3%	64	1%
50-99	998	2%	30	1%
100-149	843	2%	5	0%
150-199	1,046	2%	2	0%
200-249	1,767	4%	5	0%
250 +	839	2%	1	0%
Total in Private Practice	22,938	50%	2,338	42%
Total in Other areas	23,151	50%	3,285	58%
Total Licensees	46,089	100%	5,623	100%
As at November 17, 2013				

84. Attached to this report at **Tab 4.1.2.5** is a description of business structures that are currently permitted by the Law Society of Upper Canada. In summary, they

[31] The symposium was described by Malcolm Mercer in a post on the Legal Ethics Listserv on October 5, 2013.

[32] This information was provided by the Corporate Services Department of the Law Society of Upper Canada on November 18, 2013.

include sole practice, partnerships, limited liability partnerships, multi-discipline practices and partnerships and professional corporations. It is important to understand the current available structures as they establish the context for the changes that the Working Group is proposing.

85. It is also important to understand the current legislative framework regarding the regulation of legal services. In 2006 the *Law Society Act* was amended to authorize the Law Society to regulate "legal services" rather than the regulation of lawyers only. This was related to the amendments required for the regulation of paralegals.

86. The term "provision of legal services" was added to the Act for the first time. The legislation provides that "a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objections of a person". The Act describes various examples of the provision of legal services in section 1(6).

87. Other amendments to the Act at that time provide that the Law Society may audit, investigate and prosecute professional corporations as well as individuals.[33]

88. In the Working Group's view, these legislative provisions provide the framework that enables and legitimizes a discussion about the structures through which legal services are provided and the regulation of services within them.

Current Developments in Ontario

89. As part of its research and consultations, the Working Group learned of various developments suggesting that the impact of ABS is already being felt in Ontario.

    a. As noted earlier, legal practice is becoming globalized as a result of the merger of Canadian law firms with international law firms. In 2011 and 2012,

[33] *Law Society Act*, section 61.0.4(2).

respectively, Canadian law firms Ogilvy Renault LLP and Macleod Dixon merged with the international law firm Norton Rose LLP, and Fraser Milner Casgrain announced the intention to merge with SNR Denton and Salans to form a law firm with 2500 lawyers and 79 offices worldwide.

b. In addition to significantly expanding the global reach of Canadian law offices, these mergers will likely have a broad impact here in Ontario by heightening awareness of regulatory developments in other countries.[34]

c. Another factor influencing the current discussion in Ontario is the debate in the United States, where ABS continues to be discussed since the ABA's 2012 announcement that the *status quo* would be maintained. Formal Opinion 464 of the ABA Standing Committee on Ethics and Professional Responsibility, referred to above and issued in August 2013, concluded that fee-splitting in jurisdictions that permit the sharing of fees with non-lawyers was technically compliant with the *Model Rules of Professional Conduct*, since lawyers in U.S. firms would be dividing fees only with lawyers in another jurisdiction. In addition, litigation involving Jacoby & Myers, a law firm that has challenged the restrictions on non-lawyer investment in law firms of the New York State Bar, is ongoing. In August 2013 Jacoby & Myers announced its intention to enter the UK market. [35]

d. Participants in the Summer 2013 meetings told the Working Group about initiatives at some Toronto law firms to identify particular tasks within a range of legal work and to outsource them to offshore service providers, subject to Law Society supervision rules, in an effort to control costs.

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[34] Laurel Terry, "Trends in Global and Canadian Lawyer Regulation", *supra* note 19, p. 149.

[35] Dan Bindman, "Ambitious' Jacoby & Myers targets major recruitment drive in race to become UK legal brand", *Legal Futures*, November 8, 2013, online at http://www.legalfutures.co.uk/latest-news/ambitious-jacoby-meyers-targets-thousands-lawyers-race-become-national-uk-legal-brand.

e. During the symposium, Professor Jasminka Kalajdzic described litigation funding as a form of ABS which is already present in Ontario.

DISCUSSION AND CONCLUSIONS

Criteria for Analysing and Comparing Options

90. The Working Group's Terms of Reference require that it adopt criteria to evaluate the relative merits of proposals concerning alternative business structures. The criteria were identified based on key principles engaged in any evaluation of ABS including access to justice, public protection and ensuring that regulatory requirements are proportionate to regulatory objectives. It was intended that these criteria provide standards against which to measure the merits of any proposal for change relating to ABS. Clearly not all criteria will apply to all options, or they may apply at different stages of the ABS project, however where relevant, they are of assistance to promote a comprehensive analysis.

91. In developing these criteria, the Working Group was guided by the *Law Society Act*, section 4.2 which states:

> **4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1.The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2.The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3.The Society has a duty to protect the public interest.
>
> 4.The Society has a duty to act in a timely, open and efficient manner.
>
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular

> legal services should be proportionate to the significance of the regulatory objectives sought to be realized.[36]

Working Group Evaluation Criteria

92. The consideration of options for the implementation of alternative business structures is an important exercise with potentially broad and deep implications for legal services in Ontario. As a result, it is important that identified criteria based on fundamental principles be relied upon to assist in such considerations. The criteria identified by the Working Group are:

a. Access to justice: Any structural and related regulatory changes concerning alternative business structures should be reviewed to determine their effect on access to justice. Solutions that provide potential improvements for access to justice should be given more weight on that basis.

b. Responsive to the Public: In promoting access, the new structures and processes should be responsive to the needs of the public for legal services including greater flexibility in cost, location and availability of legal and other services with appropriate quality and adequate financial assurance of legal services.

c. Professionalism: The fundamentals of professionalism, including independence, confidentiality, avoidance of conflict of interest, and candour should be safeguarded in any move to liberalize ownership and structure.

d. Protection of Solicitor-Client Privilege: Any change proposed to implement alternative business structures must not jeopardize the protection of solicitor-client privilege.[37]

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[36] Ibid.

[37] Legislation in New South Wales and England and Wales speaks to the application of solicitor-client privilege in an ABS context. Section 143(3) of the *Legal Profession Act 2004* (New South Wales) provides that the law relating to client legal privilege, or other legal professional privilege is not excluded because an Australian legal practitioner is acting as an officer or director of an ILP. Section 190(4) of the

f. Promote Innovation: New business structures and processes should be designed to promote innovation which may include, among other things, the adoption of technology and/or other business processes that will enable them to adapt to the legal services marketplace and to better serve the public.

g. Alignment of requirements with new directions taken: The Law Society's current rules and by-laws should be aligned with the objective to promote innovation and flexibility in the provision of legal services to the public. Rules and other requirements should be proportionate to the significance of the regulatory objectives.

h. Orderly Transition: The preferred alternative business structures or related solutions options should be amenable to an orderly and thoughtful transition to new regulatory models. Any plan for new structures or service models should be inclusive, responsible, and mindful of any necessary disruptions that may be occasioned.

i. Efficient and Proportionate Regulation: Any changes should improve the Law Society's ability to effectively protect and promote the public interest in competent and ethical practices, including appropriate responses to client complaints. Restrictions on who may provide legal services should be proportionate to the significance of the regulatory objectives.

Legal Services Act 2007 provides that where an individual who is not a barrister or solicitor provides advocacy, litigation, conveyancing, and probate services, "any communication, document, material or information relating to the provision of legal services in question" is privileged from disclosure in the same way it would have been if the individual had been acting as the client's solicitor.

Alternative Business Structures – The Working Group's Conclusions

Discussion

Defining "ABS"

93. As stated earlier, the impetus for the Working Group was the emergence in other jurisdictions of new regulatory models governing alternative means of practicing law and delivering legal services.

94. In Ontario, clients are overwhelmingly served by firms that are 100% licensee-owned and that provide only legal services[38]. These firms have limited, if any, external economic relationships except for bank debt and for purchased goods and services.[39] Licensees are required to directly supervise all tasks and functions assigned to non-licensees.[40]

95. Early in its work, the Working Group determined that the term "alternative business structures" may be used to refer to any form of non-traditional business structure, as well as alternative means of delivering legal services and may include, for example,

    a. alternative ownership structures, such as non-lawyer or non-paralegal investment or ownership of law firms, including equity financing;
    b. firms offering legal services together with other professionals; and

[38] These firms are all sole proprietorships, partnerships and professional corporations. Professional corporations are not permitted to carry on any business other than providing legal services other than related or ancillary activities. The *Rules of Professional Conduct* prohibit direct or indirect fee-sharing with non-licensees other than in a multi-discipline practice (an "MDP") and in inter-jurisdictional law firms. MDPs must be effectively controlled by licensees and may only provide additional services that support or supplement the licensed activity. Fees may only be shared within an MDP with MDP partners who provide client services.

[39] The *Rules of Professional Conduct* prohibit payment of referral fees to non-licensees as well as prohibiting fee-sharing.

[40] Rule 5.01 of the *Rules of Professional Conduct.*

c. firms offering an expanded range of products and services, such as "do it yourself" automated legal forms as well as more advanced applications of technology and business processes.

96. This definition is based on our observations of ABS in the jurisdictions in which it is now implemented. In these jurisdictions, the term ABS encompasses a variety of structures. In England and Wales for example, these include the following:

a. Quality Solicitors, a network of over 200 independent law firms with access to national branding strategies, website support, and buying power;[41]
b. Co-operative Legal Services, which provides a range of legal services as part of the member-owned Co-operative Group. The Co-operative Group operates a family of businesses including food, financial services, pharmacy, funeral care, and online electrical as well as legal services.[42]
c. Scott Montcrieff and Associates, a virtual law firm whose fifty consultant lawyers work from home on a wide variety of private client matters;[43]
d. Natalie Gamble and Associates, a firm with expertise in fertility law offering related services such as donor conception and adoption;[44]
e. Winn Solicitors, an accident management firm; its services include compensation, repairs, replacement vehicles, and rehabilitation;[45] and
f. Rocket Lawyer, which combines on-line legal document assembly with on-line legal information and advice as well as pre-paid legal service packages.[46]

[41] http://files.qualitysolicitors.com/QualitySolicitors%20Info%20Pack.pdf, discussed by Edward M. Iacobucci and Michael J. Trebilcock in "An Economic Analysis of Alternative Business Structures for the Practice of Law", p. 23, September 20, 2013. This paper was commissioned by the ABS Working Group for the symposium held on October 4, 2013.

[42] http://www.co-operative.coop/legalservices/.

[43] Legal Futures, "Law Society President embraces ABS status", online at http://www.legalfutures.co.uk/latest-news/law-society-president-embraces-abs-status.

[44] www.nataliegambleassociates.co.uk

[45] http://www.winnsolicitors.com/.

97. In Australia, the first jurisdiction to adopt ABS, Slater & Gordon became the first law firm in the world to be publicly listed on a stock exchange on May 21, 2007. The firm employs 1350 staff in 69 locations with a focus on personal injury and class action litigation on the plaintiff side.[47]

98. Other Canadian Law Societies are considering ABS. On October 15, 2013, the Nova Scotia Barristers Society Council considered a report which asks, among other things, whether ABS should be permitted in that jurisdiction.[48]

99. The Working Group has observed that one of the key factors in the development of ABS is the enhanced and, in some cases, the direct use of technology to deliver services in a new way.

100. The Canadian Bar Association Legal Futures Initiative report identifies the following technologies that are transforming the practice of law:

a. the proliferation of online dispute resolution (Smartsettle and equibbly.com are two Canadian examples)[49];
b. the development of a technology-enabled marketplace where sellers of legal services can present their offerings, credentials, and fee structures, and buyers can choose the type of services they wish to purchase); and
c. intelligent systems/artificial intelligence (ultimately, intelligent systems may be able to offer advice based on comprehensive analysis of data and risk

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[46] https://www.rocketlawyer.co.uk/

[47] Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?", *supra* note 29. Since then, two other firms have been listed on the Australian Stock Exchange.

[48] Nova Scotia Barristers Society, *Transforming Regulation and Governance in the Public Interest*, *supra* note 20, online at http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf, p. 5.

[49] www.smartsettle.com and www.equibbly.com.

factors, which could surpass the human capabilities to manage information, resolve issues, and draw conclusions).[50]

Legal Services Regulation should facilitate Innovation

101. The Working Group is of the view that the proliferation of activity in the Ontario legal services marketplace beyond the Law Society's jurisdiction requires thoughtful consideration by the Society, particularly in light of the broad definition of the term "legal services" in the *Law Society Act*. To facilitate access to justice and in the public interest, the Law Society should examine the extent to which the current scheme of the Act encompasses activity in the online legal services marketplace requiring regulatory oversight.

102. The Working Group concluded that generally it is preferable that new business structures emerge in the regulated sphere. This may not always be practically feasible or reasonable. For example some unregulated services are provided from other jurisdictions over the internet. Others involve support services for legal practices and the reach of regulation into these support services may on balance not be cost effective.

103. During his presentation at the symposium, James Peters contrasted the legal needs of corporations with those of individuals and small businesses targeted by Legal Zoom. According to Mr. Peters, there is a growing presence of non-regulated service providers in the U.S. who are able to access sources of capital and expertise to enhance their market share that are not available to lawyers.

104. The emergence of these new unregulated services is an important factor in favour of permitting lawyers and paralegals greater latitude in the way in which they structure and organize their businesses and services. The emerging unregulated

[50] CBA Legal Futures Initiative: *The Future of Legal Services in Canada: Trends and Issues*, (June 2013), online at http://cbafutures.org/trends, p. 27.

activities have attracted a significant number of clients and this public should be able to access regulated services with similar ease where that is possible.

105. The question of whether and how the Law Society might regulate some of these newer forms of legal services is an question that likely merits further discussion separate and apart from the issue of ABS. This issue has significant policy and resource implications and deserves further consideration.

The Relationship between the Introduction of ABS and Access to Justice

106. The issue of access to legal services has been primarily identified as relating to the cost of these services.[51] One of the key criteria adopted by the Working Group for the evaluation of ABS is whether a specific ABS model promotes access to justice. Having carefully reviewed the emerging evidence from jurisdictions that have implemented a form of ABS, the Working Group considers that the implementation of ABS could afford improvements in access to legal services.

107. While there is not yet clear evidence that the introduction of ABSs materially affects access to justice, there is reason to think that there is real potential for enhanced access. The need for access to justice for individuals arises in two quite different contexts. Individuals face legal issues in day-to-day life for example as tenants entering into leases, testators wanting to deal with their estates, older people wanting to protect their assets and health decisions by powers of attorney and injured persons dealing with private or public income protection. Individuals can also experience a serious legal problem, such as marriage break-down, a major personal injury or a criminal charge.

108. For serious legal issues, the cost of legal services is commonly more expensive than can be afforded even by middle class individuals. Alternative business models may provide lawyers and paralegals with enhanced access to

[51] Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law", *supra* note 28, p. 10, in which Professor Hadfield observes that "conventional legal services are simply beyond the means of most Americans".

technological and business innovation. This can include the ability to partner with a business manager whose contribution may improve the efficiency of the delivery of services and the marketing of those services. With more diversified ownership and greater access to additional capital, a lawyer or paralegal could provide legal services more efficiently through access to specialized technology or support services including for books and records. ABSs may also provide new ways of accessing existing services from lawyers and paralegals.

109. The Working Group's review of the information collected shows that for day-to-day legal needs, individuals are well served in many respects by lawyers and paralegals. It is also clear however that there are gaps and that in many cases significant legal needs not being served. This is sometimes referred to as latent demand for legal services, usually in circumstances where those seeking the services are middle income earners, but the cost of some of the services are beyond their ability to afford. The results of the Working Group's research shows that a second reason members of the public may seek services from the unregulated marketplace is ease of access in terms of hours operation, location or client services. It appears that these unmet legal needs are not effectively serviced by existing business structures whether as a matter of ease of access or cost of service.[52]

110. The Law Society Treasurer, Thomas C. Conway, has identified access to justice as a key priority for the Society.[53] The Action Committee on Access to Justice in Civil and Family Matters recently released a report on this subject (*A Roadmap for Change*).[54] The Law Society, through the Treasurer's Advisory Group on

[52] MichaelTrebilcock, Anthony Duggan and Lorne Sossin, eds. *Middle Income Access to Justice*, (Toronto/Buffalo/London: University of Toronto Press, 2012), Part 2: "Defining the Problem: What are the Unmet Legal Needs?".

[53] Law Society of Upper Canada, "Access to Justice: Creating a Climate for Change", Treasurer's Blog, *Gazette*, online at http://www.lawsocietygazette.ca/treasurers-blog/creating-climate-for-change/.

[54] Online at http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

Access to Justice, has committed to ensuring that the recommendations in this report are realized.

111. As part of the Treasurer's Advisory Group Initiative, the Law Society held a symposium on Access to Justice on October 29, 2013. In an address to the symposium, Chief Justice Anne-Marie Bonkalo of the Ontario Court of Justice noted that fewer and that fewer family lawyers are offering service in important areas such as child protection. Chief Justice Bonkalo also noted the growth of interdisciplinary initiatives such as a program offered by the Community and Legal Aid Services Program at Osgoode Hall Law School and the School of Social Work at York University which offers clients the services of both law students and students of social work.

112. A recent study of 259 self-represented litigants in family and civil law matters in Ontario, British Columbia and Alberta reported that the most consistently cited reason for self-representation was the inability to afford to retain, or continue to retain, a lawyer.[55] Eighty-six percent of participants in the survey indicated that they had attempted to access legal advice services in some form. Further, virtually every one of the 14% of participants who neither retained a lawyer to represent them at any stage in their case nor sought free legal advice indicated that their reason for not trying to obtain assistance was concern about the cost. [56]

113. In 2009, the Law Commission of Ontario (LCO) embarked upon a study of family justice in Ontario, issuing a final report in February 2013. The LCO noted that members of the public facing family law issues are often confronting other challenges, including financial and mental health concerns.

[55] Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", online at http://www.representing-yourself.com/PDF/reportM15.pdf, p. 8.

[56] Ibid., p. 82.

114. In its final report, one of LCO's recommendations was the establishment of multidisciplinary centres in which lawyers would provide service to the public alongside other professionals. In this regard, the report suggested that "the ease of structuring multidisciplinary centres in a way that is truly collaborative may be affected by [Law Society] rules." The report refers to By-Law 7 and Rule 6.10 of the *Rules of Professional Conduct*. [57]

115. This argues in favour of permitting non-legal services to be delivered within the same entity that also delivers legal services. This may well provide ease of access to a combination of expert services which may be customized with the creation of multidisciplinary expertise within the entity offering the services, and economies of scope and scale. These opportunities may enable lawyers and paralegals to harness the power of the existing brand for one service to develop market share for other services and vice versa.

116. In England and Wales, the Legal Services Board announced on September 12, 2012 that it plans to monitor the impact of ABS and other reforms on access to justice using the following measures:

a. demand for legal services;
b. paths to justice (that is, whether individuals take no action in regard to their legal needs, handle them alone or seek legal advice);
c. use of legal services (analysis of the ways in which consumers use legal services i.e. do they seek information, advice or representation);
d. perception of legal services (that is, whether consumers perceive that legal services are affordable);
e. cost of legal services;
f. number of agents of delivery (the number of authorized persons compared to the population);

[57] Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, Final Report, February 2013, p. 85, online at http://www.lco-cdo.org/family-law-reform-final-report.pdf.

g. scope of delivery (the range of categories of work in which regulated entities report turnover and the proportion of consumers getting advice on clusters of problems from the same providers);
h. geography of services (proportion of agents of delivery by geographic location and the methods of communication used to interact with clients);
i. access to the courts (volumes of trials, the number of days sat by judges per trial and the length of time between court proceedings); and
j. trends in satisfaction with the justice system.[58]

117. An analysis of these measures is forthcoming from the LSB in 2014.

118. Professor Richard Devlin of Dalhousie University suggests that ABS could contribute to access to justice in Canada in various ways, including enabling members of the public to access services more conveniently, by, for example, offering financial and legal services in the same place, as well as enabling the public to access legal services in a manner they may find less intimidating than a lawyer or paralegal's office. He also suggests that the public may also benefit from an increased willingness by practitioners to take on cases perceived as risky because of an enhanced access to capital.[59]

119. While it would be wrong to suggest that ABSs are a panacea, ABSs may play a part in addressing these legal needs. ABSs may also more efficiently serve these legal needs by allowing clients to better access existing legal services together with other needed services such as, for example, social work and psychological services.

[58] Legal Futures, "LSB releases plan to monitor impact of ABSs on access to justice", September 13, 2012, online at http://www.legalfutures.co.uk/latest-news/lsb-releases-plan-monitor-impact-abss-access-justice.

[59] Richard Devlin, "Access to Justice and The Ethics and Politics of Alternative Business Structures", (2014) 91 Canadian Bar Review (forthcoming).

120. Permitting new models for the delivery of legal services and the practice of law is not the sole, nor likely the most important, solution to issues of access to justice. Lawyers and paralegals will still need to spend time to provide services for their clients, with an attendant cost. ABS models, however, have the potential to enhance access by providing new means of access in addition to the current models, and by providing lawyers and paralegals with additional means to gain efficiency and flexibility, with possible impacts on cost.

Providing Lawyers and Paralegals with more Choice in how their Practices are Structured

121. The substantial majority of firms providing legal services to individuals and small businesses are sole practitioners and small partnerships. Small firms generally serve individuals and small businesses. The main areas of small firm practice are real estate, civil litigation, wills, estates, trusts, corporate and commercial and family.[60]

122. While many lawyers and paralegals no doubt prefer to be the owner/managers of their own small practices, it was clear from the consultations undertaken by the Working Group that many practitioners consider the business and marketing aspects of their practice to be a burden. For them, practicing, even as a sole practitioner, in a structure which facilitated access to business expertise and infrastructure was attractive.

123. Experience in other jurisdictions suggests that sole practitioners and practitioners in small firms may benefit from the advantages associated with participating in a larger entity or organization, including access to technology and infrastructure, the opportunity to share business costs, access to business and other expertise,

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[60] LSUC *Final Report of the Sole Practitioner and Small Firm Task Force*, 2005, online at http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf , particularly paragraphs 36 to 37 and 39 to 41. See also, Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013), *supra* note 28.

ethical infrastructure, association with a known brand, and greater market power in dealing with suppliers and other market participants.

124. The discussions at the ABS Symposium suggested that enabling alternative ways to practice including as part of a franchise, or in similar types of affiliations or larger structures may be advantageous for some, and particularly for those who still wish to maintain some elements of a sole practice, while also receiving the supports that a larger organization can provide. Law Society regulatory experience suggests that such supports can be advantageous to clients as well as lawyers.

125. The LSB study published in October 2013 and referred to earlier in this report revealed that ABS firms are more likely to use technology that non-ABS firms. Ninety-one percent of ABS firms surveyed indicated that they had a website to deliver information and other services to clients, as opposed to 52% of non-ABS solicitors' firms. The President of the Law Society of England and Wales has recently commented that, despite the natural fear of the unknown, the Law Society has "discovered that the choice ABS offer is benefiting many of our members … "[61]

126. The Working Group notes that the introduction of ABS models in other jurisdictions has not necessarily meant that sole and small practices reduced in numbers. In New South Wales, many of the firms taking advantage of ABS were small or sole practices, and remained so within the ABS environment. Nor does the experience in other jurisdictions suggest that introduction of ABSs will transform practice. While considering that introduction of ABSs should facilitate innovation, Professors Iacobucci and Trebilcock also indicated during the October

[61] Legal Services Board, *Evaluation: Change in Competition in Different Legal Markets: An Empirical Analysis*, *supra* note 13 at 9 and "Alternative Business Structures: The View from England and Wales", January 7, 2014, online at http://cbafutures.org/FoL-Blog/Blog/January-2014/Alternative-business-structures-the-view-from-Engl#

ABS Symposium that, in their view, introduction of ABSs would not cause dramatic change to the way in which legal services are currently provided in Ontario.

127. With respect to non-lawyer ownership, the Working Group notes that new sources of capital may permit a law firm to reorganize or innovate, expand (which may entail a merger with another firm, open a new location, and begin delivery of services in new practice areas). It may also permit a firm to invest in talent (hiring of new legal and non-legal staff). Further, enhanced access to capital would permit lawyers and paralegals to reward long-standing key employees with a share in the firm. Access to new sources of capital could enable licensees to invest in knowledge management and technology.

128. Alternative sources of capital may also enable investments in business process and technological innovations, which may lead to enhanced quality, and may enable a licensee to scale operations, thereby moving away from the billable hour to a new structure. Reliance on outside capital may encourage and enable licensees to professionalize their business processes.

129. Based on the foregoing, the Working Group concludes that ABS would provide practitioners with greater flexibility to seek out the type of business model that most suits their circumstances, and would likely promote greater financial viability for the small and sole practitioners who provide retail services to the public.

Duty to the Rule of Law and Administration of Justice Supersedes Duty to Owners

130. A key component of ABS is partial or complete ownership of the entity by non-lawyers. This raises a question as to how a lawyer or paralegal working within that entity deals with the potentially competing interests of the non-lawyer owners (who are likely primarily seeking profitability) and the duty to clients and the administration of justice.

131. This issue has been addressed in other jurisdictions which implemented non-lawyer ownership. The Working Group particularly notes the approach taken to this issue in New South Wales.

132. During a visit to the Law Society of Upper Canada on July 16, 2012, Steve Mark, former Legal Services Commissioner, New South Wales, described the role of the regulator in that jurisdiction when Slater & Gordon's first public listing. The OLSC worked with the firm to ensure that the prospectus specified a hierarchy of duties according to which the legal practitioner's first duty is to the Court, the second is to the client and the third is to the shareholder. In that case, the interests of clients were protected through the prospectus to inform future share holders. Mr. Mark recommended to the Working Group that it would be preferable that this hierarchy of duties be enshrined in legislation to afford the public full protection.[62]

133. Currently there is some statutory protection for the public and clients in New South Wales. Section 162(2) of the *Legal Profession Act 2004* provides that in the event of an inconsistency between that legislation and that *Corporations Act, 2001*, under which an ILP is established, the *Legal Profession Act 2004* prevails.[63]

134. While the experience over the last decade in Australia should not be be taken to demonstrate that there would no regulatory risk if ABSs were permitted in Ontario, it is clear that there have not been any significant regulatory issues arising from ABSs in Australia. The adoption of compliance-oriented entity

[62] Steve Mark, "A short paper and notes on the listing of law firms in New South Wales". Online at http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes_for_joint_nobc_aprl_aba_panel.pdf.

[63] *Legal Profession Act 2004*, s. 162(2), online at http://www.legislation.nsw.gov.au/inforcepdf/2004-112.pdf?id=6482819c-be12-4fb9-de1c-f6e1ac7ab25b, Mr. Mark and Ms. Tahlia Gordon, previously the Research and Projects Manager of the Office of the Legal Services Commissioner, New South Wales, visited the Law Society of Upper Canada on July 16, 2012.

regulation in Australia appears to be part of the reason for this success as does the establishment of the hierarchy of duties.

135. Reframing this hierarchy of duties in terms that could apply in Ontario, an ABS providing legal services should be required (as must lawyers and regulated paralegals) to subordinate the interests of its owners to the interests of its clients and to the interests of rule of law and administration of justice. This is a key tenet of any reform of structures to ensure the legal advice provided is fully independent, and client confidentiality and privilege are protected.

Consideration of ABS models suitable for Ontario

136. The ABS Working Group considered the full range of potential ABS options and noted that the questions for decision are:

a. whether the Law Society should undertake any change respecting alternative business structures,
b. the degree to which non-licensees are permitted an ownership in the entity; and
c. the extent to which non-legal services may be provided to clients within the entity.

137. In any regulatory environment, entities providing legal services may be subject to strict ownership restrictions, or, as in jurisdictions such as New South Wales or in England and Wales, there may be much less restriction on ownership.

138. The Working Group recognizes that while changes to either ownership rules or to the permitted range of non-legal services can be considered, most potential options would involve the lifting of both ownership restrictions as well as limitations on the type of service which may be offered by the entity.

139. In order to arrive at a set of recommendations concerning alternative business structures and the services they offer, the Working Group considered a range of ABS models.

(i) Should the status quo be maintained?

140. The current Ontario regulatory model permits four types of business structures (sole practitioner, partnership, limited liability partnership and professional corporation). All require full ownership and control by the regulated licensee. There is some limited permission to provide related non-legal services through an affiliation or a multi disciplinary practice.

141. The Working Group concluded that the preponderance of the information available argues against maintaining the *status quo*. Earlier in this report there was a discussion of the advantages and risks attendant on the introduction of ABS in Ontario. Having carefully examined the copious information that the Working Group has available to it, the Working Group is satisfied that there is significant evidence to recommend the introduction of a form of ABS in Ontario.

142. As noted earlier, the introduction of ABS is not a panacea to address issues such as access to justice and the economic viability of legal practice. There is cogent evidence however to show that ABS may well contribute to the development of more accessible, flexible and viable legal services in Ontario. The introduction of alternatives will provide licensees with added options that should promote greater innovation in the provision of legal services, including potentially greater accessibility for the public seeking those services.

143. The Working Group concluded that the existing tight regulatory restrictions on business structures are not justifiable given the lack of evidence that regulatory liberalization will cause harm. This is coupled with substantial evidence that business structure liberalization combined with entity regulation is likely to provide greater flexibility and more options for both licensees and the public.

(ii) Should limited non-licensee ownership be permitted for entities providing legal services?

144. The Working Group considered whether a modest amendment to current ownership restrictions of legal practices in Ontario permitting family members to hold shares in a legal services entity was advisable.

145. In Ontario, physicians and dentists may establish health professional corporations in which family members may be shareholders.

146. In New South Wales and in England and Wales, as a result of the regulatory liberalization of ownership restrictions, many sole practitioners converted to ILPs (incorporated legal practices) in order to enable family ownership in the firm. There has been some discussion of the advantages of seeking legislative amendments to enable licensees to establish a professional corporation in which family members could own shares.

147. The Working Group recognizes that permitting family investment in smaller law firms could have beneficial tax consequences for licensees and their family members. More favourable tax treatment could benefit sole and small practitioners in particular, and might serve as a means of encouraging sole and small practitioners to continue to engage in their practices.

148. Greater tax efficiency by permitting family investment does not do more than reduce the taxes paid by licensees and received by government. These tax savings may, or may not, be passed on to clients. It is certainly arguable that the existing prohibition against family ownership for licensees is unfair. However, merely reducing tax payments does not address the economic and business issues created by restricting business structures. Accordingly, the Working Group does not recommend that ownership liberalization be limited to permitting family investment.

149. The Working Group concluded that any amendment to permit ownership by family members is too limited in scope to be of any significant benefit in the public interest. The Working Group noted however that if only a modest or incremental change to ownership is desired, the better model is to permit ownership of the entity by non-licensees up to 49%, in order to provide greater scope for investment opportunities including by employees.

(iii) Should entities be permitted non-licensee ownership but without any ability to provide non-legal services?

150. The Working Group considered recommending an ABS model with varying degrees of permitted non-licensee ownership which would not be permitted to provide any non-legal services. The advantage of such a model is that it avoids any possible risk related to the provision of non-legal services. As noted earlier, these possible risks include the loss of client confidentiality and privilege, increased risk of conflicts, and the decreased quality of legal services. At the same time, it provides lawyers and paralegals with increased access to investment in their practices to allow them to implement efficiencies.

151. The disadvantage of this approach is that it restricts the ability of lawyers and paralegals to more fully collaborate with other service providers to offer more innovative and comprehensive services to the public.

152. The Working Group questions whether a valid regulatory objective is achieved by restricting the entity to solely providing legal services. MDPs have already combined the provision of legal services and other professional services to establish a limited form of ‘one-stop shopping’ for consumers of legal and other professional services in Ontario.

153. The Working Group notes that the structuring of an entity which provides only legal services would not provide lawyers and paralegals with sufficient ability to be innovative in developing new ways to provide services to consumers.

154. The Working Group concluded that an ABS model which prohibits the ability to provide any non-legal services is too restrictive, and would be unlikely to achieve the objectives of greater accessibility and flexibility in the provision of legal services. Moreover, the Working Group noted the absence of any demonstrated risk or harm in combining legal and non-legal services so long as appropriate regulatory requirements are in place.

(iv) Should liberalized ownership be permitted together with liberalization of the provision of non-legal services?

155. The Working Group considered various models for liberalizing ownership and the non-legal services provided by the entity.

156. In its deliberations, the Working Group noted that there may be risk in permitting any services without any restrictions on the range of those services. It was noted that there may well be types of services that are inappropriate and likely to increase risk, if provided together with legal services through the same entity. The Working Group considers that effective client representation and protection of our land titles system requires particular examination with respect to legal services involving residential real estate.

157. Accordingly, the Working Group concluded that any liberalization of the provision of non-legal services should include an initial and on-going analysis by the Law Society of restrictions on the provision of non-legal services required on the basis of regulatory risk.

158. As indicated earlier in this report, jurisdictions in which ABS has been implemented, there is a more permissive approach to ownership. In Ontario, only four specified models of ownership are permitted. As noted earlier in this report, in Australia, ILPs do not impose restrictions on individuals who may hold shares in the firm. In England and Wales, the *Legal Services Act 2007* allows non-lawyers to own and run legal businesses.[64]

159. With respect to the services the ABS may offer, the *Legal Profession Act* (N.S.W.) allows an incorporated legal practice to provide any service or conduct any business that the corporation may lawfully provide or conduct, with the exception of a "managed investment scheme".[65] In England and Wales, entities that have obtained ABS licenses offer a range of services in addition to legal services including human resources assistance, claims handling, rehabilitation management, and access to health professionals.

160. The Working Group concluded that an orderly transition for the implementation of new structures may benefit from an incremental approach to liberalization of ownership. Nevertheless, there was considerable interest by most of the members of the Working Group in models of ABS that include unrestricted ownership.

161. The Working Group recommends consultation on both liberalization of ownership and unrestricted ownership by non-licensees. Partial liberalization of existing Rules would allow the Society to carefully consider whether additional changes are in the public interest, however an incremental approach takes longer, and would no doubt restrict opportunities for innovation and access.

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[64] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, *supra* note 22, p. 6.

[65] *Legal Profession Act 2004* (N.S.W.), s. 135, online at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s135.html. Section 135(3) provides that the regulations may prohibit an Incorporated Legal Practice from providing a service or conducting a business of a kind specified by the regulations.

RECOMMENDATIONS

Alternative Business Structures: the Working Group's Recommendations

162. Based on its work to date, the Working Group has identified four possible options for alternative business structures reform. The Working Group recommends consultations on these four options before the Working Group makes a final recommendation as to the appropriate model. The consultations will be undertaken with a view to testing the options to establish their suitability for Ontario.

163. **The Working Group recommends focussed as well as generalized consultation with the profession and interested stakeholders. This would include notice and invitation to comment through the Law Society's website and the Ontario Reports, as well as direct communication with all of the stakeholders who were invited to the 2013 consultations and/or the Symposium as well as others**.

Option #1: Permitting Up to 49% Ownership by Non-Licensees in Entities Only Providing Legal Services

164. Under this option, the licensee would maintain majority ownership of the entity, and would be responsible for its provision of legal services. At best, such ownership structure might generate only a near doubling of the equity investment available to the entity.

165. The Working Group noted the doubt expressed by many participants in its summer and fall meetings that arms-length investors would be interested in assuming up to a 49% ownership in a law firm. An outside investor may not perceive sufficient potential growth in the business to justify an equity investment in which the investor may only obtain a minority interest. A doubling of equity capital is unlikely to provide the resources necessary to achieve material innovation in the delivery of legal services. Nevertheless, permitting minority

equity interests for non-licensees would permit key employees to be rewarded by equity participation.

166. The Working Group concluded that, with respect to an entity only providing legal services, a minority ownership rule would likely restrict the interest in outside investment. That said, allowing up to 49% equity ownership by non-licensees is viewed as some improvement over the *status quo*. Some consider, as was the case in Australia and England, that permitting 49% non-licensee ownership provides a cautious first step towards further liberalization.

Option #2: Entity restricted to providing legal services, but with unrestricted ownership

167. This option would permit the entity to provide legal services, with unrestricted ownership. Under this option, the entity would only provide legal services, but would be free to seek capitalization in any way it sees fit. The entity could be capitalized through licensee or non-licensee ownership or any combination thereof. Nonetheless, the provision of legal services would remain under the control and supervision of licensees.

168. This option would focus the entity on delivering legal services, and increased capitalization could therefore be directed solely at enhancing the delivery of legal services. As the entity would not offer other non-legal services, the potential risks of conflicts and to confidentiality and loss of privilege which may exist in a multi-disciplinary/service environment are minimal. The requirement that licensees control and supervise the provision of legal services together with entity regulation should effectively ensure independent judgment in the delivery of legal services.

169. The importance of preserving solicitor-client privilege would require that non-licensee owners would not be permitted to access confidential information about the identity of clients and the work being done for them. The ABS entity and the licensees within the ABS would be subject to Law Society Rules and sanctions.

Further, the entity as a whole would be required to identify an individual or individuals, similar to the Legal Practitioner Director in New South Wales, who would be responsible for ensuring compliance by the entity and its owners, directors, officers and employees with the Law Society Rules. In the New South Wales scheme, failure by the Legal Practitioner Director to ensure the regulatory compliance of the entity may be the basis of a finding of misconduct. The Legal Practitioner Director may be sanctioned, or disqualified from further service in this capacity, as a result.[66]

170. However, the Working Group questions whether a valid regulatory objective is achieved in restricting such an entity to solely providing legal services. The Working Group notes that this reflects the status quo in Ontario with MDPs, which would not be very useful.

Option #3: Entity permitted up to 49% non-licensee ownership and permitted to provide both legal services and non-legal services except those identified as posing a regulatory risk

171. The Working Group considered the feasibility of permitting up to 49% ownership in an entity, and permitting the entity to provide both legal services and non-legal services except those identified by the Law Society as posing a regulatory risk.

172. As discussed at paragraphs 156 – 157, liberalized ownership may permit increased capitalization to be invested to enhance the delivery of legal services, but restrictions on non-licensee ownership are likely to restrict the amount of interest in outside investment. It is questionable whether this will achieve the innovations which may result from unrestricted non-licensee ownership.

173. Regulators in Australia and in England and Wales, permit unrestricted ownership and few if any restrictions on the pairing of legal and non-legal services. The

[66] Ted Schneyer, "Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Legal Practice", (2009) *Journal of the Professional Lawyer* 13, p. 31.

Working Group is of the view that the experiences of regulators in other jurisdictions will be instructive in identifying areas of regulatory risk.

174. This option is potentially attractive, as compared to permitting only ancillary services, on the basis that the regulator should be careful not to make assumptions about which innovations may prove valuable over time and on the basis that restrictions on what services may be provided should be determined by assessed regulatory risk.

175. It should be recognized that permitting a broader range of services to be offered by an ABS will require attention to the avoidance of conflicts and the protection of confidentiality and privilege simply because a broader range of activities would be permitted to be delivered within the ABS including by non-licensees. However, these matters appear to be capable of being addressed. For example, the law of privilege already addresses the provision of legal and non-legal services by in-house counsel[67] as well as the participation of non-lawyer experts where required for the provision of legal services without loss of privilege.[68]

176. Permitting non-licensees to become owners in an entity without requiring that they be subject to control and supervision by the licensees (as is currently the case with respect to multi-disciplinary partnerships) may encourage further innovation. It is important to note, however, that the entity as a whole would be subject to Law Society requirements.

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[67] *Pritchard* v. *Ontario (Human Rights Commission)*, [2004] 1 SCR 809, paragraphs 19-21, online at http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/2144/index.do

[68] *Barrick Gold Corporation* v. *Goldcorp Inc.*, 2011 ONSC 1325, paragraph 19, online at http://www.canlii.org/en/on/onsc/doc/2011/2011onsc1325/2011onsc1325.html, and *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, paragraph 64, online at http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc88/2011bcsc88.html?searchUrlHash=AAAAAQALU291dGggQ29hc3QAAAAAAQ.

Option #4: Entity permitted unlimited non-licensee ownership and permitted to provide legal services and any other services, except where there is a sufficient regulatory risk identified

177. The Working Group considered an ABS in which the services provided in addition to legal services would not be subject to restriction, except in circumstances where the Law Society has identified a sufficient regulatory risk. The Law Society would develop criteria governing the assessment of sufficient regulatory risk.

178. The comments made regarding Option #3 regarding the provision of non-legal services and the identification of regulatory risk apply equally to this option. The distinction in Option #4 is that unrestricted ownership by non-licensees will likely increase the entities access to capitalization, as discussed previously in this Report. The experiences of other jurisdictions suggest that regulatory risk resulting from this type of liberalization may be managed.

179. With respect to all of the options described above, the Working Group has concluded that it is unlikely that a more permissive approach to business structures in Ontario will lead to revolutionary change; however, such changes will encourage innovation and the development of new ways to deliver legal services which otherwise will be more likely to emerge in the unregulated, rather than the regulated sphere. The public may be at greater risk if innovation emerges solely in the unregulated sphere outside the Law Society's purview.

Firm and Entity Regulation: the Working Group's Recommendations

180. The Working Group has recommended that a form of alternative business structures regulation be introduced in Ontario. In the Working Group's view, this is a long term modification in regulatory approach which requires careful attention to decisions, design and implementation. It should be developed in tandem with the Law Society seeking legislative authority for regulation of entities providing legal services. As noted earlier, several other jurisdictions in

Canada are taking steps to regulate law firms, or have implemented this form of regulation. Legislation in Nova Scotia and British Columbia has already been amended for this purpose. The Barreau du Québec regulates law firms through compliance measures, but not through discipline.[69]

181. In Ontario, there is statutory authority to regulate professional corporations, but not partnerships or sole practices. This results in a gap and imbalance in regulatory authority that should be addressed. Moreover, the regulation of entities or firms provides the Law Society with greater ability to engage in proactive and preventative regulation that can reduce risk for the public. This report has described the results of proactive or compliance based regulation in New South Wales, which demonstrated a marked reduction in complaints for firms.

Recommendations: Firm and entity regulation

182. The Working Group recommends that the Law Society seek statutory amendment granting it express authority to regulate entities providing legal services in addition to its current authority to regulate individuals and professional corporations.

Compliance Based Regulation: the Working Group's Recommendations

183. The Working Group notes that the Law Society of Upper Canada currently engages in some proactive regulatory activity. An example is practice management review for lawyers and paralegals. Lawyers in private practice who have been practicing between one to eight years may be referred to the program either because of random selection by the Society, re-entry to practice, or as a regulatory response to a pattern of complaints. Paralegals holding a P1 license may also be referred to Practice Management Review.

[69] For a further discussion, see Adam Dodek, "Regulating Law Firms in Canada", *supra* note 18, p. 411. Also see Amy Salyzyn, "Regulating Law Practices as Entities: Is the Whole Greater than the Sum of Its Parts?", November 29, 2013, online at http://www.slaw.ca/2013/11/29/regulating-law-practices-as-entities-is-the-whole-greater-than-the-sum-of-its-parts/.

184. In addition to the Practice Management Program, lawyers may be subject to a spot audit, which addresses financial record-keeping requirements.

185. The Working Group acknowledges that in Ontario the regulatory scheme is predominantly reactive rather than proactive. Issues are more often identified through complaints rather than audits or reports by licensees. In contrast, in conjunction with the implementation of ABS, other regulators have adopted a compliance-based scheme. Compliance-based regulatory models are characterized by the imposition of mandatory affirmative duties and reporting obligations on professionals and monitoring and audits for compliance, with investigations and discipline as a component of the proactive scheme.[70]

Recommendations: Compliance based regulation

186. In conjunction with the implementation of both firm and entity regulation, the Working Group recommends the Law Society immediately consider implementation of compliance based regulation and refer the issue to the Professional Regulation Committee, with input from the Professional Development and Competence and Paralegal Standing Committees. The Working Group further recommends that compliance based regulation commence with a requirement that licensees and firms have in place a process for responding to complaints.

Review of Law Society Rules and By-Laws: the Working Group's Recommendations

187. In its June 2013 Report, the Working Group noted the existing constraints on business structures that arise from the Law Society By-Laws and *Rules of Professional Conduct.* As set out in the Working Group's June 2013 Report, the Law Society is required to ensure that conduct standards are proportionate to regulatory objectives, and the Working Group believes that existing constraints on business structures should be reviewed.

[70] Adam M. Dodek, "Regulating Law Firms in Canada", *supra* note 18 at 406.

188. The principal rules and by-laws governing business structures for the delivery of legal services in Ontario which the Working Group recommends for review are set out in a schedule to this report at **Tab 4.1.2.4**.

189. Several specific rules may be highlighted by way of example:

a. Rule 2.08(8)(a) provides for an absolute prohibition against directly or indirectly sharing, splitting, or dividing fees with any person who is not a licensee.

b. Rule 2.08(8)(b) provides for an absolute prohibition against giving any financial or other reward to any non-licensee for the referral of clients or client matters.

c. Rule 5.01(2)(b) requires that a lawyer directly supervise non-lawyers to whom particular tasks and functions are assigned. This requirement may be seen to limit that which may be provided by business and technological processes that are effectively but not directly supervised.

d. Sections 16 and 17 of By-Law 7 prohibit licensees from providing services of non-licensed persons except for services that support or supplement the provision of legal services.

e. Sections 18, 19 and 20 of By-Law 7 substantially limit partnership between licensees and service providers permitted under sections 16 and 17 including by the requirement that the licensee have effective control over the non-licensee even in respect of non-legal services and that the non-legal services provided be subject to compliance with all Law Society by-laws, rules etc. It is unclear that these limitations are required. As a practical matter, there are only approximately a dozen multi-discipline practices presumably as a result of these tight constraints.

190. The Working Group concluded that these and other related rules should be subject to further study both to encourage innovation and more effective service while protecting professional values.

191. While permitting ABSs as discussed in the paragraphs that follow is an important part of the reform proposed by the Working Group, the Working Group considers that reforms to existing rules could provide flexibility that is achievable in the shorter term. The Working Group recognizes that the development of the regulatory jurisdiction, processes and infrastructure required to support the implementation of the recommendations in this report will take substantial time and effort such that intermediate steps along the path may be appropriate.

Recommendations: Review of Law Society Rules and By-Laws

192. The Working Group recommends that the Working Group be authorized to consider potential revision of Law Society Rules and By-Laws regarding fee-sharing, referral fees, direct supervision, and ownership restrictions and, if thought appropriate, to refer proposed revisions to the Professional Regulation and Paralegal Standing Committees.

193. The review of Law Society Rules and By-Laws would be conducted with a view to ensuring that the rules are proportionate to the regulatory risks which they seek to mitigate. Any changes to these rules would require the approval of Convocation.

TERMS OF REFERENCE OF THE LAW SOCIETY OF UPPER CANADA WORKING GROUP ON ALTERNATIVE BUSINESS STRUCTURES

On September 27, 2012, the Working Group reported its Terms of Reference to Convocation. These Terms of Reference provide that the Working Group will

(a) inform itself on developments in Canada and abroad on new and existing alternative legal service delivery models and structures, financing arrangements, and the related regulatory process;

(b) consider these developments in light of regulatory requirements and develop a set of criteria to assess the prioritize these new models and structures. Criteria may include access to the services by the public (access to justice), public protection (risk assessment of various models), and other principles that inform the Law Society's public interest mandate, including the requirement that standards of professional conduct be proportionate to the significance of the regulatory objectives sought to be realized; and

(c) determine the range of legal service delivery models and financing arrangements that should be explored and examine the existing regulatory constraint s on delivery models and financing arrangements;

(d) create a Work Plan that will include identification of the legal services delivery models and regulatory changes that should be considered by the Law Society for possible implementation based on

    (i) an initial assessment of their impacts based on the criteria developed earlier;

    (ii) a high level consultation; and

    (iii) report the results of its work to Convocation, including, as appropriate, proposals and recommendations for next steps.

Meetings Held by the Alternative Business Structures Working Group

Australia Background Meetings – July 16, 2012 and November 6, 2012

- Steve Mark, Legal Services Commissioner, New South Wales (by telephone Nov. 6, 2012)
- Tahlia Gordon, Research and Projects Manager, Office of the Legal Services Commissioner, New South Wales (by telephone Nov. 6, 2012)

England & Wales Background Meeting – December 10, 2012

- Chris Kenny, Chief Executive, Legal Services Board, England and Wales (by telephone)
- Samantha Barrass, Executive Director, Solicitors Regulation Authority1 (by telephone)

United States Background Meeting – January 8, 2013

- Professor Paul Paton, Professor, and Director, Ethics Across the Professions Initiative, Pacific McGeorge School of Law (by telephone)
- Professor Laurel Terry, Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law (by telephone)

Legal Futures Meeting – February 12, 2013

- Mitch Kowalski, author of Avoiding Extinction: Reimagining Legal Services for the 21st Century
- Jordan Furlong, strategic consultant and author of Law21 blog

Meeting with the Equity Advisory Group ("EAG") – August 14, 2013

- 12 participants – individual and organizational representatives

Meeting with Sole Practitioners and Small Firms from Various Regions – August 26, 2013

- 9 participants

[1] Samantha Barrass will become the Chief Executive of the Gibraltar Financial Services Commissioner in February 2014.

Meeting with Legal Organizations – August 26, 2013[2]

The following organizations were represented:

- Association of Corporate Counsel Canada
- County & District Law Presidents' Association
- Criminal Lawyers Association
- Family Lawyers Association
- Ontario Bar Association
- Ontario Trial Lawyers Association
- Paralegal Society of Ontario
- The Advocates Society
- Toronto Lawyers Association

Meeting with Large Law Firm Representatives – August 27, 2013

The following law firms were represented:

- Blake, Cassels & Graydon LLP
- Borden Ladner Gervais
- Dentons Canada LLP
- Gowling, Lafleur Henderson LLP
- McMillan LLP
- Miller Thomson LLP
- Norton Rose Fulbright LLP
- Stikeman Elliott LLP

Meeting with Representatives of Law Firms With 25-100 Lawyers – August 27, 2013

The following law firms were represented:

- Fogler Rubinoff LLP
- Gardiner Roberts LLP

[2] The Licensed Paralegal Association of Ontario was also invited to attend, but was unable to participate due to scheduling issues.

- Siskinds LLP
- Thomson Rogers
- Weir Foulds LLP

ABS Symposium – October 4, 2013

- 42 participants from firms, legal organizations, and others

Symposium on Alternative Business Structures for Delivery of Legal Services

Symposium Agenda

The Law Society of Upper Canada | Barreau du Haut-Canada

Co-Chairs: Malcolm Mercer and Susan McGrath
Friday, October 4, 2013
Donald Lamont Learning Centre, The Law Society of Upper Canada, Toronto, Ontario

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8:00 – 9:00 a.m. REGISTRATION AND BREAKFAST

8:45 – 9:00 a.m. OPENING REMARKS

- Thomas G. Conway, Treasurer, The Law Society of Upper Canada

Panel 1: Survey of the ABS landscape in England and Wales, Australia, the U.S. and Canada

9:00 – 10:30 a.m.

- Professor John Flood (University of Westminster)
- Professor Laurel Terry (Penn State Dickinson School of Law)
- Professor Paul Paton (Pacific McGeorge School of Law)

10:30 – 10:45 a.m. MORNING BREAK

Panel 2: The effect of regulating business structures on the supply and cost of legal services

10:45 a.m. – 12:15 p.m.

- *Economic Implications of ABS:*
  Professor Edward Iacobucci/Professor Michael Trebilcock (Faculty of Law, University of Toronto)
- *Access to Justice and current issues in litigation financing:*
  Jasminka Kalajdzic, Associate Professor (Faculty of Law, University of Windsor)
- *Innovation in Legal Service Delivery:*
  James Peters, Vice-President, New Market Initiatives, Legal Zoom

12:30 – 1:30 p.m. LUNCH

Panel 3: Can we liberalize regulation and still protect legal ethics?

1:30 – 3:00 p.m.

- Discussion of current regulatory restrictions and alternative approaches to referral fees, fee splitting, supervision, law firm ownership, and whether legal professional corporations should be limited to performing legal services.
- *Facilitator*:
  Professor Pamela Chapman, University of Ottawa Faculty of Law, Common Law Section.
- *Presenters*:
  Amy Salyzyn (J.S.D. candidate, Yale Law School)
  Noel Semple (post doctoral research fellow, University of Toronto and visiting Scholar in Residence, Centre for the Legal Profession, University of Toronto Faculty of Law)

3:00 – 3:15 p.m. AFTERNOON BREAK

3:15 – 4:00 p.m. WRAP UP

AN ECONOMIC ANALYSIS OF ALTERNATIVE BUSINESS STRUCTURES FOR THE PRACTICE OF LAW

Edward M. Iacobucci and Michael J. Trebilcock
University of Toronto
Faculty of Law

September 20, 2013

This paper was commissioned by The Law Society of Upper Canada ("Law Society") for the Alternative Business Structures symposium held on October 4, 2013. All opinions expressed in the paper are those of the authors alone and not of the Law Society.

TABLE OF CONTENTS

I. INTRODUCTION

In this Report, we consider the economic advantages and disadvantages of alternative business structures for the practice of law. The question of the form that a legal practice takes undoubtedly engages a wide variety of policy considerations, including ethical questions, that are not necessarily confined to the economic realm. We set these other considerations to the side and focus only on the prospective economic benefits and costs of different structures. Our analysis, then, does not attempt to provide final answers to policy questions associated with alternative business structures, but rather simply offers insights from the realm of economic analysis that may be helpful in reaching an overall policy conclusion about alternative business structures. Of course, economic and non-economic concerns may be related in important ways. For example, to the extent that economic efficiencies from alternative structures lead to lower costs of providing legal services, and lower costs lead to lower prices for buyers of legal services, alternative structures may promote access to justice.[1] Our focus, however, is on the economic considerations, with only occasional reference to other, potentially very important, non-economic policy concerns.

We begin in Part II by discussing economic thinking on two related matters. The first is the economic theory of the firm. This body of thought concerns the question of what economic activities are best situated within a firm, and what economic activities are best situated outside the firm. For example, should an auto manufacturer produce its own sound systems, or should the company buy systems from a third party? This turns out to be a more difficult question than it may initially appear to be. The second issue we discuss in Part II is the economics of capital

[1] See, e.g., Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98 Michigan Law Review 953. We return to access to justice in the Conclusion.

structure. What considerations affect the economically optimal capital structure (e.g., distribution of equity ownership, the debt-equity ratio) of a firm?

In Part III we outline various business structures that legal service providers might consider adopting. In this section we review not only the kinds of structures that are permissible under Ontario law, but also structures that are not permitted here but are elsewhere.

Part IV builds on the foundation laid in Parts II and III by offering an economic analysis of alternative business structures for legal practice. This section essentially applies the economic analysis of Part II to the array of alternative business structures outlined in Part II in order to gain insight into the economic advantages and disadvantages of different structures. Part V concludes by summarizing, and by touching on the politics of reform, noting that even if liberalization of the choice of form for legal practice led to the demise of certain business structures, it would not necessarily be a bad thing, especially in the longer run, for lawyers at such doomed structures.

II. THE THEORY OF THE FIRM

Ronald Coase posed a deceptively vexing question in a seminal article in 1937[2]: why are some transactions consummated in the market between two separate parties, and why are some transactions consummated within a firm?[3] This question has spawned a host of responses without a single right answer, but with certain strains of thought emerging as prominent pieces of the puzzle. It is essential when attempting to gauge the economic impact of regulatory restrictions on the structure of legal firms to understand as a preliminary matter the considerations that help determine the optimal economic structure of a firm. This section

[2] He actually posed the question as an undergraduate student in 1932: see Phillippe Aghion and Richard Holden, "Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?" (2011) 25 The Journal of Economic Perspectives" 181 at 181.
[3] Ronald Coase, "The Nature of the Firm" (1937) 4 Economica 386.

introduces the basic ideas behind the theory of the firm that have emerged in the economic literature.

There is a related question that this section will also canvass. One can crudely think of the theory of the firm as seeking to identify what economic activity will take place within a firm. There is a related question. Assuming that there are a range of passive investors in the firm (not just owner-managers), how is their investment to be structured? For example, how much debt versus equity should a firm issue? This question is also more complex than may meet the eye. This section will review some of the basics of this matter in order to lay a foundation for discussion of the optimal ownership structure of law firms in Section III.

a) Theory of the Firm

i) Lower Transaction Costs vs. Market Pricing

Coase himself began to answer the question of why some transactions take place within a firm and some outside it by considering a key difference between the transactions.[4] Transactions that arise within the firm result from managerial exercise of authority, while transactions that take place outside the firm rely on contracts and consequential haggling between arm's length parties. There are advantages and disadvantages to each.

To illustrate, consider an example that we will return to throughout the discussion. Suppose there is a car manufacturer, General Motors, that requires sheet metal auto body forms to assemble its cars.[5] It has two basic options at polar extremes. It could itself build a factory capable of producing the sheet metal forms that are necessary for its cars. Or it could instead enter into a contract to buy the forms from an arm's length sheet metal manufacturer. There are

[4] Coase, *supra*.
[5] The relationship between GM and Fisher Auto Body is a famous example in the literature on the theory of the firm beginning with the discussion in Benjamin Klein, Robert Crawford and Armen Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process" (1978) 21 Journal of Law and Economics 297.

a range of options in between these basic possibilities. For example, GM could not vertically integrate the body supplier completely, but could take an equity interest in it, perhaps a minority interest that helps align the economic interests of GM and its supplier. Relatedly, GM and the supplier could form a joint venture of some kind. For example, GM and the supplier could each take a significant ownership stake in an organization, another corporation, or a partnership, that is specifically created to supply GM with auto body forms. These intermediate options, which are neither complete integration nor arm's length contracting, may in certain circumstances optimally resolve the competing economic tensions that arise, and that we will describe, when deciding how best to integrate activities within a form. To illustrate the basic considerations that motivate decisions on firm scope, however, we will focus on the basic choice of full integration or arm's length contracting.

An important advantage of building the sheet metal bodies in-house is that the managers at GM do not need to haggle over price, or over changes in design over time. Rather, they can build the appropriate factory, and hire the appropriate employees with the appropriate instructions to build the metal forms necessary for the cars. Coase observed that building the input in-house reduces transaction costs associated with the production of the metal.

On the other hand, the price mechanism is a vitally important source of information for economic decision-makers. While entering into a contract with a third party for the production of the metal forms may create transaction costs, the price that GM enters into for the metal forms gives GM information about the opportunity costs of using that sheet metal. If the price is $X per sheet, GM has precise confidence about the opportunity costs of that input in its automobile.

If the sheet metal is sourced in-house, in contrast, it may be much more difficult to discover exactly what the opportunity cost of sheet metal is. For one, GM must attribute

overhead costs to the production of the metal. For another, GM must calculate the opportunity cost of assigning an employee to produce an additional piece of sheet metal rather than some other input, like a windshield. Determining the economic cost of the input is much more difficult when the price mechanism is suppressed in an in-house transaction than when purchased at arm's length.

Thus, Coase identified a trade-off: the firm will weigh the advantages of lower transaction costs against the disadvantages of losing the information provided by the price mechanism, and the boundaries of the firm will be set accordingly. For some matters, the transaction costs of contracting out will exceed the benefits of information provided by the price mechanism, while for others the reverse will be true.

ii) Relationship-Specific Investments

Oliver Williamson identified another important consideration in the theory of the firm: the importance of relationship-specific investments.[6] In many longer term economic relationships, parties must make investments that maintain their value only if the relationship continues. To explain, consider again the GM example. Suppose that GM needs sheet metal of certain dimensions and shape to assemble bodies for a particular model of a car. To build that sheet metal body, suppose that specific moulds must be created at significant cost. Now consider a third party, call it Fisher, that vies to supply GM with the specific sheet metal forms. The supplier, before it can sell anything to GM, must build the moulds. The problem Fisher faces is that the moulds are virtually worthless outside the relationship with GM: they are specific to the relationship with GM. The supplier faces a dilemma: build the moulds and then hope GM buys its sheet metal, or do not build the moulds and be incapable of selling these parts to GM.

[6] For his best-known work, see Oliver Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: The Free Press, 1975).

The dilemma is made worse by the realization that once it has built the moulds, GM can lowball it on price. Fisher would only want to build the moulds and sell to GM if it anticipated prices for the products that compensate it not only for the per-unit costs of each additional sheet metal form (eg, steel costs, employee's time, etc.), but also for the up-front costs in building the specific moulds. Once Fisher has undertaken the investment in the moulds, however, GM is in a position to offer prices that cover only the variable costs of producing the steel: Fisher would accept because the costs of the moulds is sunk, and Fisher makes more money going forward accepting than rejecting the lowball offer.

Before investing in the moulds, Fisher would anticipate the future "hold-up" problems that result from having made sunk, relationship-specific investments. There are two basic ways of dealing with the so-called hold-up problem. One, before Fisher invests, Fisher and GM can enter into a long-term contract that specifies GM's obligations, including prices and quantity demanded, over time. While such contracts can, and often do in practice, resolve some of the concerns about ex post opportunism by GM, they are not easy contracts to write and enforce. Take something as simple as pricing. Many factors would influence the appropriate market-mimicking price over time, such as the price for raw materials, and demand for the moulded sheets. Long-term, detailed contracts are costly to write and enforce, and may result in prices or other conditions that are out of alignment with other market forces, which may create tensions and disputes.[7]

An alternative option is vertical integration. Rather than GM and Fisher attempting to strike a contract that protects the interests of both parties, they can instead choose to combine their operations within a single firm. The single entity, call it GM-Fisher, can build the moulds

[7] See, e.g., Victor Goldberg and John Erickson, "Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke" (1987) 30 Journal of Law and Economics 369.

itself, and simply transfer them to the car construction arm of the entity. This avoids the hold-up problems that sunk, up-front investments otherwise invite. Williamson's analysis provides another important reason why economic activity would be organized within a single firm rather than on the market.

iii) Private Investment in Joint Gains

A third theory, attributed in large part to Grossman and Hart,[8] also concerns incentives to invest associated with firm ownership of an asset. This theory concerns incentives to invest in an asset that will enhance the value of the asset. The investments are valuable, but are not susceptible of contracting; efforts could be impossible to verify in court, for example. The asset could be a physical asset, or it could be intangible. Of the latter type, Grossman and Hart provide the example of a customer list. Should the list of an insurance salesperson be owned by an insurance firm, or by the salesperson herself? There is a trade-off in that both the firm and the salesperson can make investments to improve the list, but the incentives to do so vary with ownership of the list. If, for example, the company owns the list, it will have stronger incentives to advertise broadly and grow the list; as the list grows, the company will profit, not the salesperson, because the salesperson would only have access to the list with the company's permission. Conversely, if the salesperson owns the list, she will have stronger incentives to knock on doors in order to grow the list and knows that such investments are profitable to her personally; if the company refuses to compensate for her efforts, she can take the list elsewhere. Grossman and Hart predict that whether the list will be owned by the firm or not will depend on the relative importance of the incentives to make investments in the list. If the insurance provider's incentives matter more to the value of the list, it will own the list. This may in turn

[8] See Sanford Grossman and Oliver Hart, "The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration" (1986) 94 Journal of Political Economy 691.

affect the boundaries of the firm; a natural implication might be in-house sales staff, for example. On the other hand, if the salesperson's efforts and incentives matter more, it would be more natural to have an independent sales force that owns its customer lists.

iv) Culture and Reputation

These theories illustrate the basic economic approaches to firm boundaries that emphasize the gains or losses that result from integrating economic activity within a firm rather than coordinating the activity through a contract between arm's length actors. There are many nuances within this approach, and moreover many theories that do not depend so heavily on the contract-integration divide. Space does not permit development of these alternatives in detail, but one alternative is worth mentioning. The term "firm culture" can be thought of as capturing the informal norms that prevail at the firm,[9] which are independent of formal contracts between different members of the firm, but may interact with these formal contracts. Employees may, for example, have formal contracts with the employer, and informal understandings may inform the enforcement of those contracts. Certain kinds of activity may best be promoted within a certain culture, and mixing cultures, which would be implied by integrating the different activities within a single firm, may not be appropriate. For example, if an individual's output is easily measured, perhaps because quality is easy to discern, and because teamwork is relatively unimportant, it may be suitable for the firm to have an individualistic culture that stresses individual rewards for individual performance. If, however, teamwork is vital to production, such a culture would be inappropriate.

A related consideration that may affect the boundaries of the firm concerns reputation. If a single firm develops a reputation for behaving a certain way, perhaps it is known to provide

[9] See, e.g., Ronald Daniels, "The Law Firm as an Efficient Community" (1991) 37 McGill Law Journal 801.

high quality products, for example, there may be a risk to that firm's reputation by extending into other economic activities.[10] Selling a second product may tempt the firm to renege on its reputational commitments because selling the additional product may change the short run gains from "cheating," making this the profitable strategy, not providing more costly high quality. On the other hand, it is also possible that engaging in multiple economic activities may *enhance* the incentives to maintain a good reputation with buyers. If a firm sells different products in different periods of time, for example, then selling multiple products strengthens the commitment to provide high quality: in any point in time, the firm's whole reputation is on the line for the sale of only a subset of products; better to provide high quality and protect the firm's reputation across product lines than to chisel and realize only modest short run gains from selling only a subset of the firm's products.[11]

b) Capital Structure

We have reviewed some of the general theories of the firm, which attempt to explain why some economic activity takes place inside the firm and other activity outside the firm. There is a related, though distinct, question of how the firm structures its financing. That is, given a set of economic activities within a firm, how does the firm finance those activities? In some settings, the theory of the firm and of capital structure are intimately related.[12] If two lawyers form a general partnership, for example, such a decision would affect both the boundaries of the firm, and the capital structure of the firm – there would be two partners that own the equity interest in the firm. But in general the choice of whether to combine economic activities within a firm, and

[10] See, e.g., Hendrik Hakenes and Martin Peitz, "Umbrella Branding and the Provision of Quality" (2008) 26 International Journal of Industrial Organization 546.
[11] Edward Iacobucci, "Reputational Economies of Scale, with Application to Law Firms" (2012) 14 American Law and Economics Review 302.
[12] Michael Jensen and William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305.

the choice of capital structure of that firm, raise distinct questions. GM may integrate with Fisher, but that does not answer important questions about debt-equity ratios, the concentration of equity ownership, bank debt versus public debt, etc. In what follows, we outline some considerations that influence the optimal capital structure of a firm.

i) The Irrelevance Benchmark

Modigliani and Miller ("M&M") demonstrated that, under certain conditions, including an absence of taxation, perfect competition and perfect information about investments, the choice of capital structure, debt versus equity financing for example, is irrelevant to firm value.[13] The result is not especially important in predicting real world outcomes since the assumptions are not realistic, but it is a helpful benchmark against which to assess why capital structure may affect value in practice. The basic intuition behind the M&M theorem is as follows. A firm will have a certain pattern of cash flows over time, patterns that will not be influenced by capital structure since capital structure simply divides proceeds of economic activity and does not (as a consequence of assumptions of market perfections) affect the proceeds. Capital structure merely divides the cash flows across different investors and does not affect overall value. As Miller observed, the logic of the M&M irrelevance theory is indicated by a famous Yogi Berra observation: when asked whether he wanted a pizza sliced into four or eight slices, he replied eight since he was hungry that night.[14]

ii) Debt Financing

In reality, capital structure matters. This is because there is taxation, and because there are information problems that manifest themselves in two ways. Outside investors do not have

[13] Franco Modigliani and Merton Miller, "The Cost of Capital, Corporation Finance and the Theory of Investment" (1958) 48 American Economic Review 261.
[14] Dun Gifford Jr., "After the Revolution" CFO Magazine, July 1, 1998: http://pages.stern.nyu.edu/~adamodar/New_Home_Page/articles/MM40yearslater.htm.

as good an information set about the firm's prospects as insider managers, and because outsiders have only imperfect information about their managerial decisions, managers of a firm may be able to make decisions that are valuable from their selfish perspective, but may reduce overall value; this self-interested behaviour leads to so-called "agency costs."[15] In this section, we briefly review some of the key considerations that make the choice of debt financing more attractive to entrepreneurs.

Tax creates an important bias in favour of debt over equity financing. Firms can write off interest payments to creditors, interest which provides creditors with the returns necessary to induce them to invest in the first place, as an interest expense for tax purposes. The returns that are paid to shareholders, such as dividends, in contrast cannot be treated as an expense for tax purposes. There is a structural advantage to debt financing: all things equal, distributions to investors as interest increases the after-tax value of the corporation relative to dividends.

There are also informational advantages associated with debt financing.[16] Suppose that outside investors cannot tell whether a particular enterprise will return $15 or $30, but inside managers have good information about the venture's worth. If the firm seeks to sell shares, which results in existing shareholders sharing in the proceeds with new shareholders, new shareholders will be suspicious that the true value is more likely to be $15, since old shareholders with good information about firm value would be reluctant to share with new if the value were $30.[17] To avoid suspicion about old shareholders only being willing to sell shares when values are low, old shareholders can instead issue debt. Creditors do not share in the upside of the firm's performance, and thus it will be easier, as a general rule, for them to value

[15] Jensen and Meckling, *supra*.
[16] Stewart Myers and Nicholas Majluf, "Corporate Financing and Investment Decisions When Firms Have Information That Investors Do Not Have" (1984) 13 Journal of Financial Economics 187.
[17] This logic was originally outlined in George Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 Quarterly Journal of Economics 488.

the debt even if insiders are better informed typically. In the example, creditors would be willing to lend $15 without concern, knowing that in either state of the world, they will be paid in full.

Other advantages of debt relate to disciplining managers. Managers, once they no longer hold all the financial stakes in a business, may be tempted to make self-interested, yet value-reducing decisions, such as overconsuming perquisites on the job, empire-building, or avoiding risks that jeopardize their positions. Debt can help discipline managers in different ways. For one thing, debt obligations to pay out steady streams of cash flow may address a manager's temptation to otherwise keep cash in the company, perhaps as a buffer against risk, perhaps to help build empires, or both.[18] For another, the more debt financing there is, the easier it will be for equity ownership to be relatively concentrated, rather than dispersed.[19] A relatively-cash poor entrepreneur that finances an enterprise through debt may be able to retain a significant percentage of shares. Concentrating share ownership in the hands of management, as we discuss further below, tends to provide management with stronger incentives to increase the value of shares. Debt may thus be valuable by allowing such concentration. Finally, creditors may monitor management, which helps reduce agency costs directly, and may reveal information to other monitors such as equity-holders so that they can act to discipline management.[20] For example, if a bank refuses to extend a line of credit, this may signal problems at the firm to other stakeholders.

There are, of course, disadvantages to debt finance. For one, there are bankruptcy costs. If the firm cannot pay its debts, it will enter a bankruptcy or reorganization process, which is costly and will reduce the value of the firm as a result. For another, the presence of debt may

[18] Michael Jensen, "Agency Cost of Free Cash Flow, Corporate Finance, and Takeovers" (1986) 76 American Economic Review 323.
[19] Jensen and Meckling, *supra*.
[20] George Triantis and Ronald Daniels, "The Role of Debt in Interactive Corporate Governance" (1995) 83 California Law Review 1073.

induce excessive risk on the part of managers who are looking to maximize share value.[21] This is because downside risk is shared with creditors, while upside risk is realized by shareholders; creditors have only a fixed claim. To take an extreme case, if a firm owes $100 in debt, but has only $5 in assets, a manager might well prefer to invest in a lottery ticket that is a negative expected value investment, but will pay off generously to shareholders in the very unlikely chance it is a winner. A miniscule chance of realizing value for shareholders is better than a zero chance. Debt thus tends to create perverse incentives for shareholders to engage in excessive risk that lowers the overall value of the company.

There is an important qualification to this discussion of the risk-inducing properties of debt: it is premised on limited liability for shareholders. If, for example, equity-holders had unlimited liability for the firm's debt, this would mitigate the incentives to assume excessive risk: if the risky debt does not pay off, equity-holders remain personally on the hook to creditors, which reduces their incentives to take on excessive risk. Limited liability is thus an important consideration in evaluating the economic costs and benefits of different capital structures. Limited liability puts more risk on creditors and less on equity-holders, which may have positive effects if creditors are better able to bear risk, but may also be negative by inviting excessive risk-taking.

iii) Equity Financing

While not all for-profit businesses carry debt (though most do), all for-profit businesses have equity-holders who are the residual financial claimants: they get paid after all other fixed claimants have been paid in full. The economic question with equity investment is therefore not so much whether it should be issued, but how it should be structured.

[21] Jensen and Meckling, *supra*.

One question is the extent to which equity should be concentrated or diffuse. There are three basic models with advantages and disadvantages. Equity could be concentrated in the hands of very few investors. This has the advantage of creating strong incentives for these investors to monitor management, since each has a significant stake in the value of the enterprise. It has the disadvantage, however, of exposing these investors to potentially significant risk, which is not desirable all else equal. Concentrated ownership may also be problematic, or at least difficult to achieve, if the principals behind a business require outside capital, and debt financing is problematic.

An intermediate structure would have a controlling shareholder, along with diffuse minority shareholders. Such a structure allows the controlling investor to mitigate some of its exposure to the company's risk by selling minority equity stakes, but maintains the presence of an investor with strong incentives to monitor the company's progress. A further advantage of this structure is that the market in the firm's equity provides information to investors about the performance of management. If, for example, shares in all bank firms but one are rising, this would tend to indicate less than stellar management at the one firm. The problem, however, is that with such structure, management is irreplaceable without consent of the controlling shareholder. Especially where the manager is the controlling shareholder, such consent may not be forthcoming. As a consequence, the controlling shareholder may be able to extract value from the minority without fear of consequence.

A final possibility is widely held equity. This structure creates the most opportunity for risk diversification, since no single shareholder owns a significant percentage of shares. There is also the prospect of forcing underperforming management out, perhaps through a hostile takeover (perhaps invited by underperforming shares), perhaps through a proxy contest. On the

other hand, with no single shareholder owing a significant percentage of the company, there is a danger that there will be little monitoring of management, especially given the costs and therefore relative rarity of proxy contests and hostile takeovers.

III. ALTERNATIVE BUSINESS STRUCTURES FOR THE PRACTICE OF LAW

In a voluntary survey of lawyers in 2009 by the Law Society of Upper Canada, which attracted a response rate of 51 percent, the survey found that of lawyers working in private practice:

- 18 percent reported as working as sole practitioners
- 11 percent report working at firms of 2 to 5 lawyers
- 4 percent reported working at firms of 6 to 10 lawyers
- 4 percent reported working at firms of 11 to 20 lawyers
- 3 percent reported working at firms of 21to 50 lawyers
- 2 percent reported working at firms of 51 to 100 lawyers
- 4 percent reported working at firms of 101 to 200 lawyers
- 6 percent reported working at firms of 201 or larger[22]

Assuming that that these numbers are broadly representative, it is clear that a disproportionate percentage of private legal practitioners in Ontario operate as sole practitioners or work at small firms. We now set out below the principal business structures that have emerged in Ontario for the provision of legal services, and describe alternative business models that have emerged in jurisdictions beyond Ontario that are presently restricted in this jurisdiction.

[22] *Statistical Snapshot of Lawyers in Ontatio: From 2009 annual report*, online: The Law Society of Upper Canada < http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485403>.

a) Unincorporated Sole Proprietorships

A sole proprietor or sole practitioner owns and operates his or her professional practice alone in unincorporated form, and is subject to very few formal business registration requirements. As noted above, sole proprietorships remain today a prominent feature of the legal landscape in Ontario, but are not mandated in any context. This is in contrast to the traditional rules that have applied in the UK, and some other jurisdictions, with a divided legal profession of solicitors and barristers (or advocates), where barristers have often been required to operate as sole practitioners (albeit often operating in group chambers, with shared overheads). The UK Office of Fair Trading has been critical of prohibitions on barristers forming partnerships with other barristers, or forming partnerships with solicitors, and recent regulatory changes have liberalized the rules in this respect, including liberalizing the rules pertaining to rights of audience of solicitors in most UK courts and tribunals. Obviously, an unincorporated sole proprietorship, with unlimited liability, entails risks to the personal assets of the sole proprietor from liabilities (such as professional negligence) incurred in the course of his or her legal practice, and can only draw on external sources of debt capital.

b) General Partnerships

Lawyers entering into a partnership with other lawyers may do so under the *Partnership Act*[23], and indeed historically this has been the most common form of group practice. With a general partnership, every partner in the law firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner, including liability for the negligence of other partners. While this obviously entails risks for each partner with respect to errors and omissions of other partners, including risks to personal assets, in principle it creates

[23] *Partnership Act*, RSO 1990, c P.5.

strong incentives for mutual monitoring by partners of each other's integrity and competence. Because all partners must be lawyers, the only source of external capital is debt capital (e.g., bank loans). In limited contexts, third party financiers (e.g., hedge funds) may finance litigation undertaken by a law firm in return for a share of any ultimate award or settlement, in effect shifting some of the litigation risks from lawyers and their clients to an external entity.[24] Often general legal partnerships form management companies to hold most assets of the legal practice and hire support staff and provide agreed space and services to the legal partnership as determined by contract (thus shielding assets from partnership liabilities).

c) Limited Liability Partnerships

As of 1998, lawyers in private practice in Ontario have been able to form limited liability partnerships with other lawyers, subject to minimum mandatory errors and omissions insurance coverage, and many law firms have subsequently adopted this legal form. Limited liability partnerships amongst lawyers have now also been widely permitted in many other Canadian and foreign jurisdictions. In the case of a limited liability partnership, a partner can generally still be held liable for his or her own negligent or wrongful act or omission; the negligent or wrongful act or omission of a person under the partner's direct supervision; or the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner's direct supervision if a) the act or omission was criminal or constituted fraud, or b) the partner knew or ought to have known of the act or omission and did not take the actions that a

[24] See Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian, and US third Party Litigation Funding" (2012) 61 *American Journal of Comparative Law* 93; Michael Trebilcock and Elizabeth Kagedan, "An Economic Assessment of Third Party Litigation Funding of Ontario Class Actions" (*Canadian Business Law Journal*, symposium issue, forthcoming).

reasonable person would have taken to prevent it. However, with these exceptions a partner is not liable for the debts, liabilities or obligations of the partnership or any partner.[25]

d) Professional Corporations

The *Law Society Act*[26] permits the incorporation of legal entities to provide legal services, provided that all the shareholders are members of the Law Society of Upper Canada and also directors of the entity. In Alberta, spouses and children of lawyer-shareholders may own non-voting shares.[27] Family members of physicians and dentists in Ontario also may own shares in a professional corporation.[28] This is not so for lawyers in Ontario. The *Ontario Business Corporations Act*[29] that provides for the creation of professional corporations states that the liability of a member for a professional liability claim is not affected by the fact that the member is practicing a profession through a professional corporation and remains jointly and severally liable with a professional corporation for all professional liability claims made against the corporation while the person was a shareholder. Hence, the risks borne by shareholders in a professional legal corporation are essentially the same as those borne by partners in a general partnership, and are more expansive than those associated with limited liability partnerships. The principal advantage of a professional corporation for lawyers appears to relate to tax liability.

e) Business Corporations with Limited Liability

[25] See Poonam Puri, "Judgment Proofing the Profession" (2001) 15 *Georgetown J. of Legal Ethics* 1.
[26] *Law Society Act*, RSO 1990, c L.8.
[27] See *Legal Profession Act*, RSA 2000, c L.8 s 131(3)(f).
[28] Since January 1, 2006, O. Reg. 665/05 has exempted physicians and dentists from the requirement under the *Business Corporations Act* that the shares in a professional corporation be owned by members of the regulated profession. See http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_050665_e.htm
[29] *Business Corporations Act*, RSO 1990, c .16.

Ontario does not currently permit ordinary business corporations with limited liability to provide legal services. They are, however, permitted in other professions in Ontario. Professional engineers, for example, can and do form corporations with limited liability in Ontario.[30] Moreover, legal service corporations with limited liability are permitted in other jurisdictions.

A number of US states allow Limited Liability Companies (LLC's). LLC's combine elements of a limited liability partnerships and corporations. Stock in the company is held by lawyers, who may or may not participate in management. States vary in allowing lawyers to form LLC's. The LLC is still subject to vicarious liability, but the owners' personal assets are protected, and individual lawyers are subject in many states to continuing supervisory liability (much as is the case with limited liability partnerships in Ontario).[31]

The Australian states and territories and the UK, in recent reforms, have authorized incorporated legal practices, with full limited liability, and recent estimates suggest that more than 20 percent of all legal practices have now been incorporated as limited liability entities.[32] Shares in these corporations need not be owned exclusively by lawyers (in the case of Australia, typically one director must be a lawyer), although individual lawyers working for such entities remain responsible for compliance with professional codes of conduct and continue to be subject to civil liability for their own errors and omissions, and presumably the corporate entity itself is

[30] See, e.g., *Professional Engineers Act* R.S.O. 1990, c. P.28, s. 13: "A corporation that holds a certificate of authorization may provide services that are within the practice of professional engineering."
[31] Larry Ribstein, "Ethical Rules, Law Firm Structure and Choice of Law" (2001) 69 *University of Cincinnati Law Review* 1161 at 1170-1171; See also Bryan Smith, "The Professional Liability Crisis and the Need for Professional Limited Liability Companies: Washington's Model Approach" (1995) 18 Seattle UL Rev 557 at 575-576.
[32] In NSW Incorporated Legal Practices make up 18% of all law firms. See Steve Mark, *A short paper and notes on the issue of listing of law firms in New South Wales, online:* Office of the Legal Services Commissioner New South Wales <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes_for_joint_nobc_aprl_aba_panel.pdf> [*Steve Mark*].

also vicariously liable for errors and omissions of its professional and other employees.[33] The issue of non-lawyer ownership of business entities providing legal services is sufficiently important, recent, and contentious as to warrant separate discussion.

f) Non-Lawyer Ownership of Corporate Entities Providing Legal Services[34]

The great majority of incorporated legal practices that have emerged in the UK and Australia in recent years with non-lawyer ownership have been small entities where non-lawyer employees or family members become shareholders or managers. In some cases insurance companies or claims adjusters have acquired law firms that were previously on retainer to them. However, there have been a few striking exceptions to the predominantly small scale of incorporated legal practices in these jurisdictions. For example, in Australia Slater and Gordon became the first firm of lawyers to be floated on a stock exchange when in 2004 it issued AUD $35 million of AUD $1 shares. Subsequently, Slater and Gordon began acquiring legal practices across Australia, and in 2012 and 2013 acquired significant English personal injury firms.[35] It now employs 1,350 staff in 69 locations, and serves predominantly the civil legal needs of individuals, such as conveyancing, family law, estate law, and plaintiff-side personal injury matters.[36] Two other Australian law firms have now been listed on a stock exchange.[37]

In the case of the UK, Cooperative Legal Services, the legal arm of the Cooperative Group, which includes Britain's fifth largest supermarket chain as well as banking and insurance

[33] *Steve Mark, ibid*; *Legal Services Act*, 2007 c.29.
[34] This section draws heavily on Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar, forthcoming), chap. 8 and Noel Semple, "Access to Justice: Is Legal Service Regulation Blocking the Path?" (Draft Paper, University of Toronto Law School, 2013).
[35] http://www.legalfutures.co.uk/latest-news/slater-gordon-set-acquire-fentons-extend-reach-uis/print/.
[36] Stephen, *ibid* at 176; Semple, *ibid* at 28.
[37] Shine Corporate and Rockwell Olivier, ASX, *ASX Welcomes Shine Corporate Limited*, online: <http://www.asx.com.au/documents/research/shine-corporate-limited-new-listing-media-release.pdf>; Lawyers Weekly, *Listed Firm Rockwell Olivier launches in OZ*, online: < http://www.lawyersweekly.com.au/news/listed-firm-rockwell-olivier-launches-in-oz>.

businesses, was authorized as an Alternative Business Structure in 2012. The Cooperative Group is owned by 6 million consumer members. It provides legal services to individuals, including extensive online advisory services, and plans to open branch offices in many of the 300 offices of Cooperative Bank and the Britannia Building Society, with plans to employ 3,000 lawyers by 2017.[38] Another significant firm in the UK, Riverview Law, which serves commercial law clients, has proposed doubling in size over the next year by hiring up to 100 new employees.[39] BT Law, part of BT Group, a major UK telecommunications and internet service provider, has also been issued an Alternative Business Structures license. BT Law will be associated with BT Claims, the motor claims subsidiary of the group. Several other major brands or chains are expected to be licensed as ABSs in the course of 2013, including the major motoring breakdown and insurance provider, which currently has 16 million members.[40]

In Finland, banks and insurance companies, as well as other private and non-governmental organizations, can provide legal advice to their customers, although they cannot litigate on their clients' behalf. Simple civil matters, particularly in family and property law, are handled by bank lawyers on behalf of their non-business customers.[41]

In various western European jurisdictions, including most prominently Germany, France and Spain, major international accounting firms have acquired legal affiliates, which have in turn acquired a significant share of corporate legal services in these markets. However, this development is more conveniently discussed (below) as a separate business model involving multidisciplinary professional practices in contrast to the other examples of non-lawyer

[38] Stephen, *ibid* at 181.
[39] http://www.legalfutures.co.uk/latest-news/riverview-plots-major-expansion.
[40] *Ibid*, at 182.
[41] *Ibid*, at 179-180.

ownership of legal service entities discussed above, which all involve the provision exclusively or predominantly of legal services, as opposed to multidisciplinary professional services.[42]

g) Franchising

While not accorded much prominence in contemporary discussions of alternative business structures in the provision of legal services,[43] it is not difficult to imagine the emergence of franchising networks that may be non-lawyer owned. Such networks might grant franchises to owners and operators of local franchise branches (who may also be non-lawyers), and would provide headquarters support in terms of marketing, advisory and research services, somewhat analogously to H&R Block franchises in tax advisory and preparation services. Both the head office of the franchisor and the larger franchise offices might well employ lawyers on their staffs, but may also rely heavily on online and paralegal frontline services. Presumably, lawyers so employed would remain individually responsible for compliance with professional obligations, including supervisory obligations, as well as being subject to civil liability for their own errors and omissions; the franchisor and franchisees would also presumably be vicariously liable for errors and omissions of legal and other personnel employed by them.

An example of independently owned and operated firms working within a branded network is found in the UK with QualitySolicitors.[44] The network promises its over 200 member firms (and growing) access to national branding strategies, as well as other benefits of membership, including website support and buying power, but firms remain independent.[45]

h) Multidisciplinary Professional Practices

[42] *Ibid*, at 92-99.
[43] But see Gillian Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law" (2012) unpublished, found at http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=ghadfield.
[44] See their website at http://www.qualitysolicitors.com/.
[45] See http://files.qualitysolicitors.com/QualitySolicitors%20Info%20Pack.pdf.

As noted above, multidisciplinary professional practices have emerged in a number of western European jurisdictions, typically involving international accounting firms acquiring local legal affiliates. By virtue of the *Legal Services Act* of 2007 in the UK, multidisciplinary professional practices may now also qualify for an ABS license.[46] Where legal services are involved, the authorization of the Solicitors Regulatory Authority is required. Some multidisciplinary firms of accountants and lawyers have been approved. In Ontario, in contrast, under Law Society rules adopted in 1999 and 2000, multidisciplinary practices involving lawyers and non-lawyers are subject to two major constraints: first, the lawyer partners must be "in control" of the work undertaken by non-lawyer partners, and second, the services provided by the latter may only support or supplement the provision of legal services. In the case of a law firm that is affiliated with a non-legal entity (such as an accounting firm), the rules require that a legal licensee shall own the professional business through which the licensee practices law; maintains control over the professional business through which the licensee practices law; and carries on the professional business through which the licensee practices law from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the licensee. An affiliated law firm cannot share revenues, cash flows, profits, or provide compensation for referrals with the non-legal entity with which it is affiliated.[47] More generally, Law Society rules prohibit fee-splitting between lawyers and non-lawyers outside the exception for multidisciplinary partnerships.

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[46] Charles Plant, *Our Proposals for Alternative Business Structures*, online: Solicitors Regulation Authority < http://www.sra.org.uk/sra/news/plant-abs-proposals-speech.page>.
[47] *Rules of Professional Conduct* Rule 2.08(8), online: Law Society of Upper Canada <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489377>.

Similar rules have been adopted across a number of Canadian and US jurisdictions.[48] Both recent UK and Australian reforms on non-lawyer ownership of firms providing legal and other professional services stand in sharp contrast to the much more restrictive rules that prevail in North America. While the full or partial integration of accounting, related financial and management consulting, and legal services have attracted most of the attention in policy debates to date, many other combinations of professional practices are readily conceivable, including, for example, real estate agents, surveyors, mortgage financing providers and legal service providers in the provision of bundles of real estate-related services; or lawyers, financial advisors, and family counsellors in the family law area.

IV. THE POTENTIAL ECONOMIC ADVANTAGES OF ALTERNATIVE BUSINESS STRUCTURES

Part II of our paper reviewed two key economic areas of analysis that relate to organizational structure. First, we discussed the theory of the firm, which concerns the question of what kinds of economic activities will be organized within a firm, and what economic activities will take place outside firm boundaries. Second, we examined the economic advantages and disadvantages of various kinds of capital structures. Part III reviewed different business structures that are permitted within the present Ontario landscape, as well as alternatives that are permissible outside Ontario. In this section we bring the insights of the economic questions discussed in Part II to bear on the question of organizational structure of legal practice discussed in Part III. The goal of the analysis is to gain greater understanding of the potential economic advantages of alternative business structures from a theory of the firm and capital

[48] See Michael Trebilcock and Lila Csorgo, "Multidisciplinary Professional Practices: Consumer Welfare Perspective," (2001) 24 *Dalhousie Law Journal*, page 1; Kent Roach and Edward Iacobucci, "Multidisciplinary Practices in Partnerships: Prospects, Problems and Policy Options," (2000) 79 *Canadian Bar Review* at page 1.

structure perspective. In particular, we consider the typical models of firm practice both presently allowed, as well as alternatives that are not permitted in Canada but are elsewhere, with a view to understanding the economic advantages and disadvantages of each.

Before turning to a case-by-case examination of alternative models, we offer a number of preliminary observations. To begin with, from a purely economic perspective, it is not difficult to arrive at the conclusion that the optimal legal approach to the question of alternative structures for legal practice is to be broadly permissive. As is apparent from Part I, there are a host of factors that affect the economic optimality of a given structure, factors that will vary in importance across business contexts, and even conceivably across individuals (some lawyers may be more risk-averse than others, for example). Economics would therefore tend to recommend wide latitude for choice: let the principals in a given practice adopt the model that works best in their circumstances. (As we discuss further below, in making such choices, the principals would have economic incentives to account both for their own preferences but also those of their clients: all else equal, clients would not want to deal with a firm that has a structure that is not good for clients.)

To some extent, therefore, the analysis that follows is unnecessary to establish the policy proposition that, from an economic perspective, there should be no restrictions on the business structures of legal practices. Even if it turned out that in practice individuals continued to voluntarily adopt conventional structures that are presently permitted, this would not be an argument in favour of restricting choice; rather, it would simply be an argument that choice may not lead to radical change or radical improvement in economic performance. The analysis that follows should be understood as providing the affirmative case for liberalization in that it offers concrete reasons to suppose that some particular structures may have advantages over others,

depending on context, which in turn suggests that liberalization would bring economic advantages. In other words, it is not just that there is no economic argument opposed to liberalization, but also that there are reasons to expect economic gains from liberalization. The analysis does not claim to offer precise predictions about what structures would emerge in practice, or what the precise economic gains would be as an empirical matter. Rather, it offers reasons to suppose that liberalization has the potential to bring about real economic gains.

We appreciate, of course, that policy-makers may (and indeed should) consider factors other than economic gains when assessing optimal policy towards business structures. The rule of law has a fundamental role to play in society, and to the extent that business structures affect how lawyers support the rule of law, there are considerations related to the structure of legal practice that extends beyond dollars and cents. In what follows, we offer only a view of the economic costs and benefits of different structures, recognizing that there are other values that the law should take seriously. Our analysis is intended only to offer an input into answering the broad question of whether liberalization ought to be permitted, not an answer to that question.

That said, we note that some of the kinds of ethical considerations that have influenced policy towards business structures fit easily within an economic analysis. Take, for example, basic concerns about who bears liability for negligent legal services. It may be that the legal requirement of a partnership, and consequential personal joint and several liability for partners, including liability for negligence, is designed to promote the ethical performance of the lawyer's obligations. But there is an economic lens through which to view the requirement: clients want to ensure that the lawyer personally has incentives to ensure that the advice she and her partners gives is not arrived at negligently.

There will be economic incentives for a lawyer to adopt a form and liability status that maximizes the joint value of the relationship for lawyer and client. To explain, suppose that lawyers are not required by regulation to adopt a form that leads to unlimited liability for the lawyer, but that unlimited liability and the reassurance it provides is worth $100 to a client. If the risk that the lawyer faces as a consequence of unlimited liability costs her personally less than $100, say it costs $40, she would prefer to have unlimited liability: she can charge the client up to $100 more having adopted such status, while bearing costs of only $40. There is a joint gain of $60 from unlimited liability that will be divided between client and lawyer. On the other hand, if the risk of unlimited liability costs the lawyer $120, she and the client are jointly better off with limited liability: the maximum price that the client will pay for the lawyer falls by $100, but better this for the lawyer than incurring costs of $120 by adopting a partnership and unlimited liability. While it will depend on the circumstances, it is possible that lawyers would have economic incentives to adopt unlimited liability. To the extent that unlimited liability is desirable in promoting ethical behaviour, economics and ethical considerations align with one another.

It is clearly not true, however, that economic actors always have private economic incentives to pursue what amounts to an ethical course of action. For example, there may be weak private economic incentives to fulfill ethical obligations to third parties, such as the courts and the public, since by definition the client is not willing to pay for such conduct. But the example demonstrates two important points. One, ethical considerations may also be relevant for economic decision-makers, especially where they concern the lawyer-client relationship. Two, parties have private incentives to adopt terms in their relationship, including the form of the law firm and corresponding liability features, that maximize joint value. Obviously the form

that a lawyer adopts will affect all clients that it interacts with so the lawyer cannot maximize value from the business form in respect of all clients at all times, but the lawyer has incentives to choose the best form from a value perspective across clients.

Before embarking on the structural analysis, it is also worth observing that the strength of the case for liberalization will depend on other significant institutional questions. To take an example, consider how standardized substantive law is across varying circumstances. One could imagine rules of broad, mechanical application on the one hand, versus narrow standards that depend significantly on all the facts of a particular case, and ultimately on the judgment of a legal decision-maker, on the other hand. Now consider the efforts of a legal services provider to establish a technological means to provide legal advice. If the law is broadly applied and depends on mechanical application of clear criteria, it would be relatively straightforward for a provider to invest in a web-based application that could provide advice.[49] This in turn might call for a certain kind of firm structure that would be suitable for relatively significant investment in technological capital, and less need for human capital (we discuss this further below). On the other hand, if the law is idiosyncratic and depends on an exercise of judgment that may be difficult to predict, technological solutions, and the kinds of structures that are suitable for such solutions, are less likely to emerge in a liberalized environment.

Another, more prosaic consideration that will influence the choice of structure in practice is tax law. Tax law may favour some structures more than others. Incorporation, for example, can in effect allow principal shareholders to defer paying personal taxes on income by allowing retained earnings to accumulate within the corporation without tax at the shareholder level. We cite the tax and the technology examples not because they necessarily have special importance

[49] Existing online service providers, such as LegalZoom, tend to focus on less idiosyncratic legal questions, such as incorporating a business, though also offer individualized services where applicable.

but simply because they illustrate the kinds of considerations that will influence the choice of structure. The choices are not made in an institutional vacuum.

As a further observation on the specific question of tax, we in general will not spend much time assessing the tax implications of different business structures. This is not because tax is an insignificant consideration in practice when actors are establishing different business structures. Rather, we focus on non-tax considerations because they are, in our view, more important as a policy matter. Policy should be concerned about real economic gains to society, while tax minimization may not do anything positive for society. For example, it could be that the corporate form would better allow lawyers to minimize their tax bills relative to partnerships, but we would not view this, as a public policy matter, to be an advantage of the corporate form.[50]

There is one final observation that we will make before turning to an economic analysis of particular structures. The case for liberalization of business structures is sometimes said to rest in part on the effect of such liberalization in enhancing competition among legal service providers. In Australia, for example, it was the competition authority that was largely responsible for pressing the case for liberalizing the rules on law firm structures; in the UK, the Office of Fair Trading had adopted a similar stance. In our view, however, the relationship between the rules restricting the structure of permissible legal practice and competition are tenuous.[51] As a preliminary observation, it is important to distinguish between two related, but conceptually distinct restrictions on legal practice. First, there are restrictions on who is authorized to practice law. Second, there are restrictions on the kinds of business structures that

[50] As a possible corollary to this point, in our view there is a good argument that tax law should not induce firms to choose one structure over another, but rather should be neutral across forms. See, e.g., Benjamin Alarie and Edward Iacobucci, "Tax Policy, Capital Structure and Income Trusts" (2007) 45 Canadian Business Law Journal 1.
[51] See Edward Iacobucci and Michael Trebilcock, "Self-Regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-Regulation in Canadian Professions" (2008).

those who practice law may adopt. It is not difficult to see how these two kinds of restrictions are related to one another, but they should not be elided. They are related most clearly in the case of a multi-disciplinary practice. If there were, for example, no restrictions on who could practice law, then a lawyer and another professional (or non-professional) would be better able to form a business structure in which they both provide services without inviting concern about the unauthorized practice of law. Thus, the demand for alternative business structures would presumably grow if there were no restrictions on who is qualified to give legal advice.

The fact that restrictions on who is authorized to practice law and restrictions on alternative business structures are related does not imply that they raise the same issues. It could be entirely defensible, for example, to maintain licensing restrictions on the practice of law while liberalizing business structures. Some of the economic gains from liberalizing structure may not be realized fully with such licensing restrictions in place, but the benefits of a licensing regime, such as protecting the public from incompetent legal advisors, may justify such an approach.

It is apparent that liberalizing the permitted structures of legal practices does not itself enhance the competitiveness of the legal services market. Consider two states of the world: one in which business structures of legal practice are restricted; and another where they are liberalized. In the illiberal state of the world, there are a certain number of lawyers in a certain jurisdiction that are authorized to practice law. This number does not change with the liberalization of the choice of business structure, which in turn implies that the number of competitors for a particular service is unlikely to change significantly with the choice to liberalize. Indeed, if anything, it is conceivable that traditional restrictions on the structure of legal practice, such as restrictions on equity investment by passive outsiders, tend to keep firms relatively small, and with liberalization it would be conceivable that firms that provide legal

services could become much larger. If legal firms were to grow post-liberalization, it would be conceivable that liberalization could *reduce* competition because of a diminution in the number of firms competing for business.

We would add that, as we have outlined in a different report, we are sceptical that the legal services market in Ontario suffers significantly from an absence of competition.[52] As we observed, there are thousands of lawyers in Ontario seeking to provide legal services, and thousands of law firms as well. In addition, both para-legals and online legal forms providers[53] are plentiful and compete in at least some dimensions with lawyers. The rates for providing certain legal work range considerably, from less than $100 per hour for certain kinds of basic legal services, to more than $1,000 per hour for services with more nuance and need for highly specialized human capital. The rates do not vary because of a lack of competition, but rather in large part because certain kinds of human capital are rare, and those who possess certain qualities will realize significant returns to those qualities. Such returns, known by economists as scarcity or Ricardian rents, result whenever a resource is scarce and do not amount to market power. For example, certain hockey players might realize vast scarcity rents, but this is not because there is a lack of competition to become such hockey players.

Indeed, because there are such significant competitive pressures in the existing legal services industry, the liberalization of business structure regulation is more likely to have a positive impact. Given that there is robust competition among firms, any innovation that allows the firm to economize in its provision of services would provide the innovator with returns that they would not realize under the status quo. Other firms will quickly imitate, also in pursuit of rare economic profits, and competition is likely to result in the diffusion of productivity-

[52] Iacobucci and Trebilcock, *supra*.
[53] See, e.g., http://www.lawdepot.ca/contracts/canada/Ontario/.

enhancing innovation across the legal services market. Because of competition, the fruits of the innovations will typically be passed along to the buyers of legal services. This not only produces the usual creation of consumer surplus, which results when a buyer of a product pays less than her maximum willingness to pay for that product, but also has the potential to enhance access to justice, which may have non-economic positive effects.[54]

A final word on competition. Traditional restrictions on the financing of legal firms prevent firms from going to equity markets or issuing public debt. Firms finance through bank borrowing or partners' equity investment. Some have suggested that firms are likely to suffer from these restrictions in part because the bank lenders will appreciate that they face less competition from other capital sources and can charge higher rates as a consequence.[55] This is conceivably true, but will not be true as a general matter. If the banking sector is competitive, which is highly probable at least for loans to sophisticated law firms who could borrow from a wide range of banks, not just local ones, there will not be room for a given bank to charge supra-competitive rates. Only if there is a lack of competition within banking itself will the confinement of financing to banks result in supra-competitive prices for loans.

The gains that result from opening up financing choices thus do not in general rest on greater competition, but instead from a more suitable capital structure for the firm. Capital structure affects value in a number of ways, and choosing one instrument rather than another has implications for firm value. Liberalizing financing choices would not necessarily have a positive impact on competition, but rather a positive impact from better calibrated capital structures.

With these initial observations as background, we turn now to the economic analysis of different business structures for legal practice. We begin with traditional, and legally

[54] See Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013).
[55] Semple, *supra*.

permissible, forms, and then consider alternatives. In each case we review the advantages and disadvantages of the form from a theory of the firm and capital structure perspective. We assume initially that lawyers must associate only with other lawyers within the firm and consider the advantages of different forms on this assumption. We then turn to examining the relative merits of multi-disciplinary organizations and firms in which non-lawyers may make financial investments.

a) Sole Proprietorship

The most common form of business practice in Ontario is a sole proprietorship. The sole proprietorship has advantages and disadvantages from a theory of the firm and a capital structure perspective. On the theory of the firm, the sole proprietor has the strongest possible incentives to invest in the value of the firm. She does not share the proceeds of her investment with other members of the firm, and thus realizes fully the fruits of her investment. If, for example, she provided especially good service to a particular client in the hopes of improving the firm's reputation for high quality legal work, she would realize entirely the benefits of that investment and would not have to share it with partners. This enhances the incentives to make such investments. Similarly, any investment in growing the firm's client list is realized by her alone.

Having only one lawyer in the firm also reduces coordination costs within the firm. Coase's analysis of the theory of the firm observed that extra-firm transactions invite haggling and other costs, and observed that these costs are lower within a firm. While this may be true, within-firm costs are not zero, especially where there are multiple equity owners (such as within a partnership) and no single authority that can impose decisions on others within the firm. A sole proprietor thus minimizes intra-firm transaction costs.

There are, however, significant disadvantages of the sole proprietorship from a theory of the firm perspective. For one, clients with legal problems to solve often will have different requirements for specialization from their lawyer. The sole proprietor can either become a generalist to some extent and attempt to provide as wide a range of service as possible, or will play a role simply in referring clients to other specialists. In the latter case, there is a Coasean problem: the sole proprietor may wish to realize some benefit from the lawyer to whom she has referred business, but it may not be straightforward to enter into an arm's length agreement on how best to compensate for such referrals. Moreover, there may be legal restrictions on referral fees. The sole proprietor may settle for an informal reliance on reciprocity to deal with referrals outside the firm, which may not be optimal. At the very least, informal reciprocity may not provide the sole proprietor with strong incentives to invest in the relationship with the outside lawyer, especially where the referring relationship is likely to be asymmetric.

There may also be reputational incentive disadvantages to the sole proprietorship.[56] When performing services as a sole proprietor, the lawyer potentially suffers a reputational loss if she provides low quality advice; on the other hand, she realizes fully the benefits of shirking on service (e.g., saving time, lower exertion, savings on on-line research tools, etc.). In a partnership with other partners, in contrast, when providing services, the lawyer gets a benefit from shirking, but risks a reputational loss to other lawyers in the firm, not just herself, by so acting; outsiders may blame lawyers in the firm generally for poor performance. The relative costs of shirking may therefore be lower for a sole proprietor than a partner. Clients that recognize these incentives may be less willing to deal with a sole proprietor. There is a disadvantage from a reputational theory of the firm perspective to a sole proprietorship.

[56] See Iacobucci, *supra*.

Turning to considerations of capital structure, there is one striking advantage of a sole proprietorship from a financing perspective. Because she owns 100% of the equity of the firm, the sole proprietor does not have incentives to make decisions that are good for her as an individual, but bad for equity investors as a whole. She bears entirely the economic effects of her decisions on the value of equity. The incentives to overconsume perquisites, for example, fall away entirely, while they would be more prominent if a decision-maker owned only a small fraction of a firm's equity.[57]

On a related point, within a sole proprietorship, there is obviously no need for equity owners to monitor management to deter self-interested, wasteful decisions. The equity owner *is* the manager. This is itself an advantage of the sole proprietorship because investments in monitoring management are themselves costly.[58] That they are unnecessary in a sole proprietorship is an advantage of the form.

There are, however, significant disadvantages to the capital structure associated with a sole proprietorship. A sole proprietor bears entirely the risk of the firm's performance herself. If, for example, she specializes in an area such as real estate law, there will be significant fluctuations in business that are beyond her control. She would also bear the risk entirely if she were to make a positive net present value, but uncertain, investment. Consider the kinds of investments that are increasingly common in the legal landscape: investments in technology to provide better service to clients. For example, consider investing in a web-based tool that allows the sole proprietor to serve a significantly greater number of clients at significantly lower costs per client in providing advice about a will. There may be a significant capital cost associated with such an investment, and there may be significant risk that the cost will not be recovered if

[57] Jensen and Meckling, *supra*.
[58] *Ibid.*

the application fails to catch on with clients. Even good investments in expectation do not necessarily turn out well. The sole proprietor bears all the risk of the investment paying off. Since individuals are typically averse to risk (this is why they buy insurance), the risk associated with sole proprietorships is a disadvantage from a capital structure perspective.

There is a related financing problem that sole proprietors face. Clients may sometimes have valid legal claims, but they are costly to litigate and outcomes are not certain. Lawyers can in effect invest in their clients' claims by adopting a contingency fee arrangement. Such a fee shifts significantly the risk of an unsuccessful suit from the client to the lawyer. This is another kind of risky investment for the lawyer: she gets paid, perhaps handsomely, if the suit is successful, but is not compensated for her costs and efforts at all if the suit is lost. A sole proprietor who accepts a contingency fee arrangement bears the risk of the investment in the lawsuit herself; this is not desirable, all things equal, for a risk-averse individual.

There is also a problem for sole proprietors who are capital-constrained. Suppose that a sole proprietor has a positive net present value investment, such as the web-based application discussed above, but has little capital herself. The only outside funding that is available for a sole proprietor under present legal constraints is bank debt. For many kinds of capital, such debt may be entirely suitable. If the sole proprietor wishes to purchase the real estate where her office is located, for example, bank debt is a common source of financing for such transactions, in part because banks are in a good position to take security that allows them to assess their risks with some accuracy. But for other kinds of investments, bank debt will not be suitable. The business prospects of the risky web-based application is not something that the bank will be in an especially good position to assess, nor would there be much in the way of physical assets to treat as collateral, which would make it reluctant to lend to a capital-constrained sole proprietor.

Moreover, such an investment may have a decidedly uneven pattern of returns, which makes traditional debt financing less appropriate. For example, if the investment fails 90% of the time, but pays off so lavishly 10% of the time that it is worthwhile overall, steady repayment of bank debt may be impossible. Rather, the bank will either receive a payment 10% of the time, or very little 90% of the time. This resembles more of an equity investment than a loan (indeed, the required interest rate to make the loan profitable for the bank despite a 90% failure rate may be so high that it could be usurious), but the bank would not have the same governance levers over the firm associated with typical equity investments, and may not be willing to make such a loan. At the very least, the fact that bank debt almost never finances analogous risky ventures that do not face legal constraints on their financing (venture capital, for example, is typically structured with equity investments) suggests that the requirement that the sole proprietor only raise outside capital through bank debt is costly. This is especially true as the risk of the potential investments the sole proprietor might make increases.

Note that there is an advantage to the sole proprietorship from a debt financing perspective that is the positive flip side of the disadvantages of risk. Sole proprietors are personally liable for all the debts of the practice; there is no separate legal entity and the debt of a sole proprietorship is the debt of the sole proprietor. This liability, while exposing the lawyer to greater risk, has its advantages. For one, unlimited liability mitigates concerns of lenders that the borrower will take on excessive risk. As discussed above, if a firm owes a significant amount of debt to creditors, equity-holders enjoying limited liability may be tempted to exercise their control over the direction of the firm by assuming significant risk: if the risk pays off, equity-holders largely realize the upside; while if the risk fails to pay off, equity-holders impose losses on creditors. With unlimited liability in place, the temptation to assume excessive risk is

mitigated. If a sole proprietor increases the risk of the firm in the face of debt, she herself faces the risk of losing all her personal wealth in paying back creditors.

Of course, the strength of unlimited liability in disciplining the sole proprietor depends on the amount of her personal capital. If she has little in the way of personal assets, then the commitment to pay her personal assets to creditors matters less for her incentives to ensure that creditors are paid (though the commitment will always matter to some extent given that personal bankruptcy is costly, especially for lawyers who may suffer as a professional matter from such an outcome). This implies that concerns about excessive risk because of debt would be more likely to arise in the particular circumstances where borrowing is most important: where the sole proprietor herself has little in the way of capital to contribute.

Another, related advantage of unlimited liability concerns the sole proprietor's clients. Clients will want the lawyer to bear costs from providing services negligently. If the sole proprietor faces unlimited liability, she in effect offers her personal assets as a kind of bond to the client: in the event of malpractice of some kind, the client is able to recover in any civil action from the lawyer's personal assets beyond any required or assumed liability insurance. Unlimited personal liability may not be the optimal way of providing assurance to clients (liability insurance may be more transparent, for example, since clients do not have to determine themselves what the lawyer's personal assets are worth), but it is an advantage of the sole proprietorship, all things equal.

b) Partnership

The legal framework governing legal partnerships is similar to that of sole proprietor, the difference simply resting in the number of lawyers in the firm. The difference in numbers, however, may have significant effects from a theory of the firm and capital structure perspective.

In this subsection, we review the factors discussed in the context of the sole proprietor, noting how the addition of partners affects the analysis.

Consider first the theory of the firm. With a legal partnership, rather than a sole proprietor, responsibility for making investments in the value of the firm (e.g., its reputation, or its client list) is spread across individuals, rather than resting with a single lawyer. Moreover, governance of the firm is spread across lawyers, it being a hallmark of a general partnership that each partner is presumed to have a role to play in management. This increases intra-firm transaction costs. The combination of diffuse incentives to invest in the firm and diffuse authority creates trade-offs. If left to their own managerial discretion, each partner has too little incentive to make investments in the partnership's productivity: she bears the costs of the investment, but shares the benefits with her partners. Centralizing authority, and monitoring the investments of each partner in the partnership, may mitigate the underinvestment problems, but at the same time will consume resources in order to coordinate authority.

In light of the importance of individual investments in the firm's productivity, firms may strive to achieve certain cultures.[59] Such a culture may usefully indicate to each partner (and associate, for that matter) how it is that she is expected to behave, and the existence of such a culture also allows for informal monitoring to ensure that partners are compliant with the norms of the firm. To the extent that a firm is successful in generating such a culture, this reduces the costs of governing the firm, and better ensures that each lawyer has good incentives to make private investments in the value of the firm.

While not insuperable, as the existence of major national and international law (and accounting) firms demonstrates, the difficulties of coordinating governance grow as the firm grows. At the limit, a sole proprietor is able to invest and otherwise make decisions while fully

[59] See, e.g., Daniels, *supra*.

internalizing the value to the firm of such choices, and is able to do so without coordination and managerial costs. The more partners that are added to the firm, the less does each partner internalize the value of her investments in the firm, and the more difficult is the firm to manage. Successful firm cultures may mitigate these problems, but such cultures may be more difficult to develop and maintain the larger the partnership.

There are also, however, advantages from a theory of the firm perspective the larger a firm is. Since lawyers tend to be specialized, the more lawyers a firm has, the wider the potential scope of the firm's expertise. To the extent that clients have different kinds of legal problems, a partnership will be able to provide a wider range of services to a client than a sole proprietor.

There is another way of putting this point about specialization. A sole proprietor would often have to refer clients to other lawyers that are able to provide service that she cannot. As noted above, it may not be straightforward for the sole proprietor to realize the value of such referrals. In contrast, partners that in effect refer work to one another are better able to realize the value of such referrals by sharing in the firm's profits.

As a final point on the theory of the firm, partners may be better able to sustain reputations for quality service than sole proprietorships. As discussed, when a partner performs her work, she would realize short run gains from shirking on that work, but would jeopardize the reputations of all lawyers in her firm, whereas a sole proprietor only has her own reputation at stake. As a consequence, there are stronger incentives for the firm as a whole to maintain a reputation for good quality work.

From a capital structure perspective, in general, each additional partner dampens the connection between the partner's efforts on behalf of the firm and the personal profits that she realizes. As the partnership grows, each partner's average percentage equity stake in the firm

falls, which implies that she will in general realize an ever smaller personal return from her efforts to grow the value of the firm. Partnership agreements can be struck in a manner that results in imperfect sharing, but to the extent that costs and revenues are spread across partners, the more partners there are, the weaker the connection between any given partner's efforts and her share of the firm's profits. This, all things equal, dampens incentives for partners to make efforts to maximize the firm's profits, and is thus a disadvantage of the partnership relative to a sole proprietorship from a capital structure point of view. The firm will either suffer from inefficient, self-interested decisions by its partners from time to time, or it will incur expenditures in establishing some sort of governance system that helps discipline partners. Either way, the firm suffers costs as a consequence of the diffusion of equity ownership across partners.

That said, partnerships nevertheless maintain some incentives for performance by allocating equity interests to the partners. Each partner is at least a part-owner of the firm, and as a consequence benefits to at least some positive extent from good performance. This contrasts with other organizational forms, such as corporations, in which managers within the firm need not have any ownership interest at all.

A key advantage of more diffuse equity ownership in a partnership is that partners are better insulated against risk than they are in a sole proprietorship. As Gilson and Mnookin observed, there is little reason to suppose that partners within a firm are all likely to have the same demand for their services at any point in time.[60] Certain specializations will be in higher demand than others at any point in time because of the business cycle; for example, securities lawyers will be in higher demand in boom times, while bankruptcy lawyers will be busier when the economy is slower. By forming a partnership in which partners agree to share annual profits,

[60] Ronald Gilson and Robert Mnookin, "Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits" (1985) 37 Stanford Law Review 313.

securities lawyers and bankruptcy lawyers can spread the risk associated with their relatively narrow specialties. In general, one can think of the law firm as allowing lawyers to diversify their risks across the business of the partners as a group. Each lawyer will not suffer from extremes of boom or bust, but rather will share some of the profits of the boom with their partners, while benefiting from their partners' business when their business is weaker. Since individuals tend to be risk-averse, a steady return is better than realizing extremes. This is a significant advantage of a partnership over a sole proprietor.

An offsetting consideration is that sharing across partners may discourage individual lawyers from working as hard as they would if they realized profits for themselves from their efforts. Moreover, a sharing rule may tempt the successful lawyers realizing significant profits to split from the firm and form another firm. These are clearly costs associated with the risk-spreading effect of sharing among partners. Gilson and Mnookin suggest, however, that departing partners would potentially suffer by losing the reputational advantages that partnership at a respected firm provides; this may induce them to stay.[61] In addition, other considerations, such as firm culture,[62] may help respond to the shirking temptations that are associated with sharing. Sharing also avoids the opposite temptation for partners that would arise with individually-based compensation to hoard clients and profits to themselves, even if the client were better served by a different partner.

The pooling of risk that the larger partnership allows also better supports risky investments by the firm. Consider the example of a significant capital investment in a web-based software application for writing a will, or of investing in a client's costly lawsuit by accepting a contingency fee arrangement. Setting aside debt for the moment, a sole proprietor would have to

[61] *Ibid.*
[62] Daniels, *supra*

devote her own capital to fund the project, which exposes her to considerable risk even if the project is a good one in expected terms. Partners, on the other hand, are able to share the costs of the project, which reduces their exposure to risk. To take a simple example, suppose that the investment requires $100,000. Suppose further that each of ten lawyers has $100,000 that they could invest. If each were a sole proprietor, they would each bear the full risk of the investment. But if the ten lawyers are in a partnership, each can invest $10,000 in the project, and invest $90,000 in other, diversified investments. While in both cases they have invested $100,000 in potentially risky investments, only in the latter case are they diversified. Risk averse investors are better off with diversification, and this is an advantage of a partnership relative to a sole proprietorship.

Another advantage of partnerships relative to sole proprietorships is that there will be more equity capital available with a pool of equity partners to draw upon. The example just discussed assumed that each lawyer had $100,000 to invest. If the lawyers do not have so much capital to invest, then there is another advantage of partnerships: they are less likely to be capital-constrained. Without equity investment available, the firm would have to borrow from a bank, but, as noted above, risky, illiquid capital investments such as the web-based application are not typically suitable for bank loans. Sole proprietors are more likely to have to forgo positive net present value investments than partnerships.

There is an advantage of partnerships when it comes to debt financing that is similar to that of sole proprietors: partners are jointly and severally liable for the debts of the partnership, which mitigates the incentives that the firm would have to make risky choices after they borrow. If there is limited liability, creditors bear downside risk, which can lead to excessive risk by managers looking out for the interest of equity investors. With unlimited liability, on the other

hand, partners bear downside risk as well as upside, the temptation to invest in risky investments is mitigated, and lenders, anticipating this, may be more willing to lend.

As with the analysis of the sole proprietor, the commitment to lenders that unlimited liability provides depends significantly on the assets that are available from the partners. All else equal, it would be reasonable to expect that a larger partnership of lawyers will have more assets in total available for creditors than a sole proprietorship, which is another advantage of the partnership. Of course, if some partners have fewer assets than others, there may be differing attitudes within the firm itself about risk, which in turn may create governance frictions within the firm. But for a lender, more partners, and thus more assets to back a loan, will be welcome.

Clients may also benefit from unlimited liability of the partnership. They are better assured that if a lawyer at the firm engages in misconduct, and the client sues as a consequence, there will be assets available to compensate them. This is welcome from the client's perspective because the fact that the lawyer's personal assets are at stake is likely to induce the lawyer to take greater care both in her own work and in monitoring her partners. Moreover, the client is more likely to be made whole if there is such a suit because the partnership has multiple lawyers' assets available to creditors, including judgment creditors. The presence of unlimited liability is not necessarily superior to liability insurance, and in fact may be less reassuring to clients given opacity around the partnerships' personal assets, but it does serve as a useful commitment to clients and other potential creditors.

c) Limited Liability Partnership

A key difference between a limited liability partnership and a general partnership is that in the former case, lawyers are not jointly and severally liable for the negligence of their partners. Another is that while the property of the partnership is available to satisfy the

partnership's debts generally, there is limited liability to creditors with respect to the partner's personal assets. We will discuss each feature in turn.

All else equal, the limitations on partner liability are less attractive to clients for two reasons. First, since they do not have personal assets at stake, it lessens the incentives of partners to monitor their partners to ensure that they are providing quality service. Second, it reduces the assets available to compensate clients who have received negligent service (because of this feature, mandatory insurance requirements are in place in Ontario and elsewhere as a professional requirement for forming an LLP). On the other hand, a limited liability partnership has the merit of reducing risk that lawyers are subjected to from their partners' misconduct, over which they may have relatively minimal control, while ensuring that each lawyer continues to stake her personal assets to her own clients. The LLP will be adopted where the gains to the lawyers from lower exposure to risk exceed the losses to clients from having a smaller pool of assets available to compensate for negligence. In such cases, clients may insist on lower fees to compensate for the smaller "bond" that personal assets provide, but lawyers would be willing to offer this discount because the reduction in risk that they enjoy makes it value-enhancing to do so.

Turning to limited liability with respect to creditors other than negligently-served clients, there are again economic benefits and costs for lawyers and creditors. An advantage of limited liability is that the lawyer does not bear the risk of pledging personal assets to creditors. A lawyer has whatever personal assets she has invested in the partnership at risk, but does not have to go further and put all of her personal assets at risk. Individuals are risk-averse, and unlimited liability imposes costs of risk on the lawyer. Within an LLP in which lawyers are not committed

to unlimited liability, the lawyer caps risk and avoids these costs. This is an economic benefit of the LLP relative to a general partnership.

The economic benefit of limited liability may manifest itself in different ways. For example, the lawyer might behave in exactly the same way in making investments, but does not bear as much cost from risk as she would without limited liability. But the lawyer may also be able to invest in intrinsically riskier projects knowing that her personal assets are not at stake when she does so.[63] Consider again the investment in a web-based application. Suppose that the firm has a line of credit for working capital, but cannot obtain bank debt for reasons given above for the application investment. If the firm invests its capital into the application but it fails, thus jeopardizing the firm's ability to pay off its line of credit, a partner in an LLP will not be liable personally on the firm's line of credit. This better encourages the partnership to make the risky investment than would be the case in the face of unlimited liability.

This is not to say that limited liability is therefore optimal. Limited liability simply shifts the risk from the partners to creditors; the question of optimality turns on who is better equipped economically to bear this risk. Creditors will be concerned that, since they do not incur the downside risks of their investments but rather shift them to creditors, lawyers in an LLP will take on more risk than is optimal. Moreover, creditors may not be in a good position to assess the risks that the lawyers take on, which also leaves the creditors vulnerable to uncompensated risk.

Whether limited liability is optimal will depend on the relative costs of risk when borne by the lawyers as opposed to their creditors. Given the economic incentives for lawyers to make value-increasing choices of business structures, it is noteworthy that adoption of the LLP form has become popular in the Canadian landscape in recent years. This is suggestive of its efficiency relative to the general partnership.

[63] See, e.g., Hadfield, The Cost of Law, *supra*.

d) Professional Corporation

A professional corporation has the same strengths and weaknesses of the LLP, but for one difference: under the professional corporation in Ontario, the professionals who are also the shareholders remain jointly and severally liable for the damages caused by the firm's negligence. The professional corporation thus combines the joint and several unlimited liability attributes of a general partnership when it comes to liability for negligence with the limited liability attributes of an LLP when it comes to liability for other debts. As noted when discussing the general partnership, unlimited joint and several liability better assures clients of non-negligent service by encouraging partners to monitor one another, and also provides better assurance to clients of being made whole if negligence were to occur. But such liability causes each partner to bear risk over which she may have only limited control, and this is costly for risk-averse individuals. Limited liability for other debts, as discussed in the context of LLPs, also presents trade-offs. An advantage is that partners bear less risk from uncertain investments. A disadvantage is that creditors may not be as well placed to assess firm risks, and moreover by imposing downside risk on creditors, firms that borrow may be inclined to take on too much risk. The professional corporation is a hybrid of a general partnership and an LLP, and its economic merits and drawbacks reflect this combination.

e) Business Corporation (Limited Liability)

If a sole proprietor is at one end of the organizational spectrum, the business corporation is at the other. In this section, we consider the economic advantages and disadvantages of this form. As with previous discussions, we continue to assume that lawyers must be the equity investors in the firm; we consider below the prospect of non-lawyer, equity investors.

The key difference, and the one that we therefore focus on in this section, between a business corporation on the one hand, and the partnership, LLP and professional corporation on the other, is that the lawyer-shareholders in the corporation are not liable for any unpaid debts of the corporation, including debts to clients who have successfully sued for negligence. This has advantages and disadvantages from a capital structure perspective. An advantage is that the lawyer-shareholders are not exposed to risks over which they may have relatively little control, namely, the risks of fellow lawyers within the firm behaving negligently. Unlike other structures such as an LLP, the lawyer in a corporation is also potentially protected from personal liability for her own negligent actions, the possibility of which would also expose her to costly risk and uncertainty.

We say that the lawyer is "potentially" protected because the limited liability status of a corporation does not necessarily protect individual tortfeasors within the corporation from personal liability for their torts.[64] (We would also note that lawyers would presumably remain subject to professional discipline even if practicing within a corporation.) The difference with a corporation is that the lawyer cannot be held personally liable for the torts committed by the corporation generally. Lawyers' personal assets are better protected in a corporate structure than in any of the other structures, which mitigates risk that they bear.

The disadvantage of fully limited liability is that clients can no longer rely on the bond that pledging personal assets effectively implies; lawyers with less risk of personal liability may be less inclined to take care. Moreover, lawyers not financially responsible for the misconduct of their colleagues will be less inclined to monitor their colleagues, which may also lead to less care for the client. The risk mitigation benefits must be weighed against the weaker incentives to take care in order to assess the net gains from incorporation.

[64] See *ADGA Systems International v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.).

Given the starkest limitation on personal liability that the corporation presents, this is a useful juncture at which to review the implications of insurance. While alluding to the possibility of liability insurance, we have generally treated the prospects of liability in, say, a general partnership as creating risk for lawyers. In reality, lawyers may take steps (and indeed by regulation may be obliged to do so) to mitigate this risk through insurance. This does not eliminate the conclusion that lawyers bear costs if there is potentially personal liability. For one thing, lawyers must pay for liability insurance, which is a cost resulting in part from personal liability. For another thing, insurers may risk rate the particular lawyer. This has other implications. First, the insurer may itself monitor the lawyer to some extent to minimize the chances that the lawyer behaves negligently; this substitutes to some extent for limited incentives to take care that the threat of personal liability would otherwise generate. Second, a lawyer that has an incident on her insurance record may have to pay greater premia in the future, which implies some personal risk associated with negligence. As a final point, insurance contracts will typically include both deductibles and maximum liability for the insurer. This also implies that the lawyer will bear residual risk. In short, liability insurance does not negate the conclusion that personal liability exposes the lawyer to risk that she would not face in a corporate setting.

f) Non-Lawyer Ownership

We have reviewed the basic structures that law firms may currently adopt, as well as a limited liability corporation, which lawyers in Ontario cannot form. We have restricted the analysis by assuming that only lawyers can own equity in the firm, an assumption that is much less apt in liberal jurisdictions like Australia and the UK. Ontario itself allows for multi-disciplinary partnerships, but imposes important restrictions such as a requirement that lawyers control the firm. In this section we consider the potential economic advantages and

disadvantages of liberalizing rules concerning non-lawyer equity ownership of a law firm. We begin by focusing on the theory of the firm, which discussion can be conducted without significant emphasis on the particular legal organizational form (e.g., partnership or corporation) that the firm with non-lawyer equity-holders adopts. We then turn to capital structure, which will include a more detailed discussion of form.

There are two kinds of non-lawyer ownership worth considering. Non-lawyers may themselves bring professional credentials to the firm, or they may be simply passive, financial investors. The theory of the firm advantages largely arise with the former kind of equity-holder. Allowing non-lawyers to own equity in a firm that includes lawyers has several possible economic advantages. From a Coasean perspective, there are potentially significant savings in transaction costs resulting from non-lawyer equity owners. Take the example of a client that requires both legal and accounting advice on a given matter. If a lawyer and an accountant are equity-owners in the firm, each realizes an economic benefit when the other is retained by a client. This creates economic incentives for one to refer business to the other without complicated referral contracts (even if permitted). Moreover, when working for the same client on a file, it is likely that the lawyer and accountant will be better able to coordinate their actions if they are both within the same firm than if they practice independently.[65] This creates productivity gains, as Coase pointed out, but also in all probability lowers the transaction costs of the client, who is able to engage in one-stop shopping.

Moreover, if the lawyer and accountant both have equity stakes in the firm, this encourages personal investments in general assets of the firm, including its reputation. For example, an ownership stake in the accountant's future billings would encourage the lawyer to

[65] See, e.g., Lilla Csorgo and Michael Trebilcock, "Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective" (2001) 24 Dalhousie Law Journal 1.

be especially willing to take extra steps to enhance the reputation of the accountant, through referrals if nothing else. To the extent that multi-disciplinary firms tend to have a larger number of partners, having both the reputation of both accountants and lawyers at stake in the firm's work may also create stronger incentives to maintain a reputation for quality work: more professionals' reputation is in jeopardy when the firm performs its work.

It is worth noting an additional potential gain from adding non-lawyer professionals to a firm that practices law. Non-lawyers may not be themselves a member of a regulated profession, but may simply be professional business managers. There is no reason necessarily to conclude that lawyers will be the best managers of legal practices. An advantage, then, from allowing non-lawyer equity-holders is that it would allow non-lawyers to manage while owning equity stakes in the firm that incentivize them to a good job. This is another theory of the firm advantage of non-lawyer equity ownership: non-lawyer managers may have the ownership stakes that provide them with economic incentives to invest in firm value.

There are clearly potential economies from a theory of the firm perspective in allowing non-lawyer equity investment, but there are potential costs as well. The larger and broader is a firm's practice, the lower the costs of coordinating action outside the firm through contract, but the larger the costs of coordinating within the firm. There could be difficulties in coordinating behaviour across members of the firm as it grows in size and scope, especially if there are cultural differences between different professions. For example, professional managers may not have the same understanding of a lawyer's sense of ethical responsibilities, which could create intra-firm conflicts and consequential costs. Other costs may include a temptation for each member of the firm to refer clients to their own firm's professionals when in fact the client's

circumstances may call for a different provider. That is, some credibility of the referral may be lost if referrals are intra-firm.

It is therefore not necessarily the case that non-lawyer equity ownership leads to economic gains on net, though such ownership clearly allows some expected economic benefits from a theory of the firm perspective.

The next set of issues to consider are the economic costs and benefits of non-lawyer equity ownership from a capital structure perspective. Given the analysis above, the most illuminating context in which to examine this question is one that departs most significantly from the contexts discussed already, which is one in which there are no restrictions on the form or ownership of firms that offer legal services, as in Australia. And the most useful scenario within this context to consider is passive, non-lawyer, financial investment in equity.

Passive investors by definition do not directly affect the nature of the activities within the firm, but may significantly alter the capital structure of the firm and thus affect the firm's performance in carrying on business. There are two prominent advantages of outside equity ownership. First, outside shareholders may provide capital to the firm that would be very difficult to raise from capital-constrained professionals within the firm, or from banks. As discussed above, many investments are not suitably financed with debt. An investment in technology such as the web-based application discussed above is not a good candidate for debt financing: its returns are highly variable and uncertain, and moreover bank lenders may not be in a good position to assess its worth (and there may not be any physical collateral to offer as security). But equity investment in technology start-ups is suitable, and indeed is common. There may be expert investors in the technology space, venture capitalists for example, that are

not only capable of valuing a prospective investment, but once having made the investment may be able to offer management advice, thus adding non-lawyer management skills to the mix.

Outside investors may also be in a position to finance risky investments in lawsuits by a firm that has entered a contingency fee arrangement. A firm may be willing to take on such a fee arrangement, but may not have the capital to finance the suit. Because of a highly variable outcome and uncertain cash flow, as well as a difficulty in valuing the suit, banks may be unwilling to lend. Equity investors may, in contrast, be willing to assume uncertainty in returns, and may either have or develop expertise in valuing such suits. Law firms that would otherwise not be able to finance contingency-fee based lawsuits may be able to do so in the presence of non-lawyer equity investors.

On a related point, even if lawyers or other active professionals within a firm could conceivably raise the capital to pursue a risky investment such as a technological investment in law, or an uncertain lawsuit on a contingency fee, doing so exposes equity-holders to risk. This is especially problematic for sole proprietors and small firms, but even for larger firms, partners may bear considerable risk. In contrast, at the limit, a law corporation could be publicly traded with literally thousands of investors, each with small stakes in the firm. Such investors are much better placed to diversify the firm's risk than the inevitably smaller number of equity-owners at a firm without outside passive investors. This is a feature of potentially great importance in facilitating risky investment by law firms.

Allowing passive non-lawyer investment opens up a range of capital structures that could alter radically the economics of law firm capital structures. We have discussed the theory of the firm benefits of having both lawyer and non-lawyer equity-owners. There may, however, be advantages on net if lawyers were not to own equity at all, and a firm instead is financed by non-

lawyer shareholders. For example, if lawyers have a comparative advantage in providing legal advice and not managing a business, it may be better to have a business owned and managed by non-lawyers, with lawyers serving as employees but not shareholders. Non-lawyer managers may provide the entrepreneurial skills that the firm requires to be successful, while lawyer employees provide the legal expertise.[66] Such a model would be probably most especially suitable for a firm that relied heavily on technological solutions to support the provision of legal advice: non-lawyer entrepreneurs may have the skill set, and finances, to manage and fund the firm, while lawyer employees provide the legal advice that may underpin the development and operation of the technology. To draw an analogy, it is not unusual for technological entrepreneurs to provide a vision and business skills at a tech start-up, while relying on engineer employees (perhaps motivated by stock options) to actually create the technology. This may also be an appropriate model for legal practice: lawyers bring their human capital to the firm, but leave financial capitalization to others who may be better placed to bear the risk of the firm's success, perhaps because they can diversify more easily, perhaps because bearing such risk allocates to them appropriate incentives to manage the business. We observe that such a model has in effect been adopted in Australia at Slater and Gordon, which has a very large complement of lawyer employees, but is publicly traded.

In the context of publicly listed firms, the limited liability associated with a corporation assumes stark advantages relative to other possibilities, such as joint and several liability among shareholders. In the absence of limited liability, the value of a share may depend in part on the identity, and more specifically, wealth, of fellow shareholders.[67] This makes valuing a share

[66] See also, Hadfield, The Cost of Law, *supra* (observing that non-lawyers will often have the technological insights necessary for innovation in the legal services market).
[67] See Jensen and Meckling, *supra*; Paul Halpern, Michael Trebilcock, and Stuart Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 University of Toronto Law Journal 117.

costly, and undermines the value of a public listing. Moreover, the separate legal personality of a corporation allows clear "asset partitioning": the assets of the corporation are owned by the corporation as an independent legal entity, thus avoiding blurry lines between business assets and personal assets of investors.[68]

There are, naturally, economic disadvantages associated with outside equity ownership. Most prominently, lawyers that do not own equity in the firm will not have the same incentives to work to increase the value of the firm as lawyers in a partnership. There is a cost to incentives from diversifying the risk of a firm across passive investors. Indeed, because of this, clients may be reluctant to engage lawyers that do not have a stake in their firm. One possibility to respond to this concern is for a controlling shareholder to emerge that, because of its stake in the firm, has a strong incentive to monitor management to ensure that the lawyers in the firm's employ are providing service optimally.

Other possibilities include the emergence of hybrid ownership solutions, such as the franchising possibility discussed above.[69] In a franchise, the overall business model and firm reputation (brand) is promoted by a franchisor. The franchisor corporation engages franchisees that have territories in which they provide the franchise system's product or service under the franchise system's brand. This system allows a centralized entrepreneurial team to create a business model that they in effect rent to franchises in exchange for payment, including, typically, a share of the franchise's profits.[70] The primary advantage of the franchise system over a single entity model of a business with geographically distributed, but centrally owned

[68] See, e.g., Henry Hansmann and Reinier Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale Law Journal 387; Edward Iacobucci and George Triantis, "The Legal and Economic Boundaries of Firms" (2007) 93 Virginia Law Review 515.
[69] For discussion of franchise contracts, see, e.g., Gillian Hadfield, "Problematic Relations: Franchising and the Law of Incomplete Contracts" 42 Stanford Law Review 927.
[70] See QualitySolicitors as an example of a network of independent firms: http://www.qualitysolicitors.com/.

outlets, is that the franchisee owns the equity in the franchise, which provides her with incentives to build the value of the local business. The franchisee benefits from the brand created by the franchisor, and the franchisor works to maintain this reputation by monitoring franchises to ensure that they meet the system's standards.

Such a model could be successful in the legal context, just as it has in the tax context as outlined in the H&R Block example alluded to above, and is off to a promising start in the legal context with the QualitySolicitors example from the UK. Local lawyers could own a local franchise to provide legal services, but a franchise system with non-lawyer investors could build the brand and relevant business solutions, such as technology applications that would be available to franchisees and their clients. Moreover, it would be conceivable that the franchisor could help provide capital to fund risky, contingency-fee lawsuits led by a franchisee. Such a system could draw on entrepreneurial experts at the franchisor, who are incentivized through equity ownership to grow the profits of the franchise system as a whole, while allocating equity and profits to local franchisees to promote the local business.

As this discussion has demonstrated, liberalized ownership rules create the potential for the most gains from alternative business structures by creating a potential separation between the financiers of a legal business and the providers of legal advice within that business. While there are potential incentive problems that non-lawyer ownership might create, there are significant gains in raising equity capital to finance investment, and in allowing investors in law firms to diversify risk, that may offset these problems. Moreover, imaginative hybrid solutions, such as franchise systems, could attempt to exploit the benefits of non-lawyer entrepreneurship, while preserving lawyers' incentives to promote their personal practices.

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There is no question that legal reform in the UK and Australia has led to interesting and significant innovations in legal structures. Publicly traded law firms, such as Slater and Gordon, and networks of firms, such as QualitySolicitors, are prominent examples of such innovation. Evidence of the impetus to innovate can also be found within the more traditional regulatory framework of the provision of legal services. In North America, LegalZoom offers an innovative combination of online and in-person legal advice, while conforming with the more restrictive sets of rules governing business structures found there.[71] Removing the constraints that presently exist on alternative business structures would undoubtedly invite even further innovation.[72]

However, before concluding this section on the promise of alternative business structures for legal practice, a note of caution is appropriate. As Noel Semple has pointed out, the rules on alternative structures have been very liberal for over a decade in Australia, yet the legal profession has not undergone a radical transformation.[73] There have clearly been innovations, such as the emergence of publicly traded law firms, but many traditional structures remain in place. For example, Semple observes that in New South Wales, where liberal rules have been in place the longest, the number of sole practitioners and small firms has *grown* in the last ten years.[74] In light of this evidence, it would be inappropriate to predict a sweeping revolution from liberalization in Ontario, but the analysis has shown that the potential for economic gains is nevertheless real. Even if only some firms attempt to adopt new models, this could nevertheless be of economic advantage to lawyers, their investors, and ultimately, clients.

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[71] See http://www.legalzoom.ca/.

[72] Hadfield, The Cost of Law, *supra* argues that the economics of reducing the cost of legal services for ordinary individuals makes clear that the scale of legal services delivery needs to expand dramatically to justify the fixed costs of investments in marketing ,document production,consumer and legal research,information technology and firm management.In turn these functions require an expanded role for non-legal expertise as well as greater scope for diversifying the risks associated with such investments.In her view the limited liability corporation with non-lawyer shareholders is an essential mechanism for realizing economies of scale and specialization in servicing the needs of ordinary individuals.

[73] Semple, *supra*.

[74] Semple, *supra* at 46.

V. CONCLUSION

One conclusion should be abundantly apparent from this review of the economics of alternative business structures: there is no single structure that is optimal across all contexts.[75] Rather, there are trade-offs with respect to every choice of form and capital structure, and the best resolution of each trade-off depends on the circumstances. The nature of a firm's clients in some cases may best call for a general partnership; in others, a limited liability partnership. The nature of the service provided may in some cases call for a sole proprietorship; in others, a publicly traded corporation. It is overly simplistic, therefore, to favour one form over others from an economic perspective.

The importance of context, however, does not imply that it is impossible to draw any meaningful policy conclusions from the analysis. It is clear that from an economic perspective, there are potential gains from opening up options for business structures and associated capital structures. This itself makes an economic argument in favour of liberalization: even if most legal practices maintain traditional structures, if some firms benefit from innovative models, choice creates economic benefits. It is also fair to conclude that the gains from liberalization are most likely to materialize where a large capital investment is necessary for a firm to realize certain gains. An investment in a client's lawsuit through a contingency fee, for example, may generally be more efficiently financed with outside, financial investors than the handful of lawyers who may prosecute the suit. An investment in technology will also more probably be efficiently achieved by a firm with outside investors than a general partnership.

Liberalization predictably generates economic gains, but the size of these gains cannot be predicted with any certainty. Experience in the UK and Australia suggests that liberalization

[75] See, e.g., Iacobucci and Triantis, *supra*.

does invite change, although the pace of change appears to be much more evolutionary than revolutionary, at least to date.

We conclude by making observations about the impact of reform on key stakeholders: lawyers themselves, and clients. These effects would presumably have a significant influence on the politics of reform. As noted in the discussion of competition, changing the rules on alternative business structures does not itself affect the number of lawyers in practice in a given jurisdiction. It may, however, affect considerably the nature of the firms in which the lawyers practice. Individuals with significant economic stakes in existing firms may be threatened by reform. But such a threat to current firm structures should not be elided with a threat to the kinds of lawyers that practice at these firms. For example, consider a small-town sole proprietor with a general practice. Such a lawyer may predict that liberalization would result in a large corporation, perhaps a franchise system, encroaching on her business. Such a development would undermine the value of the equity of an existing lawyer in her sole proprietorship, but would not imply that the lawyer (and others of her type) will be out of business. Rather, the corporation will itself need lawyers, and the sole proprietor may shift from being an owner of her practice to an employee in a larger firm. While there may be short run dislocations in some instances, in the longer run new business models will generally emerge if they are more economically efficient than existing models. Greater efficiency means greater potential gains for lawyers, clients and investors alike. For example, lawyers may prefer simply to practice law rather than run a business; for them, status as an employee may be preferable to status as a sole proprietor. When considering the politics of liberalization, then, it is important not to confuse challenges to existing law firm structures with challenges to existing lawyers. Reform, while it may threaten existing structures, may be welcome both for many clients and for many lawyers.

Moreover, the threat to existing structures should not be exaggerated. Experience elsewhere has demonstrated that liberalization may be entirely consistent with one-person and other small practices. For example, as Semple notes, the number of small firms has increased in the last ten years in New South Wales.[76] Neither theory nor experience suggests that lawyers will necessarily suffer economically under a more liberal regime.

Finally, to return to a point that we raised in the Introduction, our focus has been on the economics of alternative business structures, but economic gains are entirely consistent with the promotion of at least some non-economic values. Access to justice is a matter of concern in Ontario and elsewhere,[77] and high prices for legal services are clearly a major contributor to this concern.[78] If alternative business structures emerge in a liberalized regime, this is likely to reflect the economic gains that they generate. Moreover, given that the legal services market is highly competitive, it is probable that economic efficiencies realized as a result of liberalization would be passed onto clients and prospective clients.[79] It is possible, therefore, that the economic gains that liberalization tends to promote would in turn tend to promote access to justice.[80] In this respect, at least, economic and non-economic social goals are aligned.

[76] Semple, *supra* at 46.
[77] See, e.g., Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).
[78] See Hadfield, The Cost of Law, *supra*.
[79] Again, the market would not become more competitive as a consequence of liberalization; rather, competition would simply tend to push any savings down to clients.
[80] See Semple, *supra*.

Business Structures for the Practice of Law and the Delivery of Legal Services in Ontario

The following provisions in the *Law Society Act*, other Ontario legislation, *Rules of Professional Conduct* (version currently in force until October 1, 2014), *Paralegal Rules of Conduct*, and Law Society By-Laws are relevant to business structures.

Rules of Professional Conduct - Division of Fees, Fee-Sharing, and Fee-Splitting

1. Described below, the provisions relating to division of fees, fee-sharing and fee-splitting have the effect that:

    (i) fees may not be shared except within permitted participants in a permitted business structure; and

    (ii) referral fees are only permitted to be paid to licensed Ontario lawyers and paralegals.

2. Rule 2.08(6) of the *Rules of Professional Conduct* provides that where a client consents, fees for a matter may be divided between licensees (or members of the Law Society of Upper Canada) who are members of the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

3. Rule 2.08(7) imposes the following restrictions with respect to referral fees:

    (a) The fee must be reasonable, and cannot increase the total amount of the fee charged to the client; and

    (b) The client must be informed of the fee, and must consent to it.

4. Rule 2.08(8) of the *Rules of Professional Conduct*, which applies to lawyers, provides that lawyers may not share fees with a non-licensee. It provides as follows:

    2.08(8) A lawyer shall not

    (a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee, or

(b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.

5. Rule 2.08(9) limits this broad prohibition to permit fee sharing in certain circumstances:

   (a) within a multi-disciplinary practice (an "MDP");

   (b) between partners of an inter-provincial law firm; and

   (c) between partners of an international law partnership.

6. Rule 5.01(10), (11) and (12) of the *Paralegal Code of Conduct* (the "Paralegal Rules") imposes similar restrictions on paralegals with respect to the division of fees, fee-splitting, and referral fees. Paralegal Rule 5.01(12) permits fees sharing between partners in a Multi-Disciplinary Partnership (MDP).

Ownership Restrictions

Professional Corporations

7. The ownership and permissible scope of practice of professional corporations is limited by the current regulatory structure. Section 62(0.1)14(iv) of the *Law Society Act* provides that Convocation may make by-laws regarding professional corporations. Section 62(28.1) provides that Convocation may make by-laws governing the practice of law and provision of legal services through professional corporations.

8. Section 3.1(2)(a) of the *Business Corporations Act* (OBCA) provides for the practice of a profession by a professional corporation if an Act so permits.[1] Section 3.2(2) of the Act provides for conditions which a professional corporation must satisfy, including the identity of shareholders. Section 61.0.1(4) of the *Law Society Act* limits ownership of professional corporations practicing law and providing legal services to lawyers and paralegals.[2]

[1] *Business Corporations Act*, R.S.O. 1990, c. B16, online at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90b16_e.htm.

[2] *Law Society Act*, R.S.O. 1990, c. L.8, online at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90l08_e.htm.

9. The *Law Society Act* limits all forms of share ownership. Unlike the case of some regulated health professionals,[3] family members of lawyers and paralegals are not permitted to own shares in a professional corporation. Further, lawyers from other jurisdictions may not be shareholders in Ontario professional corporations.

10. As well as limiting ownership of professional corporations, the activities of professional corporations are limited by section 61.0.1(1)(5) (paragraph 3) of the Act which requires that

> The articles of incorporation of a professional corporation … shall provide that the corporation may not carry on a business other than [the practice of law or the provision of legal services], but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to [the practice of law of law or legal services], including the investment of surplus funds earned by the corporation.

11. A professional corporation is limited to providing services "related to" or "ancillary to" legal or paralegal practice.

Limited Liability Partnerships

12. Section 44.2(a) of the *Partnerships Act* provides that a limited liability partnership may carry on business in Ontario for the purpose of practicing a profession if a statute so permits.[4] Section 61.1(1) of the *Law Society Act* provides that subject to the by-laws, lawyers and paralegals may form a limited liability partnership for the purpose of practicing law or providing legal services in Ontario. Section 61.1(1) (d) provides that two or more professional corporations may form a limited liability partnership for the purpose of practicing law in Ontario, providing legal services, or both.

13. Part III of Law Society By-Law 7 ("Business Entities") regulates the following:

[3] Members of the College of Physicians and Surgeons of Ontario and members of the Royal College of Dental Surgeons of Ontario may form professional corporations in which their family members own shares.

[4] *Partnerships Act*, R.S.O. 1990, c. P.5, online at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p05_e.htm#BK49.

(i) limited liability partnerships (the By-Law imposes insurance requirements on a limited liability partnership and imposes disclosure requirements);

(ii) professional corporations; (corporate names, certificates of authorization, and information that must be contained in the register of professional corporations required under section 61.0.2 of the Act);

(iii) multi-disciplinary practices, which will be discussed in greater detail below; and

(iv) affiliations with non-licensees.

Multi-Disciplinary Partnerships

14. Section 62(0.1)32 of the Law Society Act provides that Convocation may make by-laws regarding multi-disciplinary partnerships. By-Law 7 permit a business structure in which non-licensees can be partners with licensees, but only where the licensees are in control and where the services provided by non-licensees are supportive or supplementary to the practice of law or to the provision of legal services. The non-licensee must agree to comply with Law Society rules, policies and guidelines, but the licensee is responsible to the Law Society for any non-compliance with Law Society rules.

15. Currently, there are 13 Multi-Disciplinary Partnerships (MDP) in Ontario.[5] The types of services which are provided by the non-licensee partners in an MDP are as follows:

i) human resources consulting;

ii) advice and assistance with patents and trademarks;

iii) public policy advice;

iv) translation;

v) economic, tax and accounting advice;

vi) financial services advice;

[5] This information is current to November 2013.

vii) mortgage broker services;

viii) chartered accounting services;

ix) immigration consulting;

x) U.S.-licensed attorneys with expertise in class action litigation and civil trials; and

xi) marketing and advertising services.[6]

16. Section 16 of By-Law 7 provides that:

> A licensee shall not, in connection with the licensee's licensed activity, provide to a client the services of a person who is not a licensee except in accordance with this Part.

17. Section 17 provides a limited exception to this broad prohibition:

> A licensee may, in connection with the licensee's licensed activity, provide to a client the services of a person who is not a licensee who practises a profession, trade or occupation that supports or supplements the licensed activity.

18. The language of "supporting or supplementing" the licensed activity in the MDP By-Law is similar to the language of "relating to or ancillary to" the licensed activity in section 6.0.1(1)(5) of the *Law Society Act* in respect of permitted activities of professional corporations.

19. Section 18 of By-Law 7 regulates partnerships or associations with persons who are not licensees of the Law Society of Upper Canada and who practice a profession, trade or occupation that "supports or supplements" the licensed activity. A licensee may enter into a partnership or association with a professional to permit the licensee to provide the services of the professional to clients. A "professional" is "an individual or a professional corporation established under an Act of the Legislature, other than the *Law Society Act*, the services of whom or which a licensee may provide to a client in connection with the licensee's licensed activity."

[6] Lawyers who are partners in an MDP reported the following areas of practice: employment and labour law, workplace safety and insurance law, intellectual property law, litigation, corporate/commercial, administrative law, civil litigation, real estate law, wills/estates/trusts, criminal law, citizenship and immigration, consumer legal services, and tax law.

20. Section 18(2) requires that a licensee who wishes to enter into a multi-disciplinary partnership or association must ensure that the following conditions are satisfied:

    1. the professional must be qualified to practise a profession, trade or occupation that supports or supplements the licensee's licensed activity;

    1.1.1 the professional must be of good character;

    2. the professional must agree that the licensee has "effective control" over the practice of the other profession, trade or occupation (the professional must practice the profession, trade or occupation to provide services to clients of the partnership or association);

    3. the professional must agree with the licensee in writing that when acting in partnership or in association, the professional will not practice his or her profession, trade or occupation outside of the provision of services to the clients of the MDP or association;

    4. if the professional provides services other than to clients of the firm/association, the non-lawyer/non-paralegal can only do so from other premises;

    5. the non-lawyer/non-paralegal must agree with the licensee to comply with Law Society rules, by-laws, policies and guidelines;

    6. in the case of partnerships (as opposed to associations), the non-lawyer/non-paralegal must agree with the licensee to comply with the Law Society rules, policies and guidelines on conflicts of interest in relation to clients of the partnership who are also clients of the professional practicing independently of the partnership.

21. According to section 19 of the By-law, while the non-licensee must agree to comply with Law Society rules, policies and guidelines, it is the licensee who is responsible to the regulator for the non-licensee's compliance with Law Society rules.

22. Section 20(1) of the By-Law requires that Law Society approval must be obtained before a licensee enters into partnership with a professional.

23. Rule 6.10 of the *Rules of Professional Conduct* provide that a lawyer in an MDP shall ensure that non-licensee partners and associates comply with these Rules and all ethical principles that govern a lawyer. Rule 3.04(15) of the Paralegal Rules similarly provides that a paralegal in a multi-discipline practice shall ensure that non-licensee partners and associates observe the conflict of interest rule for the provision of legal services and for any other business or professional undertaking carried on by them outside the professional business.

Affiliations

24. The essence of affiliation is joint service delivery by licensees and non-licensees. Currently there are 49 affiliations in Ontario.[7]

25. Section 62(0.1)31 of the Law Society Act permits Convocation to make by-laws regarding affiliations. Section 31(2) of By-Law 7 provides that

> a licensee affiliates with an affiliated entity when the licensee on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity.

26. With respect to the professional business through which licensed services are provided, section 32 of By-Law 7 requires that the licensee

(a) own the professional business or comply with the MDP By-Law;

(b) maintain control over the professional business; and that

(c) the joint business not be carried on from premises from which the non-licensee carries on other business.

[7] Information as of November 22, 2013.

27. Section 33(1) of By-Law 7 requires a licensee who agrees to affiliate to immediately notify the Law Society of the affiliation. Further, section 33(2) requires that the notice contain the following information:

    1. the financial arrangements between the licensee and the non-licensee; and
    2. arrangements for compliance with Law Society rules, policies and guidelines on conflicts of interest and confidentiality of information with respect of the joint clients.

Supervision

28. Rule 5.01(2)(b) of the *Rules of Professional Conduct* requires that a lawyer directly supervise non-lawyers to whom particular tasks and functions are assigned. Rule 8.01(3) of the *Paralegal Rules of Conduct* provides that "a paralegal shall, in accordance with the By-Laws, directly supervise staff and assistants to whom particular tasks and functions are delegated". By-Law 7.1 governs the circumstances in which a licensee may assign certain tasks and functions to a non-licensee within a law practice.

FOR DECISION

NATIONAL DISCIPLINE STANDARDS PILOT PROJECT

MOTION

194. That Convocation approve in principle the attached National Discipline Standards of the Federation of Law Societies of Canada set out at Tab 4.2.1.

195. The goal of the National Discipline Standards Project is to develop a set of standards against which each Law Society's performance in the area of lawyer discipline can be assessed. There are 21 standards.

196. These standards were the subject of a pilot project which ends in April 2014 and have been modified throughout the pilot project period. The Law Society has been involved in the project since the outset and has been regularly reporting to the Federation about the Law Society's performance on the draft standards. The regular reporting process has contributed to modifications to some of the standards.

197. The Council of the Federation of Law Societies of Canada is scheduled to approve the standards in April 2014, which are to take effect on January 1, 2015. Law Societies are being asked to review and adopt the standards so that they can be implemented by that date.

198. As part of the implementation plan, between April 2014 and January 2015 the pilot project will continue.

199. The Professional Regulation, Paralegal Standing and Tribunals Committees considered the National Discipline Standards Pilot Project at their February 2014 meetings.

200. All three Committees have reviewed the standards and recommend that Convocation approve them in principle.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

NATIONAL DISCIPLINE STANDARDS PILOT PROJECT

List of Standards as of January 2014

Timeliness

1. **Telephone inquiries:**
   75% of telephone inquiries are acknowledged within one business day and 100% within two business days.

2. **Written complaints:**
   100% of written complaints are acknowledged in writing within three business days.

3. **Timeline to resolve or refer complaint:**
   80% of all complaints are resolved or referred for a disciplinary or remedial response within 12 months.

   90% of all complaints are resolved or referred for a disciplinary or remedial response within 18 months.

4. **Contact with complainant:**
   For 90% of open complaints there is contact with the complainant at least once every 90 days during the investigation stage.

5. **Contact with member:**
   For 90% of open complaints there is contact with the member at least once every 90 days during the investigation stage.

Hearings

6. 75% of citations or notices of hearings are issued and served upon the lawyer within 60 days of authorization.

   95% of citations or notices of hearings are issued and served upon the lawyer within 90 days of authorization.

7. 75% of all hearings commence within 9 months of authorization.

   90% of all hearings commence within 12 months of authorization.

8. Reasons for 90% of all decisions are rendered within 90 days from the last date the panel receives submissions.

9. Each law society will report annually to its governing body on the status of standards 3, 4 and 5. For standards 6, 7 and 8, each law society will report quarterly to its governing body on the status of the standards.

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NATIONAL DISCIPLINE STANDARDS PILOT PROJECT

List of Standards
December 2013

Public Participation

10. There is public participation at every stage of discipline; i.e. on all hearing panels of three or more; at least one public representative; on the charging committee, at least one public representative.

11. There is a complaints review process in which there is public participation for complaints that are disposed of without going to a charging committee.

Transparency

12. Hearings are open to the public.

13. Reasons are provided for any decision to close hearings.

14. Notices of charge or citation are published promptly after a date for the hearing has been set.

15. Notices of hearing dates are published at least 60 days prior to the hearing, or such shorter time as the pre-hearing process permits.

16. There is an ability to share information about a lawyer who is a member of another law society with that other law society when an investigation is underway in a manner that protects solicitor-client privilege, or there is an obligation on the lawyer to disclose to all law societies of which he/she is a member that there is an investigation underway.

17. There is an ability to report to police about criminal activity in a manner that protects solicitor/client privilege.

Accessibility

18. A complaint help form is available to complainants.

19. There is a lawyer directory available with status information, including easily accessible information on discipline history.

Qualification and Training of Adjudicators

20. There is ongoing mandatory training for all adjudicators, including training on decision writing, with refresher training no less often than once a year and the curriculum for mandatory training will comply with the national curriculum if and when it is available.

21. There is mandatory orientation for all volunteers involved in conducting investigations or in the charging process to ensure that they are equipped with the knowledge and skills to do the job.

CONTINUATION OF THE PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE

MOTION

201. That Convocation

(a) approve continuation of the Pre-Proceeding Consent Resolution Conference pilot project for an additional two years; and

(b) direct that the Professional Regulation and Tribunals Committees (the latter in consultation with the Chair of the Tribunal) prepare a report prior to the end of the two year period with recommendations regarding the continuation of the process on a permanent basis.

Overview

202. The Pre-Proceeding Consent Resolution Conference (the "Consent Process") is an alternative to the regular investigations and hearings stream. The Consent Process was approved by Convocation on January 28, 2010 as pilot project. Changes to the *Rules of Practice and Procedure* required to support the Consent Process were approved by Convocation on January 27, 2011. The 2010 and 2011 Convocation Reports may be found at **Tab 4.3.1** and **Tab 4.3.2**, respectively.

203. Reporting on the pilot project was awaiting completion of two cases in the process. In summary, based on the report from the Professional Regulation Division, the Committee has concluded that the Consent Process to be a helpful tool and it is likely to be used with greater frequency in the future.

204. No changes are recommended by the Committee to the portion of the Consent Process that occurs prior to authorization by the Proceedings Authorization Committee.

205. The Committee, and the Tribunals Committee, which also reviewed this matter, believes there may be ways to streamline some aspects of the post-authorization Consent Process. For this reason it is recommended that the procedures set out in Rule 29 of the *Rules of Practice and Procedure* be reviewed. Rule 29 may be found at **Tab 4.3.3**.

206. The Committee with the agreement of the Tribunals Committee, recommends that the Consent Process be continued for a further two years. The continuation of the two-year pilot will permit additional study of the post-authorization Consent Process. During that time, both Committees will consider a report containing recommendations regarding whether the Consent Process should be continued on a permanent basis.

Background – Purpose of the Consent Process

207. The Consent Process begins during the investigation stage and concludes with a Hearing Panel Order. Through the Consent Process, a licensee may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.

208. The goals of the Consent Process were to:

a. be flexible by providing for negotiations at an early stage for licensees who are interested in making early admissions in aid of a fast outcome that is more certain;
b. reduce the time and resources required for full investigation and prosecution of some cases;
c. save significant costs for the licensee; and
d. continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

Overview of the Consent Process

209. The policy which includes a description of the Consent Process is set out in the 2010 Report at **Tab 4.3.1** and has also been codified in part in Rule 29 of the *Rules of Practice and Procedure*. A brief overview is set out below.

Description

210. The Consent Process may be initiated by the Law Society or the licensee during the investigation stage. Cases are approved for the Consent Process by the Director, Professional Regulation. Once presented to the licensee, he or she has 30 days to accept or reject the agreement, or negotiate changes with the Law Society. The Law Society and the licensee negotiate a tentative agreement on admissions and penalty, and conduct a fast-track investigation before finalizing the agreement.

211. The Director will only approve a case where in her opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest. Additional criteria have been identified in the 2010 Report at **Tab 4.3.1**, page 8 (paragraph 18) including:

    a. that the licensee is prepared to admit to the allegations;
    b. there is sufficient jurisprudence on the issue;
    c. discipline proceedings have not yet been authorized;
    d. the licensee is cooperating with the Law Society;
    e. the Law Society has no concerns about the licensee's capacity to engage in the process; and
    f. the licensee has legal representation or has been advised to obtain independent legal advice.

212. Once the Director is satisfied with the agreement, a Consent Proposal is referred to the Proceedings Authorization Committee (PAC) for authorization.

213. After authorization by PAC, a Consent Resolution Conference is held (Rule 29.02). This meeting is not public (Rule 29.05(3)). The Consent Resolution Conference may accept or reject the Consent Proposal but should accept it unless the Panel concludes that the joint submission on penalty is outside of the reasonable range.

214. Until the Consent Resolution Conference accepts the Consent Proposal, either party may withdraw (Rule 29.06). If the parties withdraw or the Consent Proposal is rejected by

them or the Consent Resolution Conference, the Law Society completes its investigation. The documents created for the Consent Resolution Conference and any statements made at the Consent Resolution Conference are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations (Rule 29.08).

215. Lastly, a Notice of Application is issued and the matter proceeds to a hearing in public before the same members of the Conference panel, composed as a Hearing Panel. The Consent Proposal becomes part of the public record and the Hearing Panel issues an Order in the normal course.

Experience with the Consent Process

216. Two cases have been completed through the Consent Process to date.

217. In the first case, the licensee was granted permission to surrender their licence. No costs were ordered. The misconduct that was the basis for the admissions and the finding was multiple failures to respond to and cooperate with the Law Society, and failure to provide the Law Society with information with respect to the disposition of the licensee's practice.

218. In the second case, the licensee was suspended for one month, was required to continue weekly telephone meetings with a sponsor for a period of two years and was required to pay costs in the amount of $2000. The misconduct that was the subject of the licensee's admissions, and the basis for the finding, was that the licensee had contravened Rule 6.01 of the *Rules of Professional Conduct* by acting without integrity when the licensee received trust funds totaling $5,800 from various clients and withheld them from the licensee's employer, appropriating them for personal use.

Benefits

219. Based on information from the Director of Professional Regulation, the Committee has identified benefits from the above two cases. Early agreement increased the level of certainty in the process for both parties. Discipline Counsel was able to consider the strengths and weaknesses of the Law Society's case and to negotiate a fair outcome based

on an agreed set of facts at an early stage in the process. Disclosure was not required, thereby saving time in the investigation and discipline process.

220. The two cases were different substantively, suggesting that the Consent Process may be appropriate in different types of cases.

Challenges

221. The Committee noted that identifying appropriate cases and moving them forward at an early stage in the investigation is a key challenge. The Committee understands that steps are being taken to assist in identifying more cases in future, at an earlier stage in the process.

222. In addition, despite the goal of expediting the investigations/hearing process, the Consent Process is somewhat cumbersome. This is largely because of the two-step process, as the Consent Resolution Conference is scheduled first, followed by the hearing. The requirement to schedule a Conference panel and a subsequent hearing take time, particularly since it is necessary to schedule the same three-member panel. It would be appropriate to explore ways to address this issue in future. For example, it may be possible to include in the Consent Proposal the parties' consent to a single member Hearing Panel.

Recommendations and Next Steps

223. The Committee believes that the goal of providing an alternative to the regular investigations/discipline process is still relevant. In the Committee's view, there have not been enough cases through the Consent Process to fully assess its efficacy. The Committee recommends that Convocation approve the continuation of the Consent Process for an additional two years.

224. The Committee's review of the Consent Process has occurred in the context of its consideration of one of Convocation's current priorities, which is enhancements to Tribunals procedures and processes, including file and case management, to improve

effectiveness and efficiency. Relevant priorities related to Professional Regulation are enhanced case management, discipline diversion and avoidance, expanding matters for which a single adjudicator hearing can be utilized, and exploring written hearings.

225. The Committee continues to study these matters, and there may be other ways to achieve the goals of the Consent Process that are equally effective.

226. Accordingly, the Committee recommends that:

a. Convocation approve the continuation of the Consent Process as set out in this report, and

b. the processes set out in Rule 29 of the *Rules of Practice and Procedure* (the Consent Resolution Conference and subsequent Hearing) be considered along with the other discipline/tribunals enhancements currently being studied.

The Law Society of Upper Canada | Barreau du Haut-Canada

Report to Convocation
January 28, 2010*

Professional Regulation Committee

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

Purpose of Report: Decision

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

*Items deferred from December 4, 2009 Convocation

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For Decision

COMMITTEE PROCESS

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

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

Motion

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

Introduction and Background

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

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

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

Why the Conference is Being Proposed

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

7. The proposed process:

a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;

b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing[1];

c. will save significant costs for the licensee[2]; and

d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

Cases Suitable for the Process

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

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

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

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

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

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

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

Overview of the Process

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

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

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

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

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

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

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

Pilot Project

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

Details of the Conference Process

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

Step 1 - Initiating the Conference

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

18. In addition to the general test set out in paragraph 17 above, before approving a case, the Director must ensure that the following criteria are met:

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

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

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

with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

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

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

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

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

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

Step 3 - Submission of the Consent Proposal to the PAC

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

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

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

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

Step 4 - Presentation to a Conference Panel

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

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

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

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

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

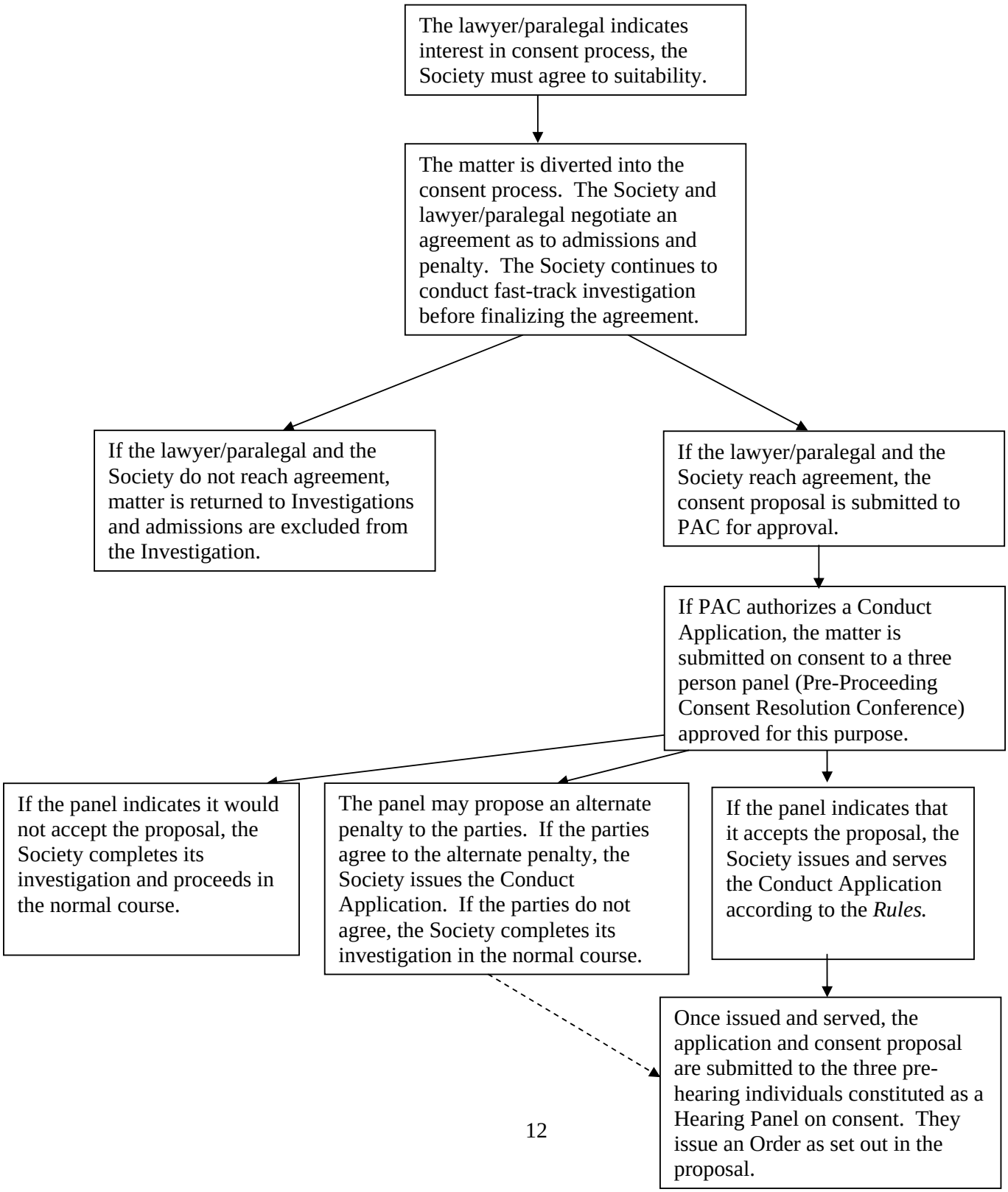
Step 5 – The Hearing

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

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

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

PROPOSED CONSENT PROCESS



Key Elements of the Process

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

Transparency

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

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

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

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

Penalties and Mitigation

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

42. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:

a. The existence or absence of a prior disciplinary record;

b. *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*

c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;

d. The extent and duration of the misconduct;

e. The potential impact of the member's misconduct upon others;

f. *Whether the member has admitted misconduct, and obviated the necessity of its proof;*

g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);

h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

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

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

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

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

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

Proceedings to be heard by one member

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

…

Legal Representation

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

Timelines

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

Documents and the Record

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

Tribunals Office's Administration of the Process

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

Amendments to the *Rules of Practice and Procedure*

51. To implement the Conference process, amendments to the *Rules of Practice and Procedure* would be required. They would refer to the process as a "pre-proceeding

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

consent resolution conference", and codify the procedural elements of the process described in this report. Consequential amendments to certain Rules may also be required.

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

APPENDIX 1

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

B.l. Joint Submissions of Counsel

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

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

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

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

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

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

…

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

THE REPORT WAS ADOPTED

APPENDIX 2

Tribunals Offices' Administration of the Proposed Consent Process

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

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

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

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

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

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

7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.

8. In accordance with Rule 9 of the *Rules of Practice and Procedure*, Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.

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

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

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

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

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

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

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

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

Motion

53. That Convocation approve

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

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

Introduction

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

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

56. To determine if a conflict exists, the lawyers assisting PBLO must have their firms do extensive conflicts searches before agreeing to provide the brief services. This can be very time-consuming, to the point where clients are being denied services because the conflicts checks are pending. PBLO has advised that this affects its ability to provide

access to justice to those for those who access PBLO's programs, and can defeat the purpose of the programs for those most in need.

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

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

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

Background on PBLO's Law Help Ontario Programs

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

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

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

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

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

64. The application form to be completed by those seeking these services, attached at **Appendix 4,** offers information on the program, including the following:

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

b. the matter must clear a conflicts check, and that if a conflict arises, this means that a lawyer (or law firm) cannot represent the person if the opposing parties are the firm's client.[7]

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

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

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

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

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

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

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

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

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

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

> **Scope of Service: Providing Limited Scope Assistance**
>
> Law Help has been developing procedures and best practices regarding the provision of limited scope assistance. An advice module for volunteer lawyers has been developed to address best practices regarding a lawyer's ethical and professional obligations in a court based context where providing limited services, such as appearing on a motion. This advice module (and others) will be posted on the Law Help website as an on-line resource for its volunteers.
>
> Limited retainer forms are in use that recognize the various types of limited scope assistance that may be offered, including single day assistance, multiple day assistance (both under the auspices of Law Help) and a private limited scope retainer between the firm and litigant.
>
> Law Help encourages volunteer lawyers to use these written retainers in circumstances where they are providing services to litigants beyond the standard 30 minutes information and advice session. For example, where they may be drafting (or "ghostwriting") documents or appearing before Superior Court on a motion. In addition, a form is in use that the volunteer

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

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

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

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

> lawyer may provide to opposing counsel, court staff, and the presiding justice to notify them of the limited role of the Law Help duty counsel service.

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

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

The Rules in Question

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

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

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

determine if a conflict exists. Further, the Society would be concerned that once a conflict is identified, the lawyer responded appropriately.

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

How PBLO Has Defined the Issue

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

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

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

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

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

75. More recent information was received from PBLO this fall, at the request of the Law Society. PBLO confirmed the information disclosed in Mr. Scott's letter:

a. The amount of time it takes to clear conflicts creates long delays for litigants trying to access legal assistance. Depending on the law firm and conflict checking process, litigants can expect to wait anywhere from 20 minutes to three hours before they can speak with a pro bono lawyer. This issue is compounded by the number of litigants who try to use the centre. Between January and September 30, 2009, the Law Help Centre had over 5800 visitors, nearly all of whom had to wait for a conflicts check to clear before they could receive assistance. The delays multiply and force the centre to turn people away. No available lawyers and running out of time in a day remain the main reasons that people are denied service at Law Help Ontario.

b. Conflict checking impedes law firm participation, especially now that the demand from the public is so high. In the past three months, the PBLO has been informed on at least three separate occasions that law firms were cancelling their pro bono appearances because their conflicts departments were being overwhelmed by the volume of names they had to run.[9]

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

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

> Conflicts of interest continue to present a problem for servicing litigants. However, important strides in identifying the scope of the challenge and developing important institutional support to rectify the issues have occurred. The main problem is that litigants are turned away when a conflict exists or must wait--sometimes up to 3 hours--for conflicts to clear. In addition, some law firms are also reluctant to assist clients if they think the matter may pose a future business conflict. A common problem occurs where large companies or institutions (banks, financial companies, insurance companies, the city, police, etc.) are involved. Most of the larger law firms--the source of the majority of PBLO's volunteers--are conflicted when the lawyer checks with their firm. At least one firm has reported that approximately 80% of such conflicts are affiliated with financial institutions.
>
> The conflicts issue is compounded as the popularity of the projects grows. Law Help now attracts litigants from communities outside of the Toronto area. It is frustrating for litigants who have traveled great distances if they have to wait for half a day, or if they can't be served at all. Where a conflict of interest exists, Law Help staff often give out the Law Help phone number to the litigant so they can call ahead to have conflict checks cleared if they choose to return on another day. This is helpful to the litigant; however, it interrupts front line staff providing direct assistance. It can also be frustrating when the litigant has a question that is procedural (such as a question regarding service of documents), because they still have to clear conflict checks in order to speak to a lawyer.
>
> Law Help tracked the actual number of conflicts for a four month period from March 1 to June 30, 2008. There were 184 conflicts of interest where litigants could not be seen and either had to return, or were not serviced at all. This averages out to 2.3 conflicts per day or 25% of all applicants for assistance during this period.
>
> Recent developments have helped increase access to some extent. In order to decrease the wait time for clients, many participating firms have developed an expedited search process for Law Help. If the name matches a name in their database, the firm deems it to be a conflict. They eliminate the much lengthier checking process.[10]

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

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

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

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

Other Legal Regulators

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

80. In the United States, a number of the courts and state bar associations have adopted rules to enhance access to justice for the unrepresented and to facilitate pro bono participation in brief services projects, especially those run through an organized assistance program. The common elements of these initiatives are:

    a. developing comprehensive plans to address the needs of unrepresented litigants, including revising judicial ethics and court procedures;

b. informed consent on the client's part regarding the use of limited representation
c. use of retainers to limit representation up front;
d. adoption of special conflict-of-interest rules in high-volume, public service programs that adhere to best practices.

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

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

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

> **Limited representation**
>
> **7.01** In Rules 7.01 to 7.04, **"limited legal services"** means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the

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

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

lawyer and the client that the lawyer will not provide continuing representation in the matter.

[added 01/09]

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

[added 01/09]

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

[added 01/09]

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

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

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

[added 01/09]

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

> 5.1. (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:
>
> (i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and

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

(b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

Jun2009

Commentary

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

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

conflict before or at the time of meeting with the client receiving the short-term legal services.

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

The confidentiality of information obtained by a lawyer providing short-term legal services pursuant to this Rule must be maintained. If not, a lawyer's partners and associates in his or her firm, or other lawyers providing services under the auspices of the non-profit legal services provider, will not be able to act for other clients where there is a conflict with the client who has obtained, or is obtaining, short-term legal services. Without restricting the scope of screening measures which may appropriately be undertaken in a particular set of circumstances, the following are some examples of proper measures which may be taken to ensure confidentiality. The lawyer who provided the short-term legal services shall have no involvement in the representation of another client whose interests conflict with those of the client who received short-term legal services from the lawyer, and shall not have any discussions with the lawyers representing the other client. Discussions involving the relevant matter should take place only with the limited group of firm members working on the other client's matter. The relevant files may be specifically identified and physically segregated and access to them limited only to those working on the file or who require access for specifically identified or approved reasons. It would also be advisable to issue a written policy to all lawyers and support staff, explaining the screening measures which have been undertaken.

No consent is required from either the client who received short-term legal services, or the client whose interests may conflict with the client receiving short-term legal services, to allow a lawyer, the lawyer's firm or a non-profit legal services provider to act for any client whose interests conflict with those of the client who has received short-term legal services, provided there has been compliance with Chapter 6, Rule 5.1(b). Rule 5.1(a) does not contemplate that a conflict, of which a lawyer is or becomes aware when engaged in the provision of short-term legal services through a non-profit legal services provider, may be waived by consent.

When offering short-term limited legal services, lawyers should also assess whether the client may require additional legal services, beyond a limited consultation. In the event that such additional services are required or advisable, the lawyer should explain the limited nature of the consultation and encourage the client to seek further legal assistance.

Jun2009

The Committee's Assessment and Proposal

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

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

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

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

89. The Committee agreed that the Law Society should take an approach similar to that taken by the Law Society of Alberta and the Law Society of British Columbia. The committee proposes that Convocation adopt a conflict of interest standard applicable to PBLO brief

services that would permit a lawyer to act in such cases unless the lawyer *knows* of a conflict of interest that would prevent him or her from acting.

Information from LawPRO

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

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

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

93. From a broader risk management and claims prevention perspective, LAWPRO notes that it is important that any lawyers providing services through Law Help Ontario or similar

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

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

programs be competent and have current knowledge of the law for any matters on which they are providing short-term limited legal services.

Amendments to the *Rules of Professional Conduct*

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

95. The Committee has prepared a draft of a new rule, the text of which appears on the following pages. This proposed rule would be added to the rule on conflicts of interest (rule 2.04). The proposed rule includes:

a. A definition of the type of legal services to which the modified conflict standard applies;
b. A knowledge standard for conflicts of interest;
c. A requirement to protect confidential information, and establish required screens within a law office;
d. Client management requirements; and
e. Commentary that explains the need for the rule and that elaborates on some of the requirements.

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

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

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

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

(a) knows or becomes aware of a conflict of interest between the lawyer's client and another client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or

(b) has or obtains confidential information relevant to a matter involving a current or former client whose interests are adverse to those of the client of the lawyer, the lawyer's firm or Pro Bono Law Ontario.

(X3) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a client may act for other clients of the law firm whose interests are adverse to the client receiving short-term limited legal services, provided that adequate and timely measures are in place to ensure that no disclosure of the client's confidential information is made to the lawyer acting for the other clients.

(X4) Where a lawyer knows or becomes aware of a conflict pursuant to this sub-rule, the lawyer shall not seek the client's waiver of the conflict.

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

(a) prior to providing the legal services, ensure that the appropriate disclosure of the nature of the legal services has been made to the client;

(b) determine whether the client may require additional legal services beyond the short-term limited legal services; and

(c) in the event that such additional services are required or advisable, encourage the client to seek further legal assistance.

Commentary

Short-term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best

efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in the subrule are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

This subrule applies in circumstances in which the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for the client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

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

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

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

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (X3) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

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

APPENDIX 3

INFORMATION ON PBLO ADVOCACY PROGRAMS

Law Help Ontario - Superior Court

Law Help Ontario is a court-based, self-help centre for low-income, unrepresented litigants. It operates the Superior Court walk-in centre at 393 University Avenue. The Superior Court program was launched in November 2007 and joined the existing Small Claims Court program, described later in this report, as the two court-based programs.

Law Help Ontario provides a range of services, including general information on rules and procedures of Superior Court, help in filling out court forms, legal advice (30-minute sessions), legal representation at a trial or motion and referral services.

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

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

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

Law Help Ontario - Small Claims Court

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

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

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

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

Appeals Assistance Project (The Advocates' Society)

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

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

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

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

When the case has been perfected, the individual must contact the Projects' co-ordinator will conduct a detailed intake to determine eligibility for pro bono representation. If the person qualifies, the coordinator will try to match him or her with a pro bono lawyer. The individual is responsible for contacting that pro bono lawyer chosen to arrange an initial consultation meeting.

The goal of this meeting is to determine if the lawyer will be able to represent the individual and ensure he or she is comfortable with the lawyer. A retainer agreement is signed that outlines the kind of work the lawyer has agreed to do, that the lawyer has waived their hourly billing rate, and that the client will be responsible for disbursements.

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

Child Advocacy Project (The Advocates' Society)

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

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

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

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

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

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

The program has three main areas of activity: advocacy and legal issue training for clinical staff, direct legal assistance to low-income patients/families and systemic advocacy.

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

APPENDIX 4

LAW HELP ONTARIO APPLICATION FORM

LawHelpOntario PBLO

Welcome to Law Help Ontario, a Pro Bono Law Ontario Project.

Law Help Ontario is a self-help centre for low income, unrepresented litigants appearing before Superior Court (limited civil matters – no family, criminal, etc.) Individuals are served on a first come, first served basis; however, priority may be given to litigants with urgent matters.

APPLICATION FORM

Part A: Your Contact Information:			
❒ Male ❒ Female	First Name	Last/Family Name	
Address		City	Province
Postal Code	Home Phone	Work Phone	
Cell Phone	Email Address		
What is your Court File Number? (If you have one)			
I am the Plaintiff/Applicant in this action ❒		I am the Defendant/Respondent in this action ❒	

Please pick **one** area of law that best describes your situation

- ❒ Bankruptcy or insolvency law
- ❒ Condominium
- ❒ Construction Lien
- ❒ Construction/Renovation dispute
- ❒ Contract law
- ❒ Damage to Property
- ❒ Defamation
- ❒ Employment Law/Wrongful Dismissal
- ❒ Insurance (other than motor vehicle)
- ❒ Intellectual Property
- ❒ Landlord Tenant
- ❒ Lawyer's Invoice Dispute
- ❒ Loan or Credit Card Default (other than mortgage default)
- ❒ Medical Malpractice
- ❒ Mortgage Default
- ❒ Motor Vehicle Accident
- ❒ Negligence
- ❒ Personal Injury
- ❒ Police misconduct
- ❒ Professional Malpractice (other than medical)
- ❒ Real Estate litigation/disputes (other than mortgage default)
- ❒ Wills/Estates
- ❒ Other _____

Part B: Persons and Companies involved (or potentially involved) in your matter.	
Please list all of the **Plaintiffs/Applicants** in this matter. (Please include first and last names, company names, and trade names)	Please list the **Law Firm** that's representing each Plaintiff/Applicant. If they are not represented, write "None"
1.	
2.	
3.	
4.	
5.	
6.	
Please list all of the **Defendants/Respondents** in this matter. (Please include first and last names, company names, and trade names)	Please list the **Law Firm** that's representing each Defendant. If they are not represented, write "None"
1.	
2.	
3.	
4.	
5.	
6.	
Please list any **other** persons or companies that might be involved in your matter. Please include First and last names, company names, and trade names.	Please list the **Law Firm** that's representing the other parties. If they are not represented, write "None"

If you need additional space, please ask for an additional form. See Additional page attached ☐

LawHelpOntario PBLO

Part C: Financial Eligibility – This section must be completed in order to apply for assistance

The number of people in my household, including me, my spouse and dependent children is:
❒1 ❒2 ❒3 ❒4 ❒5+

My Marital Status: ❒ Single ❒ Separated ❒ Married/Common Law ❒Widowed

The primary source of my household income is from one or more of the following sources(s):
❒ Income assistance from Ontario Works,
❒ Income assistance from Ontario Disability Support Program,
❒ Family Benefits Act allowance,
❒ Old Age Security Pension together with Guaranteed Income Supplement,
❒ War Veterans Allowance
❒ Canada Pension Plan benefits

Please tell us about your household's employment situation:

❒ I am Self Employed
❒ I am Employed
❒ I am Unemployed
❒ I am Retired
My Occupation : _____

❒ My Spouse is Self Employed
❒ My Spouse is Employed
❒ My Spouse is Unemployed
❒ My Spouse is Retired
My Spouse's Occupation: _____

Please tell us about your living situation:
❒ Own your home. If you own, what percentage of equity do you own?_____%
❒ Rent
❒ Live with parents
❒ Other _____

My Household's Assets:
❒I/we have more than $3000.00 in liquid assets (This includes RRSP's, cash/money)
❒I/we own additional properties (cottage, rental properties, etc.)

My Income (Per Month) In Total, from all sources
I receive $_____ per month from an estate or trust
I receive $_____ per month from a rental property
I receive $_____ per month from salaries/commissions
I receive $_____ per month from other investment sources

My Spouse's Income (Per Month) In Total, from all sources
My Spouse receives $_____ per month from an estate or trust
My Spouse receives $_____ per month from a rental property
My Spouse receives $_____ per month from salaries/commissions
My Spouse receives $_____ per month from other investment sources

My Household's Expenses (Per Month)
I/we pay $_____ in child support payments
I/we pay $_____ in spousal support payments
I/we pay $_____ in rent/mortgage payments
I/we pay $_____ in child care fees

Part D: Demographics

What was your highest level of education?

- ❒ Grade School
- ❒ Some High School
- ❒ High School Diploma
- ❒ Some University/College
- ❒ University Degree/College Diploma
- ❒ Post Graduate Degree

Is English your first language? Yes ❒ No❒

Do you need services in another language? Yes ❒ No❒

If ***yes***, what language?

Which age group do you belong to?

❒ 18 – 24 ❒ 25 – 34 ❒ 35 – 44 ❒ 45 – 54 ❒ 55 – 64 ❒ 65+

Part E: Other Questions

1. How did you hear about Law Help Ontario?

- ❒ Walking by the office
- ❒ Legal Aid Ontario
- ❒ Another Legal Clinic
- ❒ The Newspaper
- ❒ The Internet
- ❒ The Law Society
- ❒ Friend/Family Member
- ❒ TV
- ❒ A Judge or Master
- ❒ Court Staff Member (10th Floor)
- ❒Other _____

2. Is this the first time you tried to get any legal help with this case? Yes ❒ No❒

*If **no**, what other places have you tried to obtain assistance?*

3. Do you currently have a lawyer (or other representative) assisting you with this case? Yes ❒ No❒

4. If you answered ***no***, has a lawyer (that was hired or worked on a contingency arrangement) ever assisted you with this case? Yes ❒ No❒

If ***yes***, why is that lawyer not assisting you now?

5. Why are you representing yourself? ***Make one selection only***

- ❒ I can't afford to hire a lawyer
- ❒ I could pay some legal fees, but not all
- ❒ I ran out of money to continue paying my lawyer
- ❒ I didn't qualify for legal aid, or they said that they couldn't help with my case
- ❒ I believe that my case is straightforward and I can handle the litigation on my own
- ❒ I can afford a lawyer, but I don't want to pay a lawyer
- ❒ I don't trust lawyers
- ❒ My lawyer had himself/herself removed from my case
- ❒ Other _____

6. Have ever you tried using the Lawyer Referral Service? Yes ❒ No❒

If ***yes***, what was the result?

7. Do you have any other cases pending at the moment? Yes ❒ No❒

8. Have you tried to settle or mediate this case without going to court? Yes ❒ No❒

9. Does the opposing party have a lawyer? ❒ Unsure Yes ❒ No❒

10. Is this your first meeting with a Duty Counsel Lawyer at Law Help Ontario? Yes ❒ No❒

11. Do you have access to the internet? Yes ❒ No❒

12. May we contact you at a later date, and leave a voicemail message, if necessary, to get your feedback about the program? Yes ❒ No❒

LawHelpOntario PBLO

Part F: Acknowledgement & Consent Section

I **swear/affirm** the information I provided is accurate to the best of my knowledge and belief. I agree to provide financial information and records to Pro Bono Law Ontario, if requested, to confirm the financial information in this application form. I am aware that Pro Bono Law Ontario, its employees, designates, and volunteers may need access to my Court File.

I **authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to access my Court File for the purpose of administering and evaluating Law Help Ontario and the services offered.

I authorize Pro Bono Law Ontario, its employees, designates, and volunteers, to photocopy this application and retain its copy on file for record keeping purposes.

I **authorize** the Pro Bono Law Ontario, its employees, designates, and volunteers to provide any information set out in this application and acknowledgement form (including any document I provide, or will provide in the future, to Pro Bono Law Ontario) to any person volunteering to assist me and any lawyer or law firm that the Intake Coordinator considers may agree to assist me.

I authorize Pro Bono Law Ontario, its employees, designates, and volunteers, to send my name, and the names of all of the parties I provided, or will provide in future, to their law firm to verify if conflicts of interest may exist.

_____ _____

Applicant 1 Signature Date

Hours: 9:30 am – 4:00 pm, Monday – Friday. We close for lunch between 12:00 – 1:00 pm
Law Help Ontario is a walk-in centre only. No appointments. We do not accept phone calls, emails, or faxes. You must visit us in person for assistance.

Law Help Ontario
393 University Avenue
Toronto, ON M5G 1E6

LawHelpOntario PBLO

ACKNOWLEDGMENT & WAIVER FORM

This acknowledgment and waiver form is for all applicants of the Pro Bono Law Ontario (PBLO) Law Help Centre seeking assistance at Law Help Ontario located at the Superior Court of Justice at 393 University Avenue, Toronto, Ontario.

Applications for Assistance

1. **I acknowledge** that all applications for assistance are assessed individually and that assistance can be declined for any reason, as determined by the PBLO Intake Coordinator and/or Duty Counsel Lawyer.[1]

2. **I acknowledge** that clients are not always assisted in the order of arrival.

Limited Scope of Duty Counsel Services

3. **I acknowledge** that the PBLO Intake Coordinator(s) cannot provide legal advice.

4. **I acknowledge** that the Duty Counsel Lawyer cannot replicate the quantity or quality of legal assistance that I might get from a lawyer hired privately to represent me fully in this matter.

5. **I acknowledge** that the Duty Counsel Lawyer can only provide me with a maximum of 30 minutes of legal assistance today. If my meeting is extended longer than 30 minutes, I agree that all terms in this acknowledgement and waiver form remain in effect.

6. **I acknowledge** that I cannot request a meeting with a specific Duty Counsel Lawyer or a Duty Counsel Lawyer that assisted me in the past.

---

[1] The Duty Counsel Lawyer may only assist by:

- Providing general information on the rules and procedures of the Superior Court of Justice;
- Guiding me on how to complete some court forms;
- Helping to identify the legal issues of my case;
- Helping to understand my legal options based on the information I provide; and
- Speaking to my legal issues at certain kinds of limited appearances, such as motion hearings.

The Duty Counsel Lawyer **cannot:**

- Help me if I already have a lawyer;
- Commission or notarize my court documents, forms, or any other legal documents;
- Act as a commissioner for taking affidavits or a notary public;
- Help me with any legal problems that are unrelated to my Superior Court of Justice civil case;
- Serve or accept service of any court documents;
- Predict or guarantee the outcome of my case or how Judges or Masters will rule; or
- Be responsible for the accuracy of the information I have in any forms or papers I file or use in court.

7. **I acknowledge** that I may reapply to seek further assistance but that the PBLO Intake Coordinator and Duty Counsel Lawyers reserve the right to deny future assistance to me where they deem it appropriate to do so.

No Ongoing Solicitor-Client Relationship with PBLO or Duty Counsel Lawyer

8. **I acknowledge** that I am **not** forming an ongoing solicitor-client relationship with PBLO, Law Help Ontario or any of its officers or employees and that I am not forming an ongoing solicitor-client relationship with the Duty Counsel Lawyer or the Duty Counsel's law firm.

9. **I acknowledge** that neither PBLO, Law Help Ontario nor any of its officers or employees or the Duty Counsel Lawyer or the Duty Counsel's law firm has any further duty to look after my legal interests in the matter that I receive assistance with today or any other matters.

Waiver of Solicitor-Client Privilege to PBLO and Duty Counsel Lawyer

10. **I acknowledge** that I do not have an expectation of confidentiality concerning any information that is shared with the Intake Coordinator or other PBLO employees and that if I wish to have a confidential consultation, I should consult or retain a private lawyer. **I further acknowledge** that the Law Help Ontario Office is an open concept and that conversations I may have may be overheard by other Law Help Ontario clients, staff, volunteers, and Duty Counsel Lawyers that may represent other parties involved in my case.

11. **I acknowledge** that any information that I share with the PBLO Intake Coordinator or other PBLO employees or that the Duty Counsel Lawyer shares with the Intake Coordinator and staff of PBLO is not protected by solicitor client privilege.

12. **I acknowledge** that any verbal information and any information set out in my application, acknowledgement and waiver form, case disposition form and any other form or document that I provide to, or is prepared by, the Law Help Ontario or the Duty Counsel Lawyer can be:

- stored at Law Help Ontario or another PBLO office;
- reviewed by staff members of PBLO, its employees, designates, volunteers, and other Duty Counsel Lawyers;
- photocopied;
- typed, scanned, transcribed, and stored in PBLO's computer system; and
- uploaded and backed up *via* the internet to a third party data protection service.

Right to Verify Conflicts of Interest

13. **I authorize** the Duty Counsel Lawyer to send my name, and the names of all of the parties listed in my application to their law firm to verify if conflicts of interest may exist.

14. **I acknowledge** that the Duty Counsel Lawyer cannot assist me where a conflict of interest is discovered or arises, which makes it inappropriate for the Duty Counsel Lawyer to continue to provide assistance.

15. **I acknowledge** that the Duty Counsel Lawyer is free to act for other clients against me on other unrelated matters in the future, without notice to me.

Right for PBLO to Retain Documents

16. **I acknowledge** that any document that forms part of my file may be kept by PBLO for the following reasons:

- administrative record keeping;
- maintaining a database of people served;
- conducting conflict of interest searches;
- assessing the quality of services provided;
- gathering general statistics about Law Help Ontario's clients;
- evaluating types of services utilized; and
- sharing with Law Help Ontario staff or volunteers whom I may visit in the future.

17. **I acknowledge** that Law Help Ontario is a pilot project and, in the future, that I may be contacted by a PBLO representative to answer questions about its value. If contacted, I may refuse to participate.

Full and Final Release

18. **I release** PBLO, Law Help Ontario, Duty Counsel Lawyers and all other parties and participating law firms together with all of their respective officers, employees, and volunteers from all claims whatsoever with respect to use of the premises and to advice/services given or advice/services that should or should not have been given at Law Help Ontario.

19. **I acknowledge** that I was able to read and understand all of the contents of this Acknowledgment Form.

Applicant (Print your full name Here)	Law Help Ontario – Form Explained by	
Applicant Signature	Signature	Date

APPENDIX 5

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

Recommendation 15:

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

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

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

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

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

    a. The scope of the Exempted Services retainer is limited to the summary services provided through the court-annexed or non-profit program. While the duty of confidentiality and loyalty endure, the lawyer-client relationship terminates at the end of the provision of the Exempted Services;
    b. If a lawyer is aware of a conflict, the lawyer may not provide legal advice to the limited scope client ("LSC"), but may assess the LSC's suitability for services provided through the court-annexed or non-profit program and refer the LSC to another lawyer at the program or clinic;
    c. If a lawyer is not aware of a conflict, the lawyer may provide Exempted Services. As the services are summary in nature and the risk associated with not performing the conflicts search is outweighed by the social benefit of the Exempted Services, the lawyer is not required to check for conflicts prior to, or following, providing the Exempted Services;

    d. If, at any time during provision of the Exempted Services, a lawyer becomes aware of a conflict, the lawyer must immediately cease providing legal advice or

services and refer the LSC and the notes taken to another lawyer at the clinic or program. If no lawyer is available, the LSC should be put in touch with a program staff person to coordinate the appointment of a new lawyer;

e. Privileged information to anyone including other lawyers at the lawyer's firm, save as provided by law. Maintaining the LSC's confidences is an important safeguard in protecting the LSC's information and guarding against the inference that other people at the lawyer's firm possess the confidential information;

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

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

   a. If the LSC contacts the lawyer, the lawyer must conduct a conflicts search prior to engaging the LSC in a new retainer;

   b. If the lawyer has advance notice that the lawyer will be speaking with the LSC on a subsequent occasion, the lawyer must conduct the conflicts search prior to that meeting;

   c. If the lawyer happens to be assigned the LSC a subsequent time while providing Exempted Services, and in circumstances not captured in 5(b), the lawyer may provide summary legal advice on that occasion but must conduct a conflicts search upon returning to the lawyer's firm.

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

   a. The regular rules for determining whether the lawyer may act for or against the existing client, the LSC, or a future firm client, apply. The Exempted Services will be treated as an isolated event that do not require prior informed consent;

   b. Despite the duty the lawyer owes to his or her clients, the lawyer must not divulge the confidential information received by the LSC during provision of Exempted Services, and the lawyer must not divulge the existing client's confidential information to the LSC.

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

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

must be advised of the conflict and the steps that will be taken to protect the clients' confidential information.

2.3.1 Conflicts of interest in limited scope retainers

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

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

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

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

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

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

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

2.3.2 American models for conflicts of interest in unbundled matters

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

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

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

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

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

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

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

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

Criminal duty counsel also provide limited scope legal services. It is less likely, but not unheard of, for a conflict of interest to arise (e.g. co-accused). The Task Force heard from duty counsel, and was advised that the standard practise is to deal with conflicts based on having actual knowledge of the conflict. While duty counsel do not wish to run afoul of the Law Society’s

conflicts rules, they believe their approach provides a practical method that balances the duty to protect a client's interest with making sure as many accused as possible have access to justice.

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

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

The Task Force considered the potential use of waivers for conflicts of interest, but concluded that such an approach presents several problems. For the waiver to be valid, it would require both the existing client and the new client to waive the conflict, and with informed consent. This would be administratively impractical, and there are some conflicts that cannot be waived in any event. Having a waiver that was only signed by one party would not amount to a true waiver, and while it would serve to alert the client to the concept of conflicts it would do little to resolve the concern. The Task Force is of the view that the better approach would be to clearly limit the scope of the retainer, and to have a mechanism for alerting the client to the concept of conflicts of interest and how conflicts would be handled should they arise. Providing the client with a clear and comprehensible limited retainer form is only part of the equation, however, and the Task Force recognizes that the conflicts of interest rules would have to be amended to create a narrow exemption for the conflict of interest rules. This exemption should seek to balance the competing demands of the duty of loyalty to a client with the increasing need for limited scope legal services at court-annexed and non-profit programs, to assist litigants who may otherwise be self-represented.

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

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

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

Report to Convocation
January 27, 2011

Tribunals Committee

Committee Members
Mark Sandler (Co-Chair)
Linda Rothstein (Co-Chair)
Alan Gold (Vice-Chair)
Raj Anand
Jack Braithwaite
Christopher Bredt
Paul Dray
Jennifer Halajian
Tom Heintzman
Heather Ross
Paul Schabas
Beth Symes
Bonnie Tough

Purposes of Report: **Decision**
Information

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

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COMMITTEE PROCESS

1. The Committee met on January 13, 2011. Committee members Mark Sandler (Co-Chair), Alan Gold (Vice Chair), Raj Anand, Jack Braithwaite, Christopher Bredt, Jennifer Halajian, Paul Schabas and Beth Symes attended. CEO Malcolm Heins attended. Staff members Helena Jankovic, Grace Knakowski, Denise McCourtie, Elliot Spears and Sophia Sperdakos also attended.

FOR DECISION

a) PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE: RULES OF PRACTICE AND PROCEDURE

Motion

2. That Convocation amend the Rules of Practice and Procedure applicable to proceedings before the Law Society Hearing Panel to implement the pre-proceeding consent resolution conference, as set out in the official bilingual version provided at Convocation, the English version also set out at Appendix 2.

Background and Information

3. In April 2009 the Professional Regulation Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who,
   a. admit to conduct allegations against them; and
   b. agree to a joint penalty or range of appropriate penalty to be submitted to a Hearing Panel to obtain an Order.

4. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee and culminated in a joint meeting of the Committees in November 2009.

5. In January 2010 Convocation approved the proposed policy for a Pre-Proceeding Consent Resolution Conference as a two-year pilot project. The full report Convocation approved is set out at **Appendix 1**.

6. The proposed English amendments to the Rules of Practice and Procedure to implement the policy are set out at **Appendix 2.** The official bilingual version of the proposed rules will be provided under separate cover to Convocation for approval.

APPENDIX 1

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

Motion

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

Introduction and Background

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

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

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

Why the Conference is Being Proposed

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

6. The proposed process:

a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;

b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing[1];

c. will save significant costs for the licensee[2]; and

d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

Cases Suitable for the Process

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

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

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

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

[3] To elaborate:
Mortgage fraud. The evidence used in a mortgage fraud case is largely documentary. In this type of case, the Society can often be certain that the lawyer's admissions are supported by the evidence, and can assess the appropriate penalty to be proposed to the lawyer and his or her counsel. Given the size of mortgage

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

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

Overview of the Process

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

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fraud investigation files, the time saved by not having to prepare the file for disclosure and for hearing, not having to prepare witnesses and forgoing the hearing, are significant.
Financial transactions. The evidence used in cases of financial misconduct is often supported by documents. Where documentary evidence is lacking, for example, where a lawyer or paralegal's books and records are not up to date, the lawyer's or paralegal's admissions would assist the Society in completing its investigation and would save the time and resources required for a contested hearing.
Fail to serve. Where a lawyer or paralegal fails to serve his or her clients, evidence is obtained from the client file, court documents and from the lawyer or paralegal and clients. Where the lawyer or paralegal does not admit to the allegations, they can take a significant amount of time to prove. If a lawyer or paralegal is willing to admit to a failure to serve his or her clients, consideration should be given to the appropriateness of the consent process.
Professionalism. Where allegations of incivility or misleading the court arise out of proceedings, the factual issue of what the lawyer or paralegal said or did may not be in dispute and is often supported by transcripts or documents. However, the lawyer or paralegal often raises a defence justifying his or her conduct, for example, on the basis of the actions of the opposing party or the adjudicator. Investigating and prosecuting these cases is very time-consuming. If a lawyer or paralegal is willing to agree to a discipline outcome and penalty, consideration should be given to the appropriateness of the consent process and the fact that it will result in a public order and record of this conduct.

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

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

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

Pilot Project

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

Details of the Conference Process

15. The following is a narrative description of the steps in the proposed Conference. A diagram following paragraph 35 illustrates the process.

Step 1 - Initiating the Conference

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

17. In addition to the general test set out in paragraph 16 above, before approving a case, the Director must ensure that the following criteria are met:

a. The public interest can be addressed through a consent order. Cases will not be included in the process if they present novel issues, or issues which, for reasons of regulatory effectiveness or transparency, require a full hearing.

b. There is sufficient Law Society jurisprudence on the issue of conduct and penalty for the Society to be able to agree to the process (the jurisprudence forms the basis for the Society's agreement to a penalty or range of penalties on the basis of the applicable law and facts);

c. Discipline proceedings have not yet been authorized in the matter;

d. The lawyer or paralegal is prepared to admit to the allegations made by the Society;

e. There is no issue of failure to cooperate with the Law Society; for example, the lawyer or paralegal is responding promptly to the Law Society;

f. The lawyer or paralegal agrees to abide by the timeline of 30 days to arrive at an agreement;

g. The Law Society has no concerns about the lawyer's or paralegal's capacity to engage in negotiations;

h. The lawyer or paralegal understands that the result of the Conference will be a public hearing, although it will be abbreviated, and a public Order;

i. The lawyer or paralegal has legal representation, failing which the lawyer or paralegal affirms that he or she has been advised to obtain independent legal advice about his or her rights in the Conference process.

18. The Law Society has the right to decide that a case is not suitable for the Conference where any of the factors listed in paragraphs 16 and 17 above would make it unsuitable or where the Law Society is not satisfied that there has been sufficient investigation to make a determination on the suitability of the process.

19. Other matters may affect the Law Society decision to continue with the process. For example, if new evidence relevant to the subject of the Conference comes to

the Law Society's attention, or if allegations of misconduct about the lawyer or paralegal arise after the process has begun, it may not be appropriate for the Law Society to continue with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

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

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

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

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

24. If one of the parties is unable to agree to the outcome, the consent process would terminate and the matter would be returned to the Investigation department. The

documents prepared in support of the Conference would be excluded from any further proceedings.

Step 3 - Submission of the Consent Proposal to the PAC

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

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

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

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

Step 4 - Presentation to a Conference Panel

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

30. Consistent with the current Convocation policy on joint submissions (attached as [TAB 1]), the members of the Conference panel should accept the consent

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

proposal unless the panel concludes that the joint submission on penalty is outside the reasonable range, in the circumstances.

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

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

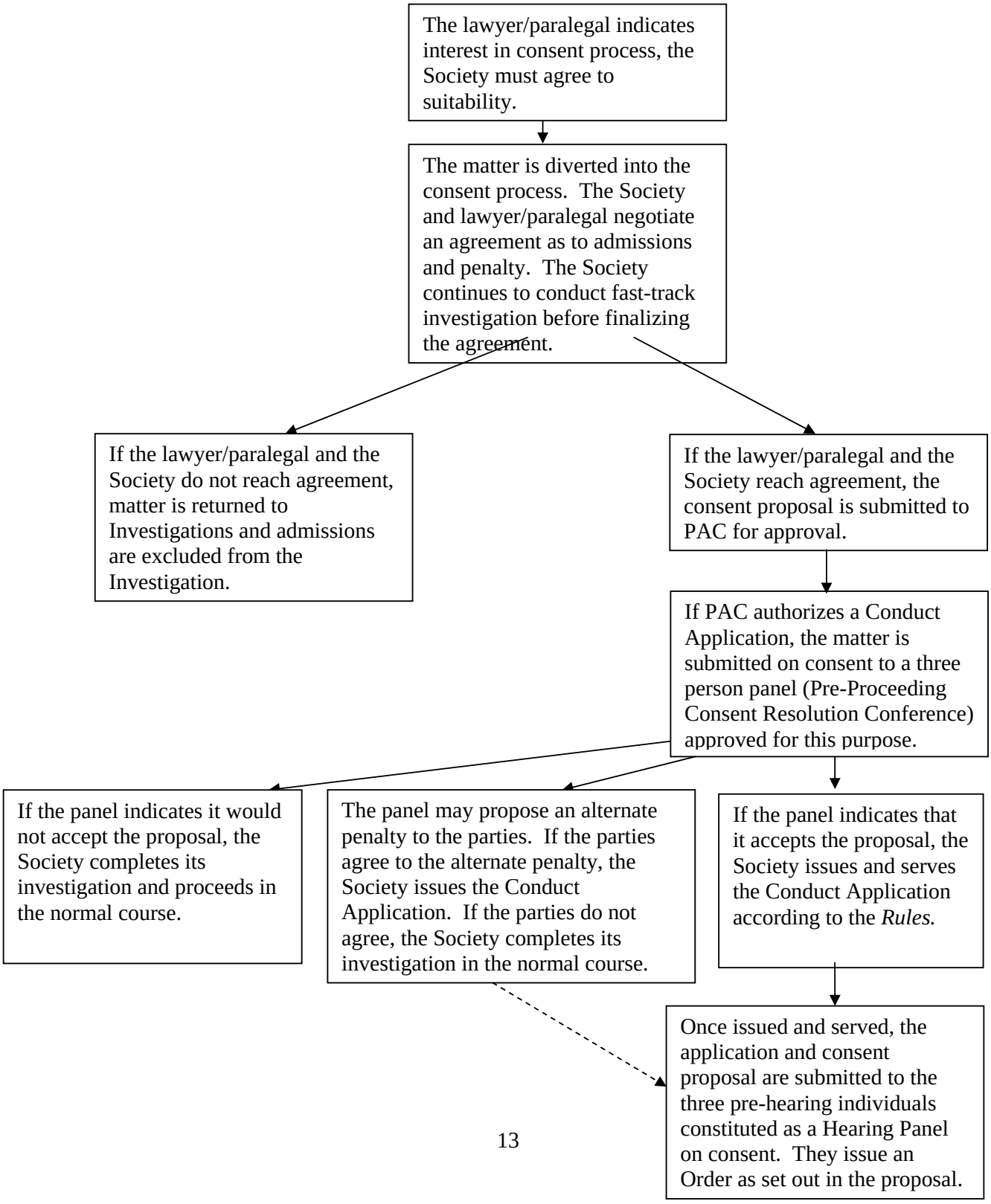
Step 5 – The Hearing

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

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

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

PROPOSED CONSENT PROCESS



Key Elements of the Process

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

Transparency

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

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

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

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

Penalties and Mitigation

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

41. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:

a. The existence or absence of a prior disciplinary record;

b. *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*

c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;

d. The extent and duration of the misconduct;

e. The potential impact of the member's misconduct upon others;

f. *Whether the member has admitted misconduct, and obviated the necessity of its proof;*

g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);

h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

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

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

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

45. At the hearing stage that follows the Conference, in some cases, it may be appropriate for a single member of the Hearing Panel to preside at the hearing. This person would be selected from the three persons who convened as the Conference panel, as he or she would be familiar with the facts and the issues that led to the consent agreement. Similar to the process described in paragraph 43, this person would sit as a single member with the consent of the parties.[5]

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

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

Legal Representation

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

Timelines

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

Documents and the Record

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

Tribunals Office's Administration of the Process

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

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

Amendments to the *Rules of Practice and Procedure*

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

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

TAB 1

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

B.l. Joint Submissions of Counsel

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

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

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

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

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

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

…

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

THE REPORT WAS ADOPTED

TAB 2

Tribunals Offices' Administration of the Proposed Consent Process

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

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

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

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

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

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

7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.

8. In accordance with Rule 9 of the *Rules of Practice and Procedure*, Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.

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

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

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

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

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

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

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

APPENDIX 2

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE
(applicable to proceedings before the Law Society Hearing Panel)
MADE UNDER
SECTION 61.2 OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 27, 2011

MOVED BY

SECONDED BY

THAT the rules of practice and procedure applicable to proceedings before the Law Society Hearing Panel, made by Convocation on February 26, 2009 and amended by Convocation on June 25, 2009 and June 29, 2010, (the "Rules") be amended as follows:

1. The definition of "hearing" in subrule 1.02 (1) of the English version of the Rules is revoked and the following substituted:

"hearing" does not include a consent resolution conference, a proceeding management conference or a pre-hearing conference;

2. Rule 25.01 of the English version of the Rules is amended by adding the following subrule:

Consent resolution conference: no costs

(4) Despite subrules (1) and (2), no costs shall be awarded against the Society or the subject of the proceeding based on,

(a) either party's refusal to participate or either party's withdrawal from participation in a consent resolution conference; or

(b) the fact that a consent resolution conference did not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

3. The English version of the Rules are further amended by adding the following Rule:

RULE 29

CONSENT RESOLUTION CONFERENCE

Definitions

29.01 In this Rule,

"consent resolution conference" means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

(a) the decision and order to be made by the Hearing Panel in the conduct proceeding; or

(b) the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding;

"consent resolution panel" means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

"potential proceeding" means a conduct proceeding that has not been commenced;

"subject of a potential proceeding" means the person who will be the subject of a conduct proceeding once it has been commenced.

Consent resolution conference: when shall be conducted

29.02 (1) The chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,

   i. to commence a conduct proceeding, and

   ii. to request the Hearing Panel to direct that a consent resolution conference be conducted.

2. The conduct proceeding has not been commenced.

3. The Society and the subject of the potential proceeding have agreed to,

i. the decision and order to be made by the Hearing Panel in the conduct proceeding; or

ii. the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

4. The subject of the potential proceeding has consented to participate in a consent resolution conference.

5. The Society has requested a consent resolution conference.

Who conducts consent resolution conference

(2) Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted under subrule (1), the chair, or, in the absence of the chair, the vice-chair, shall assign either one or three panelists to conduct the consent resolution conference.

Request to Tribunals Office

29.03 (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunals Office.

Information re conditions

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel of the existence of the conditions set out in rule 29.02.

Contact information of subject of potential proceeding

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

Notice of consent resolution conference: Society

29.04 Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted, the Tribunals Office shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

Procedure applicable to consent resolution conference

29.05 (1) The practices and procedures applicable to proceedings before the Hearing Panel that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

Consent resolution conference not open to public

(3) A consent resolution conference shall be conducted in the absence of the public.

Withdrawing participation in consent resolution conference

29.06 (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

Notice of withdrawal

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunals Office.

Settlement at consent resolution conference: commencement of conduct proceeding

29.07 (1) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding the Society shall,

(a) commence the conduct proceeding; and

(b) notify the Tribunals Office in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

Settlement at consent resolution conference: non-application of certain Rules

(2) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.

2. Rule 7.

3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

No settlement at or withdrawal from consent resolution conference: subsequent hearings

29.08 Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

INFORMATION

b) TWO YEAR REVIEW ON NON-BENCHER ADJUDICATOR INITIATIVE

Summary

7. In April 2007 Convocation approved the addition of four non-bencher lawyers and four non-bencher non-lawyers to become members of the Law Society's Hearing Panel. It also directed that two years after implementing the recommendation there be a review for Convocation of the manner in which the non-bencher lawyers and the non-bencher non-lawyers have served as adjudicators.

8. The non-bencher lawyers and non-lawyers were appointed in January 2009. As directed by Convocation the Committee is providing the two year review, for Convocation's information.

9. The Committee has concluded that although it is still early to obtain a full picture of the non-bencher adjudicator initiative, indications are that it,

   a. enhances the Law Society's ability to effectively adjudicate and manage its hearings process in the public interest,

   b. has made it possible to provide important human resources to the Hearing Panel; and

   c. offers an opportunity for non-benchers to play a valuable role in Law Society matters and become more aware of issues related to professional regulation.

Introduction and Background

10. In April 2007 Convocation approved a number of recommendations of the Tribunals Composition Task Force including,

> **Recommendation 1**
> That Convocation approves the eligibility of,
> a. four non-bencher lawyers, and
> b. four non-bencher non-lawyer persons
> to be members of the Law Society's Hearing Panel.

Recommendation 2
That if Convocation approves recommendation 1, all Hearing Panel members be remunerated on the same basis, except that the non-bencher lawyer and non-bencher non-lawyer members are not required to donate 26 days to the Law Society before being eligible for remuneration.

Recommendation 3
That Convocation budget annually an amount not exceeding $100,000 for the remuneration and expenses associated with adding non-bencher lawyers and non-bencher non-lawyer persons to the Hearing Panel.

Recommendation 4
That if Convocation approves Recommendation 1, two years after implementing the recommendation, Convocation authorize a review of the manner in which the non-bencher lawyers and the non-bencher non-lawyer persons have served as adjudicators on the Law Society's Hearing Panel, the results of which are to be reported to Convocation.

11. A process was developed to seek applicants for the adjudicator positions. A notice was placed in the *Ontario Reports* in English and French for lawyer applicants. Copies of the notices are set out at **Appendix 3**. A description of the process followed for both non-bencher lawyer and non-bencher non-lawyer adjudicator appointments is set out at **Appendix 4**. The appointments were made in 2009.

Scope of this Report

12. Convocation directed that a review take place after two years of operation of the non-bencher adjudicator initiative. Although it is possible to provide some assessment of the initiative, in the Committee's view there has been insufficient time to fully assess qualitative issues that require the benefit of a longer period. Accordingly, the Committee's report is impressionistic, with a general overview of the initiative over the last two years.

Use of Non-bencher Adjudicators

13. In discussing usage of non-bencher adjudicators it is important to note, as well, that in addition to the four non-bencher lawyer appointees and the four non-bencher non-lawyer appointees, the Law Society has on occasion appointed "temporary" panelists (lawyer and non-lawyer) where needed for French

language hearings and temporary paralegal panelists for good character or appeal hearings. The Law Society has authority to do this pursuant to section 49.24.1 of the *Law Society Act*.

14. The issue of French language hearings illustrates one of the benefits of the non-bencher adjudicator initiative in enhancing adjudicative resources. As benchers and lay benchers are elected and appointed, respectively, those able or available to hear French language hearings can vary from time to time. To provide more continuity, three of the four non-bencher lawyer adjudicators and two of the non-bencher non-lawyer adjudicators are bilingual. This reduces the need to use "temporary" panelists. From a public interest perspective it has enhanced resources available to ensure the public and licensees are able to avail themselves of the opportunity to be heard in French.

15. Since Convocation passed the non-bencher adjudicator initiative the Law Society has also been required to populate a significant number of panels to hear paralegal good character matters. This has required extensive use of lay benchers and non-bencher non-lawyer adjudicators as well as temporary paralegal panelists. The non-bencher adjudicator initiative did not include appointments of additional non-bencher paralegal adjudicators. Given that the paralegal good character hearings are currently winding down, the need for additional temporary paralegal panelists may diminish, although this issue may require further discussion in the future.

16. The four non-bencher lawyer candidates and the four non-bencher non-lawyer appointees are sent a hearings schedule, in the same way as bencher adjudicators, and provide their availability to sit on Law Society hearings and other matters. Like all adjudicators they may be scheduled to sit on pre-hearing conferences, hearings, summary hearings, appeals, interlocutory motions, motions in hearings and appeals, short matter dates (hearings estimated by the parties to require less than one day), long matter dates (hearings estimated by the parties to require more than one day) in lawyer and paralegal matters in both English and French.

17. As with all adjudicators the non-bencher adjudicators may be assigned to a matter, with an anticipated time commitment, only to be required to participate for less time because a matter does not proceed or takes less time than anticipated. The reverse may also be true; a matter may take more time than initially anticipated.

18. The non-bencher non-lawyer adjudicators have been used on a number of matters. Their availability has assisted in scheduling hearings over the last two years. The non-bencher lawyers, in particular those who are bilingual, have also had a number of occasions to sit on hearings or otherwise participate.

19. The existence of an additional pool of adjudicators has provided the Chair of the Hearing Panel with additional scheduling flexibility. On occasion these adjudicators have made the difference between being able to schedule a hearing or not when the time commitment involved or the last minute change in scheduling made it impossible to schedule a bencher adjudicator. The availability of additional lay and French speaking adjudicators has also facilitated flexibility in scheduling.

20. The information at **Appendix 5** sets out the number of times a non-bencher adjudicator was assigned to matters in 2009 and 2010 and how much actual participation time this represented.[6] It reveals some unevenness in the use of non-bencher adjudicators, particularly non-bencher lawyers. The Committee is of the view that the non-bencher adjudicators must be given ample opportunity to participate in hearings and matters. The goal of the initiative is to develop additional and experienced adjudicative resources to enhance the operation of the Tribunal. This means that it is important to regularly schedule these adjudicators to participate on panels. Greater effort to do so will be made in 2011.

[6] Setting out "no. of times assigned" provides a snapshot of opportunities provided to the non-bencher adjudicator to participate. Often, however, an assigned matter will not proceed, (adjournments, withdrawals, resolutions by ASF, etc.) so the actual participation is reflected in the second number.

Expenses and Remuneration for Non-Bencher Adjudicators

21. In 2009 the total expenses and remuneration for non-bencher lawyer and non-bencher non-lawyer appointees was $87,099.36, representing the use of five non-lawyers and three lawyers. This was the first year of the initiative and occurred before the paralegal good character hearings were underway. In that year an additional $1,522.02 was spent on two temporary paralegal panelists.

22. From January to November 2010, $153,642.37 was spent on non-bencher lay adjudicators (approximately 60% of the total), non-bencher lawyer adjudicators (approximately 30% of the total), and temporary lawyer and lay adjudicators (approximately 10% of the total). This includes $27,615.75 (18%) for French hearings. Specifically, the expenses and remuneration for,

a. non-bencher lay adjudicators were:

Expenses	$31,439.34	($3,125.66 of which was for French hearings)
Remuneration	$60,274.81	($2,300.00 of which was for French hearings)
Total	$91,714.15	($5,425.66 or which was for French hearings)

b. non-bencher lawyer adjudicators were:

Expenses	$13,455.32	($ 4,893.59 of which was for French hearings)
Remuneration	$31,873.64	($12,700.00 of which was for French hearings)
Total	$45,328.96	**(**$17,593.59 or which was for French hearings)

a. "temporary" lawyer and lay adjudicators were:

Expenses	$ 1,684.45	($1,296.50 of which was for French hearings)
Remuneration	$14,914.81	($3,300.00 of which was for French hearings)
Total	$16,599.26	($4,596.50 of which was for French hearings)

2. In November 2010 the Committee reported to Convocation that the $100,000 limit placed on expenses for non-bencher adjudicators had been exceeded. It noted that given,

a. the requirements of Regulation 167/07;

b. the Law Society's commitment to having lay benchers on all hearings; and

c. a licensee's right to a French language hearing,

non-bencher lawyer and non-bencher non-lawyer appointees were necessarily assigned despite the cap having been reached. It noted that in all likelihood additional funds would have to be expended before the end of 2010 and that it was realistic to expect a similar experience and needs in 2011. In the 2011 budget Convocation included an increase to $175,000.

3. As a regulator of the profession in the public interest the importance of regulatory proceedings being scheduled as expeditiously as possible cannot be over-emphasized. The public in general and complainants in particular, have a right to expect that the Law Society will effectively address the issues of lawyer and paralegal competence, conduct and capacity. The non-bencher adjudicator initiative has provided greater flexibility to the Tribunals process.

4. The Committee also believes that the initiative is providing an additional benefit. Small though the numbers are, a new group of lawyers and lay people are becoming familiar with the Law Society, with the intricacies of professional regulation, the responsibilities that accompany it and the issues that affect lawyers and paralegals. Expanding adjudicative responsibilities beyond benchers strengthens the Law Society's work.

Conclusion

5. The Committee is of the view that the non-bencher adjudicator initiative is proceeding well, has added to the Law Society's capacity to regulate in the public interest and represents an important component of the Law Society's ongoing commitment to transparent, fair, and effective regulatory processes.

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

Invitation to Lawyers to apply for Appointment to the Law Society of Upper Canada's Hearing Panel

The Law Society of Upper Canada exists to govern Ontario's legal profession in the public interest.

The Law Society of Upper Canada is seeking four qualified lawyers for appointment to its Hearing Panel. The term of appointment shall be at the pleasure of Convocation.

The Law Society of Upper Canada governs legal service providers in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct. In furtherance of that mandate, the Law Society's Hearing Panel hears cases related to the conduct, capacity and competence of lawyers and paralegals. The Hearing Panel consists of benchers, lawyers, paralegals and public appointees.

This is a part-time position that is remunerated on a *per diem* basis. Reasonable expenses are paid/refunded. Assignment to hearings will be on an *as needed* basis.

Successful applicants must be currently licensed by the Law Society of Upper Canada, be called to the bar for a minimum of ten years, have no disciplinary record in any jurisdiction, and must be able to devote time to the role of an adjudicator. Bilingualism (French/English) is an asset. Consideration will be given to the following qualifications:

i. adjudicative experience and legal expertise
ii. commitment to the public interest
iii. understanding of the role of an adjudicator
iv. familiarity with administrative tribunals
v. open-mindedness, empathy and the ability to consider argument
vi. commitment to preparing timely and reasoned decisions
vii. willingness to be trained as an adjudicator and to attend mandatory training sessions
viii. commitment to tribunal standards of procedure, consistency, quality and performance
ix. good oral and written communication skills

The Law Society of Upper Canada encourages applicants that reflect the diversity of Ontario. We appreciate all interest and will directly contact candidates under consideration.

Qualified individuals are invited to send a curriculum vitae **no later than February 14, 2008** to the Human Resources Department, Law Society of Upper Canada, 130 Queen Street West, Toronto Ontario, M5H 2N6; fax 416.947.3448; e-mail *hr@lsuc.on.ca*.

The Law Society of Upper Canada | Barreau du Haut-Canada

Le Barreau du Haut-Canada invite les avocats et avocates à faire demande comme membre de son comité d'audition

Le Barreau du Haut-Canada a pour mission de réglementer la profession juridique dans l'intérêt public.

Le Barreau du Haut-Canada cherche quatre avocats compétents pour faire partie de son comité d'audition. Les conditions de la nomination seront établies par le Conseil.

Le Barreau du Haut-Canada réglemente les fournisseurs de services juridiques dans l'intérêt du public en veillant à ce que les avocates, les avocats et les parajuristes qui sont au service de la population de l'Ontario répondent à des normes élevées en matière de formation, de compétence et de déontologie. Dans le cadre de son mandat, le comité d'audition du Barreau entend des causes portant sur la conduite, la capacité et la compétence des avocats et des parajuristes. Le comité d'audition est formé de conseillers, d'avocats, de parajuristes et de membres du public.

Il s'agit d'un poste à temps partiel qui est rémunéré selon un forfait quotidien. Les dépenses raisonnables sont payées ou remboursées. Les mandats d'audition sont assignés selon les besoins.

Pour être acceptés, les candidats et candidates doivent détenir une licence du Barreau du Haut-Canada, être assermentés depuis au moins dix ans, ne pas avoir de dossier disciplinaire dans aucun ressort et être capables d'accorder du temps à leur rôle de membre du comité. Le bilinguisme (français/anglais) est un atout. Les compétences suivantes seront prises en compte :

(i) Expérience en arbitrage et expertise judiciaire
(ii) Engagement envers l'intérêt public
(iii) Compréhension du rôle d'arbitre
(iv) Connaissance du fonctionnement des tribunaux administratifs
(v) Ouverture d'esprit, empathie et habileté à analyser un argument
(vi) Engagement à préparer des décisions opportunes et raisonnées
(vii) Volonté de participer à des séances obligatoires de formation d'arbitre
(viii) Engagement envers les normes de procédure des tribunaux, la cohérence, la qualité et le rendement
(ix) Bonnes habiletés de communication orale et écrite

Les personnes qualifiées sont invitées à envoyer leur curriculum vitae le **14 février 2008 au plus tard** aux Ressources humaines, Barreau du Haut-Canada, 130, rue Queen Ouest, Toronto (Ontario) M5H 2N6; téléc. 416.947.3448; courriel *hr@lsuc.on.ca*

Le Barreau du Haut-Canada encourage les candidats et candidates qui représentent la diversité de l'Ontario. Nous vous remercions de votre intérêt et contacterons directement les personnes dont la candidature sera retenue.

APPENDIX 4

APPOINTMENTS PROCESS FOR NON-BENCHER ADJUDICATORS

1. The Law Society placed advertisements in the *Ontario Reports* for lawyer applicants. For non-lawyer applicants, it wrote to previous lay benchers and solicited from other regulators the names of lay adjudicators who might meet the Law Society's appointment criteria.

Lawyer Applicants

2. The Law Society received 229 applications from lawyers and 13 applications from non-lawyers. Of these, 133 applications were from lawyers inside Toronto and 96 were from lawyers outside of Toronto. There were 153 male applicants, and 76 female applicants.

3. The then Director, Policy and Tribunals read every lawyer resumé. Only those applicants with prior adjudicator experience were selected for further review. This reduced the number to 70.

4. The Director and other designated staff then reviewed the 70 lawyer applicants against the criteria set out in the advertisement, and selected a short list of 27 lawyers.

5. In June 2008, the Director provided the names of all 229 lawyers, including the 70 with adjudicator experience, and the short list and resumés of the 27 short-listed applicants to a bencher working group of Alan Gold, Larry Banack and Bonnie Warkentin.

6. The Working Group met on July 8, 2008 to review the applicants. It selected a short list of 6 lawyers (three from within Toronto and three from outside Toronto).

7. The shortlisted applicants were then vetted for any Law Society regulatory issues, and their references were checked. The remaining members of the working group, Alan Gold and Larry Banack reviewed the shortlist.

Non-Lawyer Applicants

8. The Law Society received 13 applications from non-lawyers. The Director reviewed the applicants and provided their resumés to the Working Group in June 2008. The Working Group discussed these applicants at its July 8 meeting, and selected a short list of five applicants. The references of the five applicants were checked.

9. Alan Gold and Larry Banack reviewed the applicants following the reference and regulatory checks, and recommended four lawyer and four non-lawyer adjudicators to the Committee for appointment to the Hearing Panel. The Committee reviewed the names and information about their experience and recommends that Convocation invite them to become members of the Hearing Panel.

APPENDIX 5

2009 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE

Appointee	Lawyer or non-lawyer[7] appointee	Number of times assigned to a hearing panel	Hearing participation (in hours)[8]
1	Lawyer	3	13
2	Lawyer	1	7
3	Lawyer	0	0
4	Lawyer	0	0
5	Non-lawyer	12	244
6	Non-lawyer	10	151
7a	Non-lawyer	4	59
7b[9]	Non-lawyer	1	9
8	Non-lawyer	3	21
Totals		**34** **lawyer appointees (4)** **non-lawyer appointees (30)**	**504** **lawyer appointees (20)** **non-lawyer appointees (484)**

[7] In 2009, the four lawyer appointees to the Hearing Panel were Margot Blight, Adriana Doyle, Jacques Ménard and Howard Ungerman. The five non-lawyer appointees were Andrea Alexander, Anne-Marie Doyle, Barbara Laskin, Maurice Portelance and Sarah Walker.
[8] Includes participation for continuation hearing dates.
[9] Non-lawyer appointee adjudicator 7b replaced non-lawyer appointee adjudicator 7a.

2010 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE

Appointee	Lawyer or non-lawyer[10] appointee	Number of times assigned to a hearing panel	Hearing participation (in hours)
1	Lawyer	11	35
2	Lawyer	12	26
3	Lawyer	13	87
4	Lawyer	4	11
5	Non-lawyer	21	255
6	Non-lawyer	17	111
7	Non-lawyer	5	44
8	Non-lawyer	14	81
Totals		**97** **lawyer appointees (40)** **non-lawyer appointees (57)**	**650** **lawyer appointees (159)** **non-lawyer appointees (491)**

[10] In 2010, the four lawyer appointees to the Hearing Panel were Margot Blight, Adriana Doyle, Jacques Ménard and Howard Ungerman. The four non-lawyer appointees to the Hearing Panel were Andrea Alexander, Barbara Laskin, Maurice Portelance and Sarah Walker.

RULE 29

CONSENT RESOLUTION CONFERENCE

Definitions

29.01 In this Rule,

"consent resolution conference" means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

(a) the decision and order to be made by the Hearing Panel in the conduct proceeding; or

(b) the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding;

"consent resolution panel" means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

"potential proceeding" means a conduct proceeding that has not been commenced;

"subject of a potential proceeding" means the person who will be the subject of a conduct proceeding once it has been commenced.

Consent resolution conference: when shall be conducted

29.02 (1) The chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,

   i. to commence a conduct proceeding, and

   ii. to request the Hearing Panel to direct that a consent resolution conference be conducted.

2. The conduct proceeding has not been commenced.

3. The Society and the subject of the potential proceeding have agreed to,

   i. the decision and order to be made by the Hearing Panel in the conduct proceeding; or

ii. the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

4. The subject of the potential proceeding has consented to participate in a consent resolution conference.

5. The Society has requested a consent resolution conference.

Who conducts consent resolution conference

(2) Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted under subrule (1), the chair, or, in the absence of the chair, the vice-chair, shall assign either one or three panelists to conduct the consent resolution conference.

Request to Tribunals Office

29.03 (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunals Office.

Information re conditions

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel of the existence of the conditions set out in rule 29.02.

Contact information of subject of potential proceeding

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

Notice of consent resolution conference: Society

29.04 Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted, the Tribunals Office shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

Procedure applicable to consent resolution conference

29.05 (1) The practices and procedures applicable to proceedings before the Hearing Panel that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a

consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

Consent resolution conference not open to public

(3) A consent resolution conference shall be conducted in the absence of the public.

Withdrawing participation in consent resolution conference

29.06 (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

Notice of withdrawal

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunals Office.

Settlement at consent resolution conference: commencement of conduct proceeding

29.07 (1) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding the Society shall,

(a) commence the conduct proceeding; and

(b) notify the Tribunals Office in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

Settlement at consent resolution conference: non-application of certain Rules

(2) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.

2. Rule 7.

3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

No settlement at or withdrawal from consent resolution conference: subsequent hearings

29.08 Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

1. Rule 6.

2. Rule 7.

3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

No settlement at or withdrawal from consent resolution conference: subsequent hearings

29.08 Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

FOR INFORMATION

ANNUAL REPORT OF THE COMPLAINTS RESOLUTION COMMISSIONER

227. Part I of By-Law 11, which governs the office of the Complaints Resolution Commissioner, requires that the Complaints Review Commissioner ("the Commissioner") submit an annual report to the Committee. The Committee must then provide the report to Convocation. The relevant section of the By-Law reads:

> **Annual report**
>
> 3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.

228. The report of the Commissioner, Stindar K. Lal, is attached as **TAB 4.4.1.**

229. Mr. Lal and one member of his staff attended the Committee's February 13, 2014 meeting to discuss the report.

Annual Report of the Complaints Resolution Commissioner

January 1, 2013 – December 31, 2013

Submitted by Stindar Lal, QC/cr
Complaints Resolution Commissioner

TABLE OF CONTENTS

A. Introduction

The Complaints Resolution Commissioner is appointed by Convocation pursuant to Section 49.14 of the *Law Society Act, R.S.O. 1990, ch. L.8* (hereinafter referred to as the "*Act"*). The role and responsibilities of the Complaints Resolution Commissioner (hereinafter referred to as the "Commissioner") are set out in Sections 49.14 to 49.19 of the *Act* and are attached to this Report as Appendix 1. The *Act* also outlines the administrative responsibilities of the office of the Commissioner.

Part 1 of By-Law 11[1] (hereinafter referred to as "By-Law 11"), made pursuant to Section 62 of the *Act*, a copy of which is attached to this Report as Appendix 2, elaborates on the role and functions of the Commissioner.

Pursuant to Section 3 of By-Law 11, the Commissioner is required to submit to the Professional Regulation Committee of the Law Society of Upper Canada an Annual Report "upon the affairs of the office of the Commissioner during the immediately preceding year". I am submitting this Report for the 2013 calendar year. This will be my final Report to the Committee, as my current appointment expires on March 31, 2014.

B. Complaints Resolution Commissioner's Functions

By-Law 11 provides the Commissioner with two distinct functions, the Complaints Resolution function and the Complaints Review function.

Complaints Resolution Function:

The Complaints Resolution function provides the Commissioner with the statutory authority to perform a formal resolution function. It allows the Law Society, with the consent of the complainant and licensee, to refer a matter to the Commissioner for resolution, prior to the file being investigated or referred to the Proceedings Authorization Committee.

The Commissioner has a broad discretion to determine the process for the resolution function. While the resolution function has been available for implementation since 2007, to date, the Commissioner has only been called upon to perform the review function.

[1] By-Law 11 was made May 1, 2007, and was most recently amended May 30, 2013.

Complaints Review Function:

By-Law 11 also provides the Commissioner with the authority to review a complaint if a complainant requests that the Law Society refer a reviewable complaint to the Commissioner for review.

Subsection 4 (1) of By-Law 11 identifies those complaints which may be reviewed by the Commissioner. It provides that a complaint may be reviewed if:

(a) the merits of the complaint have been considered by the Law Society;
(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
(c) the complaint has not been previously reviewed by the Commissioner; and
(d) the Law Society has notified the complainant that it will be taking no further action in respect of the complaint.

Subsection 4 (2) of By-Law 11 provides that a complaint may not be reviewed by the Commissioner if, in the opinion of the Commissioner, it concerns only the quantum of fees or disbursements charged by a licensee, a licensee's filing requirements, the handling of money and other property or negligence of a licensee.

Subsection 5 (3) of By-Law 11 requires the complainant to request a review within 60 days of being notified of the Law Society's decision to close the file. During 2013, while the office of the Commissioner received a request for review on 301 files, 16 of the requests were received outside the 60 day time period. In each of such instances, the complainant was notified in writing of the Commissioner's lack of jurisdiction to conduct a review. In 2012, there were nine such requests and during 2011, 10 such requests were received.

In some cases, Counsel to the Commissioner and Counsel to the Director of Professional Regulation have been able to work together to resolve issues in advance of a meeting. In other cases, informal resolutions have been achieved after the Review Meeting was completed, eliminating the need to formally refer the matter back to the Law Society.

Standard of Review:

By-Law 11 Subsection 7 (2) requires that the Commissioner apply a standard of reasonableness in reviewing the Law Society's investigation of a complaint. This standard of review requires the Commissioner to determine whether the Law Society's consideration of a complaint and its resulting decision to take no further action with respect to the complaint was reasonable. The Commissioner's role is similar to that of an ombudsman in that as an ombudsman, a degree of deference is given to the body which is being overseen. Applying this standard of review, if the Commissioner is satisfied that the decision to close a complaint file is reasonable, no further action is recommended. However, if the Commissioner is not satisfied that the decision arrived at by the Law

Society was reasonable, the complaint will be referred back to the Law Society with a recommendation that the Law Society take further action.

The decision to refer a file back to the Law Society is case specific. It is a decision based on several factors such as the facts relating to a particular complaint, the rationale for seeking a review of the complaint from the Commissioner, the quality of evidence on which the complainant is relying and the reasonableness of the position taken by the Law Society. Therefore, each complaint is unique.

Section 49.19 of the *Act* states **"**A decision of the Commissioner is final and is not subject to appeal."

C. Composition of the Office

The office of the Commissioner is currently staffed with one part-time Counsel, who is also responsible for the management of the office and one full-time Counsel. Counsel participate in the reviews, providing the Commissioner with legal advice when required. The office is also staffed with a Senior Coordinator and an Administrative Assistant.

D. Complaints Review Process

Notice to the Complainant:

Upon being advised by the staff of either the Complaints Resolution Department or the Investigations Department of the Professional Regulation Division that a complaint file is being closed without a referral to the Proceedings Authorization Committee for other action, including disciplinary action, the complainant is notified that the Law Society's decision to close the complaint may be reviewed by the Commissioner.

Format of the Review Meeting:

By-Law 11, Subsection 8 (1) provides that the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

By-Law 11, Subsection 8 (2) provides that where practicable, the Commissioner will meet with each complainant, and the Commissioner may meet with the complainant by telephone, electronic or other communication facilities in order to allow all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

Until the end of December 2011, all meetings were scheduled as in-person meetings. However, if the complainant was unable or unwilling to attend the in-person meeting, the complainant was provided with the opportunity to participate in a teleconference meeting or alternatively, request a review based on the written materials.

In December 2011, in order to meet the growing demand for reviews, a form entitled the "Request for Review by the Complaints Resolution Commissioner" (the "form") was introduced. In this form, the complainant is informed of three options for proceeding with a review of a complaint by the Commissioner: an in-person meeting, a meeting by teleconference or proceeding with the review based on the written material contained in the Law Society's file. In the last option, the complainant often submits detailed written material with the form. Attached to this Report and marked as Appendix 3 is a copy of the form. Also attached and marked as Appendix 4 is a copy of the Information Sheet, which explains the review process to the complainant.

Since the introduction of the form, there has been an increase in the number of requests for review based on the written materials. However, when given a choice, many complainants still prefer to have an in-person meeting, even when advised that the review will proceed more expeditiously if done either by teleconference or in writing.

Since the establishment of the Commissioner's office, most of the files reviewed were investigated and closed by the Complaints Resolution Department, which department may not have the opportunity to meet with complainant in person. Therefore, a meeting with the Commissioner may be the complainant's only opportunity to voice his or her concerns in person. A discussion with the Commissioner also allows the complainant an opportunity to ask questions about the Law Society's process, including the investigation and resulting outcome. For instance, it is often difficult for a lay person to appreciate the difference between a breach of the Rules and a claim in negligence.

In considering the efficiencies of the office of the Commissioner, this office examined the different formats for proceeding with a review meeting. It was noted that since verbally communicating with the Commissioner permits an open dialogue between the complainant and the Commissioner, less detail is required in the Commissioner's decision letter following an in-person or teleconference meeting. When concluding a review based on the written materials, the Commissioner's letter requires that the Commissioner recite all relevant facts and address all objections set out in the complainant's written submissions. In addition, communication from the complainant is more frequent following a review based solely on the written materials, which may be attributable, in part, to the Commissioner's ability to clarify issues and manage the complainant's expectations during an in-person or teleconference meeting.

Location of the In-person Meetings:

Although most in-person Review Meetings have been held in Toronto, in December 1997, to provide greater accessibility to the process for those complainants who reside outside of the Toronto area, Convocation approved the holding of Review Meetings in centers outside of Toronto. Currently, in-person meetings are held approximately once a year in Ottawa and London.

Processing Requests for Review:

Upon receipt of a request for review, the office of the Commissioner sends the complainant a letter of confirmation and notifies the investigating department of the request for review. The Professional Regulation Division then provides written notice of the request for review to the licensee. However, pursuant to Subsection 8 (4) of By-Law 11, the licensee who is the subject of the complaint is not entitled to participate in the review process.

The investigating department is responsible for preparing the materials for the review. A bound copy of all relevant materials, referred to as the Complaints Review Index, is prepared for use at the Review Meeting. The Complaints Review Index usually includes the Law Society's closing letter or report, copies of all relevant materials submitted by the complainant and either the licensee's written response or a synopsis of the response. Once the Complaints Review Index is completed, it is reviewed by the office of the Director, and then delivered to the Coordinator at the Commissioner's office. On receipt of the bound materials, the Coordinator schedules the Review Meeting. A letter is sent to the complainant, advising the complainant of the scheduled date, the time, the manner in which the meeting will proceed and, if in person, the place where the meeting will be held. A copy of the Complaints Review Index for the complainant's use during the meeting is also enclosed with the letter. A copy of the Complaints Review Index is also provided to the Commissioner and to Counsel to the Commissioner, for review, in advance of the meeting.

Documents that fall within the confidentiality provisions of Subsection 49.12 (1)[2] of the *Act* are also provided to the Commissioner and Counsel to the Commissioner. The type of information considered confidential includes:

(a) Law Society record of information relating to the licensee;
(b) evidence from third parties which is protected by confidentiality or solicitor-client privilege;
(c) solicitor-client information, when the complainant is not the client or the information is in respect of other clients.

Review Meeting Schedule:

Since the establishment of the office of the Commissioner, the growing demand for reviews has been met by an increase in the number of review days and the number of files reviewed on each of the review days.

In an effort to further reduce the waiting time between the receipt of a request for review and the conduct of the Review Meeting, and in order to accommodate the high demand for reviews and the limited resources available, in addition to four review days each

[2] 49.12 (1) A bencher, 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.

month with four reviews on each day, reviews based on the written materials were conducted on days not scheduled for review meetings.

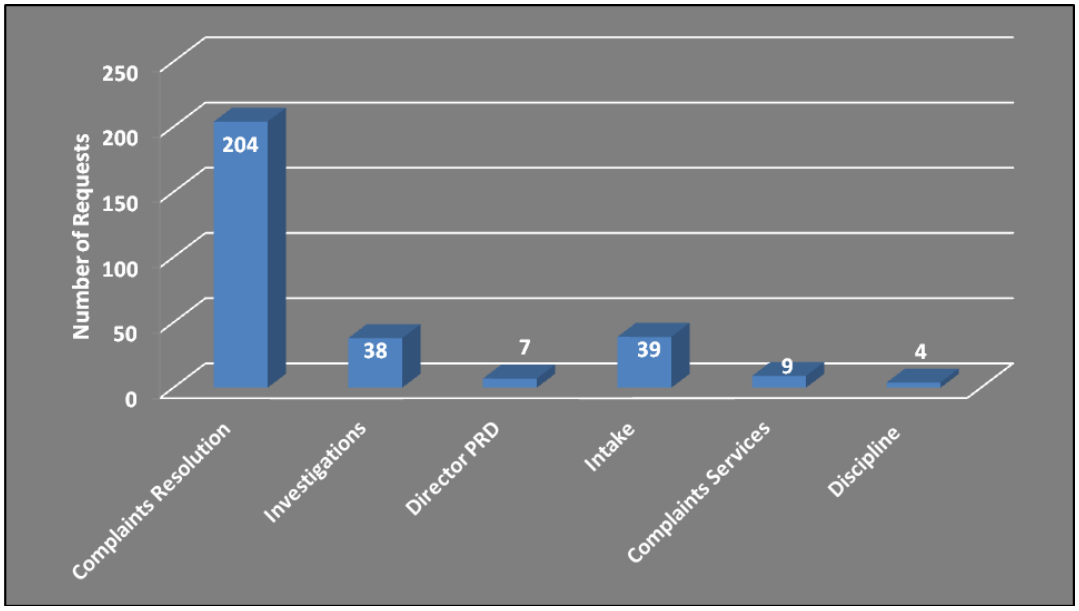
E. Statistical Information

What follows is relevant statistical information on the "affairs of the office of the Commissioner" for the current year and for the two previous years, for comparison purposes.

Number of Requests for Review:

In 2013, there were 301 requests for review. Table 1 that follows provides a breakdown of the departments from which the requests for review were received.

Table 1 – CRC Requests Received by Department in 2013



As indicated earlier in this Report, Subsection 4 (1) of By-Law 11 provides that a review is only available when the merits of a complaint have been considered by the Law Society. This Subsection of the By-Law has been interpreted to mean that the Commissioner can only review those files that have been investigated under the authority set out in Section 49.3 of the *Act.* These relate generally to complaints that have been referred to the Complaints Resolution Department or the Investigations Department and exclude cases that have been closed by Complaints Services, the Intake Department or the Discipline Department.

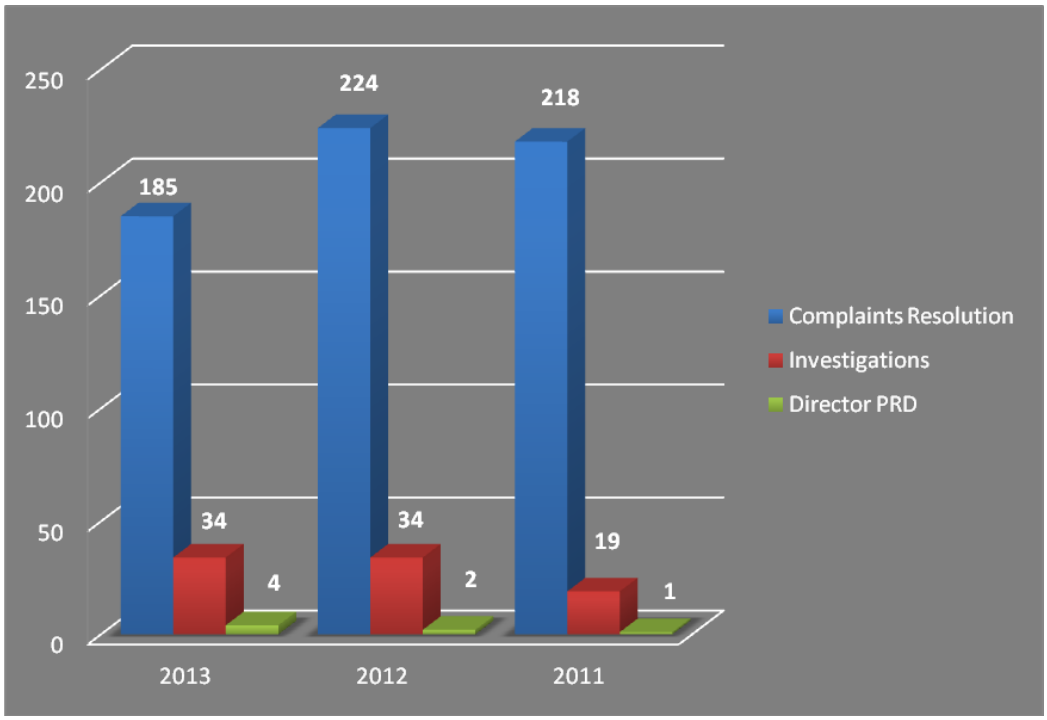
Notwithstanding, as Table 1 indicates, the office of the Commissioner receives a number of requests for review on files closed by Complaints Services, the Intake Department and the Discipline Department. When the office of the Commissioner receives a request for review of a complaint closed by either Complaints Services or the Intake Department, the complainant is advised that the Commissioner does not have the jurisdiction to review the matter and the complainant is referred back to the department that notified the complainant of the file closing, for a further response. The department Manager then reviews the file and if the Manager believes that the file should remain closed, the complainant is so notified. If the complainant still remains dissatisfied, the file is forwarded to the appropriate Director for review. With respect to requests for review from files closed in the Discipline Department, the complainant is advised that a matter which has been referred to the Discipline Department by the Proceedings Authorization Committee cannot be reviewed by the Commissioner.

Table 1 above also includes an additional 26 files for which a request for review was received, but for which the Commissioner did not have the jurisdiction to review. Nineteen of these files were investigated by the Complaints Resolution Department, four by the Investigations Department and three by the Director's office. The Commissioner's lack of jurisdiction arose for a variety of reasons, including the expiry of the 60 day time period for requesting review, the investigation had been discontinued, or the file was with the Proceedings Authorization Committee. In such circumstances, the complainant was notified in writing of the reason for the Commissioner's lack of jurisdiction to review the matter.

After eliminating those files where the request was outside the Commissioner's jurisdiction, the number of requests for review by the Commissioner in 2013 was 223. There were requests for review on 260 files in 2012 and there were 238 requests for review received in 2011.

Table 2 that follows provides a comparison of requests for review received by Department from 2011 through 2013. It does not include those requests where the complaint is outside the Commissioner's jurisdiction to review.

Table 2 - Comparison of Requests Received by Department from 2011 through 2013



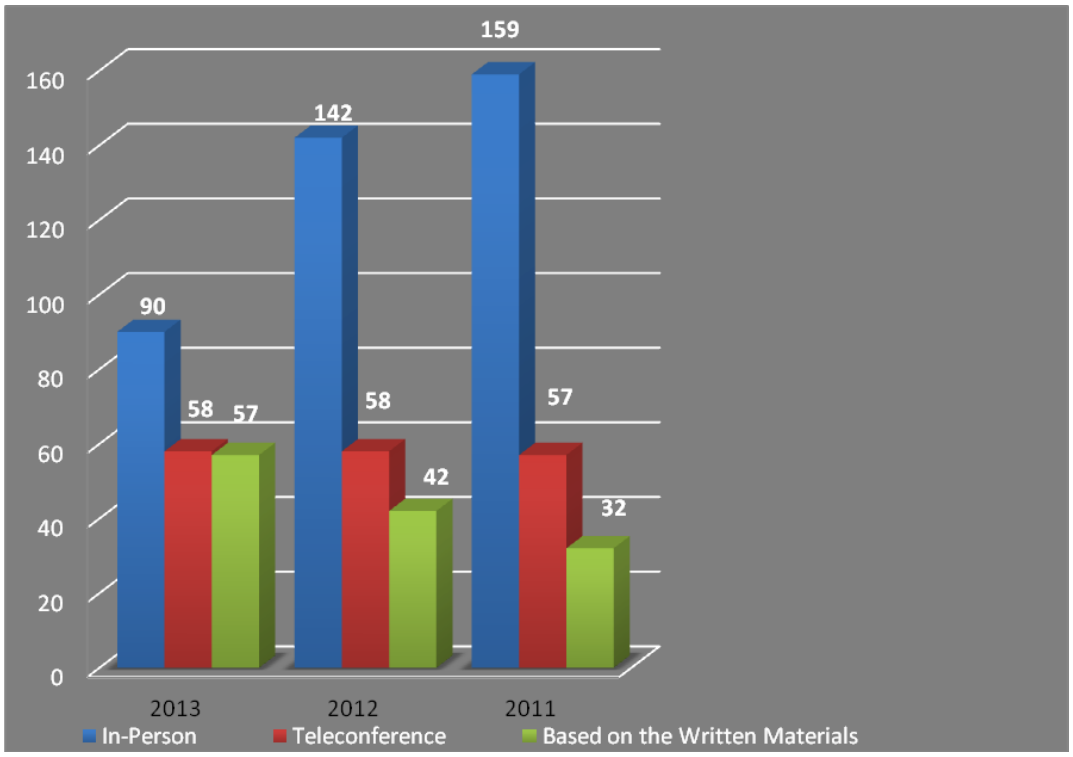
Number of Reviews Conducted:

From January 1, 2013 to December 31, 2013, 205 files were reviewed by the Commissioner. During 2012, 242 complaint files were reviewed and from January 1, 2011 to December 31, 2011, 248 files were reviewed.

From the 205 reviews conducted in 2013, 86 of the requests for review were received in 2013, 117 were received in 2012 and two were received in 2011**.** Of the 242 reviews conducted in 2012, 110 of the requests were received in 2012, 130 of the requests were received in 2011 and two requests were made in 2010. Of the 248 reviews conducted in 2011, 87 of the requests were made in 2011, 146 of the requests were made in 2010, 12 requests were made in 2009 and three requests were made in 2008.

Format of Review Meetings Conducted:

Table 3 – Comparison of Format of Review Meetings Held



As indicated in Table 3, during 2013, of the 205 files reviewed, 90 (44%) were reviewed in in-person meetings, 58 (28%) were conducted in teleconference meetings and 57 (28%) proceeded based on the written material.

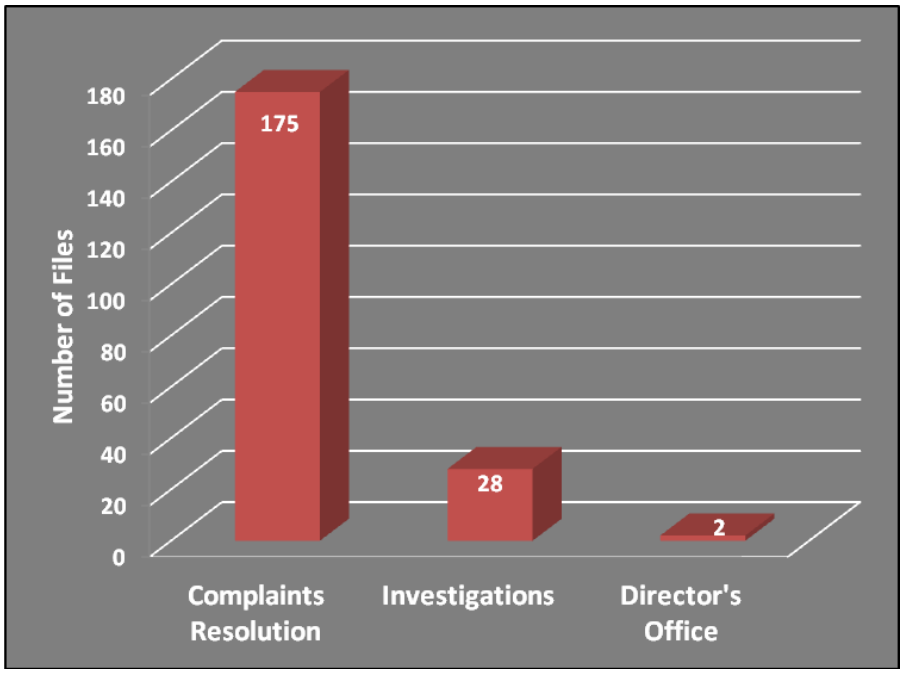
From January 1, 2012 to December 31, 2012, a total of 242 files were reviewed by the Commissioner. There were 142 (59%) in-person meetings, 58 (24%) teleconference meetings and 42 (17%) reviews based on the written materials.

During 2011, of the 248 files reviewed, 159 (64%) proceeded as in-person meetings, 57 (23%) proceeded by teleconference and 32 (13%) file reviews were based on the written material.

Department that Conducted the Investigation:

Table 4 that follows identifies the department that conducted the investigation of the files reviewed in 2013.

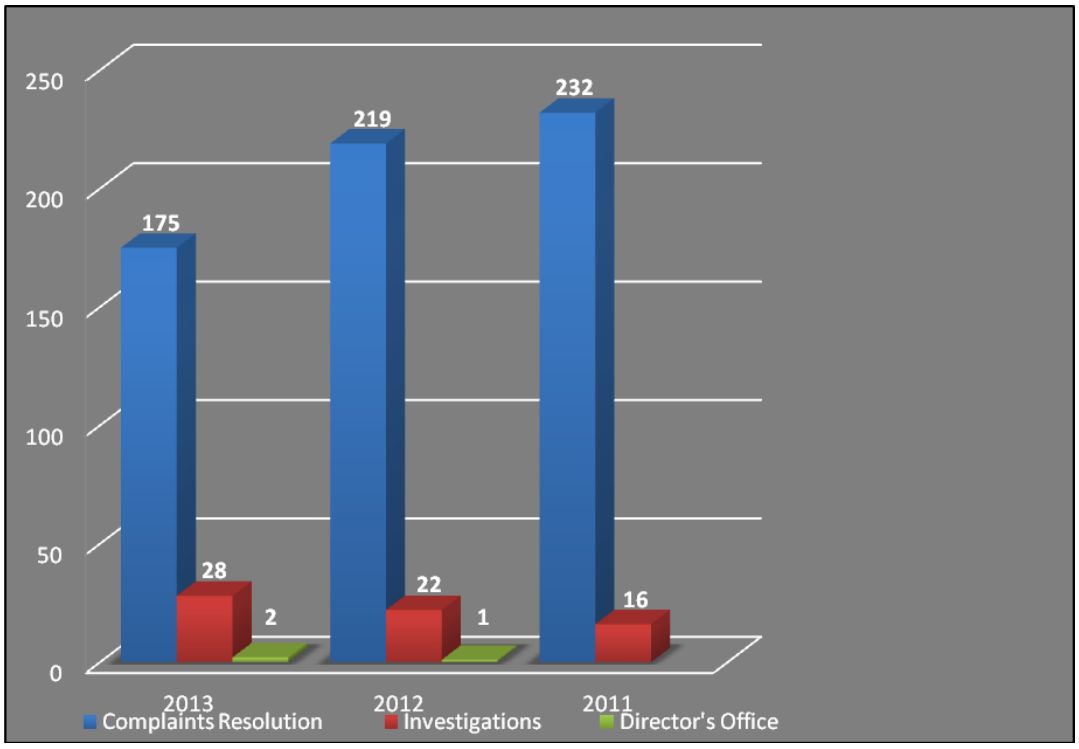
Table 4 – CRC Reviews Conducted in 2013 by Department



As Table 4 demonstrates, from the 205 files reviewed in 2013, 175 were investigated by the Complaints Resolution Department, 28 of the files were investigated by the Investigations Department and two files were investigated by the Director's Office.

Table 5 that follows provides a comparison of the department that conducted the investigation of the files during 2013, 2012 and 2011.

Table 5 – Reviews Conducted 2013, 2012 and 2011 from Each Department



As Table 5 demonstrates, from the 205 files reviewed in 2013, 175 were investigated by the Complaints Resolution Department, 28 were investigated by the Investigations Department and two files were investigated by the Director's office.

As Table 5 also demonstrates, from the 242 files reviewed in 2012, 219 were investigated by the Complaints Resolution Department, 22 of the files were investigated by the Investigations Department and one file was investigated by the Director's office.

In 2011, from the 248 files reviewed, 232 were investigated by the Complaints Resolution Department and 16 were investigated by the Investigations Department.

Predominant Issues in the Cases Reviewed:

The Law Society identifies the issues raised in each complaint file. Relying on the Law Society's categorization, Tables 6, 7 and 8 that follow identify the predominant issues identified in each of the files reviewed in 2013, 2012, and 2011 respectively.

The current case management system may record more than one "predominant issue" in each file, resulting in the total number of issues identified exceeding the number of files reviewed.

Table 6 - Predominant Issues Identified in each of the 2013 Files Reviewed

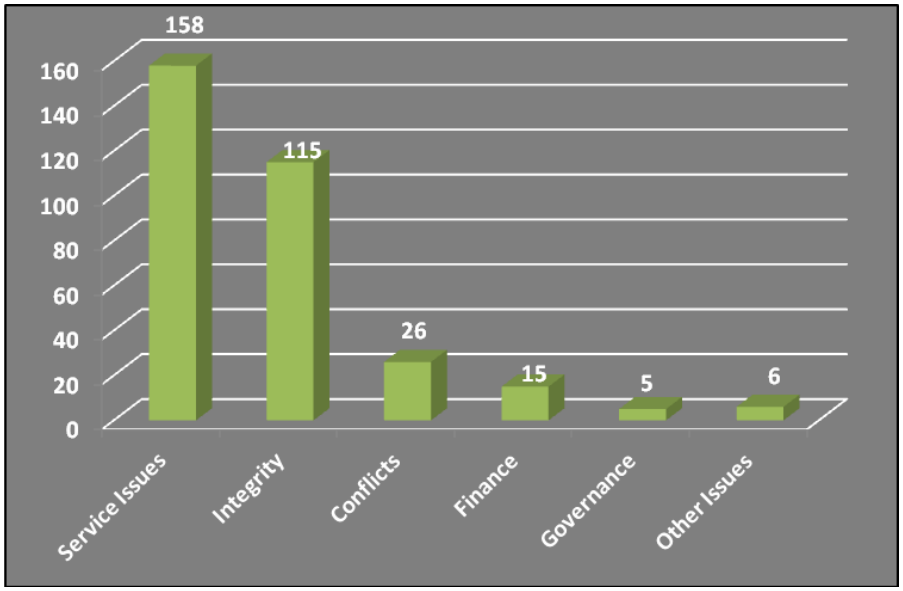


Table 7 - Predominant Issues Identified in each of the 2012 Files Reviewed

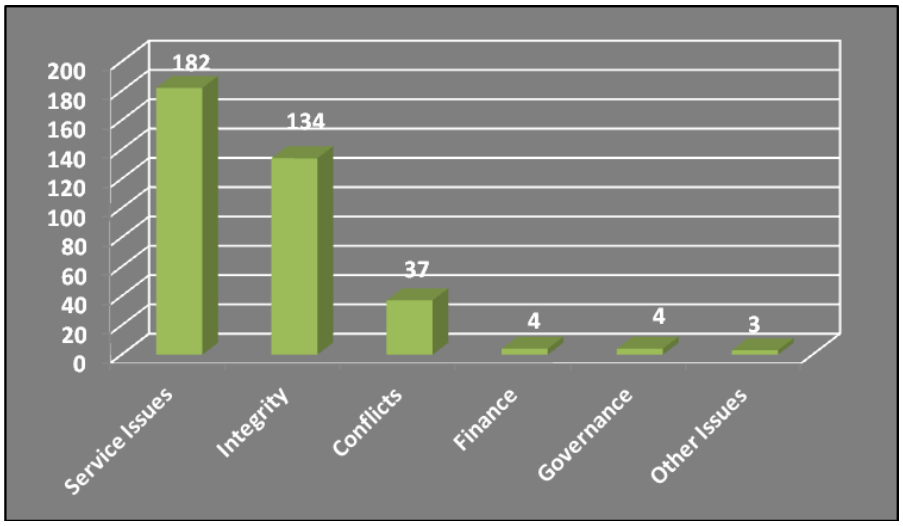
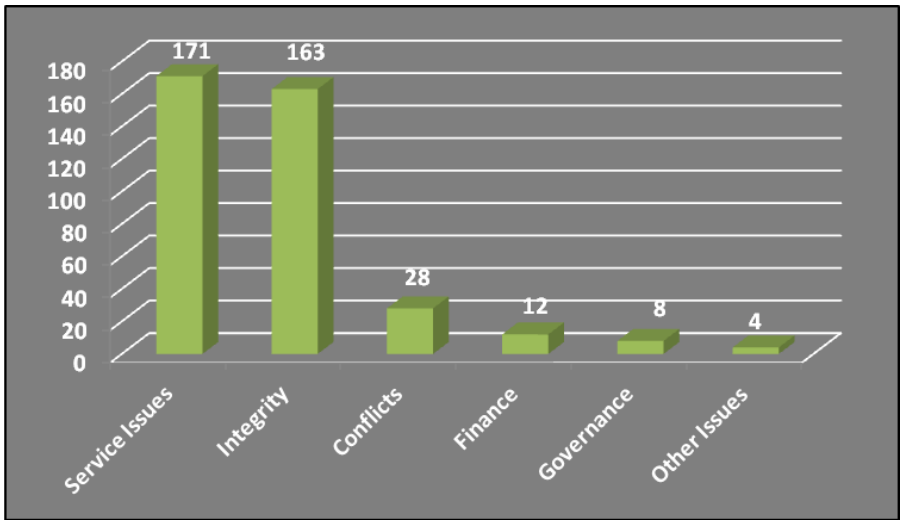


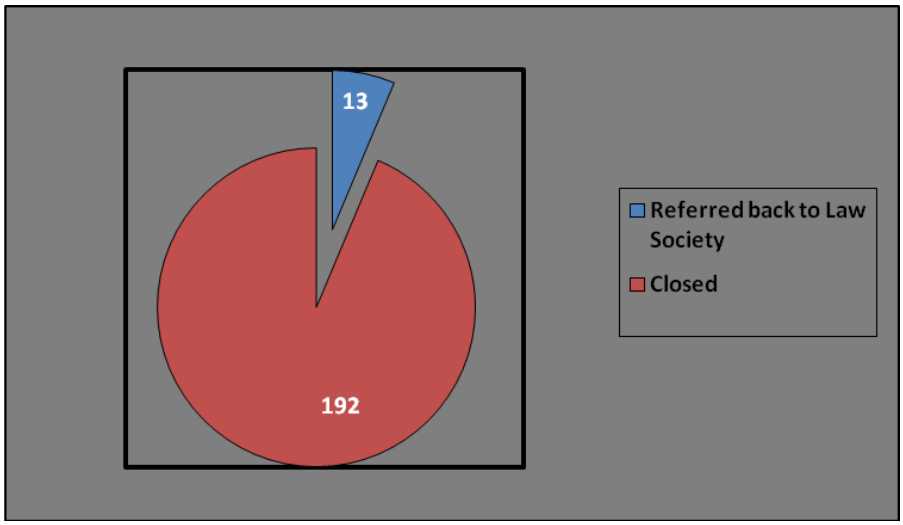
Table 8 - Predominant Issues Identified in each of the 2011 Files Reviewed



Results of the Reviews Conducted in 2013:

Figure 1 (1) that follows depicts the results of the 205 files reviewed by the Commissioner in 2013.

Figure 1 (1) - Review Results 2013



From the 205 files reviewed in 2013, 13 files were sent back to the Law Society. On nine of these files, the Commissioner was not satisfied that the decision to close the matter was reasonable and referred the complaint files back, pursuant to Clause 7 (2) (b) of By-Law 11, with a recommendation for further action. With respect to the remaining four cases, while the Commissioner found the Law Society's decision to close the complaint

file to be reasonable based on the evidence available to the Law Society at the time of closing the file, the Commissioner referred the file back for either a review of new evidence pursuant to Subsection 7 (1) of By-Law 11 and/or to address practice concerns.

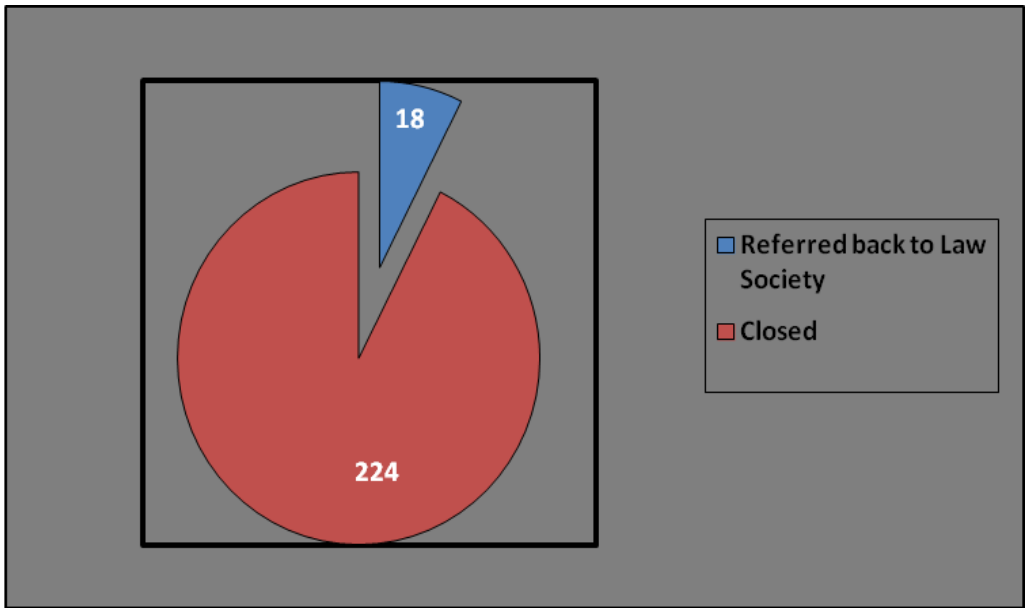
The Commissioner has identified practice issues in order to support the Law Society's efforts to serve the public interest. For example, in one instance, the Commissioner identified concerns regarding the content of the Law Society's closing letter including failing to include the reasons for the outcome. In another instance, a failure to disclose the regulatory action taken was identified. In a third instance, the Commissioner brought to the Law Society's attention a failure to notify the complainant that a witness was interviewed.

In addition, Counsel to the Commissioner and Counsel to the Director have continued to work together to address and improve practices and procedures between the Professional Regulation departments and the office of the Commissioner. Counsel to the Commissioner has also worked on an informal basis with the Managers of the Professional Regulation departments to clarify issues and address concerns, in advance of the Review Meetings. As an example, when additional material was received well in advance of a scheduled Review Meeting, the documents were provided to the department manager and/or the investigator, for consideration before the meeting. Furthermore, when possible, where outstanding issues are identified prior to the Review Meeting, the investigator has addressed the issues prior to the meeting. These mutually cooperative practices and procedures have promoted a more efficient and effective transfer of files and has allowed for greater consistency in the practices and procedures within the review process.

Results of the Reviews Conducted in 2012:

Figure 1 (2) that follows depicts the results of the 242 files reviewed by the Commissioner in 2012.

Figure 1 (2) - Review Results 2012

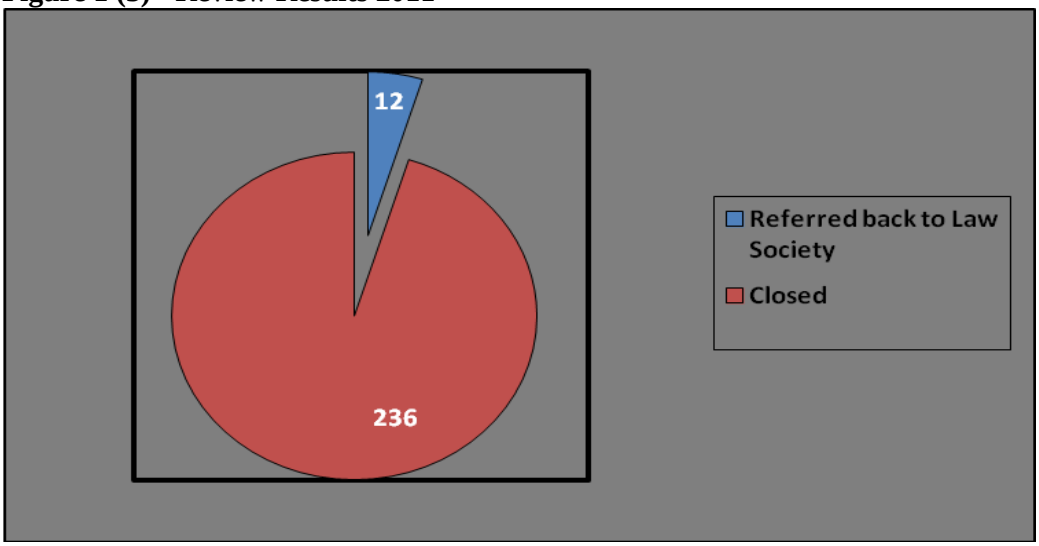


As shown in Figure 1 (2), during 2012, from the 242 decisions rendered, there were 18 files sent back to the Law Society, with a recommendation for further action.

Results of the Reviews Conducted in 2011:

Figure 1 (3) that follows reflects the results of the Review Meetings conducted in 2011.

Figure 1 (3) - Review Results 2011



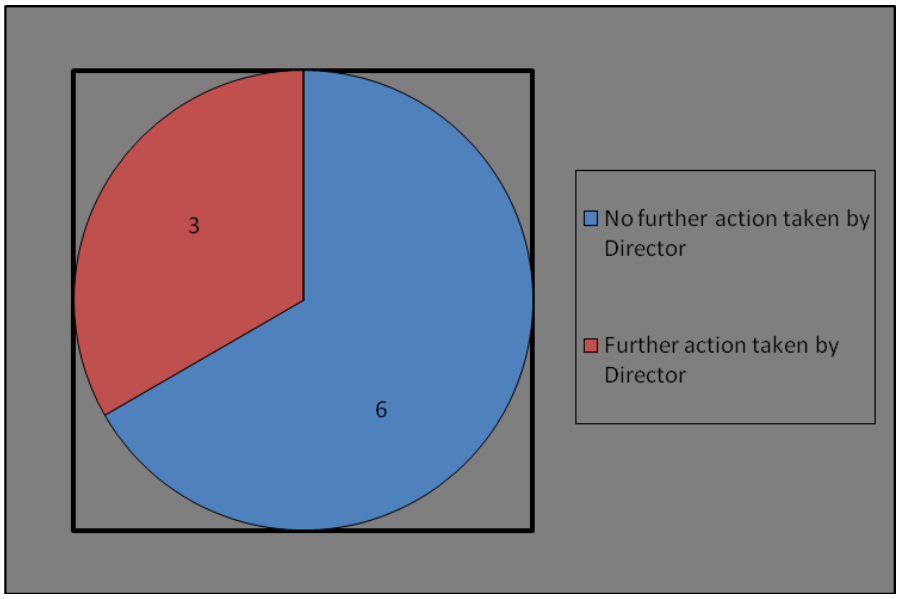
As shown in Figure 1 (3), during 2011, from the 248 files reviewed, there were 12 files which were sent back to the Law Society, with a recommendation for further action. There was a 13th file refererred back in 2011, however, it was a decision rendered in 2011 on a file reviewed in 2010.

Director's Response to Files Referred Back to the Law Society in 2013:

Although the Commissioner referred back 13 files to the Law Society, with respect to four of these cases, a response from the Director was not required as the Commissioner referred the cases back for other considerations. Since these four files were sent back to raise practice issues, the response from the Law Society is not depicted.

Figure 2 (1) that follows reflects the Law Society's response to the nine files that were reviewed by the Commissioner in 2013 and referred back to the Law Society pursuant to Clause 7 (2) (b), with a recommendation for further action.

Figure 2 (1) – Director's Response to Files Referred Back in 2013:



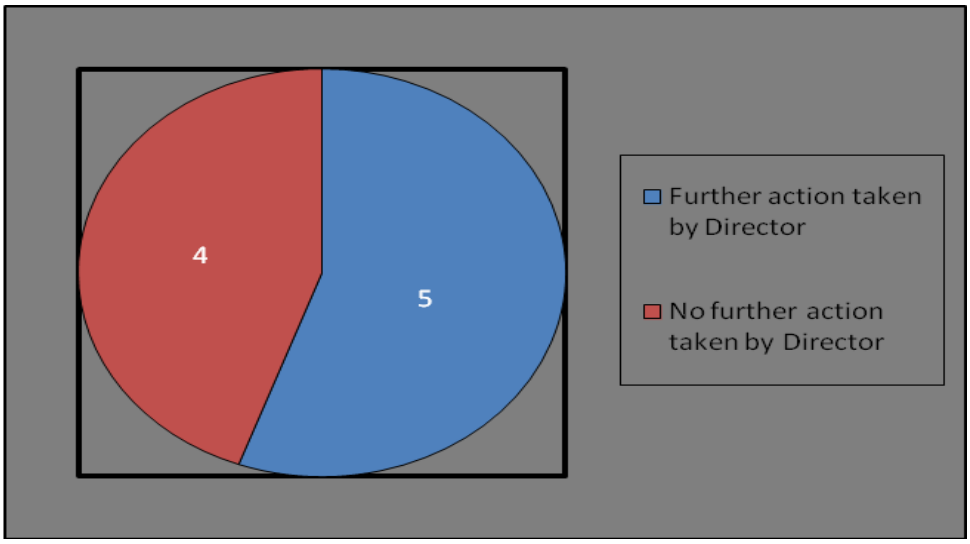
As indicated in Figure 2 (1) set out above, from the nine decisions referred back with a recommendation for further action pursuant to Clause 7 (2) (b) of By-Law 11, the Director agreed to take further action on three of the files and declined to take any further action with respect to the other six files.

Director's Response to Files Referred Back to the Law Society in 2012:

Figure 2 (2) that follows reflects the Law Society's response to the files that were reviewed by the Commissioner in 2012 and referred back to the Law Society with a recommendation for further action.

From the 18 decisions referred back in 2012, nine did not require a response from the Director as the Commissioner referred the cases back for other considerations, and are therefore not depicted in Figure 2 (2) below. From the nine decisions sent back with a recommendation for further action pursuant to Clause 7 (2) (b) of By-Law 11, the Director agreed to take further action on five of the files and declined to take any further action with respect to the other four files.

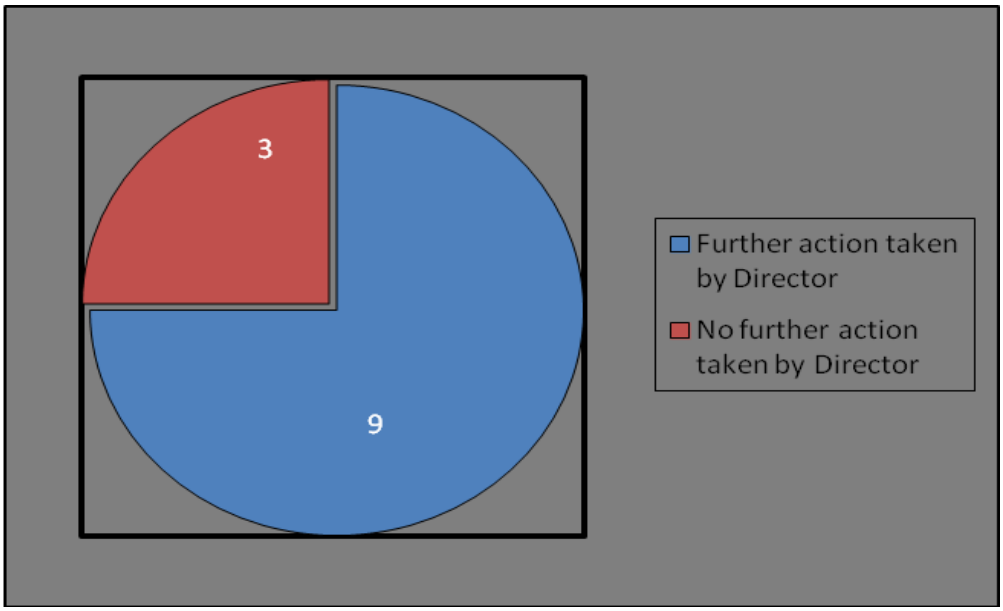
Figure 2 (2) – Director's Response to Files Referred Back in 2012



Director's Response to Files Referred Back to the Law Society in 2011:

Figure 2 (3) that follows, reflects the Law Society's response to the 12 files that the Commissioner sent back to the Law Society for further action in 2011.

Figure 2 (3) – Director's Response to Files Referred Back in 2011



As depicted in Figure 2(3), in 2011, the Director agreed to take further action on 9 of the filese sent back and declined to take any further action with respect to 3 of the files.

F. Age Tracking of Files Closed in 2013

Following submission of the Annual Report for the year ending December 31, 2012, the Professional Regulation Committee requested statistical data regarding the average time for advancing a file through the Complaints Review process. What follows is the information gathered in this regard during the 2013 calendar year. As this is the first year that such data has been collected, a comparision with previous years is not avaliable.

The following Table depicts the aging of the files from the date that a request for review was received to the date the file was closed in the Commissioner's office.

In-person and Teleconference Reviews:

There were 148 reviews completed by in-person meetings and teleconferences in 2013.

Average Age

Average age from the receipt of the request to the date the Commissioner's decision was released	**265 days**
(a) Average age from the date the request for a review was received to the date the Professional Regulation Department (PRD) was notified of the request	5 days
(b) Average age from the date that PRD was notified of the request to the date the document books were received in the Office of the Commissioner	125 days
(c) Average age from the date the document books were received to the date the review meeting was first scheduled	19 days
(d) Average age from the date the review meeting was first scheduled to the date the review meeting was held	88 days
(e) Average age from the date the review meeting was held to the date the Commissioner 's decision was released	28 days

Median Age

Median age from the receipt of the request to the date the Commissioner's decision was released	**246 days**
(a) Median age from the date the request for a review was received to the date PRD was notified of the request	2 days
(b) Median age from the date that PRD was notified of the request to the date the document books were received in the Office of the Commissioner	121 days
(c) Median age from the date the document books were received to the date the review meeting was first scheduled	3 days
(d) Median age from the date the review meeting was first scheduled to the date the review meeting was held	77 days
(e) Median age from the date the review meeting was held to the date the Commissioner's decision was released	26 days

In Writing Reviews:

There were 57 reviews conducted based on the written material in 2013.

Average Age

Average age from the receipt of the request to the date the Commissioner's decision was released	**240 days**
(a) Average age from the date the request for review was received to the date PRD was notified of the request	10 days
(b) Average age from the date that PRD was notified of the request to the date the document books were received in the Commissioner's office	127 days
(c) Average age from the date the document books were received to the date the Commissioner's decision was released	103 days

Median Age

Median age from the receipt of the request to the date the Commissioner's decision was released	**236 days**
(a) Median age from the date the request for review was received to the date PRD was notified of the request	3 days
(b) Median age from the date that PRD was notified of the request to the date the document books were received in the Commissioner's office	137 days
(c) Median age from the date the document books were received to the date the Commissioner's decision was released	84 days

No Jurisdiction Files:

There were a total of 78 files which were closed on the basis that the Commissioner did not have the jurisdiction to review the file, for a variety of reasons. The average age from receipt of the request to review to the date the complainant was notified of the lack of jurisdiction was 12 days, and the median age was seven days.

Files Withdrawn:

With respect to the 11 review files closed before a review was conducted, three of which were withdrawn by the complainant and eight which were withdrawn following a managerial review by the investigating department, the average age was 169 days and the median age was 130 days.

Active Inventory as of December 31, 2013:

There were 107 files as of December 31, 2013 in the office of the Commissioner's active inventory. A review had been scheduled for a date in 2014 on 35 files, 72 files were being prepared for review by the Law Society and all decisions on cases reviewed in 2013 were released.

G. Conclusion

My experience over the past four years has confirmed that the need for an independent, impartial review of the Law Society's investigations and resulting decision to take no further action with respect to those investigations, has proven essential. The independence of the office has been highlighted by moving the location of the office of the Complaints Resolution Commissioner off site. Questions from complainants regarding the independence of the office have been dramatically reduced since the re-location took place.

I have found my experience over the past four years to have been both challenging and exhilarating. I greatly appreciate the opportunity to assist in achieving the Law Society's mandate to act in the public interest.

EXCERPTS FROM THE *LAW SOCIETY ACT*

COMPLAINTS RESOLUTION COMMISSIONER

Appointment

49.14 (1) Convocation shall appoint a person as Complaints Resolution Commissioner in accordance with the regulations. 1998, c. 21, s. 21.

Restriction

(2) A bencher or a person who was a bencher at any time during the two years preceding the appointment shall not be appointed as Commissioner. 1998, c. 21, s. 21.

Term of office

(3) The Commissioner shall be appointed for a term not exceeding three years and is eligible for reappointment. 1998, c. 21, s. 21.

Removal from office

(4) The Commissioner may be removed from office during his or her term of office only by a resolution approved by at least two thirds of the benchers entitled to vote in Convocation. 1998, c. 21, s. 21.

Restriction on practice of law

(5) The Commissioner shall not engage in the practice of law during his or her term of office. 1998, c. 21, s. 21.

Functions of Commissioner

49.15 (1) The Commissioner shall,

(a) attempt to resolve complaints referred to the Commissioner for resolution under the by-laws; and

(b) review and, if the Commissioner considers appropriate, attempt to resolve complaints referred to the Commissioner for review under the by-laws. 1998, c. 21, s. 21.

Investigation by Commissioner

(2) If a complaint is referred to the Commissioner under the by-laws, the Commissioner has the same powers to investigate the complaint as a person conducting an investigation under section 49.3 would have with respect to the subject matter of the complaint, and, for that purpose, a reference in section 49.3 to an employee of the Society holding an office prescribed by the by-laws shall be deemed to be a reference to the Commissioner. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 48 (1).

Access to information

(3) If a complaint is referred to the Commissioner under the by-laws, the Commissioner is entitled to have access to,

(a) all information in the records of the Society respecting a licensee who is the subject of the complaint; and

(b) all other information within the knowledge of the Society with respect to the subject matter of the complaint. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 48 (2).

Delegation

49.16 (1) The Commissioner may in writing delegate any of his or her powers or duties to members of his or her staff or to employees of the Society holding offices designated by the by-laws. 1998, c. 21, s. 21.

Terms and conditions

(2) A delegation under subsection (1) may contain such terms and conditions as the Commissioner considers appropriate. 1998, c. 21, s. 21.

Identification

49.17 On request, the Commissioner or any other person conducting an investigation under subsection 49.15 (2) shall produce identification and, in the case of a person to whom powers or duties have been delegated under section 49.16, proof of the delegation. 1998, c. 21, s. 21.

Confidentiality

49.18 (1) The Commissioner and each member of his or her staff shall not disclose,

(a) any information that comes to his or her knowledge as a result of an investigation under subsection 49.15 (2); or

(b) any information that comes to his or her knowledge under subsection 49.15 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12. 1998, c. 21, s. 21.

Exceptions

(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. 1998, c. 21, s. 21.

Testimony

(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). 1998, c. 21, s. 21.

Decisions final

49.19 A decision of the Commissioner is final and is not subject to appeal. 1998, c. 21, s. 21.

BY-LAW 11

Made: May 1, 2007
Amended: June 28, 2007
September 20, 2007 (editorial changes)
October 25, 2007 (editorial changes)
February 21, 2008
April 24, 2008
October 30, 2008
January 29, 2009
October 28, 2010
April 25, 2013
May 30, 2013

REGULATION OF CONDUCT, CAPACITY AND PROFESSIONAL COMPETENCE

PART I

COMPLAINTS RESOLUTION COMMISSIONER

GENERAL

Definitions

1. In this Part,

"complainant" means a person who makes a complaint;

"complaint" means a complaint made to the Society in respect of the conduct of a licensee;

"Commissioner" means the Complaints Resolution Commissioner appointed under section 49.14 of the Act;

"reviewable complaint" means a complaint that may be reviewed by the Commissioner under subsection 6 (1).

Provision of funds by Society

2. (1) The money required for the administration of this Part and sections 49.15 to 49.18 of the Act shall be paid out of such money as is budgeted therefor by Convocation.

Restrictions on spending

(2) In any year, the Commissioner shall not spend more money in the administration of this Part and sections 49.15 to 49.18 of the Act than is budgeted therefor by Convocation.

Annual report

3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.

REVIEW OF COMPLAINTS

Reviewable complaints

4. (1) A complaint may be reviewed by the Commissioner if,

(a) the merits of the complaint have been considered by the Society;

(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;

(c) the complaint has not been previously reviewed by the Commissioner; and

(d) the Society has notified the complainant that it will be taking no further action in respect of the complaint.

Same

(2) A complaint may not be reviewed by the Commissioner to the extent that, in the opinion of the Commissioner, it concerns only the following matters:

1. Quantum of fees or disbursements charged by a licensee to a complainant.

2. Requirements imposed on a licensee under By-Law 9 [Financial Transactions and Records].

3. Negligence of a licensee.

Interpretation: "previously reviewed"

(3) For the purposes of this section, a complaint shall not be considered to have been previously reviewed by the Commissioner if the complaint was referred back to the Society for further consideration under subsection 7 (1).

Right to request referral

5. (1) A complainant may request the Society to refer to the Commissioner for review a reviewable complaint.

Request in writing

(2) A request to refer a reviewable complaint to the Commissioner for review shall be made in writing.

Time for making request

(3) A request to refer a reviewable complaint to the Commissioner for review shall be made within 60 days after the day on which the Society notifies the complainant that it will be taking no further action in respect of the complaint.

When notice given

(4) For the purposes of subsection (3), the Society will be deemed to have notified the complainant that it will be taking no further action in respect of the complaint,

(a) in the case of oral notification, on the day that the Society notified the complainant; and

(b) in the case of written notification,

(i) if it was sent by regular lettermail, on the fifth day after it was mailed, and

(ii) if it was faxed, on the first day after it was faxed.

Referral of complaints

6. (1) The Society shall refer to the Commissioner for review every reviewable complaint in respect of which a complainant has made a request under, and in accordance with, section 5.

Notice

(2) The Society shall notify in writing the licensee who is the subject of a complaint in respect of which a complainant has made a request under, and in accordance with, section 5 that the complaint has been referred to the Commissioner for review.

Fresh evidence

7. (1) When reviewing a complaint that has been referred to the Commissioner for review, if the Commissioner receives or obtains information, which in the Commissioner's

opinion is significant, about the conduct of the licensee who is the subject of the complaint that was not received or obtained by the Society as a result of or in the course of its consideration of the merits of the complaint, the Commissioner shall refer the information and complaint back to the Society for further consideration.

Disposition of complaint referred for review

(2) After reviewing a complaint that has been referred to the Commissioner for review, the Commissioner shall,

(a) if satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, so notify in writing the complainant and the Society; or

(b) if not satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, refer the complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and so notify in writing the complainant.

Disposition of complaint referred for review: notice

(3) The Society shall notify in writing the licensee who is the subject of a complaint reviewed by the Commissioner of the Commissioner's disposition of the complaint.

Referral back to Society: notice

(4) If the Commissioner refers a complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, the Society shall consider the recommendation and notify in writing the Commissioner, complainant and licensee who is the subject of the complaint of whether the Society will be following the recommendation.

Same

(5) If the Commissioner refers a complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and the Society determines not to follow the recommendation of the Commissioner, the Society shall provide the Commissioner, complainant and licensee who is the subject of the complaint with a written explanation for the determination.

Procedure

8. (1) Subject to this Part, the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

Meeting

(2) The Commissioner shall, where practicable, meet with each complainant whose complaint has been referred to the Commissioner for review, and the Commissioner may meet with the complainant by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

Participation in review: Society

(3) Other than as provided for in subsections (5) and (6), or unless otherwise expressly permitted by the Commissioner, the Society shall not participate in a review of a complaint by the Commissioner.

Participation in review: licensee

(4) The licensee who is the subject of a complaint that has been referred to the Commissioner for review shall not participate in a review of the complaint by the Commissioner.

Description of consideration, *etc.*

(5) At the time that the Society refers a complaint to the Commissioner for review, the Society is entitled to provide the Commissioner with a description of its consideration of the complaint and an explanation of its decision to take no further action in respect of the complaint.

Requirement to answer questions

(6) The Commissioner may require the Society to provide information in respect of its consideration of a complaint that has been referred to the Commissioner for review and its decision to take no further action in respect of the complaint, and the Society shall provide such information.

RESOLUTION

Discretionary referral of complaints

9. (1) The Society may refer a complaint to the Commissioner for resolution if,

(a) the complaint is within the jurisdiction of the Society to investigate;

(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;

(c) the complaint has not been referred to the Proceedings Authorization Committee;

(d) no resolution of the complaint has been attempted by the Society; and

(e) the complainant and the licensee who is the subject of the complaint consent to the complaint being referred to the Commissioner for resolution.

Parties

10. The parties to a resolution of a complaint by the Commissioner are the complainant, the licensee who is the subject of the complaint and the Society.

Outcome of Resolution

11. (1) There shall be no resolution of a complaint by the Commissioner until there is an agreement signed by all parties agreeing to the resolution.

No resolution

(2) If there is no resolution of a complaint by the Commissioner, the Commissioner shall so notify in writing the parties and refer the complaint back to the Society.

Enforcement of resolution

(3) A resolution of a complaint by the Commissioner shall be enforced by the Society.

Confidentiality: Commissioner

12. (1) Subject to subsection (2), the Commissioner shall not disclose any information that comes to the Commissioner's knowledge during the resolution of a complaint.

Exceptions

(2) Subsection (1) does not prohibit disclosure required of the Commissioner under the Society's rules of professional conduct.

Without prejudice

(3) All communications during the resolution of a complaint by the Commissioner and the Commissioner's notes and record of the resolution shall be deemed to be without prejudice to any party.

Procedure

13. Subject to this Part, the procedures applicable to the resolution of a complaint referred to the Commissioner shall be determined by the Commissioner.

Office of the
Complaints Resolution Commissioner

The Law Society of Upper Canada | Barreau du Haut-Canada

INFORMATION SHEET

This information sheet will help you request a review by the Complaints Resolution Commissioner (the Commissioner).

REQUEST FOR REVIEW:

The Commissioner, on your request, will do an independent review of the Law Society's investigation and the decision to close your complaint file. If you want to have the Law Society's decision to close your complaint file reviewed by the Commissioner, please complete the attached Request for Review form. Please return the form to the Office of the Complaints Resolution Commissioner following the instructions at the end of the Request Form. **A request for review by the Commissioner must be made in writing within 60 days of the Law Society's notification (the closing letter you received from Law Society staff) that no further action will be taken with respect to your complaint.**

THE ROLE OF THE COMPLAINTS RESOLUTION COMMISSIONER:

After reviewing a complaint that has been referred to the Commissioner for review, the Commissioner shall:

- If satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, so notify in writing the complainant and the Society; or
- If not satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, refer the complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and so notify in writing the complainant.

THE COMPLAINTS RESOLUTION COMMISSIONER CANNOT:

- Make a finding of professional misconduct;
- Impose disciplinary penalties;
- Make a finding of professional negligence;
- Award payment of money or other compensation for financial losses;
- Direct a licensee (lawyer or licensed paralegal) to refund fees or disbursements; or
- Conduct a new investigation.

MEETING WITH THE COMPLAINTS RESOLUTION COMMISSIONER:

As part of the review process, you may be invited to meet with the Commissioner in person or to participate in a conference call. These sessions are informal and involve a discussion of your complaint and the concerns you have with the Law Society's decision to close your file. Your meeting will be scheduled for one hour.

The Commissioner will consider your preference and decide the most appropriate manner for the review meeting to proceed. The Commissioner may also review your file based on the written material only. A review based on the written material only may result in the review being completed sooner.

The Commissioner also has in person meetings, approximately twice per year, in London and Ottawa. If you live in either of these areas and want your matter reviewed by telephone conference instead of an in person meeting, the review by the Commissioner may take place sooner.

Most people prefer to participate in the review meeting on their own. However, you may bring a friend, family member or a legal representative to your review meeting.

Counsel to the Commissioner is a lawyer and will be at the Review Meeting to assist the Commissioner and respond to any legal questions raised by the Commissioner. The Counsel's role is restricted to providing assistance to the Commissioner and he or she cannot give you legal advice.

Neither the lawyer/licensed paralegal who was the subject of your complaint nor the Law Society investigator, will be present at the meeting or during the conference call.

Office of the
Complaints Resolution Commissioner

The Law Society of Upper Canada | Barreau du Haut-Canada

INFORMATION SHEET

SCHEDULING OF THE REVIEW MEETING:

Your meeting with the Commissioner will be scheduled as soon as possible. However, it may take several months for your review to take place. We appreciate and thank you for your patience.

If you cannot attend the meeting on the scheduled date or have decided not to proceed with your complaint, please notify the Office of the Complaints Resolution Commissioner as soon as possible, so that the time set aside for your meeting can be used productively. If you want your meeting date to be adjourned/rescheduled, the Commissioner may request supporting documentation explaining why you cannot attend the meeting.

PROVIDING NEW INFORMATION:

To assist you at the review meeting, the Office of the Commissioner will send you a Document Book and correspondence. The Document Book will be sent to you when your meeting date is scheduled. The Commissioner and the Counsel to the Commissioner will also have a copy and will review the Document Book before the meeting.

If you send new material concerning your complaint or you submit written submissions to the Commissioner, please send this material within one month of sending in your Request for Review form. **Please do not send original documents.**

Do not resend copies of documents which have already been provided to the Law Society, as the information contained in the Law Society's file will be provided to the Commissioner in advance of the review meeting. **Resending copies of documents or repeating information already provided to the Law Society may delay the review.**

DECISION OF THE COMPLAINTS RESOLUTION COMMISSIONER:

The Commissioner will send you the decision in writing within several weeks of when the review has been conducted. If the Commissioner agrees with the Law Society's decision to close the complaint, the Commissioner's decision concludes the matter. There are no further reviews and the decision is final.

FOR MORE INFORMATION:

If you have any questions about how to request a review by the Commissioner, please contact the Office of the Complaints Resolution Commissioner at the following and we will be pleased to help you:

155 University Avenue
Suite 303
Toronto Ontario
M5H 3B7

Telephone: (416) 947-3442

Toll Free Number: 1-866-880-9480 (Ext. 3442)

Fax: (416) 947-5213

E-Mail: complaintsreview@lsuc.on.ca

Please advise us if, given your needs, you require the Office of the Complaints Resolution Commissioner communications in an alternate format that is accessible or if you require other arrangements to make our services accessible to you.

Request for Review by the
Complaints Resolution Commissioner

The Law Society of Upper Canada | Barreau du Haut-Canada

Before you complete the Request Form, please read the attached *"Request for Review by the Complaints Resolution Commissioner Information Sheet."*

If you want a review, you must make your Request for Review **in writing** within **60 days** of the Law Society's notification (the closing letter you received from Law Society staff) that no further action will be taken with respect to your complaint. If you want a review for more than one complaint, please complete and send a separate Request for Review form for each complaint.

You must send your Request for Review to:
Office of the Complaints Resolution Commissioner
155 University Avenue, Suite 303, Toronto, Ontario, M5H 3B7
Fax: 416-947-5213 Email: *complaintsreview@lsuc.on.ca*

If you have any questions about your request for a review, please call the Office of the Complaints Resolution Commissioner at 416-947-3442 or 1-866-880-9480.

I. INFORMATION ABOUT YOU (THE COMPLAINANT)

Salutation: Mr. ___ Ms. ___ Mrs. ___ Dr. ___ Other: ___

First Name: _____ Last Name: _____

Home Phone Number: _____ Cell Phone Number: _____

Fax Number: _____ Email: _____

Please indicate where you want the Document Book (mailed via XpressPost) and other mailed communications about this review to be sent:

Address: _____ Unit/Apt.: _____

City: _____ Province: _____ Postal Code: _____

What is the best way to contact you from Monday to Friday between the hours of 8:30 a.m. and 4:30 p.m. (select one) :

___ Telephone Telephone Number: _____

___ Facsimile Facsimile Number: _____

___ Email Email Address: _____

Are you a lawyer or licensed paralegal: Yes ___ No ___

Request for Review by the
Complaints Resolution Commissioner

The Law Society of Upper Canada | Barreau du Haut-Canada

2. DETAILS OF LAW SOCIETY COMPLAINT MATTER

LSUC File Number: _____

- Name of Lawyer/Paralegal: _____
- Name of Law Society's Investigator: _____
- Date of Law Society's letter notifying you that the file is being closed: _____
- What is your relationship to the lawyer/paralegal? _____

  ___ Client ___Opposing lawyer or paralegal ___ Other (specify)_____
- What area of law/legal services does your complaint relate to? _____

  ___ Real Estate ___ Civil Litigation ___ Corporate/Commercial/Business ___ Estates/Wills

  ___ Matrimonial/Family ___ Administrative/Immigration ___ Criminal ___ Other (specify): _____
- Are you acting under a Power of Attorney or some other form of authorization? ___ Yes ___ No

  If yes, please provide supporting documentation with this request form.
- If you are complaining about an estate:

  Are you a beneficiary? ___ Yes ___ No

  Are you the Estate Trustee or the Executor? ___ Yes ___ No

  If yes, please provide supporting documentation with this request form.

List any other Complaints you have submitted which are still under investigation with the Law Society or related to this complaint:

File Number(s)	Name of Lawyer(s)/Paralegal(s)
_____	_____
_____	_____
_____	_____

Request for Review by the
Complaints Resolution Commissioner

The Law Society of Upper Canada | Barreau du Haut-Canada

3. PREFERENCE FOR REVIEW MEETING

Please check a box to show your preference for the form of the Commissioner's review meeting.

I prefer the review by the Commissioner to occur (Please select only one):

☐ **In Person***
*Please note that in person meetings take place at the Office of the Complaints Resolution Commissioner.

☐ **By Telephone Conference**
Telephone number you would like to be contacted at: _____

☐ **Based on the Written Materials in this File**
This option does not involve a meeting with you in person or by telephone conference. Selecting this option may result in the review being completed more quickly. If you want to send written submissions, please send your submissions and any additional documents to the Office of the Complaints Resolution Commissioner within 1 month of sending this request.

4. REASON FOR YOUR REQUEST FOR A REVIEW

Please briefly explain why you want a review by the Commissioner. Before you complete this section, please review the Information Sheet which explains the Commissioner's role.

_____

_____

_____

_____

5. ADDITIONAL DOCUMENTS

Are you attaching copies of any new documents?: Yes ___ No ___
Please do NOT send originals.

(Please do not resend copies of those documents which have already been provided to the Law Society of Upper Canada. The information contained in the Law Society's file will be provided to the Commissioner in advance of the review meeting. **Resending copies of documents or repeating information already provided to the Law Society may delay the review**.)

6. SIGNATURE

Date Signed _____ **Signature** _____

Please send this form and accompanying documents to:
Office of the Complaints Resolution Commissioner
155 University Avenue, Suite 303, Toronto, Ontario, M5H 3B7
Fax: 416-947-5213 Email: complaintsreview@lsuc.on.ca

If you have any questions about your request for a review, please call the Office of the Complaints Resolution Commissioner at 416-947-3442 or 1-866-880-9480.

Please advise us if, given your needs, you require the Office of the Complaints Resolution Commissioner communications in an alternate format that is accessible or if you require other arrangements to make our services accessible to you.

FOR INFORMATION

PROFESSIONAL REGULATION DIVISION

QUARTERLY REPORT

230. The Professional Regulation Division's Quarterly Report (fourth quarter 2013), provided to the Committee by Zeynep Onen, the Executive Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period October to December 2013.

The Law Society of Upper Canada | Barreau du Haut-Canada

The Professional Regulation Division

Quarterly Report

October - December 2013

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

The Quarterly Report

The Quarterly Report provides a summary of the Professional Regulation Division's activities and achievements during the past quarter, October 1 to December 31, 2013. The purpose of the Quarterly Report is to provide information on the production and work of the Division during the quarter, to explain the factors that may have influenced the Division's performance, and to provide a description of exceptional or unusual projects or events in the period.

The Professional Regulation Division

Professional Regulation is responsible for responding to complaints against licensees, including the resolution, investigation and prosecution of complaints which are within the jurisdiction provided under the *Law Society Act*. In addition the Professional Regulation provides trusteeship services for the practices of licensees who are incapacitated by legal or health reasons. Professional Regulation also includes the Compensation Fund which compensates clients for losses suffered as a result of the wrongful acts of licensees.

See Appendices for a case flow chart describing the complaints process as well as a description of the Professional Regulation division processes and organization.

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

INDEX

SECTION 1

REPORT HIGHLIGHTS

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

Highlights of Quarterly Performance

New Cases

During the three year period starting in 2011 and ending in 2013, there was approximately a 5% increase in the intake of new regulatory cases. The trends were unusual during this period in that the total number of new cases in 2011 was higher than in 2012 which saw a 1.7% reduction. In 2013 however, there was a noticeable increase in new cases with a 5.4% increase when compared to 2012.

When caseload trends are viewed over the long term, there is an increase in new cases at the rate of approximately 2% annually. The pattern through 2011, 2012 and 2013 was anomalous, however the overall result is that by the end of 2013 there was approximately a 2% annual increase on average in each year.

It should also be noted that the rate of increase in new cases was higher in the first half of 2013 and decreased in the second half, with only a 2% increase in new cases over 2012.

Other trends during 2013 are that new complaints against lawyers and paralegal licensees increased (lawyers: 3896 received in 2013 vs. 3820 received in 2012; paralegal licensees: 584 received in 2013 vs. 480 received in 2012). The number of complaints raising issues of unauthorized practice remained stable. (260 received in 2013 vs. 259 received in 2012).

Case Completion and Case Inventories

During 2013, Professional Regulation completed slightly more cases than were received, and so maintained a relatively stable inventory of complaints. At the end of the year the case inventory of 3066 cases was marginally lower (<1%) than at the end of 2012 (3084 cases).

Investigations (Complaints Resolution & Investigations Departments)

Complaints Resolution received approximately the same number of new cases in 2013 as in 2012. (1889 received in 2013 vs. 1899 received in 2012). The department completed 1889 cases in 2013 with the result that the inventory of cases under investigation also reduced by 2.8% to 917 from 891 at the end of 2012.

In 2013, the number of new cases referred into Investigations increased by 8.3% (1348) over the number referred to that department in 2012 (1245). In the same period the department completed 1344 cases. At end of 2013 there were 1120 complaint cases under investigation in this department.

Mortgage Fraud Investigations

In 2013, the Law Society received significantly fewer complaints of mortgage fraud (36 new licensee investigations) than in 2012 (52 new licensee investigations). Professional Regulation also significantly reduced the number of cases under active investigation through closure or referral into discipline. During the year, 65 investigations were completed. As a result, the

department reduced the number of licensees under investigation for mortgage fraud from 83 to 65.

Unauthorized Practice (UAP)

In 2013, 260 unauthorized practice (UAP) complaints were received in Professional Regulation, virtually the same as the number received in 2012 (256) and in 2011 (255). Although UAP complaints have not increased in the past three years, they have stabilized at a high rate. Of the 260 new complaints, 197 were referred into Investigations. In the year, that department closed 187 UAP complaints and transferred 14 UAP complaints (relating to 5 non-licensees) to be considered for prosecution. In 2013, 4 permanent injunctions were obtained under section 26.3 of the *Law Society Act*. Two of these orders have been appealed.

Discipline and Hearings

The Discipline department receives cases on completion of investigations and prepares them for the Proceedings Authorization Committee (PAC) and if authorized, issues the hearing notice and represents the Law Society at hearings.

During 2013, the department received 301 new cases relating to 152 licensee/ applicants. This was an increase of approximately 12% from the 136 new licensee/applicant matters received in 2012.

In 2013 the PAC authorized 242 matters including 178 hearings, 34 invitations to attend and 27 letters of advice.

In relation to those authorizations, Professional Regulation issued 158 hearing notices. This was an increase from the 115 issued in 2012; and the 134 issued in 2011. In 2013 126 hearings were completed before the Hearing. In the same period 20 appeals were made to the Appeal Panel and 3 appeals and 3 judicial reviews were commenced before the Divisional Court. The Appeal Panel completed 17 appeals in this period.

At the end of 2013 the Discipline department had 541 complaints relating to 204 licensees or applicants in its process.

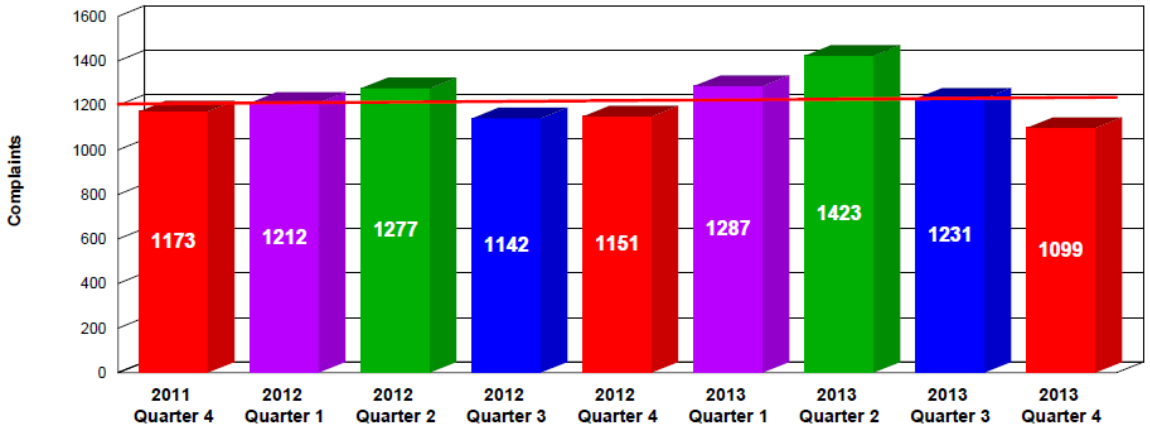
SECTION 2

DIVISIONAL PERFORMANCE DURING THE QUARTER

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

PERFORMANCE IN THE PROFESSIONAL REGULATION DIVISION

Graph 2A: Complaints[1] Received in the Division



For the 12 month period ending December 31, 2013, new complaints received in the Professional Regulation Division increased by 5.4% over the same period ending December 31, 2012. As noted in the chart below, increases were noted in all complaint/case groups.

Detailed Analysis of Complaints Received in the Division

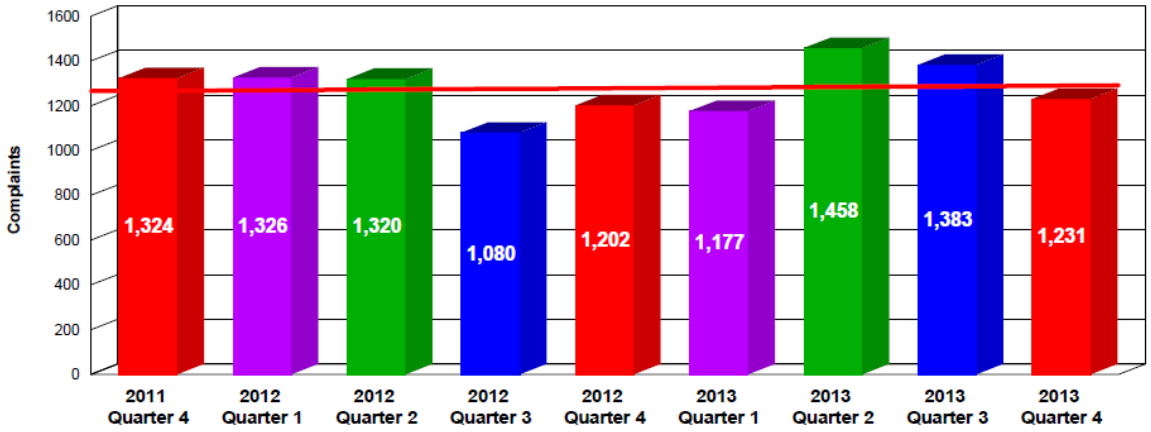
	Total for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total for 2013
Complaints against Lawyers	3820	1015	1026	969	886	3896
Lawyer Applicant Cases★	99	18	67	21	9	115
Complaints against Licensed Paralegals	480	160	152	143	129	584
Paralegal Applicant Cases★	155	29	121	34	21	205
Complaints against Non-Licensees/Non-Applicants*	228	65	57	64	54	240
TOTAL	4782	1287	1423	1231	1099	5040

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP complaints see section 3.4.

[1] Includes all complaints received in PRD from Complaints Services.

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

Graph 2B: Complaints Closed[2] in the Division (by Quarters)



The number of cases closed in the 12 month period ending December 31, 2013 increased by 6.5% over the same period ending December 31, 2012. In 2013, the number of closures exceeded the number of new cases received in the Division (5249 vs. 5040).

Detailed Analysis of Complaints Closed in the Division

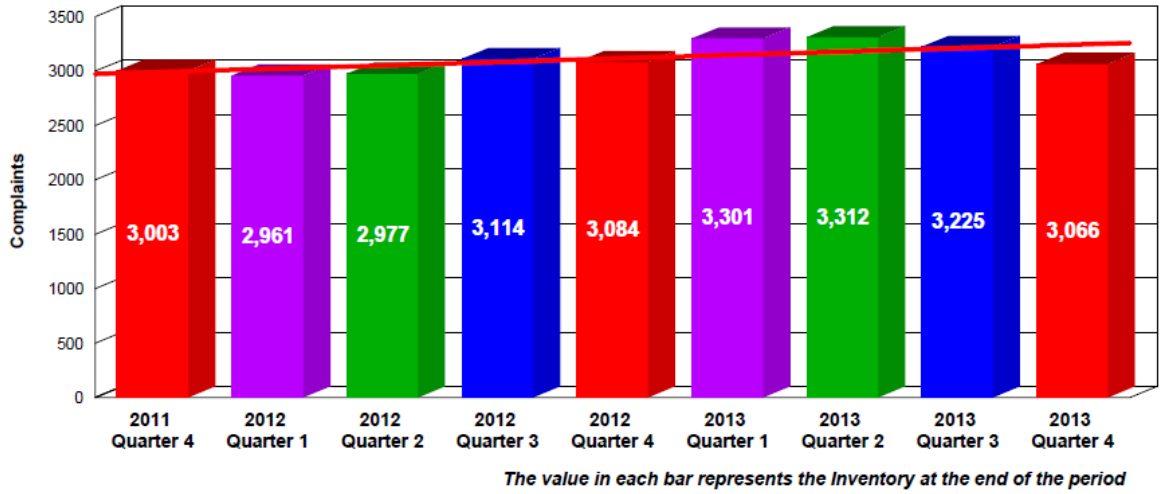
	Total for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total for 2013
Complaints against Lawyers	3932	946	1118	1101	1009	4174
Lawyer Applicant Cases★	88	13	64	31	14	122
Complaints against Licensed Paralegals	486	105	127	124	131	487
Paralegal Applicant Cases★	163	37	83	53	33	206
Complaints against Non-Licensees/Non-Applicants*	259	76	66	74	44	260
TOTAL	4928	1177	1458	1383	1231	5249

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP ccomplaints see section 3.4.

[2] This graph includes all complaints closed in Intake, Complaints Resolution, Investigations and Discipline.

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

Graph 2C: Total Inventory[3]



The inventory in the Division at the end of 2013 was slightly lower than at the end of 2012 (2066 at the end of 2013 vs. 2084 at the end of 2012). The breakdown of the inventory in the chart below demonstrates that decreases occurred in the inventory of all complaint/cases groups.

Detailed Analysis of Division Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
Complaints against Lawyers	2546	2711	2656	2575	2449
Lawyer Applicant Cases★	31	37	39	29	25
Complaints against Licensed Paralegals	322	378	404	427	398
Paralegal Applicant Cases★	60	55	91	77	67
Complaints against Non-Licensees/Non-Applicants*	125	120	122	117	127
TOTAL	3084	3301	3312	3225	3066

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP ccomplaints see section 3.4.

[3] This graph does not include active complaints in the Monitoring & Enforcement Department.

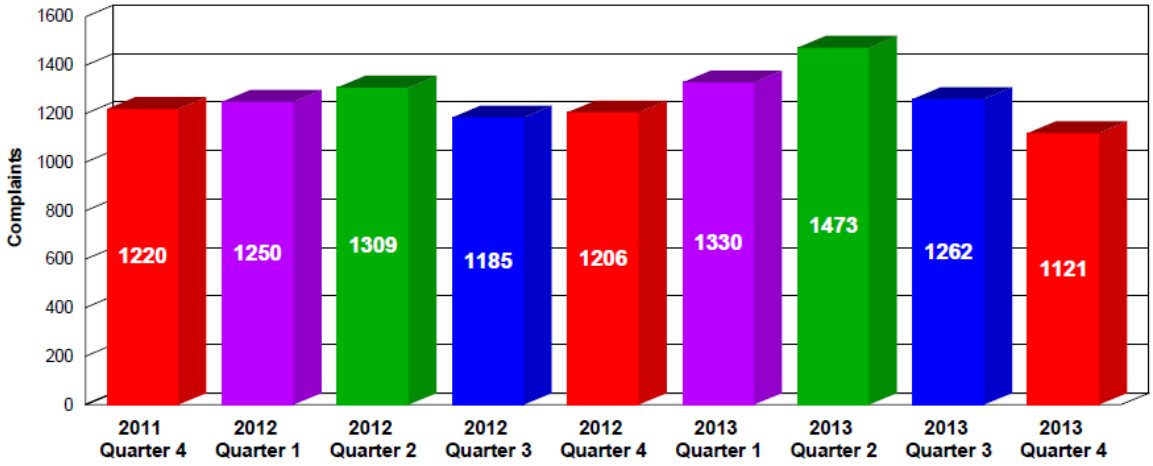
SECTION 3

DEPARTMENTAL PERFORMANCE DURING THE QUARTER

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

3.1 – Intake

Graph 3.1A: Intake - Input[4]



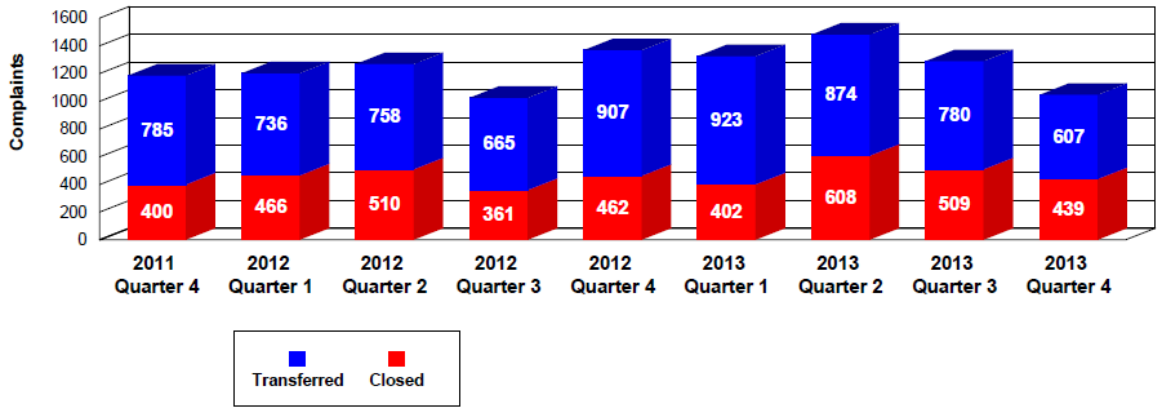
The Intake department processes all new regulatory complaints. In Q4 2013, in addition to the 1099 new cases, Intake re-opened 22 complaints which met the threshold for re-opening a closed matter.

[4] Includes new complaints received and re-opened complaints

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

3.1 – Intake

Graph 3.1B: Intake - Complaints Closed and Transferred Out



In 2013, Intake closed 1958 cases, which represents an 8.8% increase over the number of cases closed by the department in 2012.

Detailed Analysis of Complaints Closed and Transferred From Intake

		Totals for 2012		Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013	
Complaints against Lawyers	Closed	1431	3894	327	425	404	368	1524	3991
	Transferred	2464		737	639	605	486	2467	
Lawyer Applicant Cases★	Closed	61	98	2	45	15	5	67	113
	Transferred	37		17	18	11	0	46	
Complaints against Licensed Paralegals	Closed	138	483	28	39	40	35	142	568
	Transferred	345		108	127	111	80	426	
Paralegal Applicant Cases★	Closed	80	157	13	69	22	10	114	197
	Transferred	77		15	45	18	5	83	
Complaints against Non-Licensees/Non-Applicants*	Closed	89	232	32	30	28	21	111	273
	Transferred	143		46	45	35	36	162	
TOTAL	Closed	1799	4865	402	608	509	439	1958	5142
	Transferred	3066		923	874	780	607	3184	

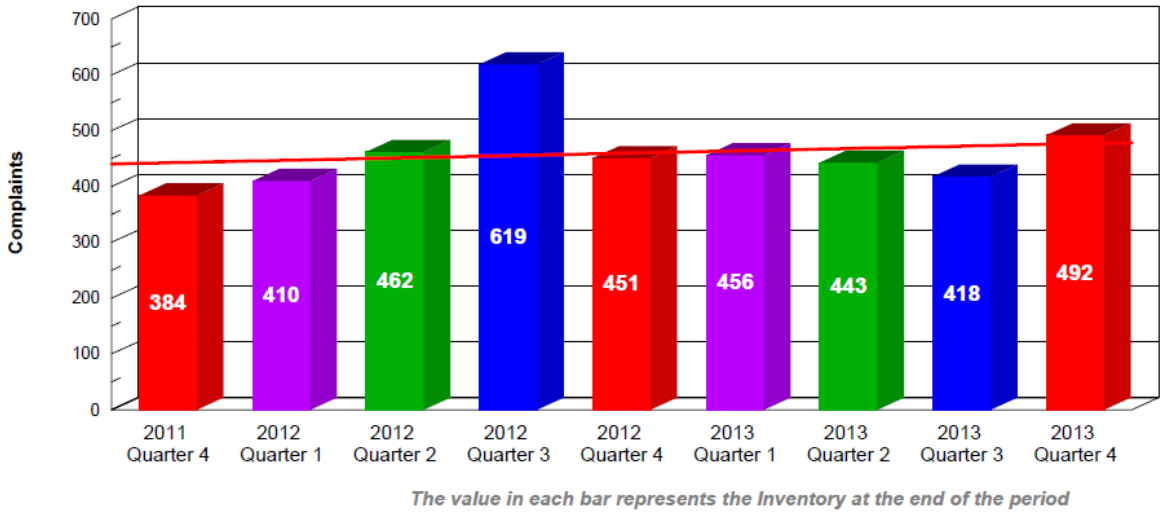
★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP ccomplaints see section 3.4.

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

3.1 – Intake

Graph 3.1 C: Intake - Department Inventory



Intake's inventory as at December 31, 2013 was 9% higher than its inventory at the end of 2012. Although the department closed and transferred more cases that it received in 2013 (5142 vs. 5040), the increased inventory is attributable to the re-opening of complaints which met the threshold for re-opening a closed matter.

Detailed Analysis of Intake Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
Complaints against Lawyers	399	387	384	369	415
Lawyer Applicant Cases★	2	1	5	0	4
Complaints against Licensed Paralegals	32	56	44	36	54
Paralegal Applicant Cases★	0	1	6	2	9
Complaints against Non-Licensees/Non-Applicants*	18	11	4	11	10
TOTAL	451	456	443	418	492

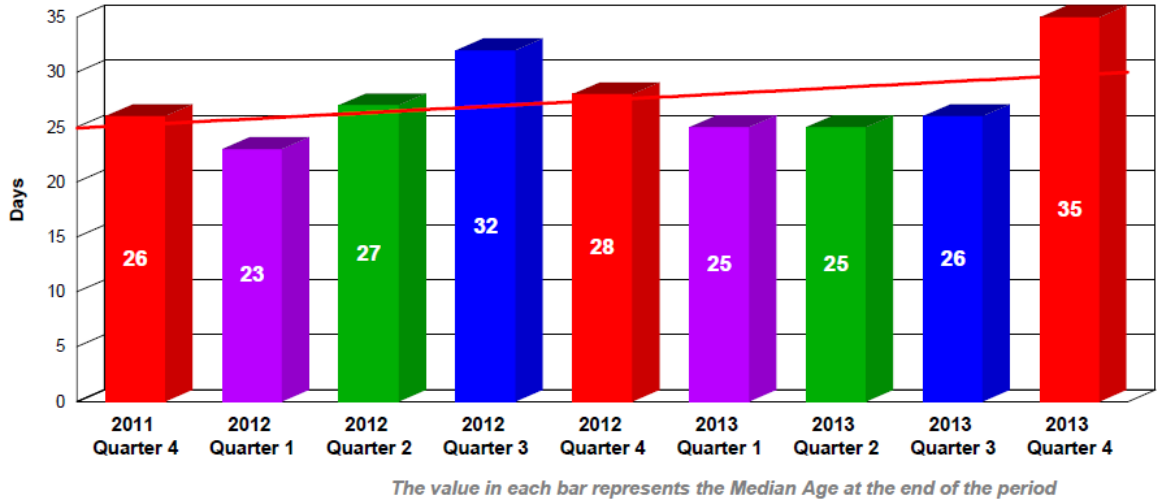
★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

3.1 – Intake

Graph 3.1D: Intake - Median Age of Complaints



Intake's median age at the end of 2013 is slightly above the department's 30-day target.

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2013)

3.1 - Intake

Graph 3.1E: Intake – Input vs. Output

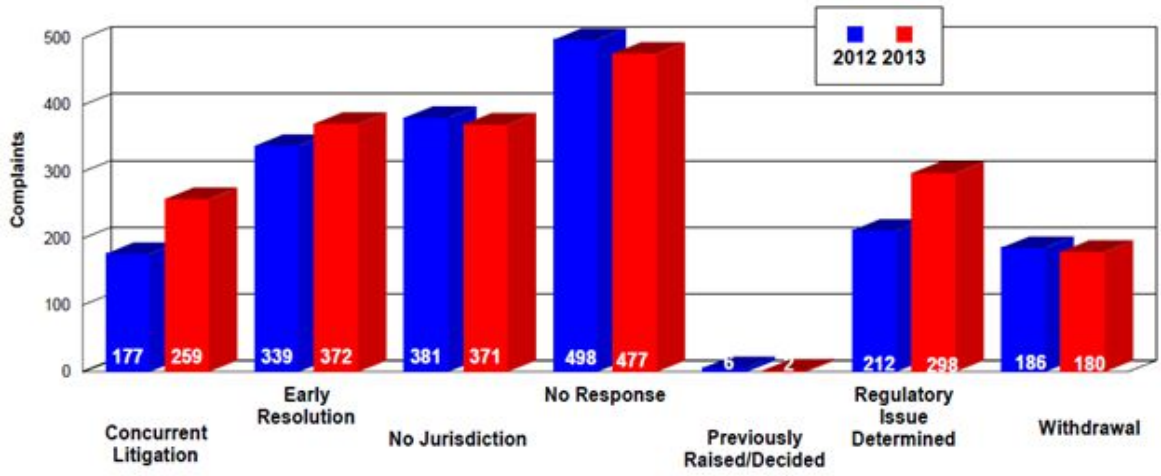
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	**47**	**37**	**32**	**43**	**55**	**43**	**49**	**31**	**22**
Received from CS	**1173**	**1212**	**1277**	**1142**	**1151**	**1287**	**1423**	**1231**	**1099**
Received from Other Departments	**0**	**1**	**0**	**0**	**0**	**0**	**1**	**0**	**0**
Total	**1220**	**1250**	**1309**	**1185**	**1206**	**1330**	**1473**	**1262**	**1121**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	**400**	**466**	**510**	**361**	**462**	**402**	**608**	**509**	**439**
Transferred to CR	**434**	**433**	**404**	**399**	**603**	**524**	**496**	**466**	**366**
Transferred to Investigation	**344**	**293**	**350**	**255**	**303**	**389**	**374**	**308**	**238**
Transferred to Other Departments	**7**	**10**	**4**	**11**	**1**	**10**	**4**	**6**	**3**
Total	**1185**	**1202**	**1268**	**1026**	**1369**	**1325**	**1482**	**1289**	**1046**

The Intake Department provides early stage processing and streaming services. The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated by (as they met the threshold for re-opening a closed matter) and received in Intake and (2) the number of complaints closed by Intake and the department to which files were streamed by Intake.

3.1 – Intake

Graph 3.1F: Intake – Complaints Closed by Disposition



This graph compares closures of complaints in the Intake Department by the reason for closure in 2012 with 2013. While the number of complaints closed in 2013 and 2012 differ, there was in fact no appreciable difference between the two years when the total number of closed complaints is considered.

	2012 (% of total cases closed)	2013 (% of total cases closed)
Concurrent Litigation	10%	13%
Early Resolution	19%	19%
No Jurisdiction	21%	19%
No Response	28%	24%
Previously Raised/Determined	0%	0%
Regulatory Issue Determined	12%	15%
Withdrawal	10%	9%
Total Cases Closed	100% (1799 cases)	100% (1958 cases)

A glossary of the individual disposition types included in each of the shown categories is available in Section 4, Appendix C.

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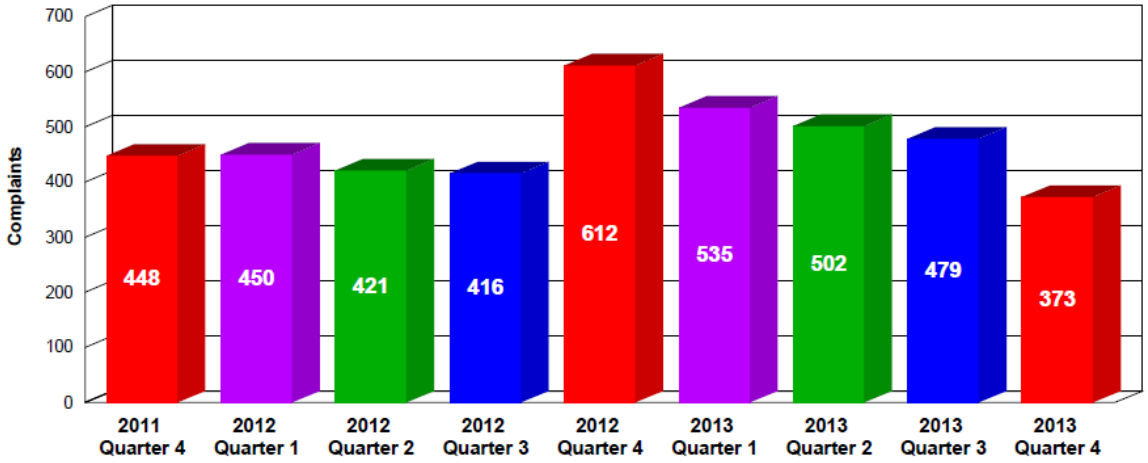
3.2 – Complaints Resolution

Graph 3.2A: Complaints Resolution – Input[5]



The input of cases into Complaints Resolution in 2013 remained almost the same as the number received in 2012 (1899 received in 2012; 1889 received in 2013).

Detailed Analysis of New and Re-opened Complaints in Complaints Resolution

	Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
Complaints against Lawyers	1736	492	443	418	330	1683
Lawyer Applicant Cases★	0	0	0	0	0	0
Complaints against Licensed Paralegals	163	43	59	60	43	205
Paralegal Applicant Cases★	0	0	0	0	0	0
Complaints against Non-Licensees/Non-Applicants*	0	0	0	1	0	1
TOTAL	1899	535	502	479	373	1889

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP complaints see section 3.4.

[5] Includes new complaints received into the department as well as complaints re-opened during the Quarter.

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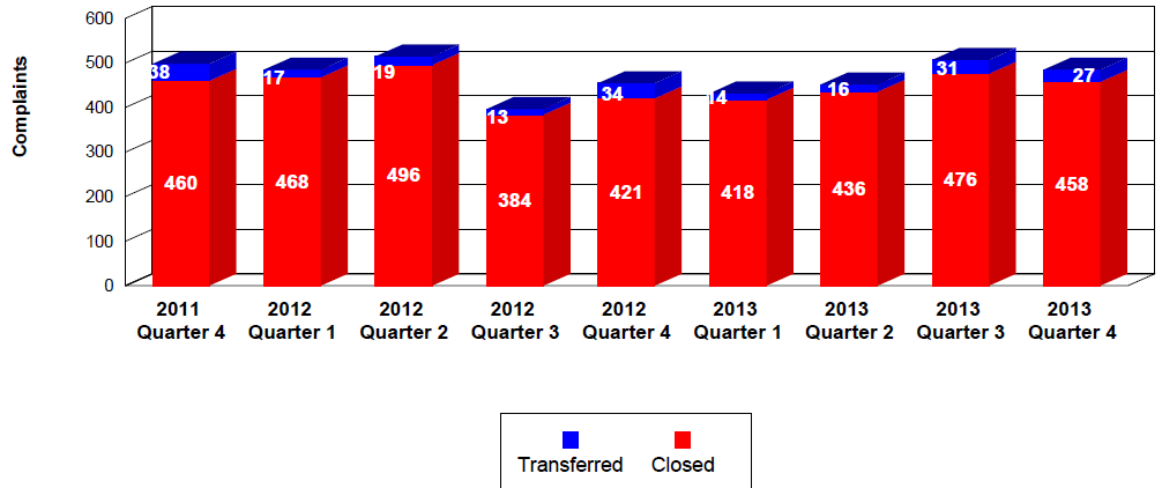
3.2 – Complaints Resolution

Graph 3.2B: Complaints Resolution - Complaints Closed and Transferred Out



The number of cases completed in 2013 by Complaints Resolution (1889) increased by 2% over the number of cases completed in 2012 (1852).

Detailed Analysis of Complaints Closed and Transferred From Complaints Resolution

		Totals for 2012		Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013	
Complaints against Lawyers	Closed	1623	1698	379	408	434	405	1626	1709
	Transferred	75		24	14	23	22	83	
Lawyer Applicant Cases★	Closed	0	0	0	0	0	0	0	0
	Transferred	0		0	0	0	0	0	
Complaints against Licensed Paralegals	Closed	146	154	39	28	42	53	162	179
	Transferred	8		3	2	7	5	17	
Paralegal Applicant Cases★	Closed	0	0	0	0	0	0	0	0
	Transferred	0		0	0	0	0	0	
Complaints against Non-Licensees/Non-Applicants*	Closed	0	0	0	0	0	0	0	1
	Transferred	0		0	0	1	0	1	
TOTAL	Closed	1769	1852	418	436	476	458	1788	1889
	Transferred	83		27	16	31	27	101	

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

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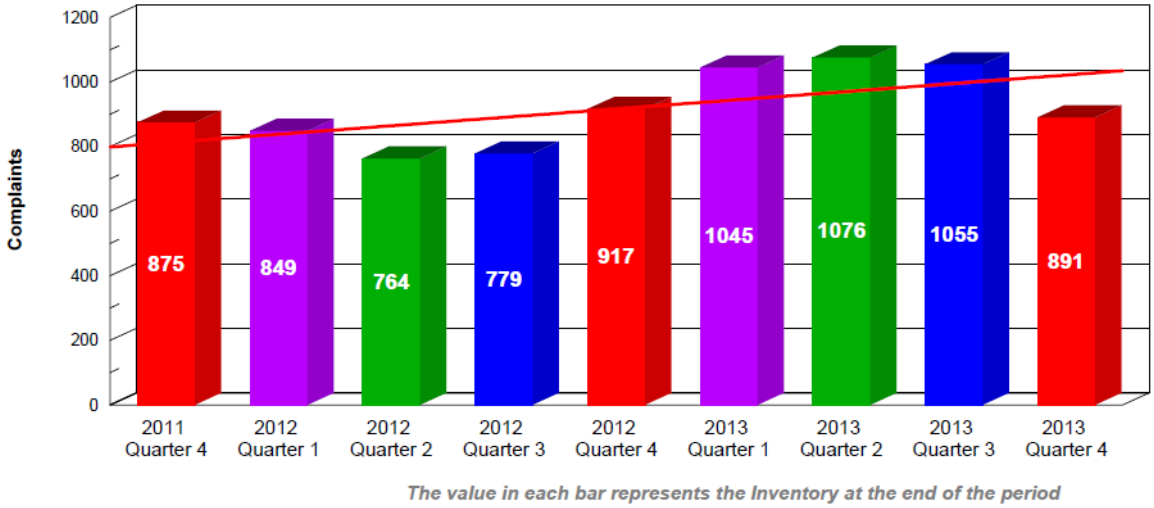
3.2 – Complaints Resolution

Graph 3.2C: Complaints Resolution – Department Inventory



The department's inventory at the end of 2013 was 2.8% lower than at the end of 2012. The inventory continues to consist mostly of complaints against lawyers.

Detailed Analysis of Complaint Resolution's Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
Complaints against Lawyers	830	957	959	928	811
Lawyer Applicant Cases★	0	0	0	0	0
Complaints against Licensed Paralegals	87	88	117	127	80
Paralegal Applicant Cases★	0	0	0	0	0
Complaints against Non-Licensees/Non-Applicants*	0	0	0	0	0
TOTAL	917	1045	1076	1055	891

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP ccomplaints see section 3.4.

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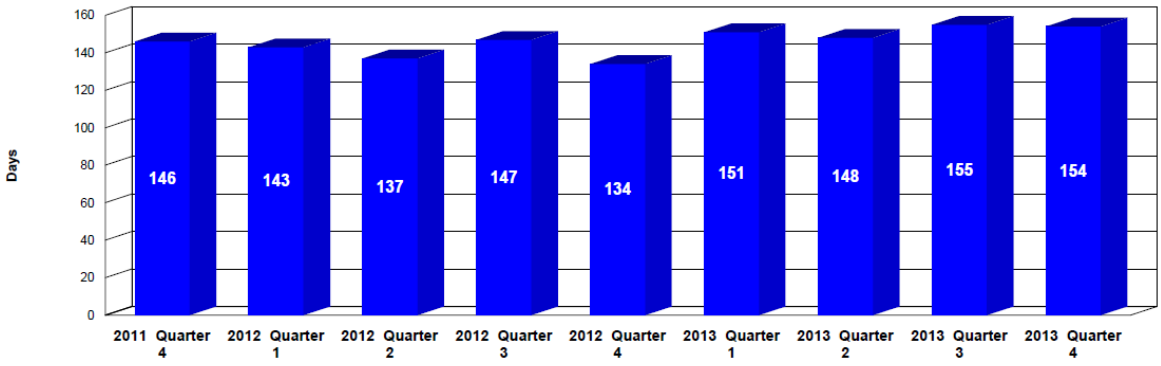
3.2 – Complaints Resolution

Graph 3.2D: Complaints Resolution - Median Age of Complaints



While the median case age of the department's caseload at the end of 2013 was higher than the median age at the end of 2012 (by 15%) and the median age at the end of 2011 (by 5.4%), it is well within the department's target range of between 150-170 days.

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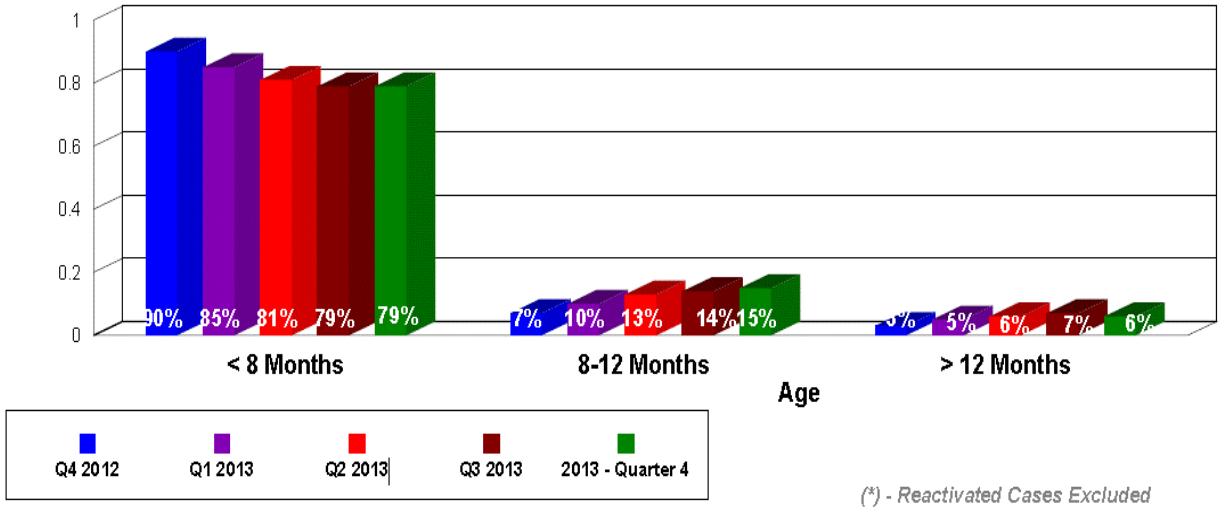
3.2 – Complaints Resolution

Graph 3.2E: Complaints Resolution – Aging of Complaints



(*) - Reactivated Cases Excluded

The above graph sets out the spectrum of aging in the department's inventory (excluding reactivated cases) at the end of each of the 5 quarters displayed. Excluding reactivated cases, Complaints Resolution's department inventory was 833 cases involving 762 subjects. The age distribution of those cases was:

Less than 8 months	658 cases involving 600 subjects
8 to 12 months	124 cases involving 119 subjects
More than 12 months	51 cases involving 43 subjects

The goal is to reduce the proportion of cases in the older time frames and increase the proportion of cases in the youngest time frame. However, it is recognized that there will always be cases that are older than 12 months in Complaints Resolution for the following reasons:

- Newer complaints against the lawyer/paralegal are received. In some cases existing cases await the completion of younger cases relating to the same licensee;
- Delays on the part of licensees in providing representations and in responding to the investigators' requests. In a number of instances, the Summary Hearing process is required;
- Delays on the part of complainants in responding to licensee's representations and to investigators' requests for additional information; and
- New issues raised by the complainant requiring additional investigation

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3.2 – Complaints Resolution

Graph 3.2F: Complaints Resolution – Input vs. Output

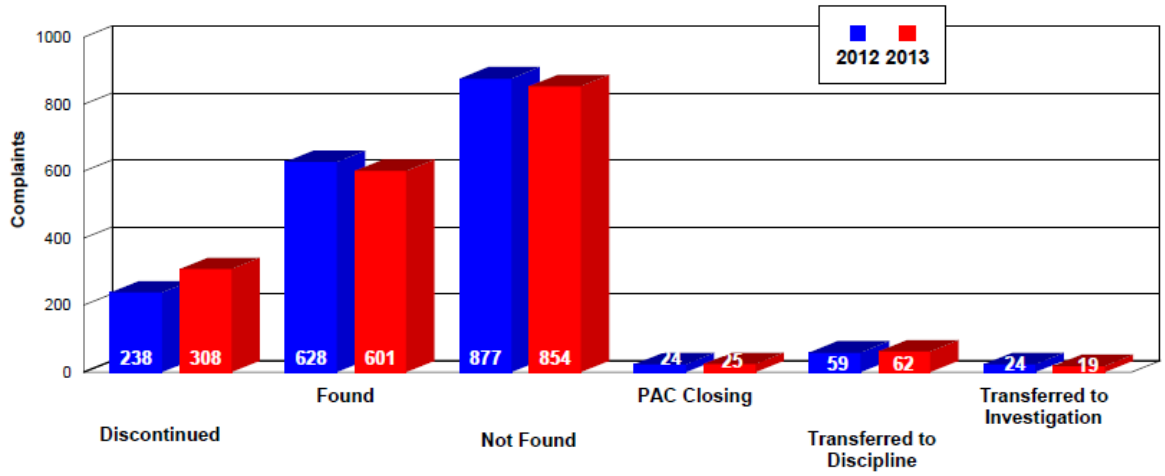
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	**13**	**14**	**7**	**6**	**4**	**10**	**6**	**6**	**7**
Received from Intake	**434**	**433**	**404**	**399**	**603**	**524**	**496**	**466**	**366**
Received from Other Departments	**1**	**3**	**10**	**11**	**5**	**1**	**0**	**7**	**0**
Total	**448**	**450**	**421**	**416**	**612**	**535**	**502**	**479**	**373**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	**460**	**468**	**496**	**384**	**421**	**418**	**436**	**476**	**458**
Transferred to Discipline	**34**	**14**	**12**	**4**	**29**	**9**	**12**	**23**	**18**
Transferred to Investigation	**4**	**3**	**7**	**9**	**5**	**5**	**4**	**6**	**4**
Transferred to Other Departments	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**2**	**5**
Total	**498**	**485**	**515**	**397**	**455**	**432**	**452**	**507**	**485**

The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated by and received in Complaints Resolution from various departments and (2) the number of complaints closed by Complaints Resolution and the department to which files were streamed by Complaints Resolution.

3.2 – Complaints Resolution

Graph 3.2G: Complaints Resolution - Complaints Closed by Disposition



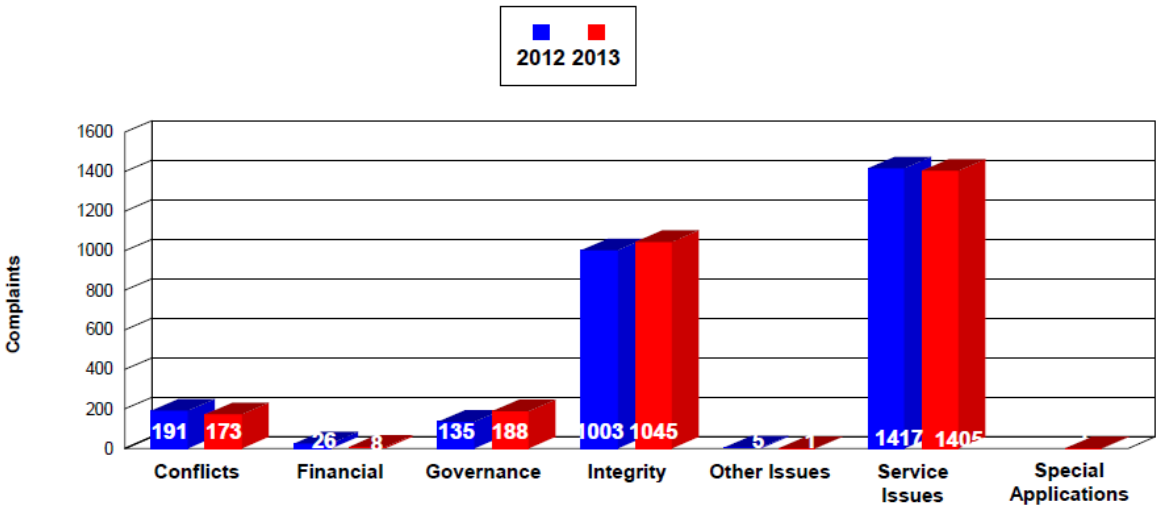
This graph shows a breakdown of the dispositions for complaints closed in or transferred out of Complaints Resolution for 2012 and 2013. With respect to the closing dispositions, as shown in the chart below, there was no appreciable difference between the two years when the total number of closed complaints is considered.

	2012 (% of total cases closed)	2013 (% of total cases closed)
Discontinued	13%	17%
Found	36%	34%
Not Found	50%	48%
PAC Closing	1%	1%
Total cases closed	100% (1769 cases)	100% (1788 cases)

A glossary of the individual disposition types included in each of the shown categories is available in Section 4, Appendix D.

3.2 – Complaints Resolution

Graph 3.2H: Complaints Resolution - Types of Complaints Received



The above graph displays the specific case types for complaints received in Complaints Resolution in 2012 and 2013. A glossary of the individual issues included in each of the shown case type groups is available in Section 4, Appendix B

As shown in the following chart, the distribution of complaint types in Complaints Resolution has remained fairly stable in 2012 and 2013. The following chart shows each complaint type as a percentage of all complaint types received in the 2 years.

	2012	2013
Conflicts	10%	9%
Financial	1%	0%
Governance	7%	10%
Integrity	53%	56%
Service Issues	75%	75%
Other Issues	0%	0%

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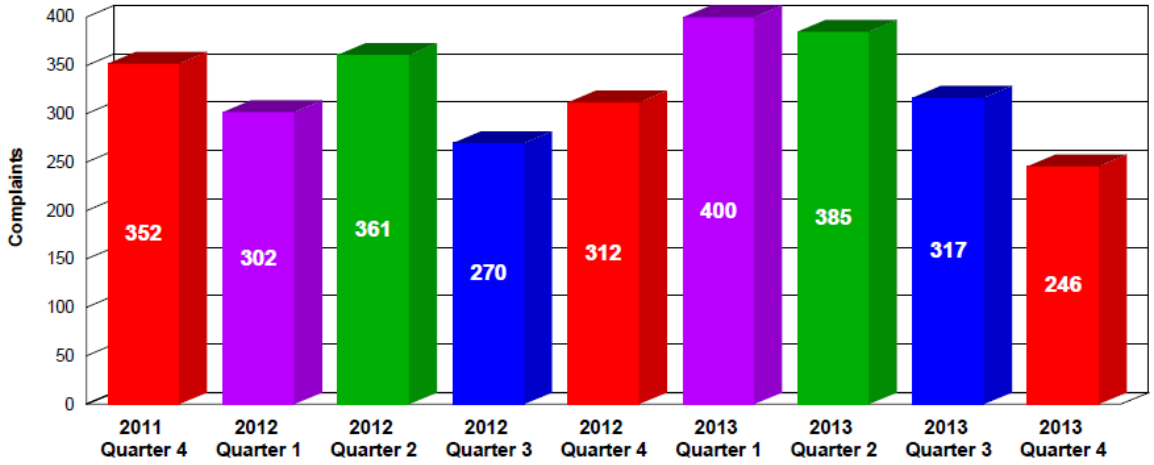
3.3 –Investigations

Graph 3.3A: Investigations - Input



The input of cases into the Investigations department in 2013 increased (by 8.3%) from the input in 2012.

Detailed Analysis of New and Re-opened Complaints Received in Investigations

	Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
Complaints against Lawyers	796	254	208	197	164	823
Lawyer Applicant Cases★	37	18	18	11	0	47
Complaints against Licensed Paralegals	190	67	69	54	40	230
Paralegal Applicant Cases★	80	15	45	19	6	85
Complaints against Non-Licensees/Non-Applicants*	142	46	45	36	36	163
TOTAL	1245	400	385	317	246	1348

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP complaints see section 3.4.

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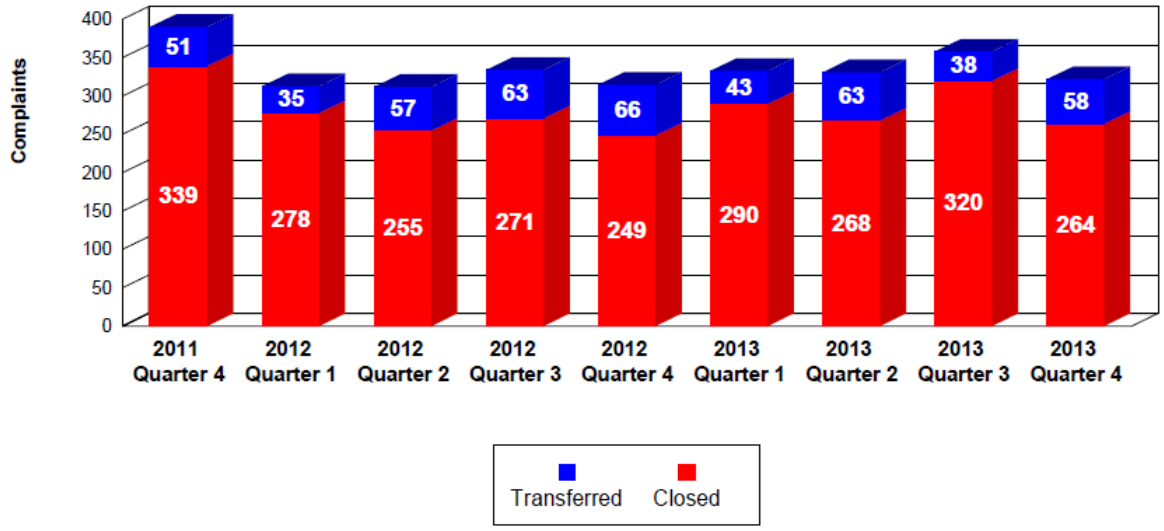
3.3 –Investigations

Graph 3.3B Investigations - Complaints Closed and Transferred Out



The number of cases closed/transferred out of the department (1344 cases) also increased from the number completed in the same period in 2012 (1274 cases).

Detailed Analysis of Complaints Closed and Transferred Out of Investigations

		Totals for 2012		Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013	
Complaints against Lawyers	Closed	657	815	181	171	194	183	729	875
	Transferred	158		23	45	32	46	146	
Lawyer Applicant Cases★	Closed	24	27	11	17	14	9	51	52
	Transferred	3		1	0	0	0	1	
Complaints against Licensed Paralegals	Closed	163	206	32	39	39	27	137	175
	Transferred	43		7	17	4	10	38	
Paralegal Applicant Cases★	Closed	69	69	23	12	31	22	88	95
	Transferred	0		4	1	2	0	7	
Complaints against Non-Licensees/Non-Applicants*	Closed	140	157	43	29	42	23	137	147
	Transferred	17		8	0	0	2	10	
TOTAL	Closed	1053	1274	290	268	320	264	1142	1344
	Transferred	221		43	63	38	58	202	

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

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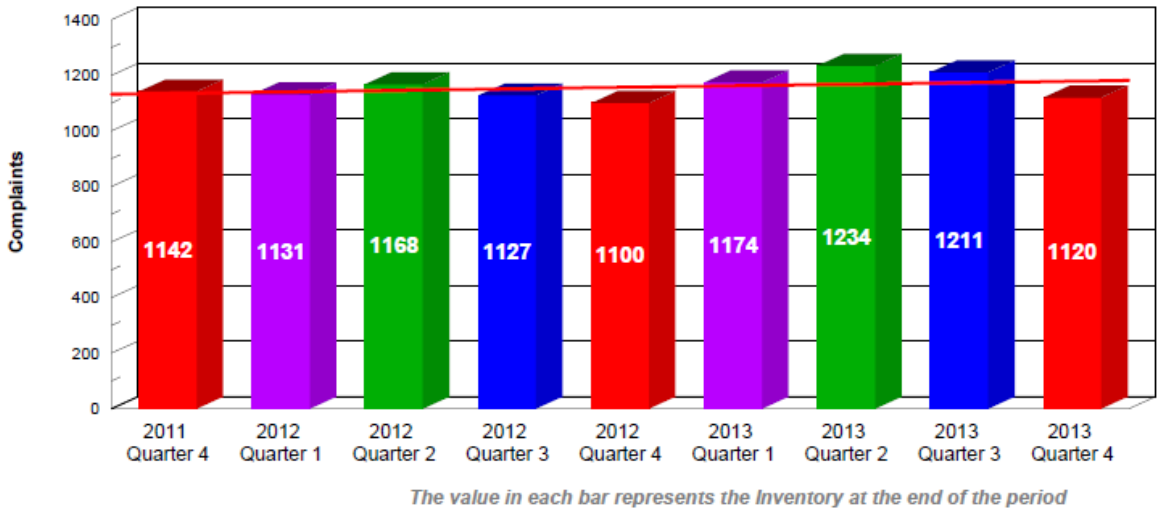
3.3 – Investigations

Graph 3.3C: Investigations – Department Inventory



The number of cases completed by the department in 2013 (1344) was almost the same as the number of cases received in the department (1348). Investigations' inventory increased slightly (by 1.8%) from 1100 at the end of 2012 to 1120 at the end of 2013.

Detailed Analysis of Investigations Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
Complaints against Lawyers	796	851	851	837	759
Lawyer Applicant Cases★	25	31	31	28	20
Complaints against Licensed Paralegals	145	174	186	200	202
Paralegal Applicant Cases★	43	32	64	52	36
Complaints against Non-Licensees/Non-Applicants*	91	86	102	94	103
TOTAL	1100	1174	1234	1211	1120

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP complaints see section 3.4.

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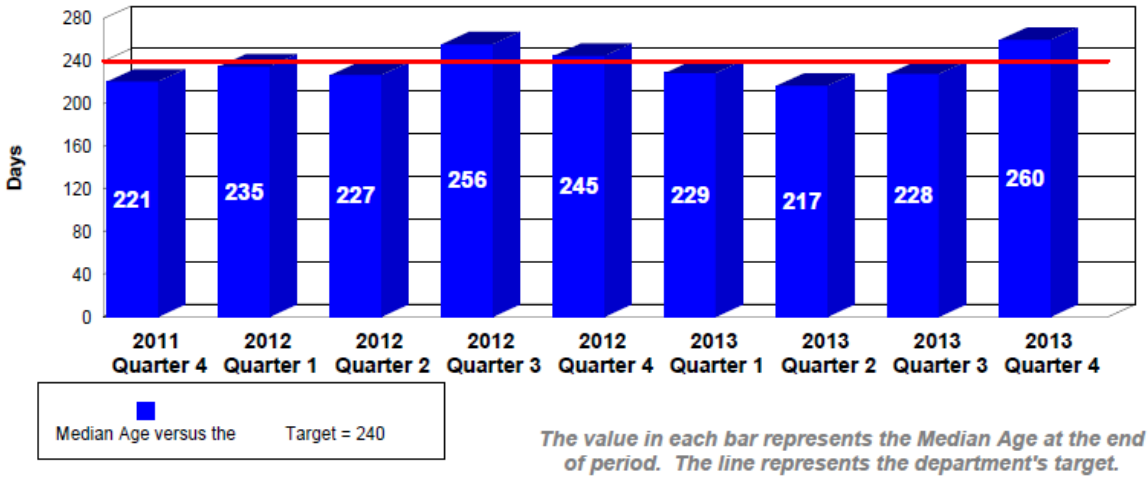
3.3 – Investigations

Graph 3.3D: Investigations - Median Age of All Complaints



Investigations' median age at the end of 2013 was 6% higher than the median age at the end of 2012, increasing from 245 days to 260 days.

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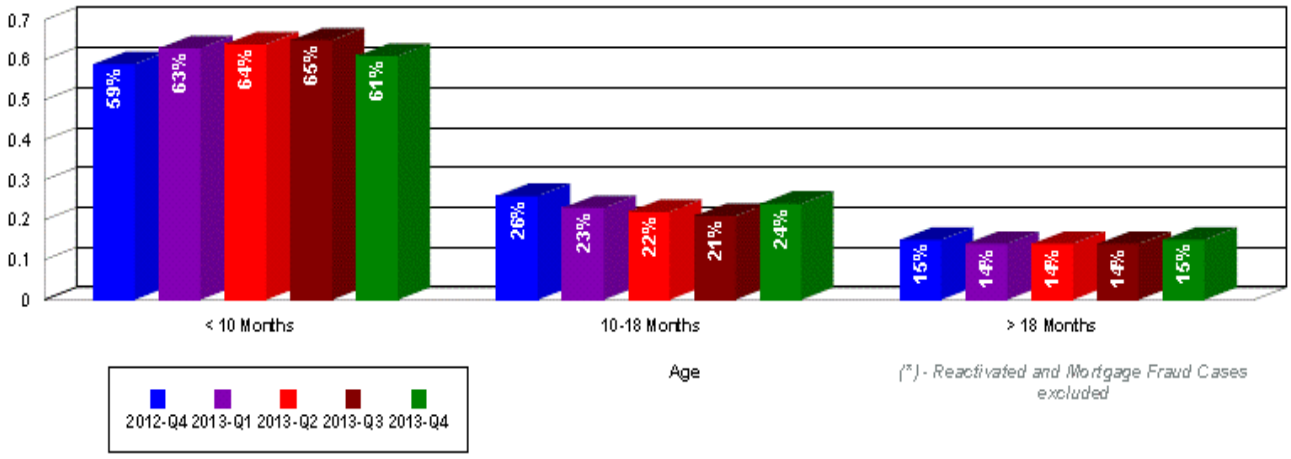
3.3 – Investigations

Graph 3.3E: Investigations – Aging of Complaints

(a) Core Cases



The above graph sets out the spectrum of aging in the department's inventory (excluding reactivated and mortgage fraud cases) at the end of each of the 5 quarters displayed. The inventory of Investigations at the end of 2013, excluding reactivated and mortgage fraud cases, was 966 cases involving 737 subjects. The distribution of those cases was:

Less than 10 months	591 cases involving 451 subjects
10 to 18 months	228 cases involving 177 subjects
More than 18 months	147 cases involving 109 subjects

While the department strives to reduce the proportion of cases in the older time frame and to increase the proportion of cases in the youngest time frame, it is recognized that there are cases that are older than 18 months in Investigations for the following reasons:

- The investigator has to wait for evidence from a third party (i.e. not the complainant or the licensee/subject), for example psychiatric evaluation, court transcripts, or a key witness;
- Newer complaints are received against the licensee/subject. In order to move forward together to the Proceedings Authorization Committee, the older cases await the completion of younger cases;
- A need to coordinate investigations between different licensees/subject where the issues arise out of the same set of circumstances (e.g. a complainant complains about 2 lawyers in relation to the same matter);
- Multiple cases involve one lawyer. These investigations are complex and time consuming;
- Where capacity issues are raised during a conduct investigation.

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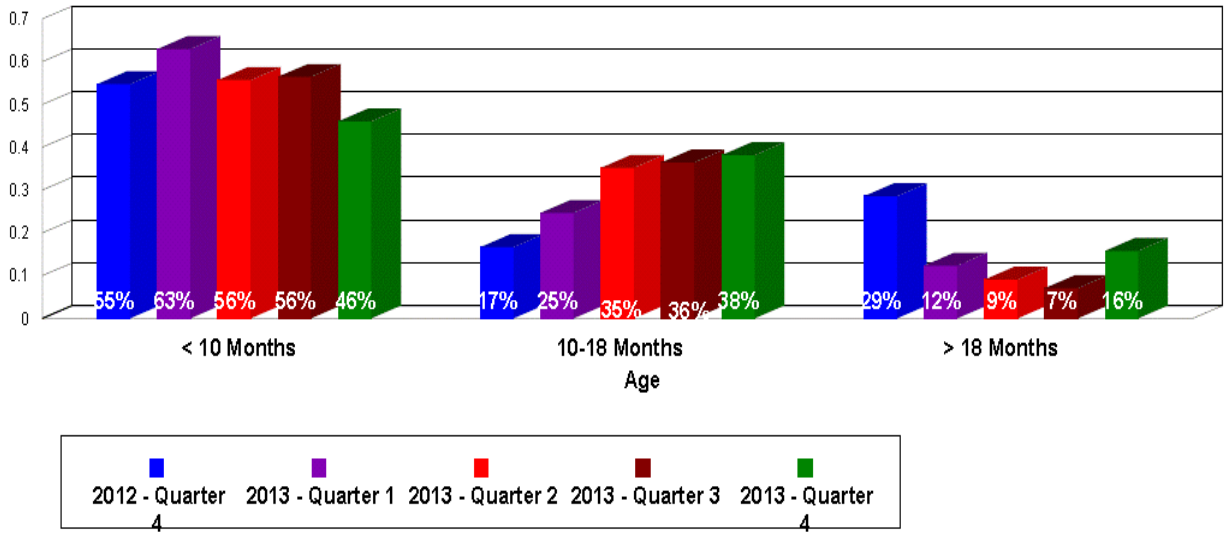
3.3 – Investigations

(b) Mortgage Fraud Cases



The above graph sets out the spectrum of aging in the department's mortgage fraud case inventory at the end of each of the 5 quarters displayed. The inventory of mortgage fraud cases at the end of 2013 was 76 cases involving 65 subjects. The distribution of those cases was:

Less than 10 months	35 cases involving 28 subjects
10 to 18 months	29 cases involving 26 subjects
More than 18 months	12 cases involving 11 subjects

As noted above, the department strives to reduce the proportion of mortgage fraud cases in the older time frame and to increase the proportion of cases in the youngest time frame. However, it is recognized that there will always be mortgage fraud cases that are older than 18 months in Investigations for the reasons cited above, particularly:

- When newer complaints against the licensee/subject are received, existing investigations may have to await their completion in order that all the cases can be taken to Proceedings Authorization Committee together.
- There is a need to coordinate investigations between different licensees/subject where the issues arise out of the same set of circumstances (e.g. a complainant complains about 2 lawyers in relation to the same matter).
- There are multiple cases involve one lawyer resulting in greater complexity.

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3.3 – Investigations

Graph 3.3F: Investigations – Input vs. Output

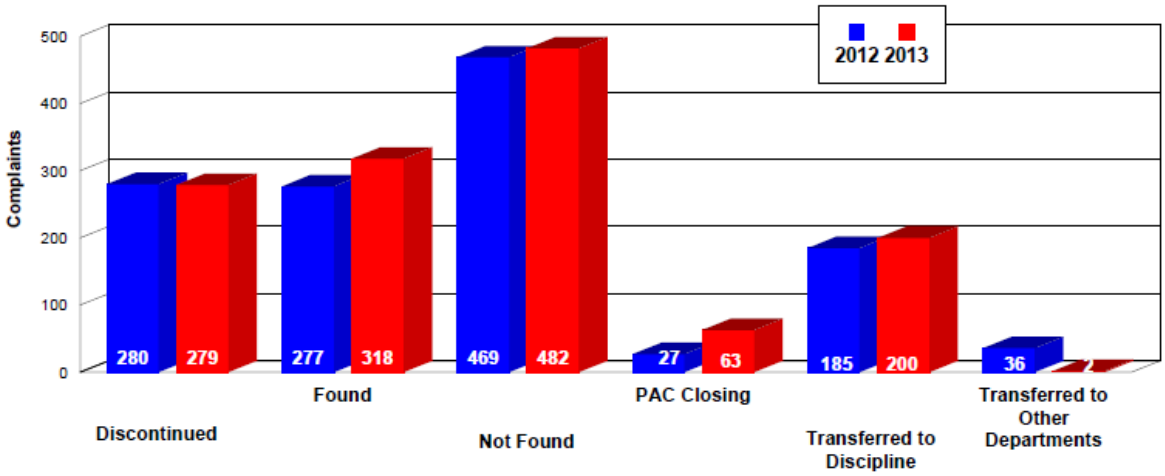
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	4	5	4	4	4	4	6	3	4
Received from CR	4	3	7	9	5	5	4	6	4
Received from Discipline	0	1	0	2	0	2	1	0	0
Received from Intake	344	293	350	255	303	389	374	308	238
Received from Other Departments	0	0	0	0	0	0	0	0	0
Total	**352**	**302**	**361**	**270**	**312**	**400**	**385**	**317**	**246**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	339	278	255	271	249	290	268	320	264
Transferred to Discipline	48	32	45	46	62	42	63	37	58
Transferred to Other Departments	3	3	12	17	4	1	0	1	0
Total	**390**	**313**	**312**	**334**	**315**	**333**	**331**	**358**	**322**

The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated by and received in Investigations from various other departments and (2) the number of complaints closed by Investigations and the department to which files were streamed by Investigations.

3.3 – Investigations

Graph 3.3G: Investigations – Complaints Closed by Disposition



This graph shows a breakdown of the dispositions for complaints closed in or transferred out of Investigations for 2012 and 2013. With respect to the closing dispositions, as shown in the chart below, there was no appreciable difference between the two years when the total number of closed complaints is considered.

	2012 (% of total cases closed)	2013 (% of total cases closed)
Discontinued	27%	24%
Found	26%	28%
Not Found	45%	42%
PAC Closing	3%	6%
Total cases closed	100% (1053 cases)	100% (1142 cases)

.A glossary of the individual disposition types included in each of the shown categories is available in Section 4, Appendix D.

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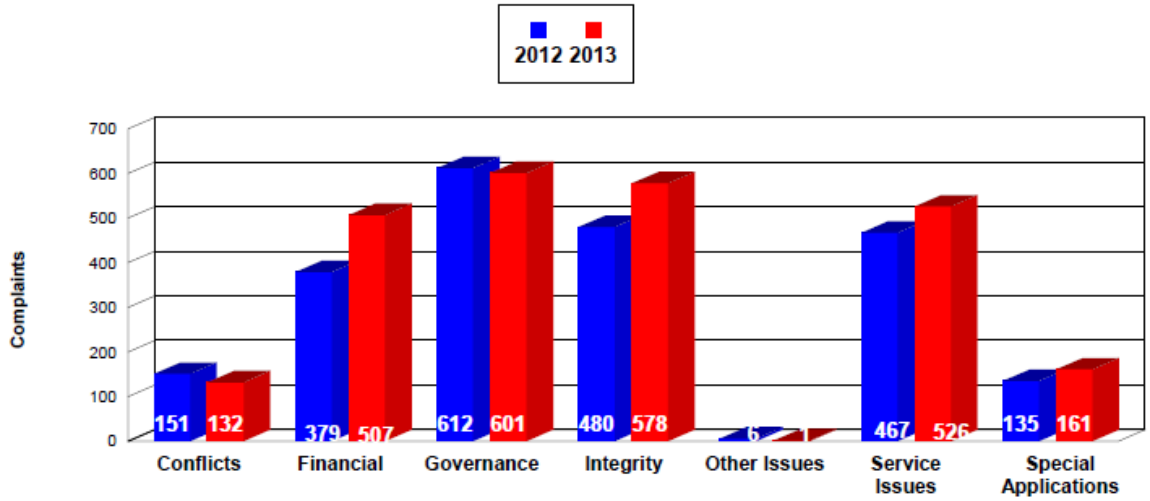
3.3 – Investigations

Graph 3.3H: Investigations - Types of Complaints Received



The above graph displays the specific case types for complaints received in Investigations in 2012 and 2013. A glossary of the individual issues included in each of the shown case type groups is available in Section 4, Appendix B.

As shown in the following chart, the distribution of complaint types in Investigations has remained fairly stable between 2012 and 2013. The following chart shows each complaint type as a percentage of all complaint types received in the 2 years:

	2012	2013
Conflicts	12%	9%
Financial	30%	38%
Governance	50%	45%
Integrity	39%	43%
Service Issues	38%	39%
Special Applications	11%	12%
Other Issues	0%	1%

3.4 – Unauthorized Practice (UAP)

Graph 3.4A: Unauthorized Practice Complaints in Intake

Quarter	New	Closed/Transferred			Active at end of Quarter
		Closed	Transfer to CR	Transfer to Inv	
Totals: 2008	337	122	50	168	
Totals: 2009	445	165	86	192	
Q1 2010	94	42	0	76	36
Q2 2010	89	32	0	69	32
Q3 2010	67	32	1	50	29
Q4 2010	80	45	0	54	18
Totals - 2010 (+ POL)	330* (398)	151	1	249	
Q1 2011 (+ POL)	61 (74)	24	0	41	20
Q2 2011 (+ POL)	61 (84)	20	1	54	12
Q3 2011 (+ POL)	70 (80)	27	0	49	28
Q4 2011 (+ POL)	63 (83)	16	1	62	15
Totals – 2011 (+POL)	255 (321)	87	2	206	
Q1 2012 (+ POL)	77(91)	16	0	61	17
Q2 2012 (+POL)	58 (80)	22	0	49	6
Q3 2012 (+POL)	41 (44)	16	0	27	11
Q4 2012 (+POL)	80 (84)	32	0	45	19
Totals – 2012 (+POL)	256 (299)	86	0	182	
Q1 2013 (+POL)	71(93)	29	0	59	11
Q2 2013 (+POL)	60(66)	26	0	51	5
Q3 2013 (+POL)	69 (81)	27	0	46	9
Q4 2013 (+POL)	60(71)	20	0	41	11
Totals – 2013 (+POL)	260 (311)	102	0	197	36

* In response to the number of UAP complaints being received in the division, a new allegation of "Practising Outside the Scope of Licence" ("POL") was added to the division's case management system in Q1 2010. This allows for improved identification of the nature of these complaints. In 2013, complaints alleging practicing outside the scope of licence were received in a total of 51 cases. Prior to Q1 2010, these would have been included in the UAP figures.

As noted in the chart above, in 2013 the Division received 4 UAP complaints more than it did in 2012 (260 vs. 256) and 5 UAP complaints more than it did in 2011 (260 vs. 255).

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3.4 – Unauthorized Practice (UAP)

Graph 3.4B: Unauthorized Practice investigations (in Complaints Resolution and Investigations)

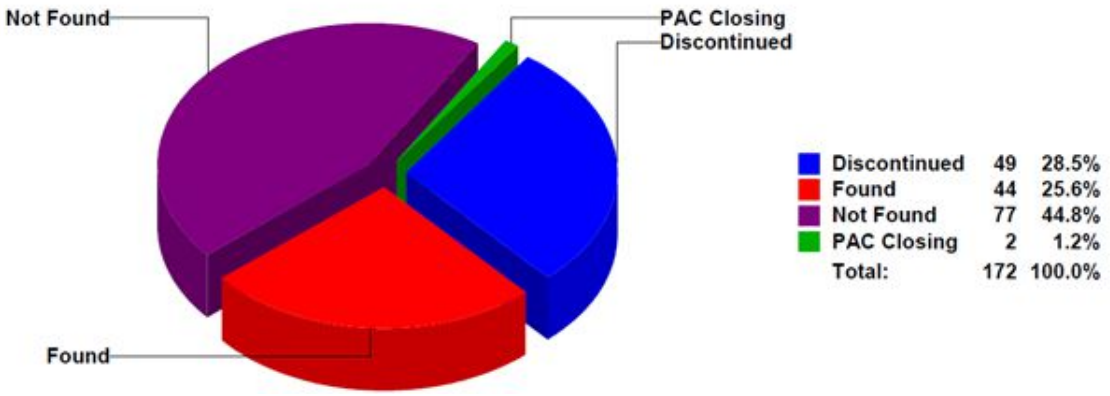
	New		Closed[6]		Inventory	
	CR	Inv	CR	Inv	CR	Inv
Totals: 2008	52	171	64	126	106	
Totals: 2009	77	187	48	138	168	
Totals: 2010	1	249	28	190	124	
Q1 2011	0	41	0	61	0	104
Q2 2011	1	54	0	56	1	102
Q3 2011	0	49	0	45	1	106
Q4 2011	1	62	0	26	1	139
Totals: 2011	2	206	0	188	140	
Q1 2012	0	61	1	45	0	156
Q2 2012	0	49	0	65	0	140
Q3 2012	0	27	0	41	0	120
Q4 2012	0	45	0	34	0	131
Totals: 2012	0	182	1	185	131	
Q1 2013	0	59	0	62	0	128
Q2 2013	0	51	0	36	0	143
Q3 2013	0	46	0	58	0	129
Q4 2013	0	40	0	31	0	137
Totals: 2013	0	197	0	187	137	

As noted in the chart above, in 2013, a total of 187 UAP cases were completed. The inventory of UAP cases in Investigations increased slightly from 131 cases at the end of 2012 to 137 cases at the end of 2013.

[6] "Closed" refers to completed investigations and therefore consists of both those investigations that were closed by the Law Society and those that were referred for prosecution/injunctive relief.

3.4 – Unauthorized Practice (UAP)

Graph 3.4C: Unauthorized Practice Investigations – Closing Dispositions



This chart displays the dispositions of unauthorized practice (UAP) investigations closed in Complaints Resolution and Investigations in the quarter:

"Not found" refers to investigations where there was no evidence of unauthorized practice/provision of legal services.

"Found" reflects investigations that were closed by some action to remedy the unauthorized practice such as an undertaking or an injunction.

"Discontinued" investigations were closed without a final determination on the merits of the complaint for reasons such as the withdrawal of the complaint by the complainant.

Graph 3.4D: UAP Enforcement Actions

In 2013, 2 matters were initiated in the courts, 1 for a permanent injunction and 1 prosecution in relation to a breach of an injunction. Currently, there are 3 open UAP matters (1seeking a permanent injunction, 2 appeals).

In 2013, orders were obtained in 4 matters prohibiting the respondents from further contravening the provisions of s. 26.1 of the *Act*. Two of the respondents have appealed those orders.

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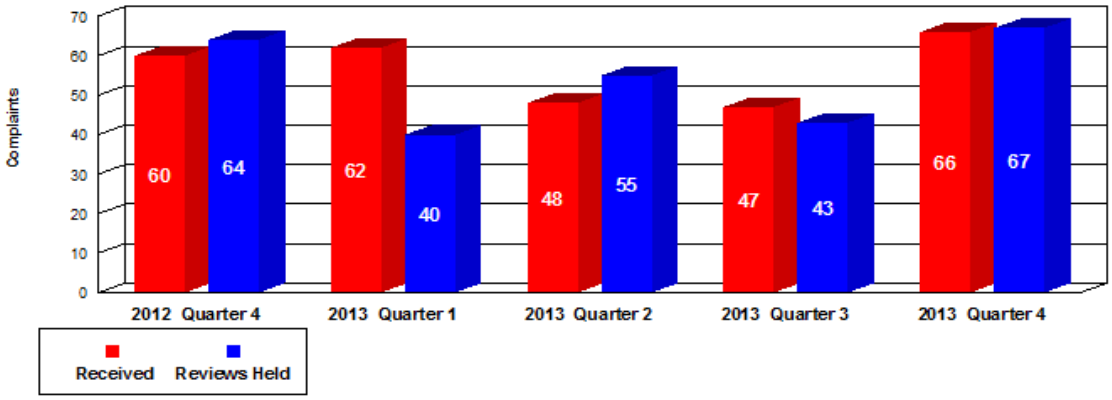
3.5 – Complaints Resolution Commissioner

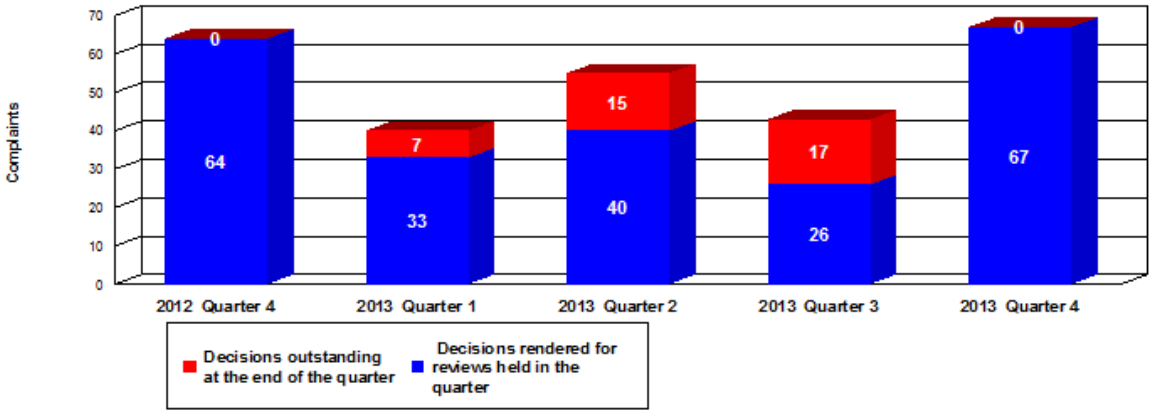
Graph 3.5A: Reviews Requested and Files Reviewed (by Quarter)



In 2013, the Complaints Resolution Commissioner received 223 requests for review. This represents a decrease of approximately 15% from the number of requests for review received in 2012 (262). The 223 requests for review were received from 193 complainants and involved investigations of 199 lawyers and 15 paralegals. An additional 52 requests were received (48 for cases closed in Complaints Services and Intake and 4 for matters which were closed in Discipline following a hearing before a Hearing Panel) over which the Commissioner had no jurisdiction.

In 2013, the Commissioner reviewed 205 cases, a 15% decrease from the number of cases reviewed in 2012 (242). Fifty-six (56) of the cases reviewed were conducted in writing.

Graph 3.5B: Status of Files Reviewed in each Quarter



While the files may be reviewed in one quarter, the final decision by the Commissioner may not be rendered in the same quarter. In the last quarter of 2013, the Commissioner rendered decisions in all 67 cases reviewed in that quarter. As at December 31, 2013, there were no decisions outstanding.

3.5 – Complaints Resolution Commissioner

Graph 3.5C: Decisions Rendered, by Quarter

Quarter	Decisions Rendered (# of decisions where review in previous quarter(s))	Files to Remain Closed	Files Referred Back to PRD
Total 2009	194	174 (90%)	20 (10%)
Total 2010	193	160 (83%)	33 (17%)
Total 2011	260	248 (95%)	12 (5%)
Q1 2012	36	32 (89%)	4 (11%)
Q2 2012	50	48 (96%)	2 (4%)
Q3 2012	67	63 (94%)	4 (6%)
Q4 2012	89	81 (91%)	8(9%)
Total 2012	242	224 (93%)	18 (7%)
Q1 2013	40	38 (95 %)	2 (5 %)
Q2 2013	55	49 (89%)	6 (11%)
Q3 2013	43	40 (93%)	3 (7%)
Q4 2013	67	65 (97%)	2 (3%)
Total 2013	205	192 (94%)	13 (6%)

In 2013, the Commissioner rendered 205 decisions, a similar decrease of 15% from the number of decisions rendered in 2012 (242).

Of the 205 decisions rendered in 2013, the Commissioner sent 13 files back to Professional Regulation. In 9 of these cases, the Commissioner was not satisfied that the decision to close was reasonable and referred the cases back with a recommendation for further investigation. With respect to the remaining 4 cases, while he found the Law Society's decision to close the case to be reasonable, the Commissioner referred the cases back for other considerations (e.g. to consider new information provided by the Complainant during the review; to consider an investigation of another licensee; practice issues, etc.).

With respect to the 9 cases referred back with a recommendation for further investigation:

- The Director declined the recommendation in 6 cases
- The Director adopted the recommendation in 3 cases

In addition, with respect to 1 of the 4 matters referred back for other considerations, the Director adopted the recommendation for further consideration given the new information provided by the Complainant during the review meeting.

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Active Inventory

As at December 31, 2013, the Office of the Complaints Resolution Commissioner had an inventory of 107 files (reduced from 123 files at the end of 2012):

Request received; awaiting preparation of CRC materials	72 files
Review Meeting Scheduled	35 files

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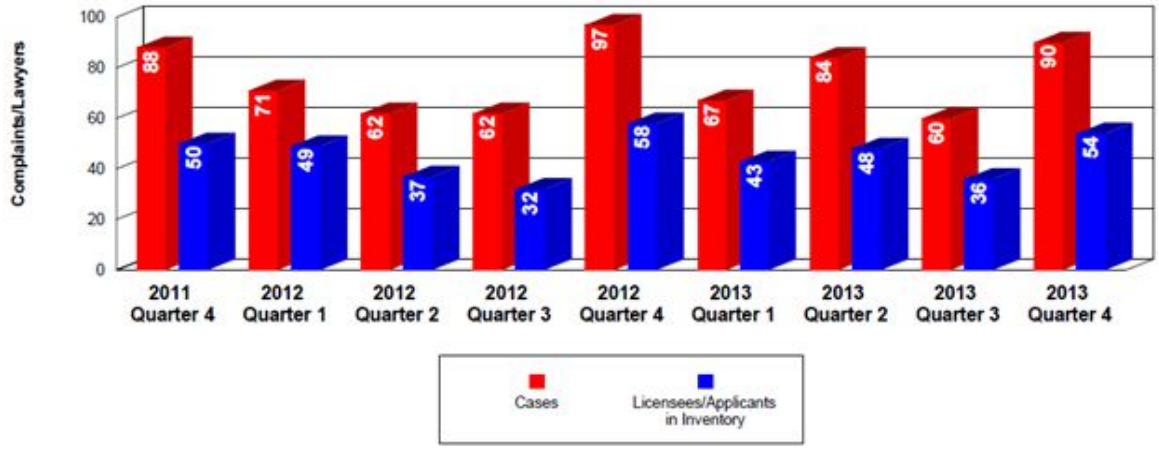
3.6 – Discipline

Graph 3.6A: Discipline - Input[7]



In 2013, 152 new licensee/applicant matters were received in Discipline, approximately 12% more than were received in 2012. These matters related to 301 cases.

Detailed Analysis of New Cases Received in Discipline

		Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
Lawyers	Cases	226	47	65	50	76	238
	Lawyers	110	29*	36*	27*	43*	114
Lawyer Applicants	Cases	4	1	0	0	0	1
	Lawyer Applicants	3	1*	0	0	0	1
Licensed Paralegals	Cases	56	9	18	8	14	49
	Licensed Paralegals	20	7*	11*	8*	11*	29
Paralegal Applicants	Cases	11	10	1	2	0	13
	Paralegal Applicants	3	6*	1*	1*	0*	8
TOTAL	Cases	292	67	84	60	90	301
	Licensees & Applicants	136	43*	48*	36*	54	152

* The number of new Lawyers and Paralegals cited represents the number coming into the department each quarter. However, there may, in fact, already be cases involving the licensee/applicant in the department.

[7] "Input" refers to complaints that were transferred into Discipline from various other departments during the specific quarter. Includes new complaints/cases received in Discipline and the lawyers/applicants to which the new complaints relate.

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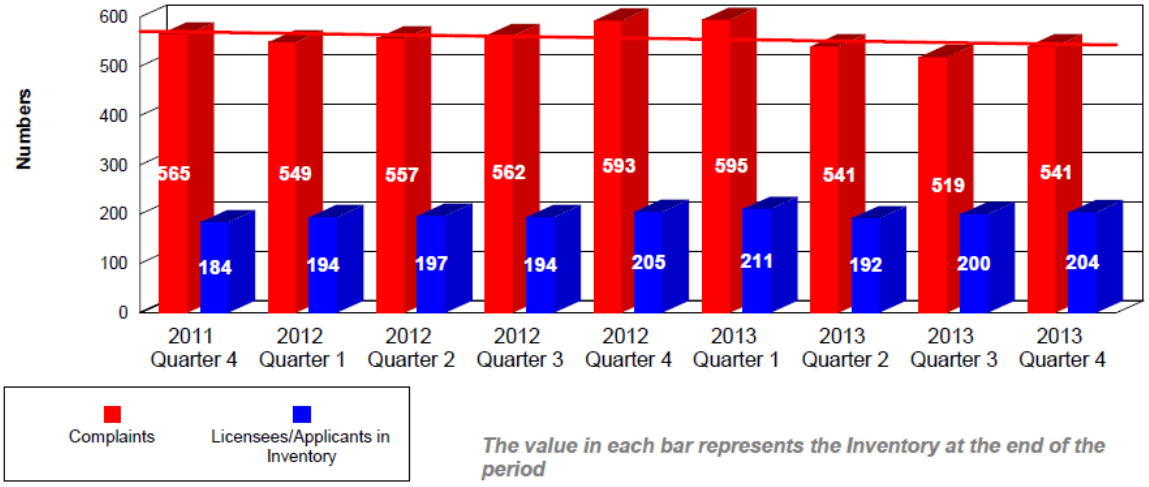
3.6 – Discipline

Graph 3.6B: Discipline – Department Inventory[8]



This graph shows the total number of licensees/applicants and related complaints that are in the Discipline process at the end of each of the last 9 quarters. While the department's inventory of cases at the end of 2013 was lower (by 9%) than it was at the end of 2012, its inventory of licensees/applicants was the same as at the end of 2012 (204 vs. 205).

Detailed Analysis of Discipline's Inventory

		Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
Lawyers	Cases	514	508	460	433	458
	Lawyers	171	176	160	164	169
Lawyer Applicants	Cases	4	5	3	1	1
	Lawyer Applicants	4	5	3	1	1
Licensed Paralegals	Cases	58	60	57	62	60
	Licensed Paralegals	21	20	20	26	26
Paralegal Applicants	Cases	17	22	21	23	22
	Paralegal Applicants	9	10	9	9	8
TOTAL	Cases	593	595	541	519	541
	Licensees & Applicants	205	211	192	200	204

[8] Consists primarily of complaints and lawyers/applicants that are in scheduling and are with the Hearing Panel or on appeal.

3.6 – Discipline

Graph 3.6C: Discipline – Matters Authorized by PAC

		Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
Conduct	Lawyer	104 (SH-31)*	35 (SH-5)*	36 (SH-13)*	16 (SH-6)*	34 (SH-12)*	121 (SH-36)*
	Paralegal	21 (SH-12)*	7 (SH-1)*	13 (SH-1)*	10 (SH-4)*	11 (SH-6*)	41 (SH-12)
Capacity	Lawyer	5	-	1	3	-	4
	Paralegal	-	-	-	-	-	
Competency	Lawyer	-	-	-	-	-	
	Paralegal	-	-	-	-	-	
Non-Compliance	Lawyer	-	-	-	-	-	
	Paralegal	-	-	-	-	-	
Interlocutory Suspension	Lawyer	2	-	1	1	3	5
	Paralegal	1	-	-	-	-	
Licensing	Lawyer	3	3	-	-	-	3
	Paralegal	1	1	2	1	-	4
Invitation to Attend	Lawyer	34	5	7	12	7	31
	Paralegal	-	-	1	2	-	3
Letter of Advice	Lawyer	9	1	2	3	18	24
	Paralegal	-	1	2	-	-	3
Regulatory Meeting	Lawyer	3	1	-	1	1	3
	Paralegal	-	-	-	-	-	
Yearly Totals	Lawyer	160	45	47	36	63	191
	Paralegal	23	9	18	13	11	51
	TOTAL	**183**	54	65	49	74	**242**

*The number of Summary Hearings (SH) authorized appears in brackets and is included in the total number of conduct matters authorized in each quarter.

In 2013, PAC authorized 242 matters as compared to 183 matters in 2012.

- In relation to matters requiring hearings[9], PAC authorized 178 matters in 2013, as compared to137 matters in 2012. This represents an increase of 30% in 2013.
- In relation to matters which were authorized by PAC to proceed with a regulatory response other than a hearing (i.e. by invitation to attend, letter of advice or regulatory meeting), PAC authorized 65 matters in 2013, as compared to 46 matters in 2012. This represents an increase of approximately 40% in 2013.

[9] Including conduct, capacity, competency, non-compliance, interlocutory suspension and licensing matters.

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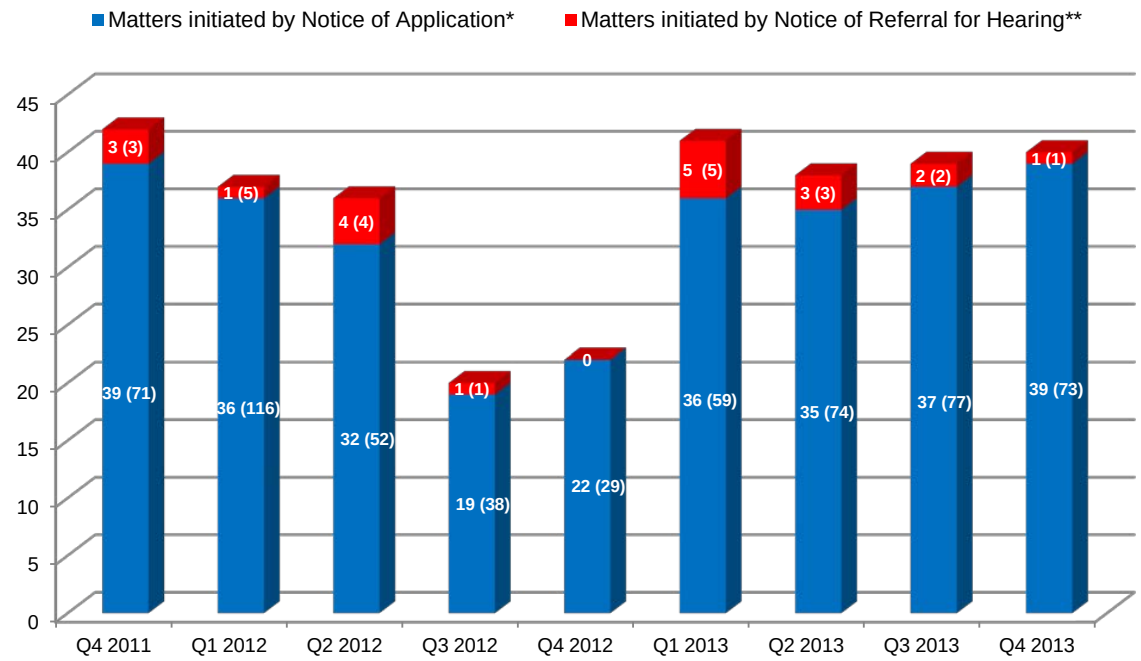
3.6 – Discipline

Graph 3.6D: Discipline - Notices Issued



* Matters which are initiated by Notice of Application include conduct, capacity, non-compliance and competency matters. Also included in this category are interlocutory suspension/restriction motions.

** Matters which are initiated by Notice of Referral for Hearing (formerly Notice of Hearing) include licensing (including readmission matters), reinstatement and restoration matters.

The above graph shows the number of notices issued by the Discipline department in the past 9 quarters. The numbers in each bar indicate the number of notices issued and, in brackets, the number of cases relating to those notices. One notice may relate to more than one case. For example, in Q4 2013, 39 Notices of Application were issued (relating to 73 cases) and 1 Notice of Referral for Hearing was issued (relating to 1 case).

	2011	2012	2013
Notices of Application issued	**122**	**109**	**147**
Notices of Application	118	104	142
Interlocutory Suspension/Restriction motions	4	3	5
Notices of Referral for Hearing issued	**12**	**6**	**11**
Total Notices Issued	**134**	**115**	**158**

3.6 – Discipline

With respect to the 39 Notices of Application[10]/Notices of Motion for Interim Suspension Order which were issued in Q4 2013:

26 were issued less than 1 month after PAC authorization;
8 were issued between 1 and 2 months after PAC authorization; and
1 was issued between 2 and 3 months after PAC authorization; and
4 were issued more than 3 months after PAC authorization.

[10] Notices of Application are issued with respect to conduct, competency, capacity and non-compliance matters and require authorization by the Proceedings Authorization Committee (PAC).

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3.6 – Discipline

Graph 3.6E: Discipline – Completed Matters

		Q1 2012	Q2 2012	Q3 2012	Q4 2012	Total 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total 2013
Conduct Hearings	Lawyers	17	16	18	31	82	20	32	18	24	94
	Paralegal Licensees	6	6	4	3	19	4	2	3	9	18
Interlocutory Suspension Hearings/Orders	Lawyers	2	1	1	-	4	-	1	-	2	3
	Paralegal Licensees	-	1	-	-	1	-	-	-	-	-
Capacity Hearings	Lawyers	-	-	1	4	5	1	-	-	1	2
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
Competency Hearings	Lawyers	-	-	-	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
Non-Compliance Hearings	Lawyers	-	-	-	1	1	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
Reinstatement Hearings	Lawyers	2	1	-	-	3	1	-	-	-	1
	Paralegal Licensees	-	-	-	-	-	-	-	1	-	1
Restoration	Lawyers	-	-	-	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
Licensing Hearings (including Readmission)	Lawyer Applicants	-	1	2	1	4	-	2	2	-	4
	Paralegal Applicants	3	1	1	-	5	1	1	1	-	3
TOTAL NUMBER OF HEARINGS	Lawyers*	21	19	22	37	101	22	35	20	27	104
	Paralegals*	9	8	5	3	25	5	3	5	9	22
	TOTAL	**30**	**27**	**27**	**40**	**124**	**27**	**38**	**25**	**36**	**126**

3.6 – Discipline

Graph 3.6F: Discipline – Appeals

The following chart sets out the number of appeals filed with the Appeal Panel, the Divisional Court or the Court of Appeal in the calendar years 2008, 2009, 2010, 2011 and 2013.

Quarter/Year	Appeal Panel	Divisional Court	Court of Appeal
2008	14	8 appeal	
2009	19	1 appeal	3 motions for leave; 2 appeals
2010	27	3 appeals; 2 judicial reviews	4 motions for leave
2011	18	6 appeals, 2 judicial reviews	2 motions for leave
2012	23	4 appeals; 5 judicial reviews	2 motions for leave
2013 1st Quarter	7	1 judicial review	
2nd Quarter	3	3 appeals	
3rd Quarter	5	1 judicial review	
4th Quarter	5	1 judicial review	
Total:	20	3 appeals; 3 judicial reviews	

As of December 31, 2013, there are 13 appeals pending before the Appeal Panel, 5 appeals in which the Appeal Panel has reserved on judgment, 1 appeal before the Appeal Panel that has been adjourned sine die, 4 appeals in which the Appeal Panel has rendered decisions but is still seized on the issue of costs and 1 appeal which the Appeal Panel had sent back for re-hearing however, as the Law Society elected not to re-prosecute the matter, the Appeal Panel is considering the issue of penalty.

With respect to matters before the Divisional Court, there are 6 appeals and 3 judicial review matters pending. There are no matters pending in the Court of Appeal.

In 2013, 17 appeals before the Appeal Panel were completed:

- 2 appeals were abandoned or deemed abandoned;
- In 1 appeal, the Notice of Appeal was quashed;
- 7 appeals were dismissed;
- 7 appeals were allowed or allowed in part.
  - In 3 matters, appeals/cross-appeals were launched by both the licensee and the Law Society:
    - In one of the appeals, the Appeal Panel granted the licensee's appeal, set aside the decision and order of the Hearing Panel and ordered a new hearing before a differently constituted Hearing Panel. As a consequence, the Appeal Panel found it unnecessary to decide the Law Society's appeal against penalty;
    - In another appeal, the Appeal Panel allowed the Law Society's appeal, setting aside the dismissal of one of the particulars by the Hearing Panel, and dismissed the licensee's appeal to set aside the decision and order of the Hearing Panel. A

new hearing was ordered on certain particulars, however, as the penalty was upheld (revocation), the new hearing did not proceed.

- In the third appeal, the Appeal Panel allowed the licensee's cross-appeal, set aside the decision and order of the Hearing Panel and remitted the matter for a new hearing before a differently constituted Hearing Panel. Given the disposition of the licensee's appeal, the Appeal Panel found it unnecessary to decide the Law Society's appeal.

o 2 of the appeals were launched by the Law Society

- In one appeal, the Appeal Panel allowed the appeal in part, ordering that the suspension ordered by the Hearing Panel is not varied but substituting the Hearing Panel's costs order of $10,000 with a costs order in the amount of $50,0000
- In the other appeal, the Appeal Panel allowed the Law Society's appeal, setting aside the Hearing Panel's decision to strike or dismiss one of the particulars (3a) and ordering a new hearing, if the Law Society chooses to continue the proceeding, before a newly constituted Hearing Panel.

o 2 of the appeals were launched by the licensee/applicant

- In one appeal, the Appeal Panel allowed the licensee's appeal against penalty, reducing (a) the 2 year suspension ordered by the Hearing Panel to 12 months and (b) the requirement that the licensee complete 50 hours of professional development to 25 hours
- In the other appeal, the Appeal Panel allowed the applicant's appeal and remitted the matter to a differently constituted Hearing Panel for a new hearing.

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3.6 – Discipline

Graph 3.6G: Discipline – Input vs. Output

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	**2**	**21**	**4**	**5**	**5**	**9**	**2**	**2**	**5**
Received from CR	**0**	**0**	**0**	**4**	**29**	**9**	**12**	**23**	**18**
Received from Investigation	**48**	**32**	**39**	**46**	**62**	**42**	**63**	**34**	**58**
Received from Other Departments	**38**	**18**	**19**	**7**	**1**	**7**	**7**	**1**	**9**
Total	**88**	**71**	**62**	**62**	**97**	**67**	**84**	**60**	**90**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	**112**	**86**	**54**	**49**	**65**	**59**	**134**	**74**	**68**
Transferred to Other Departments	**0**	**1**	**0**	**0**	**1**	**2**	**3**	**7**	**0**
Total	**112**	**87**	**54**	**49**	**66**	**61**	**137**	**81**	**68**

The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated and received in Discipline from various other departments and (2) the number of complaints closed by Discipline and the department to which files were streamed by Discipline.

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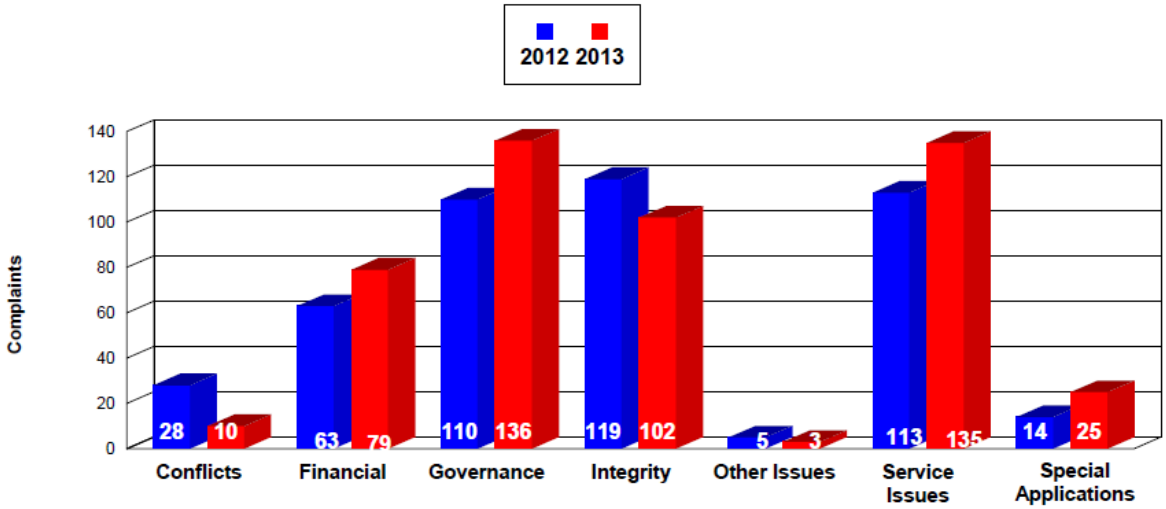
3.6 – Discipline

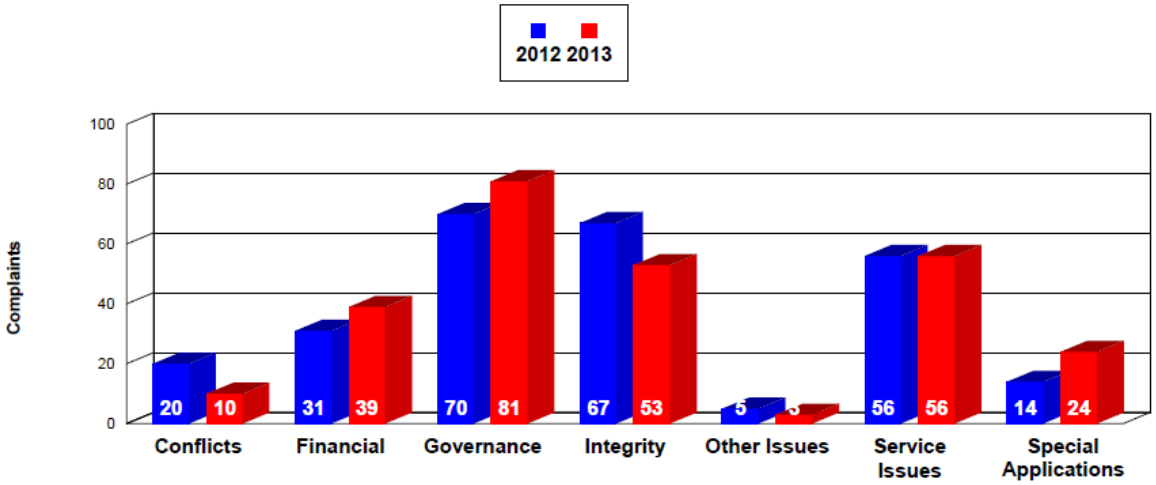
Graph 3.6H: Discipline - Types of Complaints Received

(a) By Cases



The above graph displays the specific case types for complaints received in Discipline in 2012 and 2013. A glossary of the individual issues included in each of the shown case type groups is available in Section 4, Appendix B.

(b) By Licensees/Applicants



This graph shows the breakdown of case types by licensees/applicants. As noted previously, Discipline may receive more than one case per licensee.

3.6 - Discipline

As shown in the graphs on the previous page and the following chart, the distribution of complaint types in Discipline has remained stable in 2013 when compared to 2012.

The following chart shows each complaint type as a percentage of all complaint types received in 2012 and 2013 and the proportion of licensees/applicants receiving each complaint type in the 2 years:

		2012	2013
Cases	**Conflicts**	10%	3%
	Financial	24%	29%
	Governance	43%	50%
	Integrity	46%	37%
	Service Issues	44%	49%
	Special Applications	5%	9%
	Other Issues	1%	1%

Licensees/Applicants	**Conflicts**	15%	7%
	Financial	23%	29%
	Governance	52%	61%
	Integrity	50%	40%
	Service Issues	42%	42%
	Special Applications	10%	18%
	Other Issues	3%	2%

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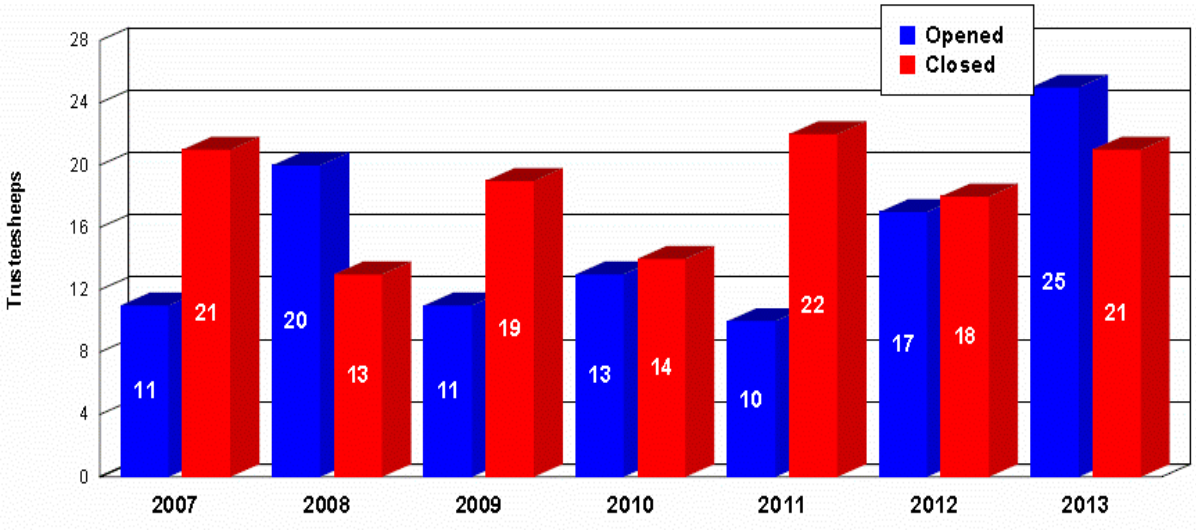
3.7 – Trustee Services

Graph 3.7A: Trustee Services - Formal Trusteeships Opened and Closed



This graph displays the number of formal trusteeships that were opened and closed in the past 7 years. Formal trusteeships are court-ordered.

During 2013, Trustee Services opened 76 files. As of December 31, 2013, a total of 93 active files remained in its inventory, which included 33 active court ordered (formal) and 9 voluntary (informal) trusteeships. The remaining files involve various other matters that Trustee Services deals with on a regular basis, including search warrants and the administration of the Unclaimed Trust Fund.

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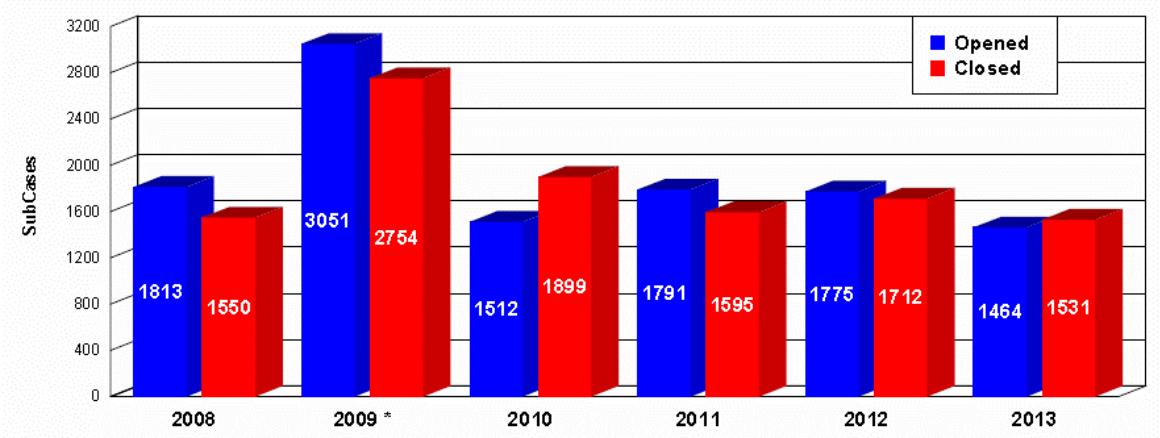
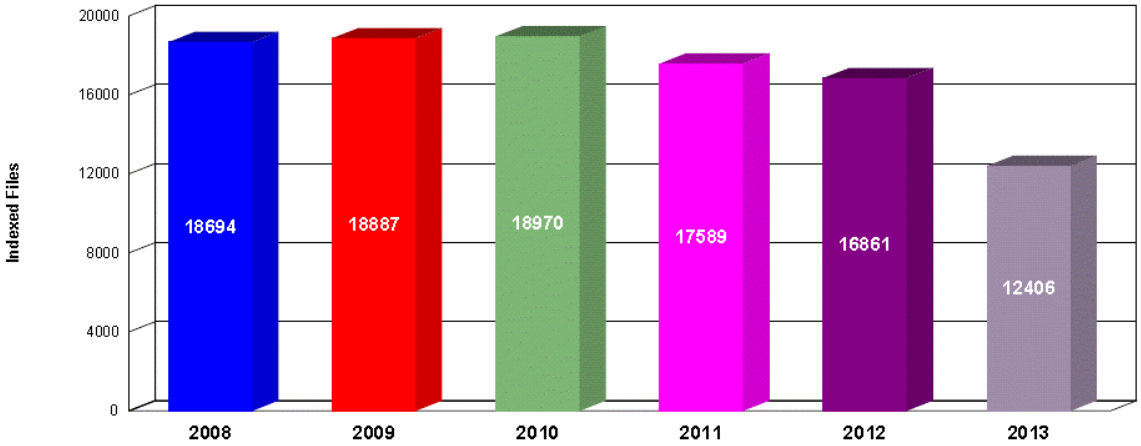
3.7 – Trustee Services

Graph 3.7B: Trustee Services – Client Request Files Opened and Closed, by Quarters



Trustee Services staff receive and respond to specific client related requests, such as the return of a file or responding to requests for information concerning a professional business. The graph above shows these requests (which are created as sub-cases in the division's case management system, IRIS) that were opened and closed in the past five years. The higher numbers in 2009 represent a one-time capturing of work in progress as a result of the department's decision in that year to also record distribution of client funds to specific individuals within the IRIS system. As of December 31, 2013, Trustee Services had 433 active client request files, of which 264 related solely to the distribution of trust funds.

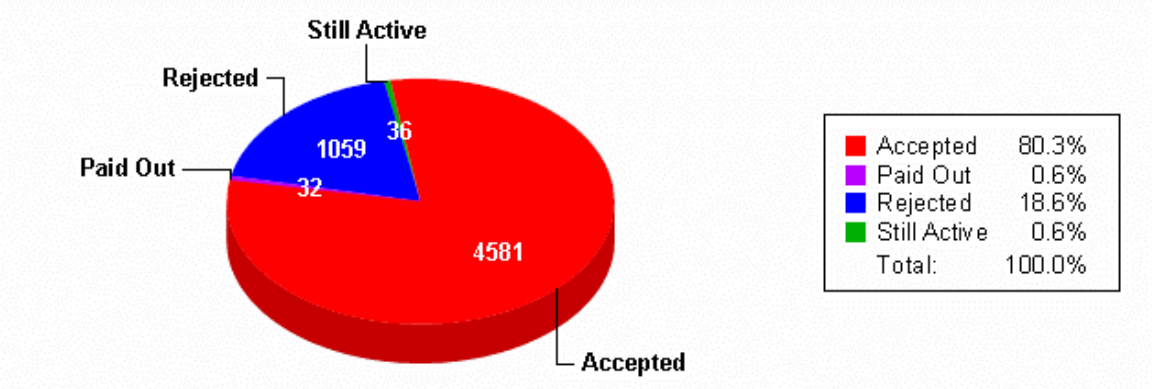
Graph 3.7C: Trustee Services – Client Files Indexed Annually



When Trustee Services obtains a formal, court-ordered trusteeship against a licensee or enters into a voluntary trusteeship arrangement with a licensee, client files are retrieved from the licensee's professional business, indexed and preserved for the benefit of the clients. The above graph displays the number of client files obtained and indexed in the last 6 years. In addition to the indexing of client files, Trustee Services also indexes wills and Powers of Attorneys which are in the licensee's possession.

3.7 – Trustee Services

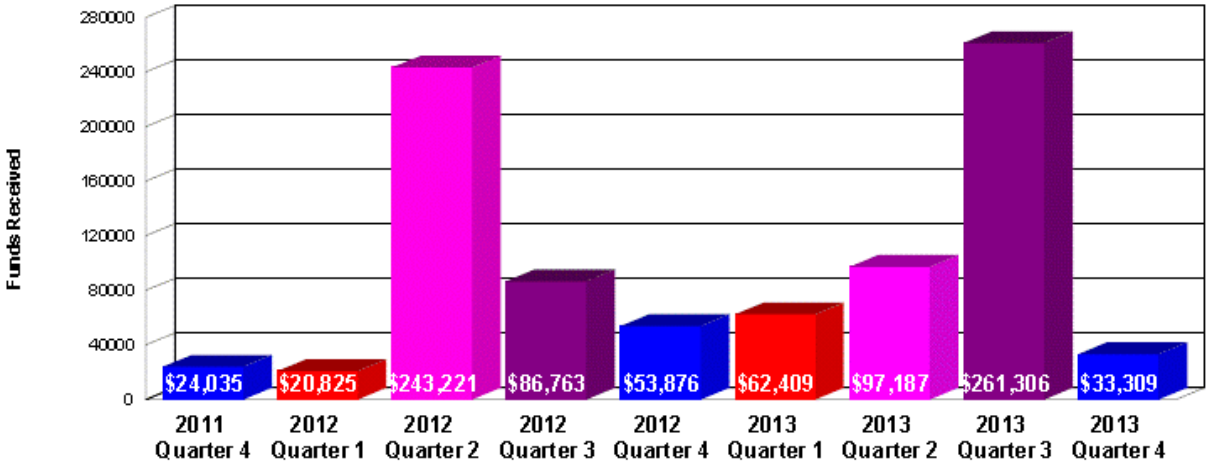
Graph 3.7D: Unclaimed Trust Fund – Summary of Applications Made



The Unclaimed Trust Fund (UTF) is a program that enables lawyers to apply to have trust funds they have held for at least 2 years to be taken over and held by the Law Society. This diagram displays the results of applications made to the UTF from its inception on February 1, 1999 to December 31, 2013.

Graph 3.7E: Unclaimed Trust Fund - Amounts Received

The graph below shows the amounts received into the UTF for the previous 9 quarters. As of December 31, 2013, a total of $2,840,955.12 had been received into the Fund since its inception and $93,498.49 has been paid out, leaving a balance in the Fund of $2,933,487.31.



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3.8 – Monitoring & Enforcement

Graph 3.8A: Monitoring & Enforcement – New Matters

	Total for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total for 2013
Enforcement	29	8	9	7	4	28
Insolvency	29	6	7	10	7	30
Orders	174	31	44	32	40	147
Restitution & Judgments	13	3	1	1	1	6
Undertakings	42	9	9	16	13	47
TOTAL	**287**	**57**	**70**	**66**	**65**	**258**

The above chart sets out the number of new matters opened by the Montoring and Enforcement Department in 2013. As at December 31, 2013, the department had an active inventory of 1551 cases, broken down as follows:

Enforcement	10 (with an additional 1 in abeyance)
Insolvency	99
Orders	391 (with an additional 237 in abeyance)
Restitution & Judgments	35 (with an additional 2 in abeyance)
Undertakings	305 (with an additional 471 in abeyance)
TOTAL	**840**

Graph 3.8B: Monitoring & Enforcement – Collections

In 2013, the department collected a total of $331,469.95
$312,347.33 (Discipline Order costs)
$ 15,000.00 (Compensation Fund Recoveries)
$ 4,122.52 (bankruptcy dividends)

Graph 3.8C: Monitoring & Enforcement – Regulatory Inquiries

In May 2009, Monitoring & Enforcement took over responsibility for responding to inquiries from the public concerning regulatory matters. The following chart sets out the number of emails/ telephone inquiries the Monitoring and Enforcement staff responded to and the number of licensees who were the subjects of those inquiries:

Type of Inquiry		Totals for 2009*	Totals for 2010	Totals for 2011	Totals for 2012	Totals for 2013
Email	**Number**	**1655**	**4302**	**2643**	**3474**	**3860**
	Licensees	**2844**	**5976**	**3755**	**4148**	**4368**
Telephone	**Number**	**3193**	**3575**	**1097**	**918**	**936**
	Licensees	**3544**	**3944**	**1211**	**970**	**979**
Total Inquiries	**Number**	**4848**	**7877**	**3740**	**4392**	**4796**
	Licensees	**6388**	**9920**	**4966**	**5118**	**5347**

*May 1 to December 31 only

SECTION 4

APPENDICES

APPENDIX A

A Description of the Professional Regulation Division Work Process

Client Service Centre (CSC)

All complaints to the Law Society receive initial processing in the CSC. It is the responsibility of this group of staff to sort these complaints to identify those which may raise regulatory issues, and to forward them to Professional Regulation.

Intake

Intake receives all new complaints referred to Professional Regulation. Its function is to review and substantiate the complaints, identify regulatory and risk issues, triage where required, and to provide early resolution where appropriate. Intake also has an important case management function, determining and facilitating the regulatory approach that will best serve the requirements of the case, and ensuring that different investigations concerning the same lawyer are appropriately linked.

Complaints Resolution

The role of Complaints Resolution is to investigate and resolve complaints where the allegations indicate less serious breaches of the *Rules of Professional Conduct*. The majority of complaints are resolved, or closed on the basis of an informal regulatory response. Where a significant breach of the rules is shown on investigation, or where the lawyer fails to cooperate in the regulatory process, a prosecution or other response may be sought from the Proceedings Authorization Committee.

Investigations

The Investigations Department's primary responsibility is to investigate allegations concerning a licensee's conduct or capacity, which, if made out, are likely to lead to discipline proceedings. Investigations staff includes lawyers, investigators and auditors. On completion of the investigation a complaint is referred to the Procedures Authorization Committee, closed, or resolved. On reviewing any complaint referred to it, the Proceedings Authorization Committee may authorize a prosecution, order further investigation, or authorize an alternative resolution such as an Invitation to Attend. The Investigations Department is also responsible for unauthorized practice cases, contrary to section 26.1 (formerly section 50) of the *Law Society Act*.

A Description of the Professional Regulation Division Work Process (Cont'd)

Complaints Review

Where a complaint is closed by Law Society staff, the complainant may have the right to a review of that decision by the Complaints Resolution Commissioner. The role of the Commissioner and the complaints review process is established by the *Law Society Act* and Law Society By-Law 11. The Commissioner receives all cases where a complainant wishes to bring a complaint and holds meetings with the complainants. At the end of the process, the Commissioner may confirm the Law Society decision, or recommend further investigation. The Commissioner may also make informal recommendations for improved process.

Discipline

Discipline counsel represent the Law Society before Hearing and Appeal Panels and in the courts when appeals are taken from the decisions of these panels. The department is responsible for the prosecution of a variety of matters including those concerning licensee conduct and capacity, applications for admission to the Law Society, and applications for reinstatement or readmission.

The majority of prosecutions concern issues of licensee conduct based on infractions of the *Rules of Professional Conduct*. The Law Society's discipline counsel issue the application commencing the process, disclose evidence, and represent the Law Society in pre-hearing and hearing processes.

Monitoring and Enforcement

The Monitoring & Enforcement Department is responsible for enforcement of Hearing Panel orders and lawyer undertakings. Monitoring & Enforcement Department activities include enforcing Hearing Panel orders, monitoring undertakings obtained at the completion of matters by other departments within the Division, ensuring that bankrupt lawyers comply with the Law Society's by-laws; enforcing judgments and mortgages obtained by or assigned to the Compensation Fund and responding to regulatory inquiries from the public.

Trustee Services

Trustee Services responds in situations where a lawyer has abandoned his/her practice or has been disbarred or suspended, as well as situations where a sole practitioner has suffered serious health problems and is unable to continue in the practice of law. Through the use of the Law Society's trusteeship powers, staff carry out the Law Society's mandate to protect the public interest by taking possession of the practice, if necessary. The department also provides information and assistance to lawyers and their personal representatives who are closing their practices.

A Description of the Professional Regulation Division Work Process (Cont'd)

Unclaimed Trust Fund Services

The Law Society has established a program that enables lawyers to submit unclaimed trust funds that they have held for at least two years to the Law Society. Members of the public who believe they are entitled to these funds are able to make claims for these funds. Trustee Services receives lawyer applications to remit funds, investigates the circumstances, and recommends whether the funds should be accepted into the UTF. In a significant minority of cases, Society staff locate the client and the lawyer is then able to return the funds.

Compensation Fund

This fund receives and processes claims from clients who have lost money because of a lawyer's or paralegal's dishonesty. The Fund depends entirely on the lawyer and paralegal fee levies. Staff receive claims and assess their merits based on a set of Guidelines approved by Convocation. The maximum compensation payable under the Guidelines is $150,000 to any one claimant for claims involving lawyers and $10,000 per claimant for claims involving paralegals.

Office of the Director

The responsibility of the Director is to oversee all departments within the Division including budget, staffing, technology, issue management and case process including an effective and timely complaints process, and appropriate risk management This includes coordination and liaison with other divisions of the Law Society and external parties, communications both within the outside the division, development of policy and rule amendment proposals, oversight of case process including the management of significant investigations and prosecutions, and resource management. The Director reports to the Professional Regulation Committee and supports Bencher work on strategic initiatives in licensee regulation.

Case Management

This department's main responsibility is the oversight of Professional Regulation's case management system, the Integrated Regulatory Information System ("IRIS"). Case Management was created in 2008 as a discrete department within the division to ensure in-house control of the quality and integrity of data maintained in IRIS and to allow for ongoing improvements to IRIS. The department is responsible for: the development of qualitative analysis and recommendations regarding file handling, issue management, work process and procedural improvements; the development of reporting structures and the examination and evaluation of reporting requirements for Professional Regulation; and ongoing monitoring of case files to ensure that the Professional Regulation product continues to support the Law Society's mandate to protect the public and maintain public confidence in the legal profession in Ontario. Case Management is also responsible for various divisional projects, including the Discipline History Project and the Reasons Analysis Project.

APPENDIX B - Glossary of Case Types Used in the Quarterly Report

Case Type Name	*Individual Allegations*	
Conflicts	Licensee in a Position of Conflict	
	Business / Financial Relations with Client	
Financial	Estate / Power of Attorney	
	Real Estate / Mortgage Schemes	
	Misapplication	
	Misappropriation	
	Pre-Taking	
	Co-mingling / Mishandling Trust Accounts	
	Breach of No-Cash Rule	
Governance	Fail to Maintain Books & Records	
	Practice by Former / Suspended Licensee	
	Relations Prohibited Persons / Fail Prevent UAP	
	UAP by Non-Licensee	
	Fail to Prevent Practise Outside Scope of Licence	
	Practising Outside Scope of Licence	
	Fail to Report Misconduct / Error / Omission	
	Fail to Cooperate with LSUC	
	Practising without insurance / Fee Category	
	Student Investigations	
	Improper Advertising	
	Operating Trust Account while Bankrupt	
Integrity	Conduct Unbecoming outside the Practice of Law	
	Criminal Charges	
	Counseling / Behaving Dishonourably	
	Discriminatory Conduct	
	Sexual Misconduct	
	Direct Communications with Represented Parties	
	Misleading	
	Breach of Orders, Undertaking or Escrow	
	Civility	
Service Issues	Fail to Provide Client Report	
	Fail to Follow Client Instructions	
	Fail to Communicate	
	Fail to Preserve Client Property	
	Fail to Serve Client	
	Withdrawal of Services / Abandonment	
	Fail to Supervise Staff	
	Fail to Account	
	Fail to Pay Financial Obligations	
	Breach of Confidentiality / Fiduciary Duty	
Special Applications	Readmission	Reinstatement – Order Fulfilled
	Admission	Restoration
	Capacity	Competency from PD&C
	Reinstatement – Variation of Order	Interlocutory Suspension
Other Issues	Other Issues	

APPENDIX C

Glossary of Closing Dispositions Used in the Quarterly Report
Intake Department

Closing Type Category Name	*Closing Disposition category includes:*
No Jurisdiction	Negligence Fees Non-lawyer / Non-member Mandate
No Response from Complainant	Incomplete complaint submission Failure to provide requested information
Withdrawal	Prior Resolution between Member and Complainant Withdrawal at request of Complainant UAP – Closed by Triage Project
Concurrent Litigation	Concurrent Litigation pending internal to Law Society Process Concurrent Litigation pending external to Law Society Process
Previously Raised, Previously decided	Within LS Process
Regulatory Issue Determined	Not of Sufficient regulatory concern Abuse of Law Society Process Independent resolution between Member and Complainant Exceptional Circumstances Refusal by Complainant to LSUC release information / M Counsel S.49.3 Authorization Denied Referral for Mentoring
Early Resolution	Between Parties Resolution reached by LSUC

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APPENDIX D

Glossary of Closing Dispositions Used in the Quarterly Report
Complaints Resolution and Investigations Departments

Closing Type Category Name	*Closing Disposition Category Includes:*
Discontinued (Investigations which have been closed without a final determination on the merits of the complaints.)	Availability - evidence unavailable Availability – information unavailable Availability - subject deceased Availability - witnesses unavailable Concurrent Litigation – External to LSUC Process Concurrent Litigation – Within LSUC Process Concurrent Litigation – Summary Hearing Suspension Decision - exceptional circumstances Decision - malice or abuse of process Decision - not regulatory enough Decision -refusal by complainant for LSUC to release information Decision -resolution from complainant & subject Withdrawn at Complainant's Request – independent resolution Withdrawn at Complainant's Request – other UAP – Closed by UAP Triage
Found (A breach was found as a result of an investigation but the file was closed.)	Administrative Resignation of Subject Caution – oral Caution – written Counselling – Referred by Staff Counselling – Referred by Subject Education – Referred by Staff Education – Referred by Subject Education – Staff Provided Mentoring – Referred by Staff Mentoring – Referred by Subject Practice Review – Referred by Staff Practice Review – Referred by Subject Subject Rectified Breach Undertaking – Oral Undertaking – Written
Not Found (No breach found or the complaint was outside the jurisdiction of the Law Society to continue.)	Jurisdiction – Fees Jurisdiction – Negligence Jurisdiction – Other No Breach – Inquiry Completed
PAC Closing (Closed under the direction of the Proceedings Authorization Committee ("PAC"))	Approval of Settlement Closed Invitation to Attend Letter of Advice Regulatory Meeting Undertaking

The Law Society of Upper Canada
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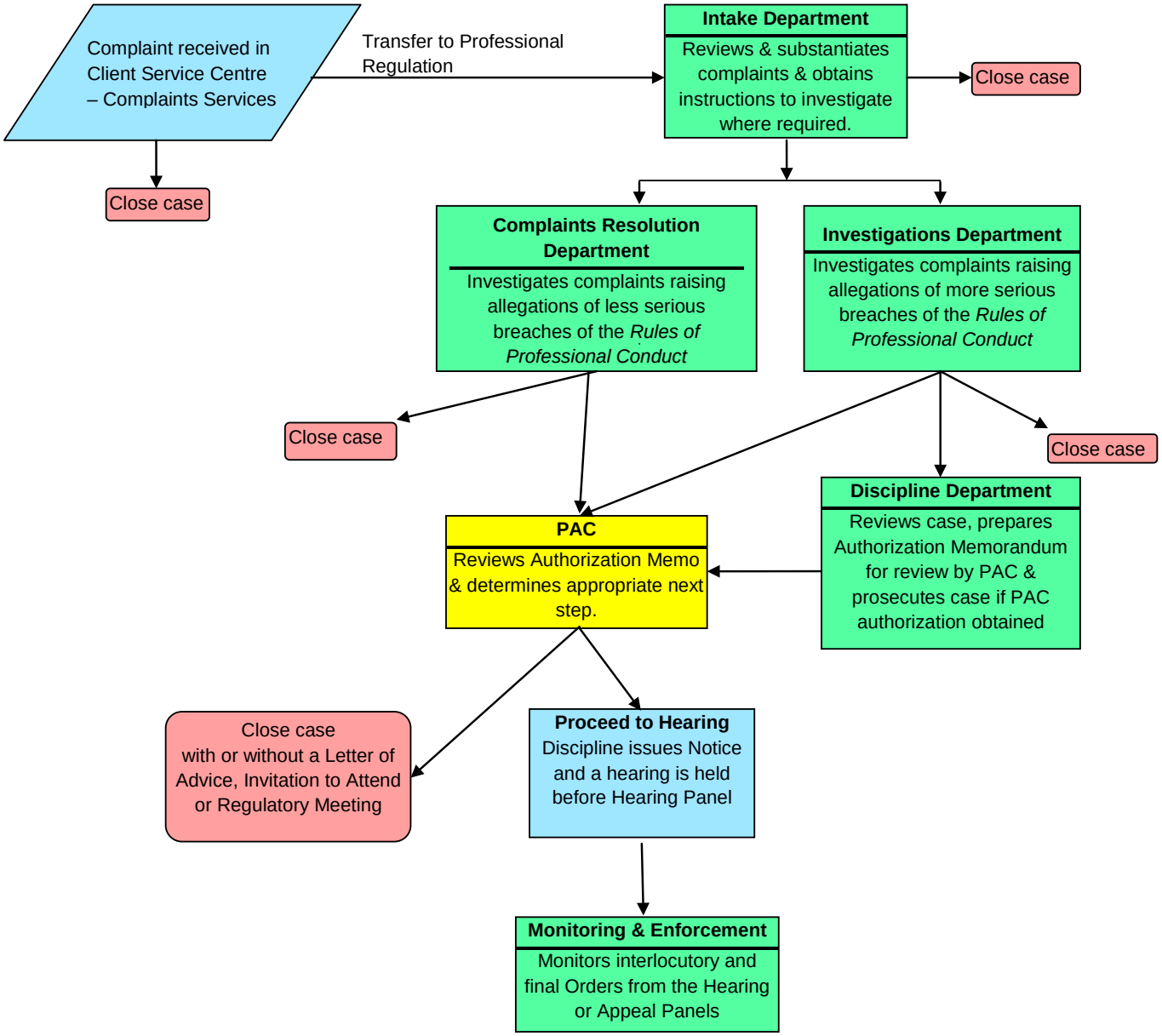
The Professional Regulation Complaint Process



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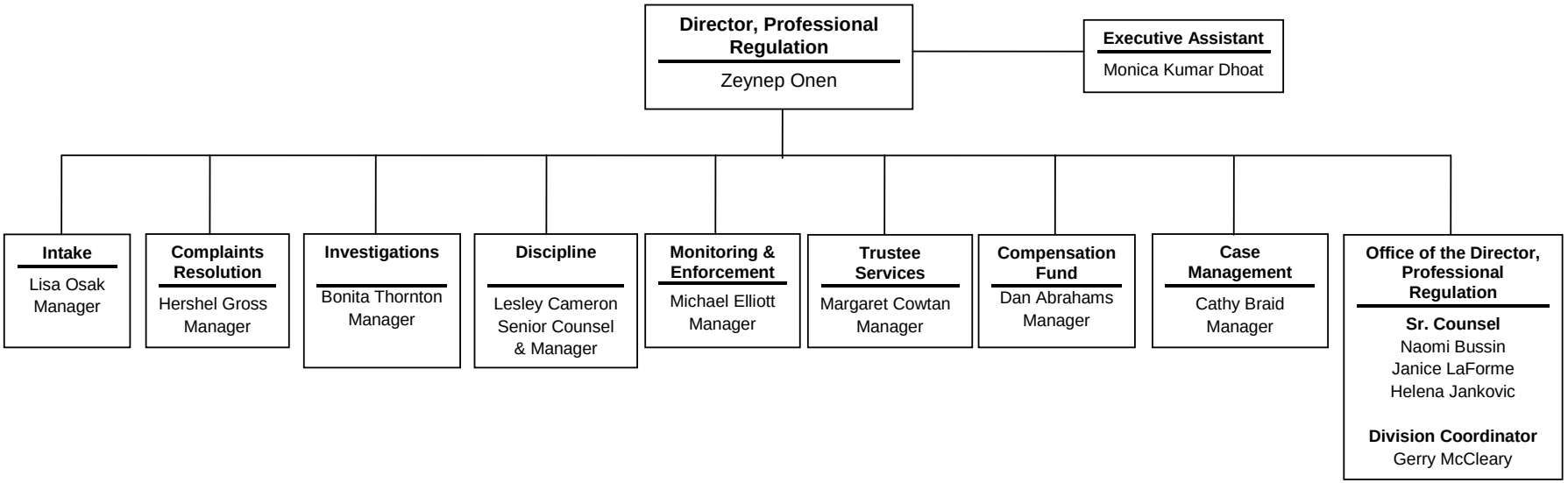
PROFESSIONAL REGULATION ORGANIZATIONAL CHART



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TAB 5

Report to Convocation
February 27th, 2014

Paralegal Standing Committee

Committee Members
Cathy Corsetti, Chair
Susan McGrath, Vice-Chair
Marion Boyd
Robert Burd
Paul Dray
Ross Earnshaw
Robert Evans
Michelle Haigh
Jacqueline Horvat
Dow Marmur
Malcolm M. Mercer
Kenneth Mitchell
Jan Richardson

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

Julia Bass 416 947 5228

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Committee Process

1. The Committee met on February 13th, 2014. Committee members present were Cathy Corsetti (Chair), Susan McGrath (Vice-Chair), Robert Burd, Paul Dray, Ross Earnshaw, Robert Evans, Michelle Haigh (by telephone), Jacqueline Horvat, Dow Marmur (by telephone), Malcolm Mercer, Ken Mitchell and Jan Richardson. Staff members attending were Diana Miles, Zeynep Onen, Naomi Bussin, and Julia Bass.

TAB 5.1

AMENDMENTS TO THE *PARALEGAL RULES*: *MODEL CODE*

Motion

2. **That Convocation approve the amendments to the *Paralegal Rules of Conduct* shown at TAB 5.1.1.**

Background

3. On June 27th 2013, Convocation approved amendments to the lawyers' *Rules of Professional Conduct*, in light of the *Model Code* developed by the Federation of Law Societies of Canada (FLSC).

4. It is now appropriate to consider corresponding changes to the *Paralegal Rules.* The Committee and Convocation have taken the position that the two sets of rules should be broadly consistent.

5. The target date for the amended rules for both lawyers and paralegals to be in force is October 2014.

6. The proposed amendments to the *Paralegal Rules* have been drafted to be consistent with the amendments to the lawyers' rules, and follow the same wording wherever possible[1]. The draft with the proposed amendments is shown at **TAB 5.1.1.**

The Committee's Deliberations

7. The Committee considered the proposed amendments at the meetings in January and February, and approved them for incorporation into the *Paralegal Rules.*

[1] The lawyers' Rules, as approved by Convocation in October 2013, had been reviewed by the Law Society's external drafter, Don Revell.

TAB 5.1.1

Paralegal Rules of Conduct

BLACKLINE VERSION SHOWING PROPOSED CHANGES ARISING FROM AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT* AS PART OF THE IMPLEMENTION OF THE FEDERATION OF LAW SOCIETIES OF CANADA'S MODEL CODE OF PROFESSIONAL CONDUCT

[for Convocation February 27th]

Adopted by Convocation March 29, 2007
Amendments Current October 25, 2012

Table of Contents [to be revised after all changes final]

Rule 1 Citation and Interpretation

1.01 CITATION

1.01 (1) These Rules may be cited as the *Paralegal Rules of Conduct*.

1.02 INTERPRETATION

Definitions

1.02 In these Rules,

"affiliated entity" means any person or group of persons other than a person or group authorized to provide legal services in Ontario;

"affiliation" means the joining on a regular basis of a paralegal or group of paralegals with an affiliated entity in the delivery or promotion and delivery of the legal services of the paralegal or group of paralegals and the non-legal services of the affiliated entity;

[New October 2008]

"associate" includes:

(a) a licensee ~~paralegal~~ who ~~is an employee of the paralegal firm in which the paralegal provides legal services~~ provides legal services in a firm of licensees through an employment or other contractual relationship; and

(b) a non-licensee employee of a multi-discipline practice providing services that support or supplement the practice of law or provision of legal services ~~in which the non-licensee provides his or her services~~.

[New October 2008]

"client" means a person who:

(a) consults a paralegal and on whose behalf the paralegal provides or agrees to provide legal services; or

(b) having consulted the paralegal, reasonably concludes that the paralegal has agreed to provide legal services on his or her behalf

and includes a client of the ~~paralegal~~ firm of which the paralegal is a partner or ~~employee~~ associate, whether or not the paralegal handles the client's work;

"conflict of interest" means the existence of a substantial risk that a paralegal's loyalty to or representation of a client would be materially and adversely affected by the paralegal's own interest or the paralegal's duties to another client, a former client or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

"consent" means fully informed and voluntary consent after disclosure:

(a) ~~a consent~~ in writing, provided that where more than one person consents, each signs the same or a separate document recording the ~~his or her~~ consent, or

(b) ~~an oral consent~~ orally, provided that each person consenting ~~giving the oral consent~~ receives a separate written communication ~~letter~~ recording ~~his or her~~ their consent as soon as practicable;

[New October 2008]

"Law Society" means the Law Society of Upper Canada;

"licensee" means,

(a) a person licensed to practise law in Ontario as a barrister and solicitor, or

(b) a person licensed to provide legal services in Ontario;

"legal practitioner" means a person

(a) who is a licensee;

(b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction.

[New – September 2011]

"limited scope retainer" means the provision of legal services by a paralegal for part, but not all, of a client's legal matter by agreement between the paralegal and the client.

[New – September 2011]

"paralegal" means a paralegal licensee of the Law Society;

"paralegal firm" includes one or more paralegals practising in a sole proprietorship, partnership or professional corporation;

"Rules" means the *Paralegal Rules of Conduct*;

"tribunal" includes courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures.

~~"legal practitioner" means a person~~

~~(c) who is a licensee;~~

~~(d) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction.~~

~~*[New – September 2011]*~~

~~"limited scope retainer" means the provision of legal services by a paralegal for part, but not all, of a client's legal matter by agreement between the paralegal and the client.~~

~~*[New – September 2011]*~~

~~**Singular and Plural Words**~~

~~(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 interpreted in the plural.~~

~~**1.03 MANNER OF INTERPRETATION**~~

~~**Standards of Paralegals**~~

~~1.03 These Rules shall be interpreted in a way that recognizes that,~~

~~(a) a paralegal has a duty to provide legal services and discharge all responsibilities to clients, tribunals, the public and other licensees honourably and with integrity;~~

~~(b) a paralegal, as a provider of legal services, has an important role to play in a free and democratic society and in the administration of justice and a 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;~~

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

~~(d) the Rules are intended to express to licensees and the public, the high ethical ideals of paralegals;~~

~~(e) the Rules are intended to specify the basis on which paralegals may be disciplined; and~~

~~(f) the Rules cannot address every situation, and a paralegal should observe the Rules in the spirit, as well as in the letter.~~

Rule 2 Professionalism

2.01 INTEGRITY AND CIVILITY

Integrity

2.01 (1) A paralegal ~~shall conduct himself or herself in such a way as to maintain the integrity of the paralegal profession.~~ has a duty to provide legal services and discharge all responsibilities to clients, tribunals, the public and other members of the legal professions honourably and with integrity.

(2) A paralegal has a duty to uphold the standards and reputation of the paralegal profession and to assist in the advancement of its goals, organizations and institutions.

Civility

~~(2)~~ (3) A paralegal shall be courteous and civil, and shall act in good faith with all persons with whom he or she has dealings in the course of his or her practice.

Outside Interests and Public Office

~~(3)~~ (4) A paralegal who engages in another profession, business, occupation or other outside interest or who holds public office concurrently with the provision of legal services, shall not allow the outside interest or public office to jeopardize the paralegal's integrity, independence, or competence.

~~(4)~~ (5) A paralegal shall not allow involvement in an outside interest or public office to impair the exercise of his or her independent judgment on behalf of a client.

Acting as Mediator

~~(5)~~ (6) A paralegal who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that the paralegal is not acting as a representative for either party but, as mediator, is acting to assist the parties to resolve the issues in dispute.

2.02 UNDERTAKINGS AND TRUST CONDITIONS

2.02 (1) A paralegal shall fulfil every undertaking given and shall not give an undertaking that cannot be fulfilled.

(2) Except in exceptional circumstances, a paralegal shall give his or her undertaking in writing or confirm it in writing as soon as practicable after giving it.

(3) Unless clearly stated in the undertaking, a paralegal's undertaking is a personal promise and it is his or her personal responsibility.

(4) A paralegal shall honour every trust condition once accepted.

2.03 HARASSMENT AND DISCRIMINATION

Application of *Human Rights Code*

2.03 (1) The principles of the Ontario *Human Rights Code* and related case law apply to the interpretation of this rule.

(2) A term used in this rule that is defined in the *Human Rights Code* has the same meaning as in the *Human Rights Code*.

Harassment

(3) A paralegal shall not engage in sexual or other forms of harassment of a colleague, a staff member, a client or any other person on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Discrimination

(4) A paralegal shall respect the requirements of human rights laws in force in Ontario and without restricting the generality of the foregoing, a paralegal shall not discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, or disability with respect to the employment of others or in dealings with other licensees or any other person.

(5) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

Services

(6) A paralegal shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

(7) A paralegal shall ensure that his or her employment practices do not offend this rule.

Rule 3 Duty to Clients

3.01 COMPETENCE

Required Standard

3.01 (1) A paralegal shall perform any services undertaken on a client's behalf to the standard of a competent paralegal.

(2) A paralegal ~~shall be alert to~~ is required to recognize a task for which the paralegal ~~any~~ lacks ~~of~~ competence ~~for a particular task~~ and the disservice that would be done to the client by undertaking that task. A paralegal ~~and~~ shall not undertake a matter without being competent to handle it or being able to become competent without undue delay or expense to the client.

(3) If a paralegal discovers that he or she lacks the competence to complete the task for which he or she has been retained, the paralegal shall: ~~either~~

(a) decline to act;

(b) ~~or~~obtain the client's consent to retain, consult or collaborate with another licensee who is competent and licensed to perform that task; or

(c) obtain the client's consent for the paralegal to become competent without undue delay, risk or expense to the client.

Who is Competent

(4) For the purposes of this rule, a competent paralegal is one who has and applies the relevant knowledge, skills~~,~~ and attributes~~, and values~~ appropriate to each matter undertaken on behalf of a client including,

(a) knowing general legal principles and procedures and the substantive law and procedures for the legal services that the paralegal provides;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising clients on appropriate courses of action;

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,

(i) legal research,

(ii) analysis,

(iii) application of the law to the relevant facts,

(iv) writing and drafting,

(v) negotiation,

(vi) alternative dispute resolution,

(vii) advocacy, and

(viii) problem-solving ~~ability~~;

(d) representing the client in a conscientious, diligent, and cost-effective manner;

(e) communicating with the client at all relevant stages of a matter in a timely and effective manner ~~that is appropriate to the age and abilities of the client and engaging the services of an interpreter when necessary~~;

(f) answering reasonable client requests in a timely and effective manner;

(g) ensuring that all applicable deadlines are met;

(h) managing one's practice effectively;

(i) applying intellectual capacity, judgment, and deliberation to all functions;

(j) pursuing appropriate training and development to maintain and enhance knowledge and skills;

(k) adapting to changing requirements, standards, techniques and practices; and

(l) complying in letter and in spirit with all requirements pursuant to the *Law Society Act*. ~~these Rules~~.

3.02 ADVISING CLIENTS

~~**General**~~

Quality of Service

3.02 (1) A paralegal has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a paralegal is service that is competent, timely, conscientious, diligent, efficient and civil.

~~A paralegal shall provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.~~

(2) A paralegal shall be honest and candid when advising clients.

(~~2~~3) A paralegal shall not undertake or provide advice with respect to a matter that is outside his or her permissible scope of practice.

Dishonesty, Fraud, etc. by Client or Others

(~~3~~4) A paralegal shall not

(~~a~~) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct~~;~~ or

(~~b~~) advise a client or any other person on how to violate the law and avoid punishment.

(~~3.1~~5) When retained by a client, a paralegal shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

(~~3~~4.~~2~~6) A paralegal shall not use his or her trust account for purposes not related to the provision of legal services.

[Amended - April 2011]

(~~4~~)(7) A paralegal shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.

[New - May 2012]

~~(4.1) (5.1) When a paralegal is employed or retained by an organization to act in a matter and the paralegal knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrules (3) and (4), the paralegal shall~~

~~(a) advise the person from whom the paralegal takes instructions that the proposed conduct is, was or would be dishonest, fraudulent, criminal or illegal, and should be stopped,~~

~~(b) if necessary, because that person refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,~~

~~(c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped, and~~

~~(d) if the organization, despite the paralegal's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 3.08.~~

~~(4.2)~~ (8) ~~When a~~ A paralegal who is employed or retained by an organization to act in a matter ~~and~~ in which the paralegal knows that the organization has acted, ~~or~~ is acting or intends to act dishonestly, fraudulently, criminally, or illegally ~~with respect to that matter, then in addition to his or her obligations under subrule (3) and (4), the paralegal~~ shall do the following, in addition to their obligations under subrule (4) :

(a) advise the person from whom the paralegal takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the ~~proposed~~ conduct ~~was or is~~ is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped,

(b) if necessary because ~~that~~ the person from whom the paralegal takes instructions, the chief legal officer~~,~~ or the chief executive officer refuses to cause the ~~wrongful~~ conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the ~~proposed~~ conduct was, ~~or~~ is or would be dishonest, fraudulent, criminal, or illegal and should be stopped, and

(c) if the organization, despite the paralegal's advice, continues with or intends to pursue the ~~proposed the~~ wrongful conduct, withdraw from acting in the matter in accordance with rule 3.08.

[New - October 2008]

Threatening Criminal Proceedings

(9) A paralegal shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

(a) To initiate or proceed with a criminal or quasi-criminal charge; or

(b) To make a complaint to a regulatory authority.

(10) Subrule (9)(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled.

Settlement and Dispute Resolution

~~(5)~~ (11) A paralegal shall advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis, and shall discourage the client from commencing ~~ill-advised~~ or continuing useless legal proceedings.

~~(6)~~ (12) The paralegal shall consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options, and, if so instructed, take steps to pursue those options. ~~for every dispute, and,~~

~~(a) if appropriate, the paralegal shall inform the client of the client's alternative dispute resolution options; and~~

~~(b) if so instructed, take steps to pursue those options.~~

Client ~~Under a Disability~~ with Diminished Capacity

~~(7)~~ (13) If a client's ability to make decisions is impaired because of minority, mental disability or for some other reason, the paralegal shall, as far as reasonably possible, maintain a normal professional relationship with that client.

~~(8)~~ (14) If the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the paralegal shall take such steps as are appropriate to have a lawfully authorized representative appointed.

Providing Legal Services Under a Limited Scope Retainer

~~(8.1)~~ (15) Before providing legal services under a limited scope retainer, a paralegal shall advise the client honestly and candidly about the nature, extent and scope of the services that the paralegal can provide and, where appropriate, whether the services can be provided within the financial means of the client.

[New – September 2011]

~~(8.2)~~(16) When providing legal services under a limited scope retainer, a paralegal shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

[New – September 2011]

(~~8~~917) Subrule ~~8.2~~ 9.2 does not apply to a paralegal if the legal services are

(a) legal services provided by a licensed paralegal in the course of his or her employment as an employee of Legal Aid Ontario;

(b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;

(c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government funded program.

(d) summary advice provided by the paralegal to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or

(e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New – September 2011]

Medical-Legal Reports

~~(9)~~(18) A paralegal who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client, shall return the report immediately to the physician or health professional, without making a copy, unless the paralegal has received specific instructions to accept the report on that basis.

~~(10)~~ (19) A paralegal who receives a medical-legal report from a physician or health professional containing opinions or findings that, if disclosed, might cause harm or injury to the client, shall attempt to dissuade the client from seeing the report but, if the client insists, the paralegal shall produce the report.

~~(11)~~ (20) If a client insists on seeing a medical-legal report about which the paralegal has reservations for the reasons noted in subrule ~~(10)~~(11), the paralegal shall recommend that the client attend at the office of the physician or health professional to see the report, in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusions contained in the medical-legal report.

Errors

~~(12)~~(21) If, in connection with a matter for which a paralegal is responsible, the paralegal discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the paralegal shall,

(a) promptly inform the client of the error or omission, being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise;

(b) recommend that the client obtain legal advice elsewhere concerning any rights the client may have arising from the error or omission; and

(c) advise the client that in the circumstances, the paralegal may no longer be able to act for the client.

Official Language Rights

~~(13)~~ (22) A paralegal shall, where appropriate, advise a client who speaks French of the client's language rights, including the right of the client to be served by a paralegal who is competent to provide legal services in the French language.

~~**Claims under Statutory Accident Benefits Schedule**~~

~~(14) (23) In addition to complying with these Rules, a paralegal when acting as an adviser, consultant or representative to a person making a claim under the Statutory Accident Benefits Schedule to the *Insurance Act* shall comply with that Act, the regulations under that Act and the Code of Conduct for Statutory Accident Benefit Representatives.~~

3.03 CONFIDENTIALITY

Confidential Information

3.03 (1) A paralegal shall, at all times, hold in strict confidence all information concerning the business and affairs of a client acquired in the course of their professional relationship and shall not disclose any such information unless: ~~expressly or impliedly authorized by the client or required by law to do so~~

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society, or

(d) otherwise permitted by this rule.

(2) The duty of confidentiality under subrule (1) continues indefinitely after the paralegal has ceased to act for the client, whether or not differences have arisen between them.

(3) The paralegal shall keep the client's papers and other property out of sight, as well as out of reach, of those not entitled to see them.

Justified or Permitted Disclosure

(4) A paralegal shall disclose confidential information when required by law or by order of a tribunal of competent jurisdiction.

(5) ~~If a paralegal believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the paralegal may disclose, pursuant to judicial order where practicable, confidential information if it is necessary to do so in order to prevent the death or harm.~~ A paralegal may disclose confidential information when the paralegal believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

(6) In order to defend against the allegations, a paralegal may disclose confidential information if it is alleged that the paralegal or his or her employees ~~are~~,

(a) ~~guilty of~~ have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs; or

~~(c) guilty of malpractice or misconduct.~~

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a paralegal.

(7) A paralegal may disclose confidential information in order to establish or collect his or her fees.

(8) A paralegal may disclose confidential information to a lawyer or another paralegal to secure legal advice about the paralegal's proposed conduct.

~~(8)~~(9) A paralegal shall not disclose more information than is necessary when he or she discloses confidential information as required or permitted by subrules (4), (5), (6) and (7).

3.04 CONFLICTS OF INTEREST – GENERAL

~~**Definition**~~

~~3.04 (1) In this rule and rule 3.05,~~

~~"conflict of interest" or "conflicting interest" means an interest, financial or otherwise,~~

~~(a) that would be likely to affect adversely a paralegal's judgment on behalf of, or loyalty to, a client or prospective client; or~~
~~(b) that a paralegal might be prompted to prefer over the interests of a client or prospective client.~~

Avoidance of Conflicts of Interest

(1) A paralegal shall not act or continue to act for a client where there is a conflict of interest, except as permitted under this rule.

(2) A paralegal shall not advise or represent ~~more than one side of~~ opposing parties in a dispute.

~~(3) A paralegal shall not act or continue to act in a matter when there is, or is likely to be, a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents~~

(3) A paralegal shall not represent a client in a matter when there is a conflict of interest unless

(a) there is express or implied consent from all clients; and

(b) it is reasonable for the paralegal to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(4) For the purpose of this rule:

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be implied and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel,

(ii) the matters are unrelated,

(iii) the paralegal has no relevant confidential information from one client that might reasonably affect the representation of the other client, and

(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

Acting Against Former Clients

(45) Unless the former client ~~and those involved or associated with the client~~ consents, a paralegal ~~who has acted for a client in a matter~~ shall not ~~thereafter~~ act against ~~the~~ a former client in ~~or against persons who were involved or associated with the client in that matter~~,

(a) ~~in~~ the same matter;

(b) ~~in~~ any related matter; or

(c) except as provided by subrule (6), in any new matter, if the paralegal has ~~obtained from the other retainer,~~ relevant confidential information arising from the representation of the former client that may prejudice that client.

(~~5~~6) If a paralegal has acted for a client and obtained confidential information relevant to a matter, the paralegal's partner or employee may act in a subsequent matter against that client, ~~if,~~ provided that:

(a) the former client consents to the paralegal's partner or employee acting; or

(b) the paralegal's firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other licensee having carriage of the new matter. ~~is appropriate to act in the new matter having regard to all the circumstances, including,~~

(i) ~~the availability of suitable alternative representation,~~

(ii) ~~the measures in place to ensure that no disclosure of the former client's confidential information to the partner or employee having carriage of the new matter will occur,~~

(iii) ~~the extent of prejudice to any party,~~

(iv) ~~the good faith of the parties, and~~

(v) ~~issues affecting the public interest.~~

~~(6) If a partner or paralegal employed in a paralegal firm has obtained confidential information from a former client that is relevant to a new matter, no partner or paralegal employed in the firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied.~~

~~(7) A paralegal may act against a client in a fresh, independent and unrelated matter if previously obtained confidential information is irrelevant to that matter.~~

Joint Retainers

(~~8~~7) Before agreeing to act for more than one client in a matter or transaction, a paralegal shall advise the clients that,

(a) the paralegal has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the paralegal cannot continue to act for both or all of them and may have to withdraw completely.

(~~9~~8) If a paralegal has a continuing relationship with a client for whom he or she acts regularly, before agreeing to act for that client and another client in a matter or transaction, the paralegal shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

(~~10~~9) If a paralegal has advised the clients, as provided under subrules (8) and (9), and the parties are content that the paralegal act for both or all of them, the paralegal shall obtain their consent.

(10) Consent to a joint retainer must be obtained from each client in writing, or recorded through a separate written communication to each client.

(11) Although all parties concerned may consent, a paralegal shall avoid acting for more than one client if it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(12) Except as provided by subrule (13) ~~(14),~~ if a contentious issue arises between two clients who have consented to a joint retainer, the paralegal must not advise either of them on the contentious issue and the following rules apply:

(a) The paralegal shall

(i) refer the clients to other licensees for that purpose; or

(ii) if not legal advice is required and the clients are sophisticated, advise them of their option to settle the contentious issue by direct negotiation in which the paralegal does not participate.

(b) If the contentious issue is not resolved, the paralegal shall withdraw from the joint representation.

~~if a paralegal's clients have consented to a joint retainer and an issue contentious between them or some of them arises, the paralegal shall not advise either of them on the contentious issue, but shall refer the clients to other licensees unless,~~

~~(a) the contentious issue does not involve the provision of legal services; and~~

~~(b) the clients are sophisticated.~~

~~(13) If the conditions set out in clauses (a) and (b) of subrule (12) are met, the clients may settle the contentious issue by direct negotiation in which the paralegal does not participate.~~

(13)~~(14)~~ If a paralegal's clients consent to a joint retainer and also agree that if a contentious issue arises the paralegal may continue to advise one of them and a contentious issue does arise, the paralegal may advise the one client about the contentious matter and shall refer the other or others to another licensee for that purpose.

Multi-Discipline Practices

(14) ~~(15)~~ A paralegal in a multi-discipline practice shall ensure that non-licensee partners and associates observe this rule for the provision of legal services and for any other business or professional undertaking carried on by them outside the professional business.

Affiliations

(15) ~~(16)~~ Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a paralegal shall disclose to the client

(a) any possible loss of confidentiality because of the involvement of the affiliated entity, including circumstances where a non-licensee or staff of the affiliated entity provide services, including support services, in the paralegal's office,

(b) the paralegal's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

(c) any financial, economic or other arrangements between the paralegal and the affiliated entity that may affect the independence of the paralegal's representation of the client, including whether the paralegal shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the paralegal and the affiliated entity, such as agreements with respect to referral of clients between the paralegal and the affiliated entity, that may affect the independence of the paralegal's representation of the client.

(16) ~~(17)~~ Where there is an affiliation, after making the disclosure as required by subrule (~~16)~~ (15), a paralegal shall obtain the client's consent before accepting a retainer under that subrule ~~(16)~~ .

(17) ~~(18)~~ Where there is an affiliation, a paralegal shall establish a system to search for conflicts of interest of the affiliation.

[New - October 2008]

3.05 CONFLICTS OF INTEREST - TRANSFERS

Application of Rule

3.05 (1) This rule applies where a paralegal transfers from one paralegal firm ("former paralegal firm") to another ("new paralegal firm"), and either the transferring paralegal or the new paralegal firm is aware at the time of the transfer or later discovers that,

(a) the new paralegal firm represents a client in a matter that is the same as or related to a matter in which the former paralegal firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring paralegal actually possesses relevant information respecting that matter.

Paralegal Firm Disqualification

(2) If a transferring paralegal actually possesses information respecting a former client that is confidential and that, if disclosed to a paralegal in the new paralegal firm, may prejudice the former client, the new paralegal firm shall cease representation of its client unless the former client consents to the new paralegal firm's continued representation or the new paralegal firm establishes that it is in the interests of justice that it continue to represent the client.

(3) In deciding whether or not it is appropriate to continue to act for a client, the new paralegal firm shall consider all the circumstances including,

(a) the adequacy and timing of the measures taken to ensure that no disclosure to any paralegal of the new paralegal firm of the former client's confidential information will occur;

(b) the availability of suitable alternative representation;

(c) the measures taken to ensure that no disclosure of the former client's confidential information, to any paralegal in the new paralegal firm, will occur;

(d) the extent of any prejudice to any party;

(e) the good faith of the parties; and

(f) issues affecting the public interest.

(4) If a transferring paralegal actually possesses relevant information respecting a former client but that information is not confidential information as described in subrule (2), the paralegal shall execute an affidavit or solemn declaration to that effect, and the new paralegal firm shall,

(a) notify its client and the former client, or if the former client is represented in that matter by a licensee, notify that licensee, of the relevant circumstances and its intended action under this rule; and

(b) deliver to the persons referred to in clause (a) a copy of the paralegal's affidavit or solemn declaration executed under this subrule.

Transferring Paralegal Disqualification

(5) A transferring paralegal described in subrule (2) or (4) shall not, unless the former client consents,

(a) participate in any manner in the new paralegal firm's representation of its client in that matter; or

(b) disclose any confidential information respecting the former client.

(6) No paralegal in the new paralegal firm shall, unless the former client consents, discuss with a transferring paralegal described in subrule (2) or (4) the new paralegal firm's representation of its client or the former paralegal firm's representation of the former client in that matter.

(7) Anyone who has an interest in, or who represents a party in, a matter referred to in this rule may apply to a tribunal of competent jurisdiction for a determination of any aspect of this rule.

3.06 DOING BUSINESS WITH A CLIENT

3.06 (1) A paralegal must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

~~Investment by Client where Paralegal has an Interest~~ Transactions with Clients

3.06 ~~(1~~2) Subject to subrule (~~2~~3), if a client intends to enter into a transaction with a paralegal who is representing the client, or with a corporation or other entity in which the paralegal has an interest other than a corporation or other entity whose securities are publicly traded, the paralegal, before accepting any retainer,

(a) shall disclose and explain the nature of the conflicting interest to the client, or, in the case of a potential conflict, how and why it might develop later;

(b) shall recommend independent legal representation and shall require that the client receive independent legal advice; and

(c) if the client requests the paralegal to act, shall obtain the client's written consent.

(~~2~~3) If a client intends to pay for legal services by transferring to a paralegal a share, participation or other interest in property or in an enterprise, the paralegal shall recommend, but need not require, that the client receive independent legal advice before agreeing to act for the client.

(3) This rule does not apply to a transfer of a non-material interest in a publicly traded enterprise.

(4) If the paralegal does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the paralegal shall decline the retainer.

Borrowing from Clients

(5) A paralegal shall not borrow money from a client unless,

(a) the client is a lending institution, financial institution, insurance company, trust corporation or any similar institution whose business includes lending money to members of the public; or

(b) the client is a related person as defined ~~by~~ in section 251 of the *Income Tax Act* (Canada) and the paralegal is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

Guarantees by Paralegal

(6) Subject to subrule (7), a paralegal shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

(7) A paralegal may give a personal guarantee if,

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the paralegal, the paralegal's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution where the paralegal as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution to provide a guarantee; or

(c) the paralegal has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and,

(i) the paralegal has complied with the requirements of these Rules regarding the avoidance of conflicts of interest, and

(ii) the lender and the participants in the venture who are or were clients of the paralegal have received independent legal representation.

Judicial Interim Release

(8) Subject to subrule (9), a paralegal shall not in respect of any accused person for whom the paralegal acts

(a) act as a surety for the accused;

(b) deposit with a court the paralegal's own money or that of any firm in which the paralegal is a partner to secure the accused's release;

(c) deposit with any court other valuable security to secure the accused's release; or

(d) act in a supervisory capacity to the accused.

(9) A paralegal may do any of the things referred to in subrule (8) if the accused is in a family relationship with the paralegal and the accused is represented by the paralegal's partner or associate.

3.07 CLIENT PROPERTY

Preservation of Client's Property

3.07 (1) A paralegal shall care for a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of property entrusted to a fiduciary.

Notification of Receipt of Property

(2) A paralegal shall promptly notify the client of the receipt of any money or other property of the client, unless satisfied that the client is aware they have come into the paralegal's custody.

Identification of Property

(3) A paralegal shall clearly label and identify the client's property and place it in safekeeping, distinguishable from the paralegal's own property.

(4) A paralegal shall maintain such records as necessary to identify a client's property that is in the paralegal's custody.

Accounting and delivery

(5) A paralegal shall account promptly for a client's property that is in the paralegal's custody and upon request, shall deliver it to the order of the client or, if appropriate, at the conclusion of the retainer.

(6) If a paralegal is unsure of the proper person to receive a client's property, the paralegal shall apply to a tribunal of competent jurisdiction for direction.

3.08 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.08 (1) A paralegal shall not withdraw from representation of a client except for good cause and ~~upon~~ on reasonable notice to the client ~~appropriate in the circumstances~~.

Optional Withdrawal

(2) Subject to subrules (7), (8) and (9) and the direction of the tribunal, a paralegal may withdraw if there has been a serious loss of confidence between the paralegal and the client.

(3) Without limiting subrule (2), a paralegal may withdraw if the client deceives the paralegal or refuses to accept and act upon the paralegal's advice on a significant point.

(4) A paralegal shall not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Mandatory Withdrawal

(5) Subject to subrules (7), (8) and (9) and the direction of the tribunal, a paralegal shall withdraw if,

(a) discharged by the client;

(b) the client's instructions require the paralegal to act contrary to the Rules, or by-laws; or

~~(b) the paralegal is instructed by the client to do something inconsistent with the paralegal's duty to the tribunal and, following explanation, the client persists in such instructions;~~

~~(c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another;~~

~~(d) it becomes clear that the paralegal's continued representation will lead to a breach of these Rules; or~~

~~(e)~~(c) the paralegal is not competent to continue to handle the matter.

Non-payment of Fees

(6) Subject to subrules (7), (8) and (9) and the direction of the tribunal, unless serious prejudice to the client would result, a paralegal may withdraw from a case if, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees.

Withdrawal from Quasi-Criminal and Criminal Cases

(7) A paralegal who has agreed to act in a quasi-criminal or criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between the withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain alternate representation and to allow such other licensee adequate time for preparation and if the paralegal,

(a) advises the client, preferably in writing, that the paralegal is withdrawing and the reason for the withdrawal;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies the prosecution in writing that the paralegal is no longer acting; and

(d) in a case where the paralegal's name appears in the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the paralegal is no longer acting.; and

(e) complies with the applicable rules of the tribunal or court.

(8) A paralegal who has agreed to act in a quasi-criminal or criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain the services of another licensee or to enable the another licensee to prepare adequately for trial and if an adjournment of the trial date cannot be obtained without adversely affecting the client's interests.

(9) If,

(a) a paralegal is justified in withdrawing from a quasi-criminal or criminal case for reasons other than non-payment of fees; and

(b) there is not a sufficient interval between a notice to the client of the paralegal's intention to withdraw and the date when the case is to be tried to enable the client to obtain the services of another licensee and to enable the new licensee to prepare adequately for trial,

the paralegal, unless instructed otherwise by the client, shall attempt to have the trial date adjourned and may withdraw from the case only with permission of the court before which the case is to be tried.

Manner of Withdrawal

(10) When a paralegal withdraws, he or she shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor licensee.

(11) Upon discharge or withdrawal, a paralegal shall,

~~(b)~~(a) deliver to the client or to the order of the client, all papers and property to which the client is entitled, (subject to the paralegal's right to a lien);

~~(b)~~(b) subject to any applicable trust conditions, give the client all information that may be required in connection with the case or matter;

~~(c)~~(c) account for all funds of the client then held or previously dealt with, including the refunding of any monies not earned during the representation;

~~(d)~~(d) promptly render an account for outstanding fees and disbursements; and

~~(e)~~(e) cooperate with the successor licensee so as to minimize expense and avoid prejudice to the client~~.~~; and

(f) comply with the applicable rules of court.

(12) In addition to the obligations set out in subrule (11), upon ~~discharge or~~ withdrawal, a paralegal shall notify the client in writing, stating:

(i) the fact that the paralegal has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new legal practitioner promptly.

~~deliver to or to the order of the client, all papers and property to which the client is entitled;~~

(13) If the paralegal who is discharged or withdraws is a member of a firm, the client shall be notified that the paralegal and the firm are no longer acting for the client.

Duties of Successor Paralegal

(~~12~~14) Before agreeing to represent a client of a predecessor licensee, a successor paralegal shall be satisfied that the predecessor has withdrawn or has been discharged by the client.

Rule 4 Advocacy

4.01 THE PARALEGAL AS ADVOCATE

Duty to Clients, Tribunals and Others

4.01 (1) When acting as an advocate, the paralegal shall represent the client resolutely and honourably within the limits of the law while, at the same time, treating the tribunal and other licensees with candour, fairness, courtesy and respect.

(2) This rule applies to appearances and proceedings before all tribunals in which the paralegal may appear.

(3) This rule does not require a paralegal, except as otherwise provided in these Rules, to assist an adversary or advance matters derogatory to the client's case.

(4) Without restricting the generality of subrule (1), the paralegal shall,

(a) raise fearlessly every issue, advance every argument, and ask every question, however distasteful, that the paralegal thinks will help the client's case;

(b) endeavour, on the client's behalf, to obtain the benefit of every remedy and defence authorized by law;

(c) never waive or abandon a client's legal rights, for example, an available defence under a statute of limitations, without the client's informed consent; and

(d) avoid and discourage the client from resorting to frivolous and vexatious objections, or from attempts to gain advantage from mistakes or oversights not going to the merits, or from tactics designed to merely delay or harass the other side.

The Paralegal and the Tribunal Process

(5) When acting as an advocate, the paralegal shall not,

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit the client to do anything that the paralegal considers to be dishonest or dishonourable;

(c) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any deception, crime or illegal conduct;

(d) deliberately refrain from informing the tribunal of any binding authority that the paralegal considers to be directly on point and that has not been mentioned by an opponent;

(e) appear before a judicial officer when the paralegal, a partner of the paralegal, a paralegal employed by the paralegal firm or the client has a business or personal relationship with the officer that gives rise to, or might reasonably appear to give rise to, pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(f) knowingly assert as true, a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(g) make suggestions to a witness recklessly or knowing them to be false;

~~(g)~~(h) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of the tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

~~(h)~~(i) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

~~(i)~~(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(k) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

~~(j)~~(l) needlessly abuse, hector, harass or inconvenience a witness;

~~(k)~~(m) improperly dissuade a witness from giving evidence or suggest that a witness be absent;

~~(l)~~ (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge; ~~or~~

~~(m)~~ (o) needlessly inconvenience a witness~~.~~ and

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

Duty as Prosecutor

(5.1) When acting as a prosecutor, a paralegal shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

[New - May 2010]

Disclosure of Documents

(6) If the rules of a tribunal require the parties to produce documents, a paralegal, when acting as an advocate,

(a) shall explain to his or her client the necessity of making full disclosure of all documents relating to any matter in issue and the duty to answer to the best of his or her knowledge, information and belief, any proper question relating to any issue in the action;

(b) shall assist the client in fulfilling his or her obligation to make full disclosure; and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information.

Errors and Omissions

(7) A paralegal who does, or fails to do, something which may involve a breach of this rule, shall, subject to rule 3.03 relating to confidentiality, disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Agreement on Guilty Pleas

(8) Before a charge is laid or at any time after a charge is laid, a paralegal acting for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

(9) A paralegal, on behalf of his or her client, may enter into an agreement with a prosecutor about a guilty plea, if, following investigation,

(a) the paralegal advises the client about the prospects for an acquittal or finding of guilt;

(b) the paralegal advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client is prepared voluntarily to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the paralegal to enter into an agreement as to a guilty plea.

4.02 INTERVIEWING WITNESSES

Interviewing Witnesses

4.02 (1) Subject to the rules on communication with a represented party at Rule 7.02, ~~A~~ a paralegal may seek information from any potential witness, whether under subpoena or not, but shall disclose the paralegal's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

[Amended – October 2012]

4.03 COMMUNICATION WITH WITNESSES GIVING TESTIMONY

Communication with Witnesses Giving Testimony

4.03 (1) Subject to the direction of the tribunal, a paralegal shall observe the following rules respecting communication with witnesses giving evidence:

1. During examination-in-chief, the examining paralegal may discuss with the witness any matter that has not been covered in the examination up to that point.

2. During examination-in-chief by another licensee of a witness who is unsympathetic to the paralegal's cause, the paralegal not conducting the examination-in-chief may discuss the evidence with the witness.

3. Between completion of examination-in-chief and commencement of cross-examination of the paralegal's own witness, the paralegal ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief.

4. During cross-examination by an opposing licensee, the witness's own representative ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding.

5. Between completion of cross-examination and commencement of a re-examination, a paralegal who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination.

6. During cross-examination by the representative of a witness unsympathetic to the cross-examiner's cause, the paralegal may discuss the witness's evidence with the witness.

7. During cross-examination by the representative of a witness who is sympathetic to that licensee's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness.

8. During re-examination of a witness called by an opposing licensee, if the witness is sympathetic to the paralegal's cause, the paralegal ought not to discuss the evidence to be given by that witness during re-examination. The paralegal may, however, properly discuss the evidence with a witness who is adverse in interest.

(2) With the consent of the opposing licensee or with leave of the tribunal, a paralegal may enter into discussions with a witness that might otherwise raise a question under this rule as to the propriety of the discussions.

(3) This rule applies, with necessary modifications, to examinations out of court.

4.04 THE PARALEGAL AS WITNESS

The Paralegal as Witness

4.04 (1) ~~Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, the paralegal who appears as an advocate shall not submit his or her own affidavit to the tribunal.~~

A paralegal who appears as advocate shall not testify or submit his or her own affidavit evidence before the tribunal unless

(a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or

(b) the matter is purely formal or uncontroverted.

~~(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, a paralegal who appears as an advocate shall not testify before the tribunal unless permitted to do so by the rules of the court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.~~

[Amended – January 2011]

4.05 DEALING WITH UNREPRESENTED PERSONS

4.05 When a paralegal ~~is dealing~~ deals on a client's behalf with an unrepresented person, the paralegal shall,

~~(a) urge the unrepresented person to obtain independent representation;~~

(~~b~~a) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the paralegal; and

(~~c~~b) make clear to the unrepresented person that the paralegal is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Rule 5 Fees and Retainers

5.01 FEES AND RETAINERS

Reasonable Fees and Disbursements

5.01 (1) A paralegal shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

(2) What is a fair and reasonable fee will depend upon such factors as,

(a) the time and effort required and spent;

(b) the difficulty of the matter and importance of the matter to the client;

(c) whether special skill or service was required and provided;

(d) the amount involved or the value of the subject matter;

(e) the results obtained;

(f) fees authorized by statute or regulation; ~~and~~

(g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency~~.~~ ;

(h) the likelihood, if made known to the client, that acceptance of the retainer will result in the paralegal's inability to accept other employment;

(i) any relevant agreement between the paralegal and the client;

(j) the experience and ability of the paralegal;

(k) any estimate or range of fees given by the paralegal; and

(l) the client's prior consent to the fee.

(3) No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to his or her employment may be taken by the paralegal from anyone other than the client, without full disclosure to, and the consent of, the client.

(4) In a statement of account delivered to the client, a paralegal shall clearly and separately detail amounts charged as fees and as disbursements.

(5) A paralegal shall not appropriate any funds of the client held in trust, or otherwise under the paralegal's control, for or on account of fees, except as permitted by the by-laws under the *Law Society Act*.

(6) If the amount of fees or disbursements charged by a paralegal is reduced by a Court Order, the paralegal must repay the monies to the client as soon as is practicable.

Contingency Fees

~~(6)~~(7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal's services are to be provided.

~~(7)~~(8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7) ~~(6)~~, the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded.

~~(8)~~(9) The percentage or other basis of a contingency fee agreed upon under subrule (7) ~~(6)~~ shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8) ~~(7)~~.

Joint Retainers

~~(9)~~(10) If a paralegal is acting for two or more clients in the same matter, the paralegal shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees

~~(10)~~(11) Fees for a matter may be divided between licensees who are not in the same firm if the client consents and the fees are divided in proportion to the work done and the responsibilities assumed.

[Amended - April 2008]

Fee Splitting

~~(11)~~(12) A paralegal shall not,

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee, including an affiliated entity; or

(b) give any financial or other reward to any person who is not a licensee, including an affiliated entity for the referral of clients or client matters.

~~(12)~~(13) Subrule (11) does not apply to multi-discipline practices of paralegal and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm.

[Amended - October 2008]

Referral Fees

~~(13)~~(14) A paralegal who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter may accept, and the other licensee may pay, a referral fee if,

(a) the referral was not made because of a conflict of interest,

(b) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(c) the client is informed and consents.

Rule 6 Duty to the Administration of Justice

6.01 ENCOURAGING RESPECT FOR THE ADMINISTRATION OF JUSTICE

General Duty

6.01 (1) A paralegal shall encourage public respect for, and try to improve, the administration of justice.

(2) A paralegal shall take care not to weaken or destroy public confidence in legal institutions or authorities by making irresponsible allegations or comments particularly when commenting on judges or members of a tribunal.

Security of Court Facilities

(3) Subject to Rule 3.03 relating to confidentiality, a paralegal who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the ~~local police force~~ persons having responsibility for security at the facility and give particulars.

Public Appearances and Statements

(4) So long as there is no infringement of the paralegal's obligation to the client, the paralegal profession, the courts, or the administration of justice, a paralegal may communicate information to the media and may make public appearances and statements.

(4.1) A paralegal shall not communicate information to the media or make public statements about a matter before a tribunal if the paralegal knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party’s right to a fair trial or hearing.

[New - October 2008]

Working With or Employing Unauthorized Persons

(5) A paralegal shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

(6) Without the express approval of a committee of Convocation appointed for the purpose, a paralegal shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the provision of legal services any person who, in Ontario or elsewhere,

(a) is disbarred and struck off the Rolls,

(b) is a person whose license to practice law or to provide legal services is revoked,

(c) as a result of disciplinary action, has been permitted to resign his or her membership in the Law Society or to surrender his or her licence to practise law or to provide legal services, and has not had his or her license restored,

(d) is suspended,

(e) is a person whose license to practise law or to provide legal services is suspended, or

(f) is subject to an undertaking not to practise law or to provide legal services.

[Amended - January 2008]

Practice by Suspended Paralegal Prohibited

(7) A paralegal whose license to provide legal services is suspended shall comply with the requirements of the By-laws and shall not

(a) provide legal services; or

(b) represent or hold himself or herself out as a person entitled to provide legal services.

[New - January 2008]

Undertakings Not to Provide Legal Services

(8) A paralegal who gives an undertaking to the Law Society not to provide legal services shall not,

(a) provide legal services; or

(b) represent or hold himself or herself out as a person entitled to provide legal services.

[New - January 2008]

Undertakings to Provide Legal Services Subject to Restrictions

(9) A paralegal who gives an undertaking to the Law Society to restrict his or her provision of legal services shall comply with the undertaking.

[New January 2008]

Rule 7 Duty to Licensees and Others

7.01 COURTESY AND GOOD FAITH

(1) A paralegal shall avoid sharp practice and shall not take advantage of or act without fair warning on slips, irregularities or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.

(2) A paralegal shall agree to reasonable requests concerning trial dates, adjournments, waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

(3) A paralegal shall not, in the course of providing legal services, communicate, in writing or otherwise, with a client, another licensee, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a paralegal.

(4) A paralegal shall not engage in ill-considered or uninformed criticism of the competence, conduct, advice or charges of other licensees, but should be prepared, when requested, to represent a client in a complaint involving another licensee.

(5) A paralegal shall answer with reasonable promptness, all professional letters and communications from other licensees that require an answer, and a paralegal shall be punctual in fulfilling all commitments.

(6) A paralegal shall not use ~~a tape recorder or other~~ any device to record a conversation between the paralegal and a client or another licensee, even if lawful, without first informing the other person of the intention to do so.

(7) A paralegal who receives a document relating to the representation of the paralegal's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

[Amended – October 2012]

7.02 COMMUNICATION WITH A REPRESENTED PERSON, CORPORATION OR ORGANIZATION

(1) Subject to subrules (2) and (3), if a person is represented by a legal practitioner in respect of a matter, a paralegal shall not, except through or with the consent of the legal practitioner,

(a) approach or communicate or deal with the person on the matter, or

(b) attempt to negotiate or compromise the matter directly with the person.

(2) Subject to subrule (3), if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a paralegal may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the paralegal receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

(3) A paralegal who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

(4) A paralegal retained to act on a matter involving a corporation or organization that is represented by a legal practitioner in respect of that matter shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.

(5) If a person described in subrule (4) (a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a paralegal to communicate, facilitate communication with or deal with the person.

(6) In subrule (4), "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

(7) This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a licensee concerning the matter to which the communication relates.

(8) The prohibition on communications with a represented person applies if the paralegal has direct knowledge of the representation or if he or she should be able to infer the representation from the circumstances.

[New - October 2012]

Rule 8 Practice Management

8.01 GENERAL OBLIGATIONS

Professional Responsibility

8.01 (1) A paralegal shall, in accordance with the By-Laws, assume complete professional responsibility for all business entrusted to him or her.

[Amended - October 2008]

Financial Responsibility

(2) A paralegal shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the paralegal clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation of the paralegal.

[Amended - January 2009]

Supervisory Responsibility

(3) A paralegal shall, in accordance with the By-Laws, directly supervise staff and assistants to whom particular tasks and functions are delegated.

[*Amended - October 2008*]

Delegation

(4) A paralegal shall not permit a non-licensee,

(a) to provide legal services;

(b) to be held out as a licensee; or

(c) to perform any of the duties that only paralegals may perform or do things that paralegals themselves may not do.

(5) A paralegal in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a paralegal in the discharge of his or her professional obligations.

[New- October 2008]

8.02 MAKING LEGAL SERVICES AVAILABLE

8.02 (1) A paralegal shall make legal services available to the public in an efficient and convenient way.

Restrictions

(2) In offering legal services, a paralegal shall not use means

(a) that are false or misleading,

(b) that amount to coercion, duress or harassment,

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) that are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or

(e) that otherwise bring the paralegal profession or the administration of justice into disrepute.

(3) A paralegal shall not advertise services that are beyond the permissible scope of practice of a paralegal.

[Amended - November 2008]

8.03 MARKETING OF LEGAL SERVICES

(1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

(2) A paralegal may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

(3) A paralegal may advertise fees charged by the paralegal for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted,

(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and

(c) the paralegal strictly adheres to the advertised fee in every applicable case.

[Amended - November 2008]

8.04 COMPULSORY ERRORS AND OMISSIONS INSURANCE

Duty to Obtain and Maintain Insurance

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

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

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

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

[Amended - January 2010]

Rule 9 Responsibility to the Law Society

9.01 RESPONSIBILITY TO THE LAW SOCIETY

Communications from the Law Society

9.01 (1) A paralegal shall reply promptly and completely to any communication from the Law Society and shall provide a complete response to any request from the Law Society.

Duty to Report Misconduct

(2) A paralegal shall report to the Law Society, unless to do so would be unlawful or would involve a breach of confidentiality between the paralegal and his or her client,

(a) the misappropriation or misapplication of trust monies by a licensee;

(b) the abandonment of a law practice by a lawyer or a legal services practice by a paralegal;

(c) participation in serious criminal activity related to a licensee's practice;

(d) the mental instability of a licensee of such a serious nature that the licensee's clients are likely to be ~~seriously~~ materially prejudiced; and

(e) any other situation where a licensee's clients are likely to be severely prejudiced.

(3) Nothing in subrule (2) is meant to interfere with the paralegal's duty to the client.

(4) A report under subrule (2) must be made in good faith and without malice or ulterior motive.

(5) A paralegal shall ~~attempt to persuade~~ encourage a client who has a claim or complaint against an apparently dishonest licensee to report the facts to the Law Society as soon as reasonably practicable ~~before pursuing private remedies~~.

(6) If the client refuses to report a claim against an apparently dishonest licensee to the Law Society, the paralegal shall obtain instructions in writing to proceed with the client's private remedies without notice to the Law Society.

(7) A paralegal shall inform the client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration. (section 141).

(8) If the client wishes to pursue a private agreement with the apparently dishonest licensee, the paralegal shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada.*

Duty to Report Certain Offences ~~Criminal Charges and Convictions~~

(9) If a paralegal is charged with an offence described in By-Law 8 of the Law Society, he or she shall inform the Law Society of the charge and of its disposition in accordance with the By-Law.

Disciplinary Authority

(10) A paralegal is subject to the disciplinary authority of the Law Society regardless of where the paralegal's conduct occurs.

Professional Misconduct

(11) The Law Society may discipline a paralegal for professional misconduct.

Conduct Unbecoming a Paralegal

(12) The Law Society may discipline a paralegal for conduct unbecoming a paralegal.

Definitions

(13) In subrules (11) and (12),

"conduct unbecoming a paralegal" means conduct in a paralegal's personal or private capacity that tends to bring discredit upon the paralegal profession including,

(a) committing a criminal act that reflects adversely on the paralegal's honesty, trustworthiness, or fitness as a paralegal,

(b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, vulnerability or unbusinesslike habits of another, or

(c) engaging in conduct involving dishonesty;

"professional misconduct" means conduct ~~by a paralegal~~ in a paralegal's professional capacity that tends to bring discredit upon the paralegal profession, including,

(a) violating or attempting to violate one of these Rules, or a requirement of the ~~Law Society Act~~ *Law Society Act* or its regulations or by-laws ~~the regulations or by-laws under that Act~~,

(b) knowingly assisting or inducing another licensee to violate or attempt to violate these Rules, a requirement of the ~~Law Society Act~~ *Law Society Act* or its regulations or by-laws ~~the regulations or by-laws under that Act~~,

(c) knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in the *Paralegal Rules of Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,

[Amended - October 2008]

(d) misappropriating or otherwise dealing dishonestly with a client's or a third party's money or property,

(e) engaging in conduct that is prejudicial to the administration of justice,

(f) stating or implying an ability to influence improperly a government agency or official, or

(g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

INDEX [to revise after all changes final]

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To include October 25, 2012 Convocation amendments

TAB 5.2

ACCREDITATION FRAMEWORK FOR PARALEGAL COLLEGES

Motion

8. **That Convocation approve the proposal for reforms to the Accreditation and Audit Framework for Paralegal Education Programs set out in the report at TAB 5.2.1.**

Background

9. The Professional Development & Competence Department prepared the report shown at **TAB 5.2.1,** with recommendations to address areas of deficiency in paralegal college programmes, in support of the Committee's overall strategic plan to strengthen the paralegal licensing platform.

The Committee's Deliberations

10. The Committee considered the report in the context of the policies underlying the current Accreditation and Audit Framework and the need to respond to recent trends in the paralegal education sector with more stringent standards and processes for approval, including a proposal for monetization.

11. The Committee agreed with the recommendations in the report and now submits it to Convocation for approval.

The Law Society of Upper Canada | Barreau du Haut-Canada

Proposal for Reforms to Accreditation and Audit Framework for Paralegal Education Programs

Prepared for:
Paralegal Standing Committee

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February 13, 2014

Introduction

1. In October 2012, the Paralegal Standing Committee approved the expansion of the paralegal licensing examination framework to incorporate substantive areas of law as the first step in moving toward a more robust testing and assessment system that supports entry-level competence of paralegal licensees.

2. The enhancements to the paralegal licensing examination platform reflect the recommendations contained in the Legal Needs Analysis Report and further echoed in the Morris Report, which focus on increasing core competence of paralegals as a foundational step in supporting the maturation of the paralegal profession. These changes are also aligned with the Law Society's strategic priorities related to paralegal members.

3. As of the end of December 2013, the development of the paralegal licensing examination framework is well under way. A new set of substantive competencies has been developed and validated by the paralegal profession, and a blueprint for the new licensing examination has been created in accordance with the Law Society's standardized process for examination development. Upcoming activities include the development of examination questions and study materials to support the new testing platform, which will be launched in August 2015.

4. This report will focus on proposals for reform of the accreditation and audit process for paralegal education programs that would further advance the system of licensure for paralegals and address areas of concern regarding the quality of college offerings that were raised for the Committee's consideration in October 2012. In particular, the October 2012 report put forward the following recommendation as the next competence initiative that should be given priority by the Law Society:

   Consider engaging in discussions regarding the accreditation of colleges that provide paralegal programs of study. Included in this consideration is the need to speak with the Ministry of Training, Colleges and Universities respecting the high volume of colleges, both community and private, that continue to seek accreditation and the impact that this influx of college students is having on the job market for newly licensed paralegals.

Accreditation and Audit Process for Paralegal Education Programs

5. The Law Society's accreditation and audit framework is a two-stage process. Program accreditation is initially granted based on a paper application, followed by an in-person audit of the program within the first three years of operation.

6. Accreditation of paralegal education programs began in summer 2008 and involves an intensive review of detailed information and supporting documentation from the applying institution to ensure that the program fulfills the Competency Profile for Paralegal Programs and meets other structural and program delivery requirements. The Competency Profile includes 18 required courses and over 300 mandatory substantive, procedural and practice management knowledge areas, skills and behaviours within a paralegal's permitted scope of practice. In 2011, the Law Society issued a formal Restatement of the Accreditation Criteria to specify minimum expectations related to instructor qualifications and the appropriate scope of field placements.

7. As of December 31, 2013, the Law Society has accredited 28 paralegal college programs at 45 college campus locations throughout Ontario. New paralegal college programs being offered by private and community colleges continue to be submitted for accreditation, in addition to resubmissions from colleges that had previously been denied on the basis that they did not meet the accreditation criteria.

8. Once accredited, each institution participates in a rigorous audit process in order to demonstrate that the program's curriculum, infrastructure and systems support the accreditation criteria. Audits consist of a documentation review and a two-day site visit to observe classes and facilities, and meet with program administrators, faculty and students. Teaching and assessment methodologies, curriculum development protocols, and academic policies are reviewed. See *Appendix 1 – Audit Policy and Framework*.

9. Audit and reporting processes are conducted in a standardized, fair and transparent manner. A draft report is sent to college administrators for clarification before it is finalized and issued. Program deficiencies are discussed with program administrators, documented and brought forward for follow-up, as appropriate.

10. The current policy, as approved by Convocation in 2007, stipulates that all programs be audited within the first three years post-accreditation and at least once every five years thereafter. Audits of accredited college paralegal programs began in November 2009.

11. As of December 2013, the Law Society has audited 24 paralegal programs, at more than 30 campus locations. All accredited college programs have generally been audited

within the first year of program operation. See *Appendix 2 – Accredited Paralegal Education Programs* for a complete listing.

Common Deficiencies in Accredited Paralegal Education Programs

12. The accreditation and audit process has been well received by the colleges. The PD&C team has fostered an open dialogue with program administrators and continues to provide feedback on questions and concerns as they arise.

13. Notwithstanding the commitment many colleges have demonstrated to ensuring their programs are in compliance with the Law Society's standards, a number of programs submitted for accreditation are poorly planned, lack appropriate leadership by qualified individuals, and are of a lower quality overall. The programs in question tend to be offered by smaller, private career colleges or franchise operations which appear to operate on a business imperative and do not have a solid academic foundation.

14. While the accreditation criteria sets out the minimum requirements that must be met before a college can legitimately offer a paralegal education program, the criteria are broadly stated. After one or two accreditation rejections, a college eventually learns how to craft their application documents to fulfill the threshold requirements, but their capacity to deliver quality professional training may remain limited. It is not until the audit stage that many of the deficiencies are fully revealed.

15. Interestingly, a handful of career colleges are purchasing curricula for their paralegal programs from third parties who have minimal connection to the paralegal training arena, rather than developing the content themselves. The ability of colleges that are not immersed in the field of study or lack a complete grasp of the rigorous training required for entry into a profession, to deliver a program that fully supports entry-level competence, is questionable.

16. The major areas of concern, as revealed by over 30 site visits, are as follows:

    a) **Uneven coverage of required competencies** – There is a lack of consistency in the amount of time and depth devoted to the required competencies. Depending on instructor qualifications and background, some aspects of the competencies may only be covered in a cursory fashion, while others may be overemphasized. Instructors may be subject matter experts but often lack skills and training in adult education methodologies, resulting in inadequate teaching approaches. Examples include: reading aloud from textbooks for an entire class, lecturing without any

opportunity for student participation and interaction, and overuse of anecdotes with minimal connection to course subject matter.

b) **Inappropriate assessment methodologies** – Some of the examinations and assessments reviewed by the audit team are wholly inadequate for a professional program of study. They may not be clearly tied to specific learning outcomes, or the levels of achievement may be ambiguous. Use of 'fill in the blank' and 'true/false' questions on tests is not uncommon.

c) **Inaccurate marking/lack of feedback to students** – In some cases, assessments are graded without a marking guide or answer key, leading to inconsistencies. Similarly, students may receive little or no feedback on their work. Criteria for successful completion of assessments may not be clearly defined.

d) **Inadequate program oversight** – In many cases, the Program Coordinator or program administrators are not monitoring the classroom activities to ensure adherence to the accreditation criteria and delivery of program content in accordance with education best practices. The Program Coordinator may not work on site at the particular program location, making opportunities for supervision minimal. Similarly, program administrators may have a business orientation rather than the mindset of a licensee or educator with insight into the subject matter and the requisite expertise in effective program design.

e) **Low student enrollment** – Class size in these programs can become an issue with only a handful of students enrolled in some cases. The lack of a critical mass of learners in this context undermines the opportunity for group discussion and peer networking which are required to support knowledge transfer and skills development in a professional learning environment. Administrators of these programs are often optimistic that more students will enrol once the program is up and running and has earned a positive reputation. A recent example involved a newly accredited program that decided to commence with only one registered student.

17. Although the current audit process provides a basic mechanism through which major program deficiencies may be addressed, more frequent audits of marginal offerings are not feasible given current staffing levels in the PD&C paralegal licensing team and the increasing number of accredited paralegal education programs. At this point, it is estimated that there will be at least 30 accredited paralegal education programs at close to 50 campus locations across the province by the end of 2014.

18. Furthermore, audits conducted by the regulator cannot be a substitute for the leadership, infrastructure and expertise that are essential to the successful execution of a paralegal education program. The Law Society's paralegal accreditation and audit process, designed at a time when the regulatory regime was first being introduced, may now be at risk of inadvertently becoming a gateway for less than optimal training ventures if more rigorous standards are not introduced.

Role of the Ministry of Training, Colleges and Universities (MTCU)

19. Recent information sessions with representatives from the Ministry suggest that its oversight of college program curriculum and training activities will be limited. The MTCU defers largely to regulators to determine which institutions should be permitted to educate in a particular field, and accordingly looks to the Law Society to set standards and benchmarks to monitor the effectiveness of paralegal education programs.

20. While the MTCU investigates financial and business viability prior to granting a private career college licence, its individual program approval application process is limited. Once a program is approved on the basis of financial viability, there is minimal audit or oversight of that program by the Ministry. Only a few auditors are apportioned for thousands of provincial programs.

Resource Implications

21. The Law Society is expending significant financial and human resources each year to ensure that accredited programs meet minimum standards for pre-licensure education and training.

22. It takes approximately 100 hours of staff time to fully process each accreditation application, including review, clarification, follow-up interactions with college administrators, and preparation of the final report. Including indirect expenses, this equates to approximately $4,800 in costs to the Law Society per accreditation application.

23. Similarly, a standard audit involves approximately 40 hours in attendance at program facilities, meetings with administration, faculty and students, as well as review of documentation, and preparation of the final report, which is equivalent to approximately $1,500 in costs. Direct expenses range from approximately $320 for a local audit to $3,000 for an out-of town audit. Therefore the total cost, including indirect expenses, of an average program audit is between $2,500 for a local audit and

$6,500 for an out-of-town audit. See *Appendix 3 – Average Accreditation and Audit Process Costs* for a detailed breakdown of expenses and staff time involved.

24. To date, there has been no charge to colleges for any portion of the accreditation or audit process. All associated costs have been borne by Paralegal members of the Law Society.

25. In comparison, the American Bar Association's (ABA) procedures for assessing U.S. law schools and paralegal education programs, upon which some of the Law Society's paralegal accreditation and audit procedures have been modelled, charge fees for all aspects of their process, including the initial application ($2,500), re-approval application ($1,750), site visits ($500), and an annual program fee ($1,250). Over a seven-year approval period, a college might expect to pay more than $10,000 to achieve and maintain its ABA approval. See *Appendix 4 – ABA Approval Process Statement of Fees*.

26. Many of the other accrediting agencies and regulators in Ontario that fulfill similar roles charge fees for these services and require re-accreditation on a cyclical basis.

27. For instance, the Canadian Council for Accreditation of Pharmacy Programs, which governs the accreditation of Pharmacy Technician education programs, also levies accreditation fees ($3,800 per location) and annual fees ($3,500 per location), plus mandatory re-accreditation and audit requirements.

28. The Canadian Association of Schools of Nursing accredits the delivery of Registered Nurse and Nurse Practitioner programs at Ontario universities. It charges application fees ($500), accreditation fees ($7,000 per location) and re-accreditation fees ($7,000 per location), with a required re-accreditation process every five to seven years.

29. Unlike the accreditation systems detailed above, Ontario colleges have no financial incentive to ensure that their programs are carefully developed to align with the accreditation requirements and incorporate education best practices under the Law Society's current regime. Colleges that do not obtain accreditation the first time around may resubmit their applications continuously, involving ongoing interactions with Law Society licensing team without a fiscal commitment to the regulatory process.

30. Similarly, colleges that have not undertaken sufficient groundwork to establish the appropriate infrastructure, teaching methodologies and overall administration and have prematurely launched their program may continue as a "work-in-progress," under the

current system, thereby requiring multiple site visits from the Law Society accreditation and program audit team to address problem areas.

31. The activity of accreditation review and audit of the college programs requires significant time and expense. To date, the costs of these activities have been supported by Paralegal member annual licensing fees. The college paralegal program system is now well established. In order to assure improved and continuing quality of that training and appropriate commitment to quality by the accredited colleges, it is recommended that the Law Society seek to recover its costs for these activities and establish a fee schedule for the accreditation and audit processes. See *Appendix 5* for the proposed schedule.

Options for Reform

32. The Committee may wish to consider making changes to the current accreditation and audit framework to reflect a more robust approach to paralegal licensing that enhances the reputation of the profession.

33. The present accreditation and audit framework, while initially suitable to support the regulation of paralegals during the first few years after the licensing process for grandparented and transitional applicants was concluded, is no longer adequate to address the challenges of overseeing the ever increasing number of providers seeking entry into the paralegal education field and ensure entry-level competence of paralegal licensees.

34. The Committee is requested to consider the following recommendations and provide its direction:

    a) Introduction of more stringent standards and criteria for program accreditation, including but not limited to the following enhancements:

        i. **Program Coordinator** – Must be a licensee who spends no more than 50% of his/her time instructing and is required to conduct periodic classroom audits with supporting documentation that can be shared with the regulator;

        ii. **Faculty** – Demonstrate relevant practice experience as well as teaching experience and/or formal training in adult education best practices;

        iii. **Class composition** – A minimum of ten students is required and new cohort intakes are limited to two per year;

iv. **Course sequence** – Curricula is covered in a logical order with foundational courses as pre-requisites to more advanced courses;

v. **Assessments** – Examinations, tests, and assignments are based on assessment best practices with respect to design and length, appropriately connected to learning outcomes, marked according to specified rubrics and answer keys, and returned to students with feedback in a timely fashion;

vi. **Field placements** – Arranged and approved by the college administration well in advance with licensee supervisors to perform duties within the paralegal scope of practice and include post-placement assessments completed by the student and supervisor;

vii. **Reporting to the Law Society** – Program administrators report on program progress and major changes at specified intervals and are advised that program accreditation may be suspended if minimum standards are not maintained in core areas;

b) Introduction of a mandatory Reaccreditation Process requiring colleges to renew their accreditation on a five-year cycle in order to confirm alignment of curricula, faculty and program structure with Law Society accreditation criteria and requirements;

c) Implementation of a fee structure as a means of formalizing the accreditation and audit framework, support enhanced approval processes and recover associated costs;

d) That there be flexibility to introduce additional program standards and administrative processes where appropriate. Going forward, the Executive Director of Professional Development and Competence, or designate, will have the authority to adjust the criteria in accordance with the policies set out in this report.

It is proposed that the new framework would be introduced in the fall of 2015 with the expectation that college programs commencing from September 2015 and onward will apply the new standards and pay the prescribed fees.

Conclusion

27. Taking steps to strengthen the accreditation and audit platform will support the Law Society's quality assurance mandate, serve to protect the public interest and solidify the reputation of the paralegal profession. The proposed reforms, representing the next step in the implementation of the strategic priorities previously set by the Paralegal Standing Committee, provide an additional layer to the regulatory framework for ensuring entry level competence.

28. The Paralegal Standing Committee is requested to consider the proposal to introduce more rigorous accreditation standards and monetize the accreditation and audit process, and provide their direction accordingly.

The Law Society of Upper Canada | Barreau du Haut-Canada

APPENDIX 1

Accredited Paralegal Education Programs Audit Policy and Framework[1]

Background

As part of its public interest mandate to regulate paralegals, the Law Society of Upper Canada ("Law Society") has created a paralegal education program accreditation process for colleges of applied arts and technology and private career academies ("institutions"). The Law Society grants accreditation status to those programs which meet criteria regarding curriculum standards, including program content and processes, faculty and field placement.

This Paralegal Education Program Audit Policy and Framework sets out the principles and processes of the audits for accredited programs. Audits will be conducted by counsel in the Law Society's Professional Development & Competence division.

Audit Policy

Accredited paralegal education programs will be audited at periodic intervals, but no less frequently than once in the first three (3) years post-accreditation and at least once every five (5) years thereafter. These audits are designed to review, assess and report on accredited paralegal education programs in relation to the information provided by the institution about its education program. If there are substantive changes to the accredited program since it was accredited, the institution is required to submit supplementary documentation detailing the changes prior to the audit being conducted, so that these changes can be appropriately reviewed.

Audits help to ensure compliance with the stated goals, criteria, competencies and standards of the paralegal education program. Audits also promote consistency of practice between institutions offering paralegal education programs, and help to ensure that students are exposed to and develop the knowledge and skills required to provide legal services to the public.

Framework of Audits

I. Schedule

As part of the accreditation process, the Law Society reserves the right to audit an institution's accredited paralegal education program. A formal review will be conducted at appropriate intervals to ensure that the representations made during the accreditation process are accurate and that the institution maintains required standards thereafter.

[1] Current at March 2013

Initial audits will be conducted for each accredited program within the first three (3) years after accreditation. At least one (1) additional audit will be conducted within subsequent five (5) year interval after the initial audit, at the Law Society's discretion.

II. Scope

The areas that will be reviewed during the audit include

- course listings, content and assessment methods
- concordance between course content and competency development
- review of qualifications and capabilities of teaching faculty
- review of field placement process and results

III. Methodology

The audit process will be comprised of two parts:

1. documentation review, and
2. site visits

1. Documentation review will include the following:
    - Request for and submission of accredited institution's documentation, including:
        - tests and assessments
        - textbooks and instructors' manuals
        - faculty evaluations, and
        - review of other records, including student files and assessments, where appropriate.
2. The second part of the audit process will be conducted through visits to selected campuses of the accredited paralegal education programs. Site visits allow Law Society auditors to observe how programs are delivered to students in the classroom setting and to meet with faculty, administration and students to obtain feedback. These site visits will include the following:
    - meetings with the Program Director and other senior administrative staff
    - meetings with a representative group of students
    - meetings with faculty, and selected verification of their experience and qualifications

- observation of classes in session, and
- meetings with the field placement coordinator

The length and scope of each site visit will be decided by the Law Society's audit team, however, sufficient notice will be provided to the Program Directors in order to schedule the required meetings. Prior notice will also be given, and sufficient time allowed, for program officials to provide requested documentation as part of the documentation review. Program Directors must remain available to Law Society auditors for follow- up or clarification of audit results once the site visits are completed.

IV. Audit Reports

Once the documentation review and site visits are completed, Law Society auditors will review and analyze the collected information. These results will be compared against the institution's accreditation application and established standards, and any gaps or deficiencies will be noted.

The Law Society's audit group will prepare a draft report for each audited paralegal education program which will summarize the group's findings. The draft report will note any discrepancies between the audit findings and the representations made in the institution's accreditation application or documentation provided. A copy of the draft audit report will be provided to each institution's program director within eight (8) weeks of completion of the site visits for that program. This copy is made available to allow the institution to provide clarification and an opportunity to address the noted discrepancies; however, no substantive changes will be made to the draft report's findings unless approved by the audit team. Once a response is received from the Program Director, the audit team will produce a final report for the audit. This report will be presented to the Director, Professional Development & Competence, or the Manager, Licensing and Accreditation for her review, and at the discretion of the Director, may be presented to the Paralegal Standing Committee for its review.

V. Post-Audit Actions

If the final audit report finds that an institution is in compliance with the requirements, no further action need be taken by either the audit team or by the institution. The institution will be expected to maintain its current standards of program delivery, and to notify the Law Society of any substantive program changes.

If the audit report finds that there are deficiencies between the representations made in the institution's application and documentation and the program's content, the audit team will notify the Director of Professional Development & Competence and discuss an appropriate course of action.

At her discretion, the Director may decide whether to take any of the following steps:

- in the case of minor deficiencies, notify the Program Director and provide the institution with a reasonable period of time to correct them to the satisfaction of the Director and/or

audit team. There will be no change to the program's accreditation status while these deficiencies are being addressed. If the deficiencies are not addressed within the designated timeframe, the Director and/or the audit team may schedule another audit

- in the case of serious and/or substantial deficiencies, notify the Program Director and provide a deadline by which the deficiencies must be remedied in order to maintain accreditation status. There will be no change to the program's accreditation status while the deficiencies are being addressed

- in the case of grave concerns which cast doubt on the institution's ability to deliver its program to an appropriate standard, notify the Program Director that the program's status as an accredited program will be revoked immediately. Such revocation will be in effect until such time as the program is modified to be compliant with the Audit Report's requirements, however it may last indefinitely or permanently if:

    - Meeting such representations would be beyond the capabilities of the institution, or

    - The Program Director/institution refuses to undertake such corrections.

- in the event that an institution has been notified regarding deficiencies as above, and such institution becomes aware that it cannot remedy the deficiencies within the specified timeframe, the institution will be required to present written reasons as to why that timeframe cannot be met. The Director will decide whether such reasons are sufficient to permit an extension.

For situations where the Director makes a recommendation regarding the accreditation status of a program, as set out above, the matter and findings of the Audit Report will be brought before the Paralegal Standing Committee for review, consideration and approval before any decision affecting accreditation is made. If the Director recommends that an institution's accreditation status should be revoked, the Director will provide written reasons to the Paralegal Standing Committee. Any changes to accreditation status which are approved by the Paralegal Standing Committee will be communicated to the affected institution.

APPENDIX 2

Accredited Paralegal Education Programs

School Name	Location	Credential	Date Accredited	Date Audited	Program Start Date
Academy of Learning	Toronto	Diploma	September 21, 2012	Oct 2013	March 14, 2013
Algonquin Careers Academy	Mississauga	Diploma	September 10, 2008	Aug/Sept 2010	2008
Algonquin Careers Academy	Ottawa	Diploma	September 10, 2008	Aug/Sept 2010	2008
Algonquin College	Ottawa	Diploma	June 4, 2008	November 2009	September 2008
Canadian Business College	Toronto	Diploma	April 20, 2011	Mar/May 2012	September 1, 2011
Canadian Business College	Mississauga	Diploma	April 20, 2011	Mar/May 2012	January 1, 2012
Canadian Business College	Scarborough	Diploma	April 20, 2011	Oct 2013	February 11, 2013
Canadian College of Business Science & Technology	Brampton	Diploma	February 9, 2012	Not yet audited	August 27, 2012
CDI College of Business, Technology and Health Care	Ajax	Diploma	January 15, 2010	Apr/May 2011	2010
CDI College of Business, Technology and Health Care	Mississauga	Diploma	April 15, 2013	Not yet audited	September 30, 2013
CDI College of Business, Technology and Health Care	Hamilton	Diploma	April 15, 2013	Not yet audited	October 15, 2013

CDI College of Business, Technology and Health Care	Toronto (Bloor)	Diploma	April 15, 2013	Not yet audited	September 30, 2013
CDI College of Business, Technology and Health Care	Toronto (Scarborough)	Diploma	April 15, 2013	Not yet audited	October 15, 2013
Centennial College	Scarborough	Certificate	August 16, 2011	Dec 2012/Jan 2013	January 1, 2012
Cestar College of Business, Health and Technology	Toronto	Diploma	May 2013	Not yet audited	September 16, 2013
Conestoga College	Kitchener	Certificate	September 7, 2011	May 2013	September 1, 2012
CTS Canadian Career College	Barrie	Diploma	June 4, 2010	June 2011	2010
CTS Canadian Career College	Sudbury	Diploma	June 4, 2010	Jun/Aug 2011	2010
CTS Canadian Career College	North Bay	Diploma	April 24, 2012	July 2013	May 1, 2012
Durham College	Oshawa	Certificate	July 11, 2008	March 2010	2008
Durham College	Oshawa	Diploma	July 11, 2008	March 2010	2008
Everest College	Toronto Central (Eglinton)	Diploma	May 12, 2010	Feb 2011	2010
Everest College	Nepean	Diploma	May 12, 2010	Feb 2011	2010
Fanshawe College	London	Certificate	September 7, 2011	May 2013	September 1, 2012
Fleming College	Peterborough	Diploma	March 18, 2010	Jan 2011	2010

George Brown College	Toronto	Certificate	June 29, 2010	Oct/Nov 2011	2010
Herzing College	Ottawa	Diploma	February 25, 2010	May 2011	2010
Herzing College	Toronto	Diploma	December 15, 2009	Nov/Dec 2010	2010
Humber Institute of Technology and Advanced Learning	Toronto - North Campus	Diploma	July 11, 2008	Oct 2010	2008
Humber Institute of Technology and Advanced Learning	Toronto - Lakeshore Campus	Degree	August 29, 2008	Oct 2010	2008
La Cité collégiale	Ottawa	Diploma	July 30, 2010	Nov 2011	2010
Loyalist College	Belleville	Diploma	June 7, 2010	March 2011	2010
Metro College	Toronto	Diploma	July 11, 2012	Dec-13	March 1, 2013
Mohawk College	Hamilton	Diploma	April 26, 2013	Not yet audited	January 1, 2014
Seneca College of Applied Arts and Technology	Toronto	Diploma	June 4, 2008	Nov 2009	2008
Sheridan College Institute of Technology and Advanced Learning	Brampton	Diploma	June 24, 2008	March 2010	2008
St. Clair College of Applied Arts & Technology	Windsor	Diploma	July 10, 2009	Nov 2010	2009
triOS College Business Technology Healthcare	Brampton	Diploma	August 22, 2013	Not yet audited	2013

triOS College Business Technology Healthcare	Hamilton	Diploma	September 13, 2010	Sept/Oct 2011	2010
triOS College Business Technology Healthcare	Kitchener	Diploma	June 22, 2010	Sept/Nov 2011	2010
triOS College Business Technology Healthcare	London	Diploma	June 22, 2010	Sept/Dec 2011	2010
triOS College Business Technology Healthcare	Mississauga	Diploma	June 22, 2010	July 2011	2010
triOS College Business Technology Healthcare	Oshawa	Diploma	September 13, 2010	Aug/Nov 2011 Jan/Feb 2012	2010
triOS College Business Technology Healthcare	Toronto	Diploma	June 22, 2010	July 2011	2010
triOS College Business Technology Healthcare	Windsor	Diploma	June 22, 2010	Sept 2011	2010
Westervelt College	London	Diploma	July 11, 2008	Apr 2010	2008

APPENDIX 3

AVERAGE ACCREDITATION AND AUDIT PROCESS COSTS

Average Cost per Accreditation	Counsel Time ($50/hour)	Coordinator Time ($30/hour)	Total Hours	Total Cost ($)
Initial Review				
Technical Review		2	2	60
Primary Review		16	16	480
Secondary Review	18	2	20	960
Report Production	4	8	12	440
Total			*50*	*1,940*
Indirect Expense Allocation				680
Total Initial Review Expenses				**2,620**
Final Review				
Review Discussion and Debrief of Issues	2	2	4	160
Primary Review		16	16	480
Secondary Review	10	2	12	560
Report Production	4	8	12	440
Total			*44*	*1,640*
Indirect Expense Allocation				575
Total Final Review Expenses				**2,215**
Total Time and Cost of Review Process			**94**	**4,835**

Average Cost of Out-of-Town Audit (approximately 2 out of 7 institutions per annum – <u>not including</u> multiple campuses)

Expense Category	Cost ($)
Personnel	1,540
Initial Audit Costs	2,250
Final Audit Costs	1,060
Indirect Expense Allocation	1,698
Total	***6,548***

Average Cost of Local Audit (approximately 5 out of 7 institutions per annum – <u>not including</u> multiple campuses)

Expense Category	Cost ($)
Personnel	1,540
Direct Audit Costs	220
Direct Re-visit Costs	100
Indirect Expense Allocation	651
Total	***2,511***

APPENDIX 4

ABA Approval Process Statement of Fees
Effective September 1, 2013

Approval Application Fee	$2,500.00	Paid at time the self-evaluation report for initial approval is submitted
Reapproval Application Fee	$1,750.00	Paid at time the self-evaluation report for reapproval is submitted
Annual Fee	$1,250.00	Paid annually by approved programs. Programs are billed directly on or about February 1. Fee is due on or before May 1. Annual fee is NOT paid in calendar year in which a self-evaluation report for reapproval is submitted.
Late Fee	$250.00	Assessed when an approved program fails to apply for reapproval or pay the reapproval application fee by the due date, fails to submit interim report by the due date or fails to pay the annual fee by the due date.
Reprocessing Fee	$500.00	Fee imposed on approved programs that submit self-evaluation or interim reports that require extensive substantive revisions resulting in multiple reviews of the report.
Sanction Fees	$500.00 – Warning $750.00 – Probation $1,000.00 -- Order to Show Cause	Fees imposed on programs that are sanctioned under Section G-105 of the ABA Guidelines for the Approval of Paralegal Education Programs
Continued Deferral Fee	$250.00	Fee imposed when a program's reapproval is deferred two or more times due to noncompliance with the ABA Guidelines for the Approval of Paralegal Education Programs. Fee is imposed by the Approval Commission, which will consider the reason for the deferral and the response of the program to the initial deferral before imposing the fee.
Follow-Up Site Visit or Special On-Site Visit Administrative Fee	$500.00	Fee imposed when a program's reapproval is deferred and a follow-up site visit is required or a program is subject to a special visit due to major changes or noncompliance. Fee is in addition to the required reimbursement of expenses incurred by the site team.
Substantive/Major Change Fees	$250.00 -- Ownership and/or Financial Support $250.00 -- Reporting New Program Director $250.00 -- Cessation of Program Option $500.00 -- New Program Option $500.00 -- Additional/New	Fee imposed on programs submitting changes pursuant to G-104.M.1 of the ABA Guidelines for the Approval of Paralegal Education Programs. Fee is paid at the time the Substantive/Major Change Report Form is submitted.

	Location $500.00 -- Program Ceasing Operation or Requesting Voluntary Withdrawal of ABA Approval $750.00 -- Substantial Curriculum Change	
Violations Relating to Honesty and Candor (G-104.D and G-501.A)	$500.00	ABA approved paralegal education program are required to exhibit honesty and candor. Programs violating these standards will be sanctioned. Increased sanctions will be imposed for each subsequent violation.
Payment of Fees	Any approved program subject to late fees, reprocessing fees, follow-up site visit administrative fees, sanction fees or continued deferral fees must submit such fees within thirty days of notification of the imposition of the fee. If the program does not pay a required fee within sixty days, the program is subject to sanctions including withdrawal of approval under G-105.	

APPENDIX 5

PROPOSED FEE SCHEDULE FOR

PARALEGAL PROGRAM ACCREDITATION AND AUDIT

ACTIVITY	PROPOSED FEE ($)
Application Fee for Accreditation	500
Accreditation Fee	4,500
Additional Campus Accreditation Fee (per campus)	1,500
Program Audit Fee	4,500
Additional Campus Audit Fee (per campus)	1,500
Audit Revisit Fee (non-compliance and remediation)	2,000
Reaccreditation Fee (every five years)	3,500
Additional Campus Reaccreditation Fee (per campus, every five years)	950

To be increased annually by the greater of 2% or the annual change (January to December) in the CPI Index Ontario all-items.

TAB 5.3

FOR INFORMATION

REVISIONS TO THE *PARALEGAL GUIDELINES – MODEL CODE*

12. The Committee approved the revised *Paralegal Guidelines* shown at **TAB 5.3.1**. The revisions reflect the changes to the *Paralegal Rules* in light of the Federation Model Code.

PROGRESS REPORT ON PARALEGAL REGULATION

13. Since this is the last report from the Paralegal Standing Committee as currently constituted, the Committee is submitting the report on the work accomplished over the last four years shown at **TAB 5.3.2.**

NATIONAL DISCIPLINE STANDARDS

14. The Committee approved the report on the National Discipline Standards being presented to Convocation by the Professional Regulation Committee.

QUARTERLY REPORT FROM PROFESSIONAL REGULATION

15. The Committee reviewed the Quarterly Report prepared by the Professional Regulation Division.

TAB 5.3.1

Paralegal Professional Conduct Guidelines

~Effective October, 2008~

BLACKLINE VERSION SHOWING PROPOSED CHANGES ARISING FROM AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT* AS PART OF THE IMPLEMENTATION OF THE FEDERATION OF LAW SOCIETIES OF CANADA'S MODEL CODE OF PROFESSIONAL CONDUCT

[for Convocation's Information, February 27th 2014]

Amendments Current to May 24, 2012

INTRODUCTION TO THE *PARALEGAL PROFESSIONAL CONDUCT GUIDELINES*

Purpose

1. Under the *Law Society Act*, the Law Society has the right to make rules and regulations to govern the professional conduct of lawyers and paralegals. The *Act* also gives the Society the ability to discipline those lawyers or paralegals who do not adhere to the rules. Regulations include the By-Laws under the *Act* and the *Paralegal Rules of Conduct,* which were adopted to govern the professional conduct of licensed paralegals.

2. The *Paralegal Professional Conduct Guidelines* ("Guidelines") have been created to assist paralegals with the interpretation and application of the *Paralegal Rules of Conduct* ("*Rules*"). The Guidelines should be considered along with the *Rules*, the *Law Society Act* (the "*Act*"), the By-Laws made under the *Act* and any other relevant case law or legislation. Neither the *Rules* nor the Guidelines can cover every situation; they should be interpreted and applied with common sense and in a manner consistent with the public interest and the integrity of the profession. It is expected that a paralegal will exercise his or her professional judgment in interpreting the Guidelines, keeping in mind the paralegal's obligations to the client, the court or tribunal and the Law Society.

Accessing the Guidelines

3. The Guidelines are available in electronic form. They are cross-referenced to the *Rules* and are linked directly to the *Rules* on the Law Society's website.

Terminology

4. For the purposes of these Guidelines, the word

   - "*Act*" refers to the *Law Society Act*,
   - "Guidelines" refers to the *Paralegal Professional Conduct Guidelines*,
   - *"Rules"* refers to the *Paralegal Rules of Conduct*,
   - "paralegal" refers to paralegals licensed to provide legal services by the Law Society of Upper Canada, and
   - "lawyer" refers to lawyers licensed to practise law by the Law Society of Upper Canada.

5. The following may be of assistance in interpreting the Guidelines:

   - The terms "shall" or "must" are used in those instances where compliance is mandated by either the by-laws made pursuant to the *Law Society Act* or the *Rules*.

   - The term "should" and the phrase "should consider" indicate a recommendation. These terms refer to those practices or policies that are considered by the Law Society to be a reasonable goal for maintaining or enhancing professional conduct.

- The term “may” and the phrase “may consider” convey discretion. After considering suggested policies or procedures preceded by “may” or “may consider”, a paralegal has discretion whether or not to follow the suggestions, depending upon the paralegal’s particular circumstances, areas of professional business or clientele, or the circumstances of a particular client or matter.

GUIDELINE 1:
PROFESSIONALISM – INTEGRITY & CIVILITY

General
Rule Reference: ~~Rule 1.03~~
Rule 2.01 (1) & (2)

1. A paralegal should inspire the respect~~,~~ ~~and~~ confidence and trust of clients and the community ~~Ontarians. Even the appearance of inappropriate conduct should be avoided.~~

2. Public confidence in the administration of justice and in the paralegal profession may be eroded by a paralegal's unprofessional conduct. A paralegal's conduct should reflect favourably on the legal professions, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

3. A paralegal has special responsibilities by virtue of the privileges afforded the paralegal profession and the important role it plays in a free and democratic society and in the administration of justice. This includes 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.

Integrity and Civility
Rule Reference: Rule 2.01(1)~~,~~ & (2) ~~& (3)~~

4. Acting with ***integrity*** means that a paralegal will be honest and will act with high ethical and moral principles. ***Integrity*** is the fundamental quality of any person who seeks to provide legal services. If integrity is lacking, the paralegal's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the paralegal may be.

5. Acting with ***civility*** means that a paralegal will communicate politely and respectfully and act in a manner that does not cause unnecessary difficulty or harm to another.

6. The obligation to show courtesy and good faith extends to clients, opposing parties, other paralegals and lawyers, support staff, adjudicators, court and tribunal officers and staff and representatives of the Law Society. This obligation applies regardless of where the paralegal may be appearing or at what stage of the process the matter may be.

GUIDELINE 2:
OUTSIDE INTERESTS

General
Rule Reference: Rule 2.01~~(4) & (5)~~ (3) & (4)

1. The term "outside interest" covers the widest range of activities. It includes activities that may overlap or be connected with provision of legal services, for example, acting as a director of a corporation or writing on legal subjects, as well as activities less connected such as, for example, a career in business, politics, broadcasting or the performing arts.

2. When participating in community activities, a paralegal should be mindful of the possible perception that the paralegal is providing legal services and a paralegal-client relationship has been established. A paralegal should not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the paralegal is acting, or that would give rise to a conflict of interest or duty to a client.

3. It is the paralegal's responsibility to consider whether the outside interest may impair his or her ability to act in the best interest of his or her client(s). If so, the paralegal must withdraw, either from representation of the client or from the outside interest.

4. When acting in another role, the paralegal must continue to fulfill his or her obligations under the *Rules*, for example, to

    - act with integrity,
    - be civil and courteous,
    - be competent in providing legal services,
    - avoid conflicts of interest, and
    - maintain confidentiality.

Acting as a Mediator
Rule Reference: Rule 2.01~~(6)~~(5)

5. A mediator works with disputing parties to help them resolve their dispute. A paralegal acting as a mediator is not providing legal services to either party – the relationship is not a paralegal-client relationship. This does not preclude the mediator from giving information on the consequences if the mediation fails.

6. When acting as a mediator, the paralegal should guard against potential conflicts of interest. For example, neither the paralegal nor the paralegal's partners or associates should provide legal services to the parties. Further, a paralegal-mediator should suggest and encourage the parties to seek the advice of a qualified paralegal or a lawyer before and during the mediation process if they have not already done so. Refer to Guideline 9: Conflicts of Interest for more information on how a paralegal's outside interests may conflict with the paralegal's duty to his or her clients.

GUIDELINE 3:
UNDERTAKINGS AND TRUST CONDITIONS

General
Rule Reference: Rule 2.02

1. Money and property change hands in most legal transactions. A paralegal may be required to hold documents and property in trust until the performance of particular conditions. These conditions are called ***trust conditions***. Promises to carry out specific tasks and/or fulfill specific conditions are called ***undertakings.*** Rule 2.02 sets out a paralegal's obligations in relation to undertakings and trust conditions.

Undertakings
Rule Reference: Rule 2.02(1), (2) & (3)

~~1. An ***undertaking*** is a ***personal promise.*** Rule 2.02 sets out a paralegal's obligations in relation to undertakings.~~

2. An undertaking is a personal promise. A paralegal could, for example, give an undertaking to complete a task or provide a document. Fulfilling that promise is the responsibility of the paralegal giving the undertaking.

3. The person who accepts the paralegal's undertaking is entitled to expect the paralegal to carry it out personally. Using the phrase "on behalf of my client," even in the undertaking itself, may not release the paralegal from the obligation to honour the undertaking. If a paralegal does not intend to take personal responsibility, this should be clearly outlined in the written undertaking. In those circumstances, it may only be possible for the paralegal to personally undertake to make "best efforts."

4. A court or a tribunal may enforce an undertaking. The paralegal may be brought before a court or tribunal to explain why the undertaking was not fulfilled. The court or tribunal may order the paralegal to take steps to fulfill the undertaking and/or pay damages caused by the failure to fulfill the undertaking.

5. To avoid misunderstandings and miscommunication, a paralegal should remember the following points about undertakings. A paralegal

   - should ensure that the wording of the undertaking is clear. If a paralegal is the recipient of an undertaking given by another paralegal or a lawyer, the paralegal should ensure that the wording is clear and consistent with his or her understanding of the undertaking. The paralegal should contact the other paralegal or lawyer to clarify the issue as soon as possible if this is not the case.
   - should consider specifying a deadline for fulfilling the undertaking.
   - should ensure that the undertaking provides for contingencies (e.g. if the obligations in the undertaking rely on certain events occurring, the paralegal should indicate what will happen if these events do not occur).

- should confirm whether or not the individual providing the undertaking is a paralegal or a lawyer.

Trust Conditions
Rule Reference: Rule 2.02(4)

6. Once a trust condition is accepted, it is binding upon a paralegal, whether imposed by another legal practitioner or by a lay person.

7. Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed and accepted in writing. Trust conditions may be varied with the consent of the person imposing them, and the variation should be confirmed in writing,

8. A paralegal should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a paralegal accepts property subject to trust conditions, the paralegal must fully comply with such conditions, even if the conditions subsequently appear unreasonable.

9. A paralegal may seek to impose trust conditions upon a non-licensee, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law.

GUIDELINE 4:
HARASSMENT AND DISCRIMINATION

The Human Rights Code
Rule Reference: ~~Rule 1.03(1)(b)~~
Rule 2.03

1. A paralegal's obligations regarding harassment and discrimination are outlined in the *Rules*, the *Human Rights Code* and related case law.

2. The *Human Rights Code* gives everyone equal rights and opportunities without discrimination relating to matters such as employment, housing and services. The purpose of the Code is to prevent discrimination or harassment on the grounds of

   - race or colour,
   - citizenship, ancestry , place of origin or ethnic origin,
   - creed,
   - sex (including pregnancy),
   - sexual orientation,
   - age (means an age that is 18 or more),
   - record of offences (in the context of employment only),
   - marital or family status,
   - disability,
   - gender identity or gender expression or
   - the receipt of public assistance (in the context of housing only).

3. More information about obligations under the *Human Rights Code* may be found at http://www.ohrc.on.ca/.

Discrimination
Rule Reference: Rule 2.03(4) & (5)

4. ***Discrimination*** means treating another person in the context, for example, of employment, services or housing, differently and less than others, because of any of the Code's prohibited grounds.

5. A paralegal should review and become familiar with human rights laws to ensure that the paralegal is meeting his or her legal and ethical obligations to others.

Harassment
Rule Reference: Rule 2.03(3)

6. ***Harassment*** is a form of discrimination. Harassment means vexatious comments or actions that are unwelcome to the person receiving the comments or actions, or comments or actions that ought reasonably be known to be unwelcome. Generally speaking, harassment is a "course of conduct" or a pattern of behaviour where more than one incident has occurred. Even one incident however, may constitute harassment if the incident is serious in nature.

7. ***Sexual harassment*** is defined in the *Human Rights Code* as an incident or series of incidents involving unwelcome sexual advances, requests for sexual favours or other verbal or physical conduct of a sexual nature when one or more of the following circumstances are present:

- such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to the recipient(s) of the conduct,
- giving in to such conduct is a condition for the supply of legal services by the paralegal, whether this condition was spoken or unspoken by the paralegal,
- giving in to such conduct is a condition of employment by the paralegal, whether this condition was spoken or unspoken by the paralegal,
- giving in to or rejecting such conduct affects the paralegal's employment decisions regarding his or her employee (which may include assigning file work to the employee, matters of promotion, raise in salary, job security, and employee benefits, among other things),
- such conduct is intended to or results in interfering with an employee's work performance, or
- such conduct creates an uncomfortable, unfriendly or unpleasant work environment.

8. Examples of behaviour considered as harassment include, but are not limited to

- sexist jokes causing embarrassment or offence,
- the display of offensive material, such as racial graffiti,
- the use of sexually degrading words to describe a person,
- the use of derogatory or degrading remarks directed at one's sex or one's sexual orientation,
- the use of sexually suggestive or obscene comments or gestures,
- unwelcome comments or inquiries about one's sex life,
- repeated racial slurs directed at language or accent of a particular group,
- unwelcome sexual flirtations, advances or propositions,
- leering,
- persistent unwanted contact or attention after the end of a consensual relationship,
- requests for sexual favours,
- unwanted touching,
- verbal abuse or threats, or
- sexual assault.

Promoting Equity and Diversity

9. The Law Society's Equity Initiatives department has developed a series of best practices and model policies to guide paralegals and lawyers in promoting equity and diversity in all areas of their professional business. All paralegals should consider adopting model policies to assist them in meeting their legal and professional conduct responsibilities. Model policies cover practices relating to employment and the provision of services to clients and include

    - preventing and responding to workplace harassment and discrimination,
    - promoting equity in the workplace,
    - parental and pregnancy leaves and benefits,
    - accommodation in the workplace, flexible work arrangements, and
    - issues relating to creed and religious beliefs, to gender and sexual orientation, and to individuals with disabilities.

10. Equity Initiatives has also developed a professional development program to design and deliver education and training to legal service providers regarding these equity and diversity issues. A paralegal may contact the Law Society to discuss available training sessions, which may be offered as seminars, workshops or informal meetings. Full information regarding these initiatives is available on the Equity section of the Law Society website at www.lsuc.on.ca.

Discrimination and Harassment Counsel

11. The Law Society provides the services of ***Discrimination and Harassment Counsel*** to anyone who may have experienced discrimination by a paralegal or a lawyer, or within a paralegal or lawyer's professional business. This service is funded by the Society but is completely independent of the Society. The service is free to the Ontario public, including paralegals and lawyers, and is strictly confidential.

12. The Discrimination and Harassment Counsel can provide advice and support and will review options with the individual using the service, which may include

    - filing a complaint with the Law Society,
    - filing a complaint with the Ontario Human Rights Commission, and
    - allowing the Discrimination and Harassment Counsel to mediate a resolution if all parties agree.

13. More information is available at www.dhcounsel.on.ca/.

GUIDELINE 5:
CLIENTS

General
Rule Reference: Rule 1.02
Rule 3

1. One of the most important duties of a paralegal is the duty of service to his or her ***client***. This duty includes obligations to be competent, maintain confidentiality, avoid conflicts of interest and continue to represent the client unless the paralegal has good reason for withdrawing. As a result, it is important for the paralegal to know exactly who is a client because it is to the client that most of the duties outlined in the *Rules* are owed. ***Client*** is defined in Rule 1.02.

2. The courts have made a distinction between a solicitor-client relationship and a solicitor-client retainer. This jurisprudence may be used by the courts to define the paralegal-client relationship and paralegal-client retainer in future. The ***relationship*** is established when the prospective client has his or her first consultation with the lawyer or law firm about retaining services. The relationship ~~is often~~ may be established without formality. The ***retainer*** is established once the lawyer agrees (expressly or implied by the lawyer's conduct) to provide legal services. The solicitor-client relationship, with all of its important duties, for example, confidentiality, continues after the retainer is established.

3. In most cases, it is clear who is the ***client***. However, there may be situations where it is difficult to determine who is the client from whom the paralegal should be receiving instructions. Problems may develop in situations involving ***joint clients***, ***authorized representatives, organizations,*** "***phantom" clients*** or ***unrepresented opposing parties***.

Joint Clients
Rule Reference: Rule 3.04~~(8) – (14)~~ (7) – (13)

4. A ***joint retainer*** occurs where a paralegal agrees to represent two or more clients in the same matter. As with any retainer, the paralegal should clearly identify the clients to whom legal services will be provided, to ensure that the paralegal fulfills his or her duties to those clients.

Authorized Representatives
Rule Reference: Rule 3.02~~(7) & (8)~~ (13) & (14)
Rule 3.04~~(8) – (14)~~ (7) – (13)

5. Identifying who is the client and whose instructions should be followed can be difficult where a client representative is involved. The paralegal should consider, determine and clearly outline these matters at the start of the relationship. If a paralegal is acting for both the individual and the individual's authorized representative, the paralegal must comply with the rules regarding joint retainers.

Acting for an Organization
Rule Reference: Rule 3.04~~(8) – (14)~~ (7) – (13)

6. When acting for a client that is an organization, it is in the paralegal's interests to clarify which officers, employees or agents of the organization may properly give instructions on the organization's behalf. The paralegal should confirm with those individuals that the paralegal acts for the organization and not for the individuals who act as its instructing agents.

7. If a paralegal is retained by both the organization and one or more of its officers, employees, or agents in the same matter, the paralegal must comply with Rule 3.04 (8) – (14) regarding joint retainers.

"Phantom" Clients

8. An individual may believe that he or she is represented by a paralegal, though he or she has not formally retained or hired the paralegal. In these cases, the paralegal may be unaware that the individual considers himself or herself the paralegal's client. These types of individuals are sometimes referred to as "phantom" clients.

9. Phantom clients are problematic because they may in fact be clients or prospective clients to whom the paralegal owes duties, yet they are phantoms that the paralegal does not see. This situation may arise when something the paralegal has done or a conversation the paralegal has had, had led a person to believe that the paralegal represents that person. One of the common ways in which phantom clients are created is through a person who consults with the paralegal on a matter but does not clearly indicate whether he or she wants to hire the paralegal or pursue the matter.

10. To avoid the problem of phantom clients, it is helpful for the paralegal to clearly identify who is the client, what is the client's matter, and who is to provide instructions. To avoid collecting phantom clients, a paralegal should also clearly communicate his or her role with anyone the paralegal deals with as a paralegal. It may be helpful for the paralegal to

    - confirm in writing whether or not the paralegal will provide legal services for a person who has consulted with him or her and refer to any limitation periods (i.e. retainer agreement, engagement or non-engagement letter),
    - inform third party individuals who attend meetings with a client that the paralegal represents the client only, and not the third party,
    - discourage clients from relaying legal advice to third parties, and
    - avoid discussing legal matters outside the working environment or a working relationship.

GUIDELINE 6:
COMPETENCE AND QUALITY OF SERVICE

General
Rule Reference: Rule 3.01
Rule 3.02(1)

1. A licensed paralegal is held out to be knowledgeable, skilled and capable in his or her permissible area of practice. A client hires a legal service provider because the client does not have the knowledge and skill to deal with the legal system on his or her own. When a client hires a paralegal, the client expects that the paralegal is competent and has the ability to properly deal with the client's case.

2. A paralegal 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 distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

Limited Scope Retainers

6. A paralegal may provide legal services under a limited scope retainer, but must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. Although an agreement for such services does not exempt a paralegal from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The paralegal should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services.

Cross reference Rule 3.02 ~~(8.1) to (8.3)~~ (15) – (17)

The Required Standard of Competence
Rule Reference: Rule 3.01(1)
Rule 3.01(4)

Knowledge
Rule Reference: Rule 3.01(4)(a) & (b)

7. Competence is founded upon both ethical and legal principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the paralegal should keep abreast of developments in all areas of law in which the paralegal provides legal services.

8. The competent paralegal will ensure that only after all necessary information has been gathered, reviewed and considered does he or she advise the client as to the course(s) of

action that will most likely meet the client's goals, taking care to ensure that the client is made aware of all foreseeable risks and/or costs associated with the course(s) of action.

9. Unless the client instructs otherwise, the paralegal should investigate the matter in sufficient detail to be able to express an opinion, even where the paralegal has been retained to provide services under a limited scope retainer. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the paralegal should so state in the opinion.

Client Service and Communication
Rule Reference: Rule 3.01(4)(d), (e), (f) & (g)

10. Client service is an important part of competence. Most of the complaints received by the Law Society relate to client service, such as not communicating with a client, delay, not following client instructions and not doing what the paralegal or lawyer was retained to do.

11. Rule 3.01(4) contains important requirements for paralegal-client communication and service. In addition to those requirements, a paralegal can provide more effective client service by

- keeping the client informed regarding his or her matter, through all relevant stages of the matter and concerning all aspects of the matter,
- managing client expectations by clearly establishing with the client what the paralegal will do or accomplish and at what cost, and
- being clear about what the client expects, both at the beginning of the retainer and throughout the retainer.

12. A paralegal should meet deadlines, unless the paralegal is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a paralegal should be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

Providing Services Under a Limited Scope Retainer
Rule Reference: Rule 3.02(15) – (17)

11. Where a paralegal provides services under a limited scope retainer to a client, it is very important to clearly identify the scope of the retainer, such as identifying the services that the paralegal will and will not be providing to the client. It is advisable that the limits of the paralegal's retainer are clearly stated in a written retainer agreement.

Practice Management
Rule Reference: Rule 3.01(4)(h)
By-Law 9

12. In a busy office, practice management includes ensuring that there is sufficient staff to assist the paralegal in fulfilling his or her professional responsibilities, for example, ensuring that communications from clients, other paralegals or lawyers are responded to and that financial records are kept in accordance with the requirements of By-Law 9.

13. Competent practice management requires that the paralegal effectively manage his or her staff, time, finances and client information. A paralegal should consider the following practice management tools:

- workplace policies and business procedures for staff,
- planning and reminder systems, and time docketing systems for time management, and
- filing, organizational and storage systems for management of client information and a system for effectively identifying and avoiding conflicts.

Applying Skills & Judgment
Rule Reference: Rule 3.01(4)(c), (i) & (l)

14. When serving clients, or otherwise acting in a professional capacity, a competent paralegal should understand the legal concepts, issues and facts, give careful consideration to the matters he or she handles and make decisions that are reasoned and make sense in the client's circumstances.

15. A competent paralegal knows the *Rules* and understands why each *Rule* is important. The paralegal uses this knowledge and understanding to guide his or her own conduct.

Continuing Education / Professional Development
Rule Reference: Rule 3.01(4)(j) & (k)

16. A paralegal is responsible <u>for</u> ~~to~~ remain<u>ing</u> competent throughout his or her career. A competent paralegal understands that maintaining competence is an ongoing professional commitment that requires the paralegal to constantly assess his or her knowledge and skills.

Failing to be Competent
Rule Reference: Rule 3.01

17. The *Rules* do not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a breach of Rule 3.01. Conversely, incompetent professional practice may constitute professional misconduct whether or not the error or omission is actionable through the

courts for professional negligence. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

GUIDELINE 7:
ADVISING CLIENTS

Honesty and Candour ~~General~~
Rule Reference: 3.02~~(1) &~~ (2)

1. A paralegal has a duty of candour with the client on matters relevant to the retainer. A paralegal is required to inform the client of information known to the paralegal that may affect the interests of the client in the matter.

2. A paralegal must honestly and candidly advise the client regarding the law and the client's options, possible outcomes and risks of his or her matter, so that the client is able to make informed decisions and give the paralegal appropriate instructions regarding the case. Fulfillment of this professional responsibility may require a difficult but necessary conversation with a client and/or delivery of bad news. It can be helpful for advice that is not well-received by the client to be given or confirmed by the paralegal in writing.

   When advising a client, a paralegal

   - should explain to and obtain agreement from the client about what legal services the paralegal will provide and at what cost. Subject to any specific instructions or agreement, the client does not direct every step taken in a matter. Many decisions made in carrying out the delivery of legal services are the responsibility of the paralegal, not the client, as they require the exercise of professional judgment. However, the paralegal and the client should agree on the specific client goals to be met as a result of the retainer. This conversation is particularly important in the circumstances of a limited scope retainer.
   - should explain to the client under what circumstances he or she may not be able to follow the client's instructions (for example, where the instructions would cause the paralegal to violate the *Rules*).
   - should ensure that clients understand that the paralegal is not a lawyer and should take steps to correct any misapprehension on the part of a client, or prospective client.

3. In some limited circumstances, it may be appropriate to withhold information from a client. For example, with client consent, a paralegal may act where the paralegal receives information in the course of representing the client on the basis that the paralegal is not permitted to share the information with the client. However, it would not be appropriate to act for a client where the paralegal has relevant material information about that client received through a different retainer. In those circumstances the paralegal cannot be honest and candid with the client and should not act.

Dishonesty, Fraud or Crime by Client or Others
Rule Reference: Rule 3.02(4), (5), (6), (7) & (8)
Rule 3.08
By-Law 9

4. A paralegal must be alert to the warning signs that may indicate dishonesty or illegal conduct by a client or any other person. The paralegal may need to, or be forced to, withdraw from representing a client where the client takes part in this type of dishonourable conduct.

5. The requirement in subrule (~~3~~5) is especially important where a paralegal has suspicions or doubts about whether he or she might be assisting a client in crime or fraud. For example, if a paralegal is consulted by a prospective client who requests the paralegal to deposit an amount of cash into the paralegal's trust account but is vague about the purpose of the retainer, the paralegal has an obligation to make further inquiries about the retainer. (The paralegal should also have regard to the provisions of By-Law 9 regarding cash transactions). The paralegal should make a record of the results of these inquiries.

6. A client or another person may attempt to use a paralegal's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a paralegal to be aware of his or her obligations under the Rules and the Law Society's By-laws regulating the handling of trust funds.

7. Rule~~s~~ 3.02~~(4.1)~~(8) ~~and (4.2)~~ speak~~s~~ of conduct that is dishonest, fraudulent, criminal or illegal, and this conduct would include acts of omission as well as acts of commission. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, would invoke these rules.

Settlement and Dispute Resolution
Rule Reference: Rule 3.02~~(5), (6)~~ (11) & (12)

8. A paralegal has an important role to play in both commencing and settling legal proceedings.

9. The paralegal should assist the client in his or her decision about commencing legal proceedings by reviewing the reasons for and against starting the proceeding, and explaining the potential consequences of a decision to commence litigation.

10. In the course of the proceedings, the paralegal should seek the client's instructions to make an offer of settlement to the other party as soon as reasonably possible. As soon as possible after receipt of an offer of settlement from the other party, the paralegal must explain to the client the terms of the offer, the implications of accepting the offer and the possibility of making a counter-offer. When making an offer of settlement, a paralegal should allow the other party reasonable time for review and acceptance of the offer. The

paralegal should not make, accept or reject an offer of settlement without the client's clear and informed instructions. To avoid any misunderstandings, the paralegal should confirm the client's instructions in writing.

Client ~~Under a Disability~~ with Diminished Capacity
Rule Reference: Rule 3.02~~(7), (8)~~ (13) & (14)
Rule 2.03

11. A paralegal must be particularly sensitive to the individual needs of a client under a disability. The paralegal should maintain a good professional relationship with the client, even if the client's ability to make decisions is impaired because of minority, mental disability or some other reason. The paralegal should also be aware of his or her duty to accommodate a client with a disability.

12. A paralegal who is asked to provide services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.

Medical-Legal Reports
Rule Reference: Rule 3.02 ~~(9), (10), (11),~~ (18), (19) & (20)

13. On occasion, in the course of representing and advising a client, a paralegal may need to obtain a report from an expert to help the client's case. Since a medical-legal report may contain information sensitive to the client, a paralegal has special responsibilities where such reports are concerned.

14. After an expert has been hired, but before the report has been prepared, the paralegal should speak to the expert to see if the findings in the report will advance the client's cause. If the findings do not, and subject to any legal requirements, the paralegal may decide not to obtain a *written* report.

Errors
Rule Reference: Rule 3.02~~(12),~~ (21)

15. When providing legal services, the paralegal may make a mistake or fail to do something he or she should have done. When the paralegal realizes this has happened, he or she must fulfill specific duties to the client.

Official Language Rights
Rule Reference: Rule 3.02(22)

16. When advising French-speaking clients, a paralegal should advise a client of his or her French language rights under each of the following (where appropriate):

- Subsection 19(1) of the *Constitution Act, 1982* on the use of French or English in any court established by Parliament,
- Section 530 of the *Criminal Code* (Canada) on an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused,
- 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
- Subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions.

Multi-Discipline Practices

Rule Reference: **Rule 3.04~~(15)~~(14)**
Rule 8.01(5)
Rule 1.0~~2~~1 definitions of "associate" and "professional misconduct"
By-Law 7

17. In a multi-discipline practice, a paralegal should be particularly alert to ensure that the client understands that he or she is receiving legal services only from the paralegal. If advice or service is sought from non-licensed members of the firm, it should be sought and provided independently of and outside the scope of the retainer for the provision of legal services. A paralegal should also be aware that advice or services provided by a non-licensed member of the firm will be subject to the constraints outlined in the relevant by-laws and rules governing multi-discipline practices. One way to distinguish the advice or services of non-licensed members of the firm is to ensure that such advice or services is provided from a location separate from the premises of the multi-discipline practice.

Affiliations

Rule Reference: **Rule 3.04 (15), (16), & (17) ~~& (18)~~**
Rule 1.0~~2~~1 definitions of "affiliated entity" and "affiliation"
By-Law 7

18. Before accepting a retainer, the *Rules* impose certain disclosure and consent requirements on a paralegal providing legal services jointly with non-legal services of an affiliated entity.

GUIDELINE 8:
CONFIDENTIALITY

General
Rule Reference: Rule 3.03 (1)

1. A paralegal cannot render effective professional service to a client, unless there is full and unreserved communication between them. The client must feel completely secure that all matters discussed with the paralegal will be held in strict confidence. The client is entitled to proceed on this basis, without any express request or stipulation.

2. A paralegal's duty of loyalty to a client prohibits the paralegal from using any client information for a purpose other than serving the client in accordance with the terms of the retainer. A paralegal cannot disclose client information to serve another client or for his or her own benefit.

What Information Must be Protected?
Rule Reference: Rule 3.03(1)

3. The obligation to protect client information extends to information ~~that is either~~ whether or not it is relevant or irrelevant to the matter for which the paralegal is retained. The source of the information does not matter. The information could be received from the client or from others. The information may come in any form – the spoken word, paper, computer documents, e-mails, audio or video recordings. The obligation also extends to the client's papers and property, the client's identity and the facts ~~s~~ that the client has consulted or retained the paralegal.

4. A paralegal should be cautious in accepting confidential information on an informal or preliminary basis from anyone, since possession of the information may prevent the paralegal from subsequently acting for another party in the same or a related matter.

5. Generally, unless the nature of the matter requires such disclosure, a paralegal should not disclose having been retained by a person about a particular matter; or consulted by a person about a particular matter, whether or not a paralegal–client relationship has been established between them.

How Long Does the Duty Last?
Rule Reference: Rule 3.03(2)

6. The Rules provide that the duty of confidentiality lasts indefinitely. The duty continues, even after the client or former client dies.

7. Problems can arise when information is provided to a paralegal or a paralegal firm by a prospective client. For lawyers, the duty to protect confidential information begins when a prospective client first contacts the lawyer or law firm. The courts may determine that a

paralegal also owes a duty of confidentiality to prospective clients, even if the paralegal is never actually retained by the prospective client.

Who Owes the Duty?
Rule Reference: Rule 3.03(1) & (3)
Rule 8.01(1)

8. The paralegal, and all other employees of the paralegal firm, owe the duty of confidentiality to every client. A paralegal must ensure that his or her employees, and anyone involved with the client's matter, understand the duty of confidentiality as set out in the *Rules*. The paralegal is ultimately responsible, if someone employed by the paralegal discloses confidential information without client authorization or as permitted by the *Rules*.

When, If Ever, is Disclosure of Confidential Information Permitted?

Disclosure With Client Authority
Rule Reference: Rule 3.03(1)

9. Disclosure of confidential information may be authorized by the client. This authorization may be express or implied. For example, where a paralegal is retained to represent a client in a Small Claims Court matter, the paralegal has the client's implied authority to disclose enough information to complete the necessary forms.

10. When disclosing confidential information on the express authority of the client, the paralegal should consider

- whether the client understands his or her right to confidentiality,
- whether the client understands the potential implications of disclosure,
- whether the client has shown a clear, informed and voluntary intention to forego the right to confidentiality, and
- whether, in the particular circumstances, it would be prudent to obtain the client's written authorization to disclose.

Disclosure Without Client Authority: General
Rule Reference: Rule 3.03(4), (5), (6), (7) ~~&~~ (8) & (9)

11. Rule 3.03 identifies a number of situations in which a paralegal ***~~must~~*** ***shall*** or ***may*** disclose confidential client information, whether or not the client consents to the disclosure.

12. This rule does not permit the paralegal to reveal confidential information about past criminal conduct, or to prevent future illegal or criminal conduct that does not involve death or serious bodily ~~or psychological~~ harm.

Disclosure Without Client Authority to Prevent Serious Bodily Harm
Rule Reference: Rule 3.03(5), (8) & (9)

13. Serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of an individual.

14. A paralegal who believes that disclosure may be warranted may wish to seek legal advice. In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, the paralegal should consider a number of factors, including:

    a) the likelihood that the potential injury will occur and its imminence;
    b) the apparent absence of any other feasible way to prevent the potential injury; and
    c) the circumstances under which the paralegal acquired the information of the client's intent or prospective course of action.

15. If confidential information is disclosed, the paralegal should record the circumstances of the disclosure as soon as possible.

Disclosure Without Client Authority to Establish or Collect Fees
Rule Reference: Rule 3.03(7) & (9)

16. If a paralegal wishes to use a collection agency for an outstanding account, the information provided to the collection agency should be limited to that necessary to collect the fees. Information contained in documents that is not necessary to enforce payment should either be deleted or blocked out.

Other Obligations Relating to Confidential Information – Security of Court Facilities and Misconduct
Rule Reference: Rule 3.03
Rule 6.01(3)
Rule 9.01(2)

17. The *Rules* require a paralegal to disclose confidential client information in other circumstances – for the security of court facilities, and to report certain acts of misconduct to the Law Society.

18. Where a paralegal discloses confidential information to prevent a dangerous situation from developing at a court facility, the paralegal should consider providing this information to the persons having responsibility for security at the facility ~~court facility~~ anonymously or through another paralegal or a lawyer.

Avoiding Inadvertent Disclosure
Rule Reference: Rule 3.03(1)

19. The following steps may assist a paralegal in meeting his or her obligation to protect confidential client information:

- not disclosing having been consulted or retained by a particular person unless the nature of the matter requires disclosure,
- taking care not to disclose to one client confidential information about another client and declining any retainer that might require such disclosure,
- being mindful of the risk of disclosure of confidential information when the paralegal provides legal services in association with other licensees in cost-sharing, space-sharing or other arrangements, and taking steps to minimize the risk,
- avoiding indiscreet conversations about a client's affairs, even with the paralegal's spouse or family,
- shunning any gossip about a client's affairs, even though the client is not named or otherwise identified,
- not repeating any gossip or information about a client's business or affairs that is overheard or recounted to the paralegal, and
- avoiding indiscreet shop-talk between colleagues that may be overheard by third parties.

Office Procedures
Rule Reference: Rule 3.03(1) & (3)
Rule 8.01(1)

20. A paralegal should establish office procedures to ensure that the confidentiality of client information is protected, such as: ~~. These procedures could include the following:~~

- recording the identity and particulars of every client or potential client,
- screening for conflicts of interest when a potential client first contacts the firm, and prior to his or her disclosure of confidential information to the paralegal,
- establishing a communication policy with each client outlining how communications between the client and firm will be conducted,
- keeping file cabinets away from the reception area, placing computer screens so they cannot be viewed by people not in the firm, keeping client files out of sight, locking file cabinets when no one is in the office, limiting access to client files only to staff who work on the matter, shredding confidential information before discarding, ensuring appropriate security for off-site storage of files,
- taking steps to protect confidential information obtained and sent in an electronic form,
- ensuring that all staff understand their obligations with respect to confidentiality and,
- limiting access to confidential information by outside service providers.

GUIDELINE 9:
CONFLICTS OF INTEREST

GENERAL
Definition
Examples of Conflicts of Interest
Rule Reference: Rule ~~3.04(1)~~ 1.02

21. Conflicts of interest are defined in Rule 1.02.

22. Conflicts of interest can arise in many different circumstances. The following are examples of situations in which conflicts of interest commonly arise requiring a paralegal to take particular care to determine whether a conflict of interest exists:

    (a) A paralegal acts as an advocate in one matter against a person when the paralegal represents that person on some other matter.

    (b) A paralegal, an associate, a partner or a family member has a personal financial interest in a client's affairs or in a matter in which the paralegal is requested to act for a client.

    (c) A paralegal has a sexual or close personal relationship with a client.

    (d) A paralegal or the paralegal's firm acts for a public or private corporation and the paralegal serves as a director of the corporation. These two roles may result in a conflict of interest or other problems.

DUTY TO AVOID CONFLICTS OF INTEREST
The Duty
Rule Reference: Rule 3.04 (1) & (2) ~~& (3)~~

23. The duty to avoid conflicts of interest is found in Rule 3.04 (1) and (2) ~~and (3)~~.

To Whom is the Duty Owed – Current Clients and Prospective Clients
Rule Reference: Rule 1.02 definition
Rule 3.04(1) ~~&~~ (3), & (4)

24. A paralegal owes the duty of avoiding conflicts of interest to all clients, including prospective clients. A paralegal should identify potential conflicts of interest at the first contact with a prospective client. A ***prospective client*** can be described as one who has consulted with a paralegal or paralegal firm to see if the firm will take on his or her matter or to see if he or she would like to hire the paralegal or firm.

25. Conflicts of interest may arise at any time. A paralegal should use a conflicts checking system to assist in managing conflicts of interest. The paralegal should examine whether a conflict of interest exists not only at the outset, but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

26. At the time that a paralegal becomes aware of a conflict, or potential conflict, the paralegal should consider whether to accept the retainer, or to continue to act. This applies even where the client consents or where the retainer would not, in the paralegal's opinion, breach the *Rules*. The paralegal should consider the delay, expense and inconvenience that would arise for the client and/or the paralegal, should the paralegal be required to withdraw from the matter at a later stage in the proceedings.

To Whom is the Duty Owed – the Firm's Clients
Rule Reference: Rule 1.02 definition of "client"

27. Since every client of a paralegal firm is also the client of every other paralegal employed at the firm, if one paralegal in the firm has a conflict of interest in a matter, then all paralegals in the firm have a conflict in that matter. As a result, when checking for conflicts, the paralegal should review the names of all current and former clients of the firm and not just the clients personally served by the individual paralegal.

~~**To Whom is the Duty Owed – Persons Involved or Associated with Former Clients**~~
~~**Rule Reference: Rule 3.04(4) (5) & (6)**~~

~~28. Sometimes there will be others who are involved or associated with the client in the client's matter. Persons ***involved or associated with clients*** may include the client's spouse, family members, business associates or employees of any related companies. The duty to avoid conflicts of interest may require a paralegal to avoid acting against those individuals as well.~~

DEALING WITH A CONFLICT OF INTEREST
Disclosing All Information
Rule Reference: Rule 3.04(3) & (4)

29. Disclosure is an essential element to obtaining a client's consent. The client needs to know of anything that may influence the paralegal's judgment or loyalty. Once the paralegal has provided the client with all the details, the paralegal must allow the client time to consider them or to ask for further clarification.

30. There may be situations where it is impossible for a paralegal to give a client or prospective client all necessary information. This may happen when the details about the conflict involve another client or a former client. Since a paralegal cannot reveal confidential information regarding another client, the paralegal may only say that there is a conflict and that he or she cannot continue with or accept the retainer.

Obtaining Consent
Rule Reference: Rule 1.02 definition of "consent"
Rule 3.04(3) & (4)

31. The client may only consent after being given all information required to make an informed decision. This is called ***informed consent***.

32. A paralegal may be able to request that a client consent in advance to conflicts that might arise in the future. The effectiveness of such consent is generally determined by the extent to which the client understands the material risks involved. A paralegal may wish to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent should be recorded in writing.

33. The *Rules* permit consent to be implied in some circumstances.

~~34. Where any other relevant persons must consent, the paralegal must make sure that their consent is also informed consent.~~

Independent Legal Advice/Legal Representation
Rule Reference: Rules 3.04~~(9)~~ (8), 3.06(~~1~~2)(b) and 3.06(~~5~~4)(b), 3.06(~~7~~6)(c)

35. There are situations where the client's informed and written consent is not enough to allow the paralegal to accept or continue with a matter. In some circumstances, the client must receive advice from an independent legal advisor regarding the matter or transaction before the paralegal may taken any further steps in the client's matter.

36. An independent legal advisor is another paralegal or ~~paralegal~~ lawyer, who can provide the client with ***independent legal advice***. This advisor is unrelated to the client's matter, associated parties or the paralegal. He or she is unbiased and objective and does not have a conflict of interest.

37. In circumstances where the paralegal is prohibited from acting for a client or prospective client, the paralegal must suggest that the individual obtain his or her own independent legal representation. ***Independent legal representation*** means that the individual has retained a legal representative, either a paralegal or lawyer, to act as his or her own representative in the matter. This retained representative is objective and does not have any conflicting interest with regards to the matter.

Refusal to Act, Withdrawal of Services
Rule Reference: Rules 3.04(~~2~~1) and 3.08

38. In some cases, the only way to deal with the conflict is to refuse to act. The paralegal may have to decline the retainer at the outset or may have to terminate the retainer and withdraw from representing the client at a later time. A paralegal may need to take this step even where the client wants the paralegal to accept the retainer, or to continue to act.

JOINT CLIENTS
General
Rule Reference: Rule 3.04(8) – (14)

39. A paralegal may be asked to represent more than one client in a matter or transaction. This is referred to as a ***joint retainer***.

40. Acting in a joint retainer places the paralegal in a potential conflict of interest. A paralegal has an obligation to all clients and in a joint retainer, the paralegal must remain loyal and devoted to all clients equally – the paralegal cannot choose to serve one client more carefully or resolutely than any other. If the interests of one client change during the course of the retainer, the paralegal may be in a conflict of interest.

Before Accepting the Joint Retainer
Rule Reference: Rule 3.04(~~8~~7) – (~~11~~13)
Rule 3.02~~(7) & (8)~~ (13) & (14)

41. In cases where one of the joint clients is not sophisticated or is vulnerable, the paralegal should consider the provisions of Rule 3.02~~(7) & (8)~~ (13) and (14) regarding clients under a disability. The paralegal may want to recommend that the client obtain independent legal advice prior to agreeing to the joint retainer. This will ensure that the client's consent to the joint retainer is informed, genuine and ~~uncoerced.~~ not obtained through coercion.

If a Conflict Develops Between Joint Clients
Rule Reference: Rule 3.04(12) – (~~14~~13)

42. Subrules 3.04(12) – (~~14~~13) set out the steps a paralegal must take in the event that a conflict develops between joint clients.

ACTING AGAINST CLIENTS

Acting Against ~~Clients or~~ Former Clients in the Same or Related Matters

Rule Reference: Rule 3.04(2), ~~(3),~~ (4~~5~~)(a) & (b)

43. A paralegal is not permitted to act against a ~~clients or~~ former client~~s~~ in the same or related matters, except with the former client's informed consent. ~~in accordance with subrules 3.04(2), (3), (4)(a) and (b).~~

Acting Against ~~Clients or~~ Former Clients in New Matters

Rule Reference: Rule 3.04~~(3), (4),~~ (5)(c), (6) ~~& (7)~~

~~44.~~ A paralegal is permitted to act against a ~~client or~~ former client in a ~~fresh, independent and unrelated~~ new matter, except in accordance with subrules 3.04(5)(c) and (6). ~~certain circumstances.~~

45. Even where the *Rules* do not prohibit a paralegal from acting against a client or former client, the paralegal should consider whether to accept the retainer (or continue acting). To act against a client or former client may damage the paralegal-client relationship, may result in court proceedings or a complaint to the Law Society.

PARALEGAL TRANSFER BETWEEN FIRMS

General

Rule Reference: Rule 3.05

46. Problems concerning confidential information may arise when a paralegal changes firms and the ~~both~~ firms act for opposing clients in the same or a related matter. The potential risk is that confidential information about the client from the paralegal's former office may be revealed to the members of the new firm and used against that client. A paralegal should carefully review the *Rules* when transferring to a new office or when a new paralegal is about to join the paralegal firm.

DEALING WITH UNREPRESENTED PERSONS

General

Rule Reference: Rule 4.05
Rule 3.04~~(2),~~ (~~8~~7) – (~~14~~13)

47. ~~In the course of providing legal services, a paralegal may have to deal with opposite parties or other individuals with an interest in the matter who are not represented by a paralegal or a lawyer. The~~ When a paralegal deals on a client's behalf with an unrepresented person, there is a potential danger to the paralegal ~~in this situation is~~ that the unrepresented person may think that the paralegal is looking after his or her interests. Rule 4.05 provides specific requirements aimed at minimizing this risk.

48. If an unrepresented person who is the opposite party requests the paralegal to advise or act in the matter, the paralegal is not permitted to accept the retainer. If the unrepresented party otherwise has an interest in the matter, such as a co-accused, the paralegal may be

permitted to act, but should be governed by the considerations outlined in Rule 3.04(~~8~~7) – (~~14~~13) about joint retainers.

FINANCIAL INTERESTS
Doing Business With a Client
Rule Reference: Rule 3.06(1) – ~~(4)~~ (3)

49. A paralegal should be cautious about entering into a business arrangement with his or her client(s) that is unrelated to the provision of paralegal services. This includes any transaction with a client, including lending or borrowing money, buying or selling property, accepting a gift, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment and entering into a common business venture.

~~50.~~ Since the paralegal is or was the client's advisor, the paralegal may have a conflict of interest. The paralegal may unknowingly influence the client to agree to an arrangement that may be unfair or unreasonable to the client. ~~This danger is present when the client wants to invest with the paralegal.~~

Borrowing From Clients
Rule Reference: Rule 3.06(5)

51. A paralegal must not borrow from clients except in accordance with Rule 3.06(~~5~~4).

Guaranteeing Client Debts
Rule Reference: Rule 3.06~~(6) – (7)~~ (5) – (6)

52. A paralegal must not guarantee client debts except in accordance with Rule 3.06(5) and (6).

PERSONAL INTERESTS
Conflicts of Interest Arising From Personal Relationships
Rule Reference: Rule 3.04(1)

53. The *Rules* do not prohibit a paralegal from providing legal services to friends or family members, but they do require the paralegal to avoid existing or potential conflicts of interest.

54. A conflict of interest may arise when a paralegal provides legal services to a friend or family member, or when the client and the paralegal have a sexual or intimate personal relationship. In these circumstances, the paralegal's personal feelings for the client may impede the paralegal's ability to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the paralegal has a sexual or intimate personal relationship, a paralegal should consider the following factors:

- The vulnerability of the client, both emotional and economic;
- The fact that the paralegal and client relationship may create a power imbalance in favour of the paralegal or, in some circumstances, in favour of the client;
- Whether the sexual or intimate personal relationship may jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the personal relationship may obscure whether certain information was acquired by the paralegal in the course of the paralegal and client relationship;
- Whether such a relationship may require the paralegal to act as a witness in the proceedings;
- Whether such a relationship may interfere with the paralegal's fiduciary obligations to the client, including his or her ability to exercise independent professional judgment and his or her ability to fulfill obligations owed ~~as an officer of the court and~~ to the administration of justice.

55. Generally speaking, there is no conflict of interest if another paralegal or lawyer at the firm who does not have a sexual or intimate personal relationship with the client, handles the client's matter.

Conflicts of Interest Arising From a Paralegal's Outside Interests
Rule Reference: Rule ~~3.04(1)~~ 1.02 definition of "conflict of interest"
Rule 2.01(4) & (5)

56. A conflict of interest may arise from the paralegal's outside interests. Outside interests covers the widest possible range of activities and includes those that may overlap with the business of providing legal services, as well as activities that have no connection to the law or working as a paralegal. If a paralegal has other businesses or interests separate from his or her paralegal firm, those interests may influence the way the paralegal serves clients. Whatever the outside interest, a paralegal must guard against allowing those outside interests to interfere or conflict with his or her duties to clients. (Also refer to Guideline 2: Outside Interests).

57. If a paralegal is in public office while still providing legal services to clients, the paralegal must not allow his or her duties as a public official to conflict with his or her duties as a paralegal. If there is a possibility of a conflict of interest, the paralegal should avoid it either by removing himself or herself from the discussion and voting in the public capacity or by withdrawing from representation of the client.

MULTI-DISCIPLINE PRACTICE
Conflicts of Interest Arising From Multi-discipline Practice
Rule Reference: 3.04(~~15~~)(14)
By-Law 7

58. A paralegal should be alert to conflicts of interest arising from a multi-discipline practice, as he or she is subject to the requirements of Rule 3.04(~~15~~)(14).

AFFILIATIONS

Conflicts of Interest Arising From Paralegals and Affiliated Entities

Rule Reference: **Rule 1.02 definition of "conflict of interest"**
Rule 3.04~~(1), (15),~~ (16) & (17) ~~& (18)~~
By-Law 7

59. A conflict of interest may arise from a paralegal's, or his or her associate's, interest in an affiliated firm of non-licensees where that interest conflicts with the paralegal's duties to a client. Rule 3.04(~~16~~15) and (~~17~~16) impose disclosure and consent requirements on a paralegal in an affiliation.

60. Conflicts of interest arising out of a proposed retainer by a client should be addressed as if the paralegal's practice and the practice of the affiliated entity were one where the paralegal accepts a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity.

61. The affiliation is subject to the same conflict of interest rules as apply to paralegals.

GUIDELINE 10:
DEALING WITH CLIENT PROPERTY

General
Rule Reference: Rule 3.07
By-Law 9

1. The term ***client property*** covers a wide range of items such as money or other valuables, physical items and information. For proper receipt, handling and disbursement of monies received from or on behalf of a client, refer to By-Law 9 and Guideline 15: Trust Accounts.

The Valuable Property Record
Rule Reference: By-Law 9, section 18.9

2. The valuable property record documents the paralegal's receipt, storage and delivery of client property. Client property may include, for example:

- stocks, bonds or other securities in bearer form,
- jewelry, paintings, furs, collector's items or any saleable valuables, and
- any property that a paralegal can convert to cash on his or her own authority.

3. The valuable property record should not include items that cannot be sold or negotiated by the paralegal, for example, wills, securities registered in the client's name, corporate records or seals. A paralegal should maintain a list of these items, but that list should be separate from the valuable property record.

The Client File
Rule Reference: Rule 3.07
Rule 3.03(3)

4. The duty to preserve client property also applies to the documents that a client may give to the paralegal at the beginning of the paralegal-client relationship and documents that are created or collected by the paralegal for the client's benefit during the relationship.

5. The courts have developed law on the issue of the client file as between lawyers and clients. This jurisprudence may be applied to define the paralegal's client file in future. Generally, documents provided to a lawyer at the start of the retainer and those created during the retainer as part of the services provided, would belong to the client. These include

- originals of all documents prepared for the client,
- all copies of documents for which copies the client has paid,
- a copy of letters from a lawyer to third parties or from a lawyer to third parties,
- originals of letters from a lawyer to the client (presumably these would have already been sent to the client in the course of the retainer),

- copies of case law,
- briefs,
- memoranda of law, where the client paid for preparation of the memoranda,
- notes or memoranda of meetings with opposing parties or their representatives, court or tribunal conferences, interviews of witnesses, etc.,
- trial preparation documents, trial briefs, document briefs, trial books,
- copies of vouchers and receipts for disbursements a lawyer made on the client's behalf,
- experts' reports,
- photographs, and
- electronic media such as computer discs.

6. Documents belonging to a lawyer (for example, notes or memoranda of meetings or telephone calls with the client) would not need to be provided to the client.

7. A paralegal should consider retaining copies of client documents, at his or her own cost, to defend against complaints or claims that may be made against the paralegal in future.

GUIDELINE 11:
WITHDRAWAL FROM REPRESENTATION

General
Rule Reference: Rule 3.08

1. A client may end the paralegal-client relationship at any time and for any reason. A paralegal is subject to certain restrictions in ending the paralegal-client relationship. The Rule requires reasonable notice; an essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts.

2. Whether the paralegal has good cause for withdrawal will depend on many factors, including

   - the nature and stage of the matter,
   - the relationship with the client,
   - the paralegal's expertise and experience, and
   - any harm or prejudice to the client that may result from the withdrawal.

3. Rule 3.08 specifies a paralegal's obligations when withdrawing legal services. It sets out situations in which the paralegal

   - may choose to withdraw (***optional withdrawal***),
   - must withdraw (***mandatory withdrawal***), and
   - must comply with special rules (***withdrawal from quasi-criminal and criminal cases***).

4. To avoid misunderstandings, it will be helpful for the paralegal to explain to the client, at the beginning of the relationship

   - that all documents to which the client is entitled ~~be provided~~ will be returned to the client when their relationship ends or the matter concludes, and
   - which documents in the file will belong to the paralegal, so that they will be kept by the paralegal when their relationship ends or the matter is finished.

5. To ensure that the client understands these details, the paralegal should consider including them in his or her engagement letter or retainer agreement.

6. Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the paralegal's obligations. The tribunal, opposing parties and others directly affected should also be notified of the withdrawal.

7. When the paralegal withdraws, he or she is subject to restrictions relating to the disclosure of client information. This would restrict the paralegal from revealing the reason for withdrawing to a ***successor*** (a paralegal or lawyer who accepts the client's

matter after the original paralegal has withdrawn). Refer to Guideline 8: Confidentiality for further information on this subject.

8. Cooperation with the successor licensee will normally include providing any memoranda of fact or law that have been prepared by the paralegal in connection with the matter, but confidential information not clearly related to the matter should not be disclosed without the written consent of the client.

Optional Withdrawal
Rule Reference: Rule 3.08(2), (3), (4), (6), (7), (8) & (9)

9. During a retainer, a situation may arise that will allow the paralegal to withdraw from representing the client.

10. A ***serious loss of confidence*** means that the paralegal and the client can no longer trust and rely on each other, making it impossible to have a normal paralegal-client relationship. An example would be where the client deceives or lies to the paralegal. Another example would be where the client refuses unreasonably to accept and act on the paralegal's advice on an important point.

11. If the retainer relates to a criminal or quasi-criminal matter, the paralegal must ensure that he or she complies with the special rules relating to withdrawal in those types of cases (refer to section entitled "Withdrawal From Quasi-Criminal and Criminal Cases" at ~~(iv)).~~ Rule 3.08(7).

Mandatory Withdrawal
Rule Reference: Rule 3.08(5), (7), (8) & (9)

12. In certain situations, a paralegal is required to withdraw from representing a client, even if the paralegal or the client wishes to continue with the retainer.

Withdrawal From Criminal or Quasi-Criminal Matters
Rule Reference: Rule 3.08(7), (8) & (9)

13. Whether a paralegal may withdraw in these types of matters~~,~~ has to do with the amount of time between ***the withdrawal*** (the date and time the paralegal intends to stop representing the client) and ***the trial*** (the date and time the client's trial begins).

14. Generally, the amount of time between the withdrawal and trial must be sufficient to allow the client to hire another representative and the new representative to prepare properly for trial.

15. While the *Rules* do not require the paralegal to make an application ~~to the court~~ to be removed as the client's representative, most tribunal rules ~~rules of court~~ do. Therefore, the paralegal should consult the rules of the tribunal ~~court~~ to determine what process is to

be followed. The paralegal must not tell the tribunal ~~court~~ or the prosecutor the reasons for withdrawal, unless disclosure is justified in accordance with the *Rules*.

16. The paralegal may seek to adjourn the trial to give the client or the new representative more time to prepare, as long as the adjournment does not prejudice the client.

Manner of Withdrawal
Rule Reference: Rules 3.08 (10), ~~and~~ (11), (12) & (13)

17. Where a paralegal withdraws from representation of a client, the required manner of withdrawal is set out in subrules 3.08(10), ~~and~~ (11), (12) and (13).

Duties of the Successor Paralegal
Rule Reference: Rule 3.08 (~~12~~) (14)

18. If a client who was represented by another paralegal or a lawyer contacts a paralegal, that paralegal has obligations as the ***successor paralegal***.

Written Confirmation

19. If a paralegal's services are terminated while the client's matter is ongoing and the client requests that the matter be transferred to a new paralegal or lawyer, the paralegal should confirm, in writing, the termination of the retainer. The paralegal should also obtain a ***direction***, signed by the client, for release of the client's file to a successor paralegal or lawyer. A ***direction*** is a written document instructing the paralegal to release the file to the successor paralegal or lawyer. If the file will be collected by the client personally, the paralegal should obtain a written acknowledgement signed by the client, confirming that the client has received the file.

GUIDELINE 12:
ADVOCACY

Definitions
Rule Reference: Rule 4
Rule 1.02 definition of "tribunal"

1. An ***advocate*** is someone who speaks and acts on behalf of others. Rule 4 outlines a paralegal's duties when appearing as an advocate before a tribunal. Rule 4 applies to all appearances and all proceedings before all tribunals. A ***tribunal*** can be either an administrative board or a court of law. An ***adjudicator*** is any person who hears or considers any type of proceeding before a tribunal and renders a decision with respect to that proceeding.

General
Rule Reference: Rule 4

2. The paralegal has a duty to represent his or her client diligently and fearlessly. Generally, the paralegal has no obligation to assist an opposing party, or to advance matters harmful to the client's case. However, these general principles do not mean that, when acting as advocate for a client before a tribunal, the paralegal can behave as he or she likes or, in some cases, as his or her client may instruct. Rule 4 describes the professional obligations that a paralegal owes to opposing parties, other paralegals and lawyers, the tribunal and the administration of justice. These obligations are paramount, and must be met by the paralegal in each and every tribunal proceeding in which the paralegal acts as advocate for a client.

Candour, Fairness, Courtesy and Respect
Rule Reference: Rule 4.01(1), 4.01(4)(d)
Rule 4.01(5)(o)
Rule 7.01(3)

3. A paralegal should not engage in rude and disruptive behaviour before a tribunal, or uncivil correspondence, language or behaviour towards opposing parties or their advocates.

Malicious Proceedings
Rule Reference: Rule 4.01(5)(a)

4. A paralegal should not help a client to bring proceedings that have no merit. Claims that have no merit waste the time of the tribunal and its officers, and do not further the cause of justice.

Misleading the Tribunal
Rule Reference: Rule 4.01(5)(c), (d), (f) ~~& (h),~~ (i), (j), (k)

5. A paralegal must ensure that neither the paralegal nor his or her client(s) misleads the tribunal. For a tribunal to decide a matter effectively and appropriately, the tribunal must have access to everything that is relevant to the issues to be decided.

Improperly Influencing the Tribunal
Rule Reference: Rule 4.01(5)(e) & ~~(g)~~ (h)

6. For the public to have respect for the administration of justice, tribunals must be fair, objective, independent and neutral. There should be no personal connection between an adjudicator and any of the parties to a proceeding or their advocates.

7. The only appropriate way to influence the tribunal's decision is through open persuasion as an advocate. This is done by making submissions based on legal principles and offering appropriate evidence before the tribunal in the presence of, or on notice to, all parties to the proceeding, or as otherwise permitted or required by the tribunal's rules of procedure. A paralegal should not communicate directly with the adjudicator in the absence of the other parties, unless permitted to do so by the tribunal's rules of procedure.

Dishonest Conduct
Rule Reference: Rule 4.01(5)(b), (c) & (f)

8. Acting with integrity before a tribunal means being honest and acting with high ethical principles.

Admissions by the Client
Rule Reference: Rule 4.01(5)(b), (c) & (f)

9. When defending an accused person, a paralegal's duty is to protect the client from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, a paralegal may properly rely on any evidence or defences, including "technicalities", as long as they are not known to be false or fraudulent.

10. However, admissions made by a client to a paralegal may impose strict limitations on the paralegal's conduct of the client's defence. The client should be made aware of this by the paralegal. Where the client has admitted to the paralegal any or all of the elements of the offence with which the client is charged, a paralegal must not do or say anything before the tribunal, including calling any evidence, that would contradict the facts admitted by the client to the paralegal. This would be misleading the court.

11. Where the client has admitted to the paralegal all the elements of the offence, and the paralegal is convinced that the admissions are true and voluntary, the paralegal may

properly take objection to the jurisdiction of the tribunal, or to the form, admissibility or sufficiency of the evidence. The paralegal could not suggest that someone else committed the offence, try to establish an alibi or call any evidence which, by reason of the admissions, the paralegal believes to be false. Admission by the client to the paralegal of all of the elements of the offence with which the paralegal is charged also limits the extent to which the paralegal may attack the evidence for the prosecution. The paralegal may test the evidence given by each witness for the prosecution and may argue that the evidence, as a whole, is not enough to prove the client guilty. The paralegal should go no further than that.

Witnesses
Rule Reference: Rule 4.01(5) (~~i), (j), (k) & (m)~~ (g), (i), (j), (l), (m) & (n)
Rule 4.02
Rule 4.03
Rule 7.01(6)

12. As an advocate, a paralegal may contact all possible witnesses for both sides of a matter, (subject to Rule 7.02 regarding communications with a represented person, corporation, or organization,) but the paralegal must be fair and honest when dealing with them. This includes the paralegal speaking to the opposing party or co-accused. The paralegal must make it clear to the witness who is the paralegal's client(s) and that that the paralegal is acting only in the interests of his or her client(s). As part of this disclosure, the paralegal should give the witness his or her name, tell the witness that he or she is a paralegal, the name of the client(s) he or she represents in the matter, and his or her status in the proceeding. A paralegal should make an extra effort to be clear when the witness does not have legal representation. Note that, although a paralegal may ask to speak to a potential witness, the witness does not have to speak to the paralegal.

13. During a hearing, a paralegal's ability to speak with a witness giving testimony is limited. This ensures that the paralegal does not influence the evidence the witness will give. A comment made by the paralegal to the paralegal's own witness during court recess, for example, may result in a breach of the *Rules*. The witness may return to the witness box and, as a result of the communication with the paralegal, offer evidence that is slanted to benefit the paralegal's client. Such evidence is no longer neutral and could mislead the tribunal.

Disclosure of Documents
Rule Reference: Rule 4.01(6)

14. The rules of procedure of the tribunal may require parties to produce documents and information to the tribunal or to the other parties in the matter. Timely, complete and accurate disclosure helps settlement efforts and makes the hearing process more effective and fair.

Agreement on Guilty Pleas
Rule Reference: Rule 4.01(8) & (9)

15. As an advocate for a person accused in a criminal or quasi-criminal matter, the paralegal should take steps reasonable in the circumstances to satisfy himself or herself that the client's instructions to enter into the agreement on a guilty plea is informed and voluntary. The paralegal should ensure the client's instructions to enter into an agreement on a guilty plea are in writing.

The Paralegal as Witness
Rule Reference: Rule 4.04

16. As an advocate, the paralegal's role is to further the client's case within the limits of the law. The role of a witness is to give evidence of facts that may or may not assist in furthering the case of any of the parties to a proceeding. Because these roles are different, a person may not be able to carry out the functions of both advocate and witness at the same time.

17. Unless permitted by the Tribunal, when acting as an advocate for his or her client before a tribunal, the paralegal should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge, or otherwise appear to be giving unsworn testimony. This is improper and may put the paralegal's own credibility in issue.

17.1 Unless permitted by the tribunal, the paralegal who is a necessary witness should testify and entrust the conduct of the case to another licensee. A paralegal who has appeared as a witness on a matter should not act as an advocate or legal representative in any appeal of that matter.

17.2 There are no restrictions on the advocate's right to cross-examine another licensee, however, and the paralegal who does appear as a witness should not expect to receive special treatment because of professional status.

Dealing With Unrepresented Persons
Rule Reference: Rule 4.05

18. The paralegal has a special duty when representing a client and an opposing party is not represented by a paralegal or a lawyer.

19. To avoid misunderstandings, it will be helpful for the paralegal to confirm in writing the steps he or she takes to fulfill the requirements of Rule 4.05.

Withdrawal and Disclosure Obligations
Rule Reference: Rule 4.01(7)
Rule 3.08

20. If, after explanation and advice from the paralegal, the client persists in instructing the paralegal to engage in or continue a type of conduct prohibited by Rule 4, the paralegal must withdraw from representing the client in the matter. (See Guideline 11: Withdrawal of Representation).

GUIDELINE 13:
FEES

Introduction
Rule Reference: Rule 5.01 (1)

1. Too often, misunderstandings about fees and disbursements result in disputes over legal bills and complaints from unhappy clients. Since these disputes reflect badly on the paralegal profession and the administration of justice, it is important that a paralegal discuss with his or her client(s) the amount of fees and disbursements that will likely be charged. It will be to the benefit of all concerned if the paralegal ensures that the client has a clear understanding not only of what legal services the paralegal will provide, but how much those services are likely to cost.

Fees and Disbursements

2. Generally, a ***fee*** refers to the paralegal's wage. Clients pay fees for the legal services provided by the paralegal. Fees may be billed in a variety of ways, including:

   - An *hourly rate*, charging for the actual time spent on the client matter,
   - A *block, fixed or flat fee*, charging a fixed amount for performing a particular task,
   - *Fees by stages*, charging for a matter which is broken down into stages, and an estimate is given as to the fee for each stage or step in the matter, or
   - *Contingency fees*, where part or all of the paralegal's fee depends on the successful completion of the matter, and the amount may be expressed as a percentage of the client's recovery in the matter.

3. The paralegal should consider which method best suits the circumstances and the client.

4. A ***disbursement*** refers to any expense that the paralegal pays on behalf of the client for which the paralegal is entitled to be reimbursed by the client. Common disbursements include charges for

   - research, such as Quicklaw charges or research conducted by third party professionals,
   - mileage,
   - postage, photocopying, faxing documents or sending documents by courier,
   - long-distance phone calls,
   - expert reports,
   - transcripts or certified documents, and/or
   - tribunal or court filing fees related to the client matter.

5. A paralegal cannot charge more than the actual cost of the disbursement. A paralegal cannot make a profit from disbursements at the client's expense.

Discussing Fees and Disbursements
Rule Reference: Rule 5.01(1)

6. The following are steps that will assist a paralegal in meeting his or her obligations under Rule 5.01(1).

~~A paralegal should discuss charges for fees and disbursements at the outset of the retainer. To ensure there is no misunderstanding, this information should be provided or confirmed in writing.~~

(a) A paralegal should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined;

(b) A paralegal should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses. The paralegal may revise the initial estimate of fees and disbursements.

(c) A paralegal should openly disclose and discuss with clients all items that will be charged as disbursements and how those amounts will be calculated. If an administrative charge forms part of the amount charged as a disbursement, disclosure of such charge should be made to the client(s) in advance.

~~The following are steps that will assist a paralegal in meeting his or her obligations under Rule 5.01(1). Whenever possible, a paralegal should provide the client with an estimate of the amount of fees the paralegal expects to charge to complete the matter, or to bring the matter to a certain stage. Once disclosure is made, the clients are able to make an informed decision as to whether or not they will accept such an arrangement.~~

7. In discussing fees and disbursements with clients, it is appropriate for a paralegal to

- provide a reasonable estimate of the total cost as opposed to an unreasonable estimate designed to garner the client's business, and
- not manipulate fees and disbursements in a manner as to provide a lower fee estimate.

8. When something happens in the matter that the paralegal or client did not expect, resulting in costs that are higher than the paralegal's original estimate, the paralegal should immediately give the client a revised estimate of cost, and an explanation of why the original estimate has changed. The client can then instruct the paralegal based on the new information. The new understanding should be confirmed in writing.

~~**Fair and Reasonable Fees**~~
~~**Rule Reference: Rule 5.01(2)**~~

~~9. In determining the fee to charge a client, a paralegal is encouraged, in appropriate cases, to provide legal services *pro bono* (for the greater good), i.e. for no fee or for a fee that has been reduced. When a client or prospective client of limited means is unable to obtain legal services, a paralegal should consider reducing or waiving the fees he or she would normally charge.~~

Hidden Fees
Rule Reference: Rule 5.01(3)

10. The relationship between paralegal and client is based on trust. The client must be able to rely on the paralegal's honesty and ability to act in the client's best interests. This means that the paralegal cannot hide from the client any financial dealings in his or her matter.

Payment and Appropriation of Funds
Rule Reference: Rule 5.01(5)
Rule 2.01(1)

11. The *Rules* are not intended to be an exhaustive statement of the considerations that apply to payment of a paralegal's account from trust. The handling of trust money is generally governed by the by-laws of the Law Society.

12. Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

Fee Splitting and Referral Fees
Rule Reference: Rule 5.01(11), (12) & (13)
By-Law 7 (Multi-discipline Practices)

13. ***Fee splitting*** occurs when a paralegal shares or divides his or her fee with another person. Where a client consents, a paralegal and another paralegal or lawyer who are not at the same firm may divide between them the fees for a matter, so long as the fees are split relative to the work done and the responsibility assumed by each paralegal and/or lawyer. Multi-discipline practices are exempt from the prohibition against fee-splitting in certain circumstances.

14. A ***referral fee*** is

- a fee paid by a paralegal to another paralegal or lawyer for referring a client to the paralegal, or
- a fee paid to the paralegal by another paralegal or lawyer for his or her referral of a person to another paralegal or lawyer.

~~15. The *Rules* do not prohibit an arrangement respecting the purchase and sale of a professional business when the consideration payable includes a percentage of revenues from the practice sold.~~

14. The *Rules* do not prohibit a paralegal from:

(a) Making an arrangement respecting the purchase and sale of a professional business when the consideration payable includes a percentage of revenues generated from the business sold;

(b) Entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the provision of legal services;

(c) Paying an employee for services, other than for referring clients, based on the revenue of the paralegal's firm or professional business.

The Statement of Account
Rule Reference: Rule 5.01(4)

16. In addition to detailing fees and disbursements, the ***statement of account*** or bill delivered to the client by the paralegal should detail clearly and separately the amount the paralegal has charged for Harmonized Sales Tax (HST). The HST applies to fees and some disbursements, as outlined by the Canada Revenue Agency (CRA) guidelines. The paralegal should review and sign the statement of account before it is sent to the client.

17. Should a dispute arise about the statement of account, the paralegal should discuss the matter openly and calmly with the client in an effort to resolve the matter. Civility and professionalism must govern all discussions, including discussions relating to fee disputes with clients.

Contingency Fees
Rule Reference: Rule 5.01(6) – (8)

18. A ***contingency fee*** is a fee that is paid when and if a particular result is achieved in a client's matter.

19. Rule 5.01(7) outlines the factors to be considered in determining the appropriate percentage (or other basis) of the contingency fee agreement. Regardless of which factors are used to determine the fee and the other terms of the contingency fee agreement, the ultimate fee must still be fair and reasonable.

20. The contingency fee agreement should be clear about how the fee will be calculated.

21. It may be helpful for a paralegal to refer to *Regulation 195/04* to the *Solicitor's Act* (which applies to contingency fees for lawyers) for guidance as to what terms should be included in a paralegal contingency fee agreement.

GUIDELINE 14:
RETAINERS

General

1. In the context of providing legal services, the word ***retainer*** may mean any or all of the following:

    - the client's act of hiring the paralegal to provide legal services (i.e., a ***retainer***),
    - the contract that outlines the legal services the paralegal will provide to the client and the fees and disbursements and HST to be paid by the client (i.e., a ***retainer agreement***), or
    - monies paid by the client to the paralegal in advance to secure his or her services in the near future and against which future fees will be charged (i.e., a ***money retainer***).

The Retainer Agreement
Rule Reference: Rule 5.01(1)

2. Once the paralegal has been hired by a client for a particular matter, it is advisable that the paralegal discuss with the client two essential terms of the paralegal's retainer by the client: the scope of the legal services to be provided and the anticipated cost of those services. The paralegal should ensure that the client clearly understands what legal services the paralegal is undertaking to provide. It is helpful for both the paralegal and client to confirm this understanding in writing by

    - a written retainer agreement signed by the client,
    - an engagement letter from the paralegal, or
    - a confirming memo to the client (sent by mail, e-mail or fax).

Rule Reference: Rule 3.02<u>(15)</u>

2.1 A written retainer agreement is particularly helpful in the circumstances of a limited scope retainer.

3. This written confirmation should set out the scope of legal services to be provided and describe how fees, disbursements and HST will be charged (see Guideline 13: Fees).

The Money Retainer
Rule Reference: By-Law 9, part IV
Rule 5.01

4. If practical, the paralegal should obtain a money retainer from the client at the beginning of the relationship. When determining the amount of the money retainer, the paralegal should consider the circumstances of each case, the circumstances of the client and the anticipated fees, disbursements and HST. Many of the factors are the same as those used in deciding if a fee is fair and reasonable.

5. The client should be advised at the outset if and when further retainers will be required. There may also be circumstances where a money retainer is not appropriate, for example, when a client and the paralegal have entered into a contingency fee agreement.

6. A money retainer must be deposited into a paralegal's trust account. After the paralegal has delivered to the client a statement of account or bill, the paralegal pays the amount of his or her statement of account from the money retainer held in trust. Disbursements and expenses paid on behalf of the client to others may be paid directly from the money retainer in the paralegal's trust account. To avoid disagreements in circumstances where a disbursement will be particularly substantial, a paralegal may want to obtain the client's approval prior to the expense being incurred.

GUIDELINE 15:
TRUST ACCOUNTS

General
Rule Reference: By-Law 9

1. A paralegal has special obligations when handling client funds. When a paralegal receives money that belongs to a client or is to be held on behalf of a client, the funds must be deposited to a ***trust account***. Because client funds must be held in trust by the paralegal, they are also known as ***trust funds***.

2. By-Law 9 outlines a paralegal's responsibilities regarding financial transactions and record-keeping, including the operation of a trust account.

Authorization to Withdraw From Trust
Rule Reference: By-Law 9

3. A paralegal must be in control of his or her trust account. Although a person who is not a licensed paralegal or lawyer may be permitted to disburse trust funds alone in exceptional circumstances, the Law Society has found appropriate exceptional circumstances to be very rare.

4. If there is only one paralegal with signing authority on the trust account(s) it would be prudent to make arrangements for another paralegal or a lawyer to have signing authority on the trust account(s) in case of an unexpected emergency (i.e. illness or accident) or planned absence (i.e. vacation). The paralegal may arrange this through his or her financial institution through a power of attorney. The chosen paralegal or lawyer must be insured and entitled to provide legal services or to practise law.

5. To ensure that no unauthorized withdrawals from trust are being made, the paralegal should limit access to blank trust account cheques and electronic banking software. A paralegal should never sign blank trust cheques. The paralegal should use pre-numbered trust cheques and keep them locked up when not in use.

GUIDELINE 16:
DUTY TO THE ADMINISTRATION OF JUSTICE

General
Rule Reference: Rule 6.01~~(1)~~
~~Rule 7.01(4)~~

1. An important part of a paralegal's duty to act with integrity is his or her obligation to the administration of justice detailed in Rule 6. The obligation includes a paralegal's duty to assist in maintaining the security of court facilities, to refrain from inappropriate public statements, and the obligation to prevent unauthorized practice.

Security of Court Facilities
Rule Reference: Rule 6.01(3)
Rule 3.03

2. An aspect of supporting the justice system is ensuring that its facilities remain safe. Where appropriate, a paralegal in the situation covered by Rule 6.01(3) should consider requesting additional security at the facility and notifying other paralegals or lawyers who may be affected. In considering what, if any, action to take with respect to this obligation, the paralegal must consider his or her obligations under Rule 3.03.

Public Appearances and Statements
Rule Reference: Rule 6.01(1), (2), (4) & (4.1)
Rule 3.03, 3.04
Rule 4.01(1)
Rule 7.01(4)

3. When making statements to the media with, or on behalf of, a client, a paralegal must be mindful of his or her obligations to act in the client's best interests and within the scope of his or her instructions from the client. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before a case has concluded.

Provision of Legal Services without a Licence / Practice of Law without a Licence
Rule Reference: Rule 6.01(5) & (6)

4. The obligations found in subrules 6.01(5) & (6) stem from a paralegal's obligation to the administration of justice and from the regulatory scheme for paralegals and lawyers set out in the *Act* and discussed below.

5. Under the *Act*, anyone who provides legal services or practices law must be licensed by the Law Society, unless they are exempt from this requirement, or deemed not to be providing legal services or practicing law. A person who is not a lawyer or a licensed paralegal is subject neither to a professional code of conduct nor the Law Society's

jurisdiction, which exist to protect the public. Only clients of regulated service providers have important protections, such as the following:

- adherence to a mandatory code of professional conduct,
- maintenance and operation of a trust account in accordance with strict mandatory guidelines,
- mandatory professional liability insurance coverage, and
- the Law Society's Compensation Funds.

GUIDELINE 17:
DUTY TO PARALEGALS, LAWYERS AND OTHERS

General
Rule Reference: Rule 2.01(3)
Rule 7.01

1. Discourteous and uncivil behaviour between paralegals or between a paralegal and a lawyer will lessen the public's respect for the administration of justice and may harm the clients' interests. Any ill feeling that may exist between parties, particularly during adversarial proceedings, should never be allowed to influence paralegals or lawyers in their conduct and demeanour toward each other or the parties. Hostility or conflict between representatives may impair their ability to focus on their respective clients' interests and to have matters resolved without undue delay or cost.

Prohibited Conduct
Rule Reference: Rule 7.01

2. The presence of personal animosity between paralegals or between a paralegal and a lawyer involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. To that end, Rule 7.01 outlines various types of conduct that are specifically prohibited.

3. One of the prohibitions in Rule 7.01(1) refers to sharp practice. Sharp practice occurs when a paralegal obtains, or tries to obtain, an advantage for the paralegal or client(s), by using dishonourable means. This would include, for example, lying to another paralegal or a lawyer, trying to trick another paralegal or a lawyer into doing something or making an oral promise to another paralegal or lawyer with the intention of reneging on the promise later. As another example, if an opposing paralegal were under a mistaken belief about the date of an upcoming trial, a paralegal would be obligated to tell the opposing representative about the error, rather than ignoring the matter in the hope the opposing representative would not appear at the trial.

Limited Scope Retainer
Rule Reference: Rule 7.02(2)

3.1 Where notice as described in Rule 7.02(2) ~~subrule (6.1)~~ has been provided to a paralegal, the paralegal is required to communicate with the legal practitioner who is representing the person under a limited scope retainer, but only to the extent of the matter(s) within the limited scope retainer as identified by the legal practitioner. The paralegal may communicate with the person on matters outside the limited scope retainer.

GUIDELINE 18:
SUPERVISION OF STAFF

General
Rule Reference: By-Law 7.1
Rule 8.01(1), (3), (4) & (5)
By-Law 7 (Multi-discipline practices)

1. A paralegal may, in appropriate circumstances, provide services with the assistance of persons of whose competence the paralegal is satisfied. Proper use of support staff allows the paralegal to make efficient use of the time he or she has for providing legal services, and may result in savings to the client. Under By-Law 7.1, some tasks may be delegated to persons who are not licensed and other tasks may not. Though certain tasks may be delegated, the paralegal remains responsible for all services rendered and all communications by and prepared by his or her employees.

2. The extent of supervision required will depend on the task, including the degree of standardization and repetitiveness of the task and the experience of the employee. Extra supervisory care may be needed if there is something different or unusual in the task. The burden rests on the paralegal to educate the employee concerning the tasks that may be assigned and then to supervise the manner in which these tasks are completed.

3. A paralegal should ensure that employees who are not licensed clearly identify themselves as such when communicating with clients, prospective clients, courts or tribunals, or the public. This includes both written and verbal communications.

4. A paralegal in a multi-discipline practice is responsible the actions of his or her non-licensee partners and associates as set out in Rule 8.01(5).

Hiring & Training Staff
Rule Reference: Rule 8.01(1)
Rule 3.01(4)(c)(h)

5. In order to fulfill his or her responsibilities to clients under the *Rules* and By-Laws, a paralegal should take care to properly hire and train staff. A paralegal should obtain information about a potential employee to inform himself or herself about the employee's competence and trustworthiness. If the position involves handling money, the paralegal may ask for the applicant's consent to check his or her criminal record and credit reports. A paralegal must comply with privacy legislation and should refer to the *Rules* to review questions that can and cannot be asked of an applicant, as outlined in the *Human Rights Code*. A paralegal should confirm the information contained in a candidate's resume, consult references and verify previous employment experiences before offering employment to a candidate.

6. Proper hiring and training of persons who are not licensed will assist the paralegal in managing his or her practice effectively, as required by Rule 3.01(4)(c)(h). Since the

paralegal is responsible for the professional business, it will assist the paralegal in fulfilling this responsibility if the paralegal educates staff regarding

- the types of tasks which will and will not be delegated,
- the need to act with courtesy and professionalism,
- the definition of discrimination and harassment, and the prohibition against any conduct that amounts to discrimination and harassment,
- the duty to maintain client confidentiality and methods used to protect, confidential client information (e.g. avoiding gossip inside and outside of the office),
- the definition of a conflict of interest, the duty to avoid conflicts and how to use a conflict checking system,
- proper handling of client property, including money, and
- proper record keeping.

GUIDELINE 19:
MAKING LEGAL SERVICES AVAILABLE AND MARKETING OF LEGAL SERVICES

~~**General**~~
~~**Rule References:**~~
~~**Rule 8.02**~~
~~**Rule 8.03**~~

~~1. In presenting and promoting a paralegal practice, a paralegal must comply with the *Rules* regarding the marketing of legal services.~~

Making Legal Services Available

Rule References:
Rule 8.02
Rule 8.03

1. Rule 8.02(1) describes the paralegal's obligation to make legal services available and the manner in which he or she must do so. A paralegal has a general right to decline a particular representation (except when assigned as representative by a tribunal), but it is a right that should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the paralegal should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the paralegal's private opinion about the guilt of the accused. A paralegal declining representation should assist in obtaining the services of a lawyer or another licensed paralegal qualified in the particular field and able to act.

2. A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a paralegal. A paralegal is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the paralegal for this purpose, and to offer assistance to a person with whom the paralegal has a close family or professional relationship. Rules 8.02 and 8.03 prohibit the paralegal from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

Marketing of Legal Services

Rule References:
Rule 8.02
Rule 8.03

3. In presenting and promoting a paralegal practice, a paralegal must comply with the *Rules* regarding the marketing of legal services.

4. Rules 8.02 and 8.03 impose certain restrictions and obligations on a paralegal who wishes to market and/or advertise his or her legal services. The *Rules* help to ensure that a paralegal does not mislead clients or the public while still permitting the paralegal to differentiate himself or herself and his or her services from those of lawyers or other paralegals. A paralegal should ensure that his or her marketing and advertising does not suggest that the paralegal is a lawyer and should take steps to correct any misapprehension on the part of a client or prospective client in that respect.

5. Examples of marketing practices that may contravene Rule 8.03(1) include:

- Stating an amount of money that the paralegal has recovered for a client or refer to the paralegal's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases.
- Suggesting qualitative superiority to lawyers or other paralegals
- Raising expectations unjustifiably
- Suggesting or implying the paralegal is aggressive
- Disparaging or demeaning other persons, groups, organizations or institutions
- Taking advantage of a vulnerable person or group
- Using testimonials or endorsements which contain emotional appeals.

GUIDELINE 20:
INSURANCE

General
Rule Reference: Rule 8.04(1) – (3)

1. As soon as a paralegal discovers an error or omission that is or may reasonably be expected to involve liability to his or her client, the paralegal should take the following steps, in addition to those required by Rule 8.04:

    - immediately arrange an interview with the client and advise the client that an error or omission may have occurred that may form the basis of a claim against the paralegal by the client;
    - advise the client to obtain an opinion from an independent paralegal or lawyer and that, in the circumstances, the paralegal may not be able to continue acting for the client; and
    - subject to the rules about confidentiality, inform the insurer of the facts of the situation.

2. While the introduction of compulsory insurance imposes additional obligations upon a paralegal, those obligations must not impair the relationship between the paralegal and client or the duties owed to the client.

GUIDELINE 21:
DUTY TO THE LAW SOCIETY

General
Rule Reference: Rule 9

1. All paralegals and lawyers owe a duty to their governing body, the Law Society, so that it can effectively and efficiently carry out its mandate to govern the legal professions in the public interest. Rule 9 details various obligations owed to the Law Society, many of which focus on measures to protect the public from inappropriate paralegal or lawyer conduct.

Duty to Respond Promptly and to Co-operate With an Investigation
Rule Reference: Rule 9.01(1)

2. In addition to the obligation to reply promptly and completely to communication from the Law Society which is set out in Rule 9.01(1), a paralegal also has a duty to cooperate with a person conducting an investigation under the *Act*. A paralegal who fails to respond promptly and completely to a Law Society inquiry about a complaint, or who fails to cooperate with a Law Society investigation, may be disciplined on that issue, regardless of the merits or outcome of the original complaint.

Duty to Report Misconduct
Rule Reference: Rule 9.01(2) – (8)

3. Unless a paralegal or lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients and others may ensue. As such, a paralegal must assist the Law Society in upholding the integrity of the profession by reporting professional misconduct of the type outlined in Rule 9.01(2).

4. Evidence of seemingly isolated events, or "less serious" breaches of the *Rules*, may, under 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 proper therefore (unless it is confidential or otherwise unlawful) for a paralegal to report to the Law Society any instance involving a breach of the *Rules* or the *Rules of Professional Conduct*.

5. The obligation to report misconduct applies to the paralegal's own conduct, as well as that of other paralegals and lawyers.

6. The onus is on the paralegal to take the necessary steps to carry out his or her obligations to the Law Society and to protect both himself or herself and his or her client. If a paralegal is unsure as to whether to report another paralegal's or lawyer's conduct, the paralegal should consider seeking the advice of the Law Society directly (through the Practice Management Helpline at 416-947-3315 or 1-800-668-7380 extension 3315) or indirectly (through another paralegal or lawyer).

Duty to Report Certain Offences ~~Criminal Charges or Convictions~~
Rule Reference: By-Law 8, subsection 3
Rule 9.01(9)

7. All paralegals have a duty to report themselves to the Law Society if certain charges (identified in By-Law 8, subsection 3) have been laid against them.

8. The By-Law only requires the paralegal to self-report the above-mentioned criminal charges or convictions. A paralegal is only required to report another paralegal or lawyer who is involved in criminal activity in certain circumstances.

GUIDELINE 22:
THE LAW SOCIETY AND ITS DISCIPLINARY AUTHORITY

General
Rule Reference: Rule 9.01 (10) – (13)
~~Rule 1.03(f)~~

1. A paralegal may be disciplined by the Law Society for either professional misconduct or for conduct unbecoming a paralegal.

2. Examples of conduct unbecoming a paralegal include a paralegal's conviction of a criminal offence or a finding or sanction imposed on the paralegal by a tribunal or licensing body.

3. Dishonourable or questionable conduct on the part of a paralegal in either private life or while providing legal services will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the paralegal, the Law Society may be justified in taking disciplinary action.

4. Generally, however, the Law Society will not be concerned with the purely private or extra-professional activities of a paralegal that do not bring into question the paralegal's professional integrity.

5. The *Rules* cannot address every situation. As such, a paralegal is required to follow both the "letter" and the "spirit" of the *Rules*. The "letter" of the rule is the meaning of the rule as it is written. The "spirit" of the rule is the sense of the rule or the meaning or importance of the rule, even though it may not be explicit or stated in the written version of the *Rule*.

GUIDELINE 23:
FINANCIAL OBLIGATIONS

General
Rule Reference: 8.01(2)

1. Rule 8.01 establishes a professional duty (apart from any legal liability) regarding financial obligations incurred in the course of providing legal services on behalf of a client.

2. The business of providing legal services often requires that a paralegal incur financial obligations to others on behalf of clients. Such obligations include charges for medical reports, disbursements payable to government registries, fees charged by expert witnesses, sheriffs, special examiners, registrars, court reporters and public officials and the accounts of agents retained in other jurisdictions.

3. To assist in avoiding disputes about payment of accounts, where a paralegal retains a person on behalf of a client, the paralegal should clarify the terms of the retainer in writing. This includes specifying the fees, the nature of the services to be provided, and the person responsible for payment. If the paralegal is not responsible for the payment of the fees, the paralegal should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

4. If there is a change of representative, the paralegal who originally retained the person to whom the financial obligation will be owed should advise him or her about the change and provide the name, address, telephone number, fax number and e-mail address of the new paralegal or lawyer.

TAB 5.3.2.

PROGRESS REPORT ON PARALEGAL REGULATION

16. This will be the last report to Convocation from the current Paralegal Standing Committee. Accordingly, the Committee is providing a progress report on recent work on a number of areas.

17. The Committee's work has been informed by the extensive research and information-gathering conducted during the Law Society's Five Year Review of Paralegal Regulation mandated by the Law Society Act, leading to the report delivered to the Attorney General in June 2012. The independent survey conducted at that time showed that paralegal regulation had already been perceived as successful, a result that was echoed in the external report commissioned by the Attorney General.

18. Of particular note recently is the successful passage of Bill 111 in December 2013. The external survey for the Five Year review indicated that while many aspects of progress to date received favourable comment from paralegal licensees, an exception was the original governance structure. With passage of Bill 111, the replacement of the previous complex voting structure with the straightforward election of five paralegal benchers will be a significant improvement.

19. Bill 111 also amended section 1 of the *Solicitors' Act*, an outdated provision that failed to accommodate paralegal licensees. Earlier, under the *Commissioners for Taking Affidavits Act,* all licensed paralegals became commissioners as of right, effective July 2013. Review of other statutes to accommodate paralegals continues, in collaboration with the government.

20. The Committee has continued work on the reviewing of the licensing exemptions in By-law 4, in keeping with Convocation's policy that exemptions should be reduced where possible. To facilitate this policy, the Law Society developed and conducted a

successful "Integration Process," providing a facilitated route to licensing for previously exempted persons. Over 420 persons applied through this process, of whom 207 have been licensed so far. There has been progress towards recognition of the advantages of licensing, even in settings where this is not mandatory.

21. The Committee worked on a number of important initiatives recognizing the status of paralegals, including,
    a. the introduction of the Paralegal Welcome Reception, now held twice a year, starting in November 2011. This has been well received;
    b. the integration of paralegals into the re-named *Law Society Referral Service*. This is an important access to justice resource for the public, and a source of new clients for paralegals;
    c. The creation of the annual Distinguished Paralegal Award, which has been presented twice so far;
    d. Providing all licensees with access to the Law Society Member Assistance Plan, for licensees in difficulty.

22. The Committee has worked closely with the Law Society's communications staff on a variety of communications activities supporting the Law Society's paralegal initiatives and to help to keep paralegal members throughout the province informed. Some examples include:
    a. Representation at the Treasurer's regional outreach dinners;
    b. promotion of the Law Society Referral Service, following the addition of paralegals to the service;
    c. a webcast for candidates in the upcoming election;
    d. the continued publication and electronic distribution of the Paralegal Update, and the sharing of information through the Ontario Paralegal Network and *Paralegal Scope* e-magazine, and
    e. the addition of a Paralegal section in the on-line Gazette.

23. Members of the Paralegal Standing Committee have been active participants in Law Society deliberations concerning matters of importance to all licensees, such as,
    a. the new rules on mandatory Continuing Professional Development;
    b. the introduction of the new Law Society Tribunal structure;
    c. the Treasurer's Access to Justice initiative;
    d. changes to the Paralegal Rules from time to time to improve their effectiveness and usefulness;
    e. the development of rules governing limited scope retainers, and
    f. the consideration of Alternative Business Structures.

24. It is worth noting that this work has been achieved while maintaining stable, reasonable fees and insurance levels for paralegal licensees.

25. The Committee has continued consideration of the directions indicated by the February 2012 Preliminary Legal Needs Report. Two significant developments arising from this work are,
    a. The current project for the strengthening of the licensing process, including a substantive-law licensing examination, as set out in the report approved by Convocation in October 2012; the Committee received a status report on this project at the meeting in January, indicating that it is proceeding as planned. The October 2012 report commented,

        > *The implementation of a substantive examination regime would appear to be the next step in the evolution of the Law Society's regulation of paralegals and of the paralegal profession itself. As the paralegal profession grows and possibly expands into other areas of practice, it is critical that the standards for entry are made as rigorous and defensible as are proportionately appropriate in the regulatory circumstances to ensure that the public interest is protected and that all stakeholders are assured that the quality of new paralegal licensees is maintained.*

    b. The report submitted by the Committee today, recommending the strengthening of the accreditation and audit process for paralegal college programmes; this is in support of the Committee's overall strategic plan to strengthen the paralegal

licensing platform. This will respond to recent trends in the paralegal education sector with more stringent standards and processes for approval.

26. The Committee's work has linked the scope of practice issue to the upgraded competence issue. This accords with the approach developed from the Law Society's five year review, and was supported by the Morris Report to the Attorney General, which included the following recommendation:

> *Recommendation 10: That the Law Society continues to actively pursue opportunities to facilitate greater access to justice through broadening of the scope of permissible paralegal practice, but that such broadening is directly linked to the recommendations above with respect to paralegal education, work experience, and professional conduct.*

27. In this regard, the Committee has considered some of the criteria that may be appropriate to consider in relation to increased scope. These are yet to be determined, but could include additional requirements of,

    a. Specified years of experience in relevant practice areas;
    b. Additional training, supplementing the basic P1 licence requirements;
    c. references, and/or
    d. qualifying examinations specific to the area of law.

28. The Committee's preferred approach would be incremental and methodical in order to avoid undue risk, and to ensure that the areas of scope to be considered are viewed through the prism of competence, in accordance with the Morris Report view that a review of the paralegal scope should be, *"directly linked to the recommendations . . . with respect to paralegal education, work experience, and professional conduct"*.

29. The Committee's work has led to the development of some directions that are planned to be the subject of stakeholder consultations in the coming months.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 6

Report to Convocation
February 27, 2014

Professional Development & Competence Committee

COMMITTEE MEMBERS
Janet Minor (Chair)
Jacqueline Horvat (Vice-Chair)
Barbara Murchie (Vice-Chair)
Alan Silverstein (V-Chair)
Raj Anand
Jack Braithwaite
Robert Burd
Mary Louise Dickson
Adriana Doyle
Ross Earnshaw
Larry Eustace
Howard Goldblatt
Vern Krishna
Michael Lerner
Dow Marmur
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Joseph Sullivan
Gerald Swaye
Robert Wadden
Bradley Wright

Purpose of Report: **Decision**
Information

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

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COMMITTEE PROCESS

1. The Committee met by teleconference on February 18, 2014. Committee members Janet Minor (Chair), Jacqueline Horvat (Vice-Chair), Alan Silverstein (Vice-Chair), Raj Anand, Jack Braithwaite, Mary Louise Dickson, Adriana Doyle, Ross Earnshaw, Vern Krishna, Michael Lerner, Dow Marmur, Nicholas Pustina and Gerry Swaye participated. Staff members Diana Miles and Sophia Sperdakos also participated.

TAB 6.1

DECISION

PATHWAYS PILOT PROJECT – RELATED AMENDMENTS TO BY-LAW 4

Motion

2. That Convocation approve amendments to By-Law 4 in accordance with the bilingual motion set out at **TAB 6.1.1: By-Law 4 Bilingual Motion**.

Background

3. In November 2012 Convocation approved a pilot project consisting of two components - a Law Practice Program ("LPP") and a continued articling requirement. In November 2013 it also approved Lakehead University Faculty of Law's integrated practice curriculum as satisfying the Law Society's experiential training requirement for lawyer licensing.

4. Proposed amendments to By-law 4 have been drafted to implement these Convocation policies. The draft bilingual motion to implement the amendments is set out at **TAB 6.1.1: By-Law 4 Bilingual Motion**. A track changes version of By-Law 4 setting out the amendments is at **TAB 6.1.2: By-Law 4 Amendments track changes**.

TAB 6.1.1

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

BY-LAW 4
[LICENSING]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2014

MOVED BY

SECONDED BY

THAT By-Law 4 [Licensing], made by Convocation on May 1, 2007 and amended by Convocation on May 25, 2007, June 28, 2007, September 20, 2007, January 24, 2008, April 24, 2008, May 22, 2008, June 26, 2008, January 29, 2009, June 25, 2009, June 29, 2010, September 29, 2010, October 28, 2010, April 28, 2011, June 23, 2011, September 22, 2011, November 24, 2011 and October 25, 2012 be further amended as follows:

1. Section 7 of the English version of the By-Law is amended by adding the following definitions:

"integrated law degree" means a bachelor of laws or juris doctor degree the conferral of which requires the successful completion of instruction and training in the practical skills and task competencies that the Society has determined are necessary for a Class L1 licence which instruction and training have been approved by the Society in advance of their delivery;

"law practice program" means a program approved by the Society in advance of its delivery that consists of a course component and a work placement component that provide instruction and training in the practical skills and task competencies that the Society has determined are necessary for a Class L1 licence;

2. Section 7 of the French version of the By-Law is amended by adding the following definitions:

« diplôme intégré en droit » S'entend d'un baccalauréat ou d'un doctorat en droit dont la remise est subordonnée à la réussite d'enseignement et de formation dans les habiletés pratiques et les compétences propres aux tâches considérées par le Barreau comme étant nécessaires à l'obtention d'un permis de catégorie L1 et qui ont été approuvées par le Barreau avant leur prestation.

« programme de pratique du droit » S'entend d'un programme approuvé par le Barreau avant sa prestation et qui comprend des cours et une période de placement professionnel qui fournissent l'enseignement et la formation dans les habiletés pratiques et les compétences propres aux tâches considérées par le Barreau comme étant nécessaires à l'obtention d'un permis de catégorie L1.

3. The definition of "licensing cycle" in section 7 of the English version of the By-Law is amended by striking out "articles of clerkship" in paragraph (a) and substituting "experiential training".

4. The definition of "cycle d'admission" in section 7 of the French version of the By-Law is amended by striking out "conclure une convention de stage" in paragraph (a) and substituting "suivre une formation expérientielle".

5. Paragraph 9 (1) 3 of the English version of the By-Law is revoked and the following substituted:

3. The applicant other than the applicant described in paragraph 4 must have,

i. experiential training by successfully completing,

A. service under articles of clerkship for a period of time, not to exceed ten months, as determined by the Society and all other requirements, as determined by the Society, that must be completed during the time of service under articles of clerkship, or

B. the law practice program, and

ii. if the experiential training mentioned in subparagraph i was completed more than three years prior to the application for licensing, successfully completed the additional education and obtained the additional experience that the Society determines is necessary to ensure that the applicant is familiar with current law and practice.

6. Paragraph 9 (1) 3 of the French version of the By-Law is revoked and the following substituted:

3. Le requérant ou la requérante qui n'est pas visé à la disposition 4 doit :

i. d'une part, avoir une formation expérientielle en ayant effectué avec succès :

A. soit le temps de service prévu en vertu de la convention de stage pour une période d'au plus dix mois, tel que fixé par le Barreau et toutes les autres exigences fixées par le Barreau auxquelles il doit être satisfait pendant le temps de service prévu en vertu de la convention de stage,

B. soit le programme de pratique du droit,

ii. d'autre part, si la formation expérientielle visée à la sous-disposition i a été terminée plus de trois ans avant la demande de permis, avoir réussi la formation complémentaire et obtenu l'expérience supplémentaire que le Barreau juge nécessaires pour veiller à ce que le requérant ou la requérante soit au fait de la loi et de la pratique en vigueur.

7. The marginal note to subsection 9 (3) of the English version of the By-Law is amended by striking out "articling and" and substituting "experiential training".

8. The marginal note to subsection 9 (3) of the French version of the By-Law is amended by striking out "du stage d'avocat" and substituting "de la formation expérientielle et autres exigences".

9. Subsection 9 (3) of the English version of the By-Law is amended by,

(a) deleting "or" at the end of clause (d);

(b) deleting the period at the end of clause (e) and substituting "; or"; and

(c) adding the following clause:

(f) the applicant has an integrated law degree.

10. Subsection 9 (3) of the French version of the By-Law is amended by,

(a) deleting the period at the end of clause e) and substituting a semi-colon;

and

(b) adding the following clause:

f) le requérant ou la requérante est titulaire d'un diplôme intégré en droit.

11. The English version of the By-Law is amended by striking out the heading immediately before section 16 and substituting the following:

EXPERIENTIAL TRAINING

12. The French version of the By-Law is amended by striking out the heading immediately before section 16 and substituting the following:

FORMATION EXPÉRIENTIELLE

13. Section 16 of the English version of the By-Law is amended by striking out the introductory portion and substituting the following:

A person who meets the following requirements is entitled to enter into experiential training through service under articles of clerkship or the law practice program:

14. Section 16 of the French version of the By-Law is amended by striking out the introductory portion and substituting the following:

Quiconque satisfait aux exigences suivantes est habilité à suivre la formation expérientielle en entrant en service en vertu de la convention de stage ou du programme de pratique du droit :

15. Paragraph 3 of section 16 of the English version of the By-Law is amended by adding "or the law practice program" after "articles of clerkship".

16. Paragraph 3 of section 16 of the French version of the By-Law is amended by adding "ou du programme de pratique du droit" after "convention de stage".

17. Section 16 of the English version of the By-Law is further amended by adding the following paragraph:

4. The person must pay the applicable fees by the time specified by the Society.

18. Section 16 of the French version of the By-Law is further amended by adding the following paragraph:

4. L'intéressé ou l'intéressée acquitte les frais applicables dans le délai fixé par le Barreau.

19. Subsection 17 (1) of the English version of the By-Law is amended by adding "or the law practice program" after "articles of clerkship".

20. Subsection 17 (1) of the French version of the By-Law is amended by adding "ou du programme de pratique du droit" after "convention de stage".

21. Subsection 19 of the English version of the By-Law is revoked and the following substituted:

Registration into licensing cycle

19. A person who registers with the Society shall be registered into a specific licensing cycle.

22. Subsection 19 of the French version of the By-Law is revoked and the following substituted:

Inscription au cycle d'admission

19. Quiconque s'inscrit au Barreau doit être inscrit à un cycle d'admission déterminé.

23. Subsection 34 (1) of the English version of the By-Law is revoked and the following substituted:

Provision of legal services by student

34. (1) A student may, without a licence, provide legal services in Ontario under the direct supervision of a licensee who holds a Class L1 licence who is approved by the Society while,

(a) in service under articles of clerkship; or

(b) completing a work placement in the law practice program.

24. Subsection 34 (1) of the French version of the By-Law is revoked and the following substituted:

Prestation de services juridiques par des étudiants

34. (1) Sans permis, un étudiant ou une étudiante peut fournir des services juridiques en Ontario sous la surveillance immédiate d'un ou d'une titulaire de permis de catégorie L1 agréé(e) par le Barreau s'il se trouve dans l'une ou l'autre des situations suivantes :

a) est en service en vertu de la convention de stage;

b) est en période de placement professionnel dans le cadre du programme de pratique du droit.

TAB 6.1.2

Formatted: Right

BY-LAW 4

Made: May 1, 2007
Amended: May 25, 2007
June 28, 2007
September 20, 2007
October 25, 2007 (editorial changes)
January 24, 2008
April 24, 2008
May 22, 2008
June 26, 2008
December 19, 2008 (editorial changes)
January 29, 2009
January 29, 2009 (editorial changes)
June 25, 2009
June 25, 2009 (editorial changes)
June 29, 2010
July 8, 2010 (editorial changes)
September 29, 2010
September 30, 2010 (editorial changes)
October 28, 2010
April 28, 2011
May 2, 2011 (editorial changes)
June 23, 2011
September 22, 2011
November 24, 2011
October 25, 2012

LICENSING

.....

PART II

ISSUANCE OF LICENCE

INTERPRETATION

Interpretation

1

7. In this Part,

"accredited law school" means a law school in Canada that is accredited by the Society;

"accredited program" means a legal services program in Ontario approved by the Minister of Training, Colleges and Universities that is accredited by the Society;

"integrated law degree" means a bachelor of laws or juris doctor degree the conferral of which requires the successful completion of instruction and training in the practical skills and task competencies that the Society has determined are necessary for a Class L1 licence which instruction and training have been approved by the Society in advance of their delivery;

"law practice program" means a program approved by the Society in advance of its delivery that consists of a course component and a work placement component that provide instruction and training in the practical skills and task competencies that the Society has determined are necessary for a Class L1 licence.

"licensing cycle" means,

(a) for a person registering with the Society to be eligible to take a licensing examination or to enter into ~~articles of clerkship~~experiental training that is a requirement for a Class L1 licence, a period running from May 1 in a year to April 30 in the following year; and

(b) for a person registering with the Society to be eligible to take a licensing examination that is a requirement for a Class P1 licence, a period running from June 1 in a year to May 31 in the following year.

GENERAL REQUIREMENTS

Requirements for issuance of any licence

8. (1) The following are the requirements for the issuance of any licence under the Act:

1. The applicant must submit to the Society a completed application, for the class of licence for which application is made, in a form provided by the Society.

2. The applicant must pay the applicable fees, including the applicable application fee.

3. The applicant must be of good character.

4. The applicant must take the applicable oath.

5. The applicant must provide to the Society all documents and information, as may be required by the Society, relating to any licensing requirement.

Time for submitting application

(1.1) An application for a licence shall be submitted contemporaneously with the applicant's registration form under section 18.

Submitting another application after one is deemed abandoned

(1.2) If an application for a licence is deemed to have been abandoned by the applicant under clause (4) (b), another application for a licence may not be submitted until after one year after the date on which the previous application was deemed to have been been abandoned and may only be submitted if a material change in circumstances is demonstrated to the Society.

Misrepresentations

(2) An applicant who makes any false or misleading representation or declaration on or in connection with an application for a licence, by commission or omission, is deemed thereafter not to meet, and not to have met, the requirements for the issuance of any licence under the Act.

Documents and information re good character requirement

(3) An applicant shall provide to the Society,

(a) at the time she or he submits her or his completed application, all documents and information specified by the Society on the application form relating to the requirement that the applicant be of good character; and

(b) by the time specified by the Society, all additional documents and information specified by the Society relating to the requirement that the applicant be of good character.

Failure to do something: abandonment of application

(4) An applicant's application for a licence is deemed to have been abandoned by the applicant if the applicant,

(a) fails to do anything required to be done under subsection (3), under paragraph 2 of subsection 9 (1), under paragraph 2 of subsection 13 (1), under subclause 13 (2) (b) (iii), subclause 13 (2) (c) (iii) or subclause 13 (2) (d) (iii) or under subsection 15 (2.2) within the time specified for the thing to be done; or

(b) takes the same licensing examination three, or if entitled four, times and fails to successfully complete the licensing examination.

LICENCE TO PRACTISE LAW

Requirements for issuance of Class L1 licence

9. (1) The following are the requirements for the issuance of a Class L1 licence:

1. The applicant must have one of the following:

i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.

ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.

2. The applicant must have successfully completed the applicable licensing examination or examinations set by the Society by not later than two years after the end of the licensing cycle into which the applicant was registered.

3. The applicant other than the applicant described in paragraph 4 must have,

i. experiential training by successfully completing,

A. service under articles of clerkship for a period of time, not to exceed ten months, as determined by the Society and all other requirements, as determined by the Society, that must be completed during the time of service under articles of clerkship, or

B. the law practice program, and

~~i. successfully completed service under articles of clerkship for a period of time, not to exceed ten months, as determined by the Society,~~

~~ii. successfully completed all other requirements, as determined by the Society, that must be completed during the time of service under articles of clerkship, and~~

ii.~~iii.~~ if the experiential training mentioned in subparagraph i ~~service under articles of clerkship~~ was completed more than three years prior to the application for licensing, successfully completed the additional education and obtained the additional experience that the Society determines is necessary to ensure that the applicant is familiar with current law and practice.

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4. An applicant who is exempt from the requirements mentioned in paragraph 3 because of clause (3)(e) must have successfully completed a professional conduct course conducted by the Society.

Exemption from degree or certificate requirement

(1.1) An applicant is exempt from the requirement mentioned in paragraph 1 of subsection (1) if,

(a) the applicant is a dean of an accredited law school and has entered upon the second consecutive year in that position; or

(b) the applicant is a full-time member of the faculty of an accredited law school and has entered upon the third consecutive year in that position.

Exemption from examination requirement

(2) An applicant is exempt from the requirement mentioned in paragraph 2 of subsection (1) if,

(a) the applicant,

(i) is authorized to practise law in a province or territory of Canada outside Ontario where the governing body of the legal profession would authorize a licensee holding a Class L1 licence to practise law in that province or territory without requiring the licensee to successfully complete an examination,

(ii) reviews the materials that the Society, acting reasonably, determines are necessary to ensure that the applicant is familiar with current law and practice in Ontario, and

(iii) certifies that he or she has reviewed and understands the materials mentioned in sub-clause (ii), in a form provided by the Society;

(b) the applicant is a dean of an accredited law school and has entered upon the second consecutive year in that position;

(c) the applicant is a full-time member of the faculty of an accredited law school and has entered upon the third consecutive year in that position; or

(d) the applicant was previously licensed to practise law in Ontario as a barrister and solicitor.

Exemption from ~~articling~~ experiential training~~and~~ requirement

(3) An applicant is exempt from the requirements mentioned in paragraphs 3 and 4 of subsection (1) if,

(a) the applicant is authorized to practise law in a province or territory of Canada outside Ontario;

(b) the applicant is a dean of an accredited law school and has entered upon the second consecutive year in that position;

(c) the applicant is a full-time member of the faculty of an accredited law school and has entered upon the third consecutive year in that position;

(d) the applicant was previously licensed to practise law in Ontario as a barrister and solicitor; ~~or~~

(e) the applicant has practised law in a common law jurisdiction outside Canada for a minimum of ten months and the Society reasonably believes such practice compares to the requirements in paragraph 3~~.~~; or

(f) the applicant has an integrated law degree.

Requirements for issuance of Class L2 licence

10. The following are the requirements for the issuance of a Class L2 licence:

1. The applicant must be authorized to practise law outside Ontario

2. The Attorney General for Ontario must request the Society to issue the licence to the applicant.

Requirements for issuance of Class L3 licence

10.0.01 The following are the requirements for the issuance of a Class L3 licence:

1. The applicant must be a member of the Barreau du Québec, other than a member who qualified for membership under the Entente entre le Québec et la France en matière de reconnaissance mutuelle des qualifications professionnelles.

2. The applicant must be authorized to practise law in Quebec.

Forfeiture of Class P1

10.01. If an applicant for a Class L1 licence holds a Class P1 licence, the Class P1 licence is forfeited to the Society at the time the class L1 licence is issued.

LICENCE TO PROVIDE LEGAL SERVICES

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LICENSING EXAMINATIONS

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~~ARTICLES OF CLERKSHIP~~ EXPERIENTIAL TRAINING

Requirements

16. A person who meets the following requirements is entitled to enter into ~~service~~ experiential training through service under articles of clerkship or the law practice program: ~~that is a requirement for the issuance of a Class L1 licence:~~

1. The person must be registered with the Society.

2. The person must meet the requirement of paragraph 1 of subsection 9 (1).

3. The person must provide to the Society all documents and information, as may be required by the Society, relating to any requirement for entering into service under articles of clerkship or the law practice program.

4. The person must pay the applicable fees by the time specified by the Society.

Student

17. (1) A person who has entered into service under articles of clerkship or the law practice program is a student.

Application of Act, *etc.* to students

(2) The following apply, with necessary modifications, to a student:

1. The following sections of the Act:

i. Sections 33 to 40.

ii. Section 45.

iii. Section 49.3.

iv. Sections 49.8 to 49.13.

v. Sections 49.20 to 49.43.

2. Ontario Regulation 167/07, made under the Act.

3. Sections 2 and 3 of By-Law 8 [Reporting and Filing Requirements].

4. Parts I, II, III and VI of By-Law 11 [Regulation of Conduct, Capacity and Professional Competence].

5. The rules of practice and procedure.

PROFESSIONAL CONDUCT AND ADVOCACY COURSE

Requirements

17.1 (1) A person who meets the following requirements is entitled to take the professional conduct and advocacy course conducted by the Society the successful completion of which is a requirement for an exemption under clause 13 (2) (b), (c) or (d) from the requirement mentioned in paragraph 1 of subsection 13 (1):

1. The person must be registered with the Society.

2. The person must pay the applicable fees by the time specified by the Society.

3. The person must provide to the Society all documents and information, as may be required by the Society, relating to the taking of the course by the time specified by the Society.

REGISTRATION

General requirements

18. (1) A person who meets the following requirements is entitled to be registered with the Society:

1. The person must submit to the Society a completed registration form, as provided by the Society.

2. The person must pay the applicable registration fee.

3. The person must provide to the Society all documents and information, as may be required by the Society, relating to any registration requirement.

Registration after application for licence deemed abandoned

(1.1) Despite subsection (1), a person whose registration is cancelled because the person's application for a licence is deemed to have been abandoned by the person under clause 8 (4) (b) is not entitled to be registered with the Society again until the time when the person may submit another application for a licence under subsection 8 (1.2).

Misrepresentations

(2) A person who makes any false or misleading representation or declaration on or in connection with registration, by commission or omission, is deemed thereafter not to meet, and not to have met, the requirements for registration, the person's registration is deemed thereafter to be void, the successful completion of any licensing examination taken by the person is deemed thereafter to be void, the successful completion of any professional conduct course conducted by the Society taken by the person is deemed thereafter to be void and any service under articles of clerkship is deemed thereafter to be void.

Registration into licensing cycle

19. ~~(1)~~ A person who registers with the Society shall be registered into a specific licensing cycle.

~~**Transition**~~

~~**Student-at-law in Bar Admission Course**~~

~~(2) Every person who is, immediately before May 1, 2007, a student-at-law in the Bar Admission Course under By-Law 12 as it read immediately before May 1, 2007, is deemed, on May 1, 2007, to be registered with the Society and to have been registered into the licensing cycle that corresponds to the academic year in which the person was admitted to the Course.~~

Cancellation of registration

19.1 A person's registration with the Society is cancelled if the person's application for a licence is deemed to have been abandoned by the person under subsection 8 (4).

Availability of name of registrant to public

20. The Society may make available for public inspection the names of its registrants at a given point in time.

OATH

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PART III

SURRENDER OF LICENCE

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PART IV

NOT PRACTISING LAW OR PROVIDING LEGAL SERVICES

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PART V

PROVIDING LEGAL SERVICES WITHOUT A LICENCE

Interpretation

29. In this Part,

"accredited law school" means a law school in Ontario that is accredited by the Society;

"accredited program" means a legal services program in Ontario approved by the Minister of Training, Colleges and Universities that is accredited by the Society;

"law firm" means,

(a) a partnership or other association of licensees each of whom holds a Class L1 licence,

(b) a professional corporation described in clause 61.0.1 (a) of the Act, or

(c) a multi-discipline practice or partnership described in section 17 of By-Law 7 [Business Entities] where the licensee mentioned therein is a licensee who holds a Class L1 licence;

"legal services firm" means,

(a) a partnership or other association of licensees each of whom holds a Class P1 licence,

(b) a professional corporation described in clause 61.0.1 (b) of the Act, or

(c) a multi-discipline practice or partnership described in section 17 of By-Law 7 [Business Entities] where the licensee mentioned therein is a licensee who holds a Class P1 licence;

"licensee firm" means a partnership or other association of licensees, a partnership or association mentioned in Part III of By-Law 7 [Business Entities] or a professional corporation.

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Provision of legal services by~~Student~~ student ~~under articles of clerkship~~

34. (1) A student may, without a licence, provide legal services in Ontario under the direct supervision of a licensee who holds a Class L1 licence who is approved by the Society while,~~-~~

(a) in service under articles of clerkship; or

(b) completing a work placement in the law practice program.

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Other law student

(2) A law student may, without a licence, provide legal services in Ontario if the law student,

(a) is employed by a licensee who holds a Class L1 licence, a law firm, a professional corporation described in clause 61.0.1 (c) of the Act, the Government of Canada, the Government of Ontario or a municipal government in Ontario;

(b) provides the legal services,

(i) where the law student is employed by a licensee, through the licensee's professional business,

(ii) where the law student is employed by a law firm, through the law firm,

(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (c) of the Act, through the professional corporation, or

(iv) where the law student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, only for and on behalf of the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively; and

(c) provides the legal services,

(i) where the law student is employed by a licensee, under the direct supervision of the licensee,

(ii) where the law student is employed by a law firm, under the direct supervision of a licensee who holds a Class L1 licence who is a part of the law firm,

(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of a licensee who holds a Class L1 licence who practise law as a barrister and solicitor through the professional corporation, or

(iv) where the law student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, under the direct supervision of a licensee who holds a Class L1 licence who works for the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively.

Same

(3) A law student may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide if the law student,

(a) is employed by a licensee who holds a Class P1 licence, a legal services firm or a professional corporation described in clause 61.0.1 (1) (c) of the Act;

(b) provides the legal services,

(i) where the law student is employed by a licensee, through the licensee's professional business,

(ii) where the law student is employed by a legal services firm, through the legal services firm, or

(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, through the professional corporation; and

(c) provides the legal services,

(i) where the law student is employed by a licensee, under the direct supervision of the licensee,

(ii) where the law student is employed by a legal services firm, under the direct supervision of a licensee who holds a Class P1 licence who is a part of the legal services firm, or

(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of,

(A) a licensee who holds a Class P1 licence who provides legal services through the professional corporation, or

(B) a licensee who holds a Class L1 licence who practises law as a barrister and solicitor through the professional corporation.

Interpretation: "law student"

(4) For the purposes of subsections (2) and (3), "law student" means an individual who is enrolled in a degree program at a law school in Canada that is accredited by the Society.

Paralegal student completing a field placement

34.1 A student enrolled in an accredited program and completing a field placement approved by the educational institution offering the program may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide if the student,

(a) is completing the field placement with a licensee who holds a Class P1 licence or a Class L1 licence, a legal services firm, a law firm, a professional corporation described in clause 61.0.1 (1) (c) of the Act, the Government of Canada, the Government of Ontario or a municipal government in Ontario;

(b) provides the legal services,

(i) where the student is employed by a licensee, through the licensee's professional business,

(ii) where the student is employed by a legal services firm or a law firm, through the legal services firm or the law firm,

(iii) where the student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, through the professional corporation, or

(iv) where the student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, only for and on behalf of the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively; and

(c) provides the legal services,

(i) where the field placement is with a licensee, under the direct supervision of the licensee,

(ii) where the field placement is with a legal services firm, under the direct supervision of a licensee who holds a Class P1 licence who is a part of the legal services firm,

(iii) where the field placement is with a law firm, under the direct supervision of a licensee who holds a Class L1 licence who is a part of the law firm,

(iv) where the field placement is with a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of,

(A) a licensee who holds a Class P1 licence who provides legal services through the professional corporation, or

(B) a licensee who holds a Class L1 licence who practises law as a barrister and solicitor through the professional corporation, or

(v) where the field placement is with the Government of Canada, the Government of Ontario or a municipal government in Ontario, under the direct supervision of a licensee who holds a Class L1 licence or a Class P1 licence and who works for the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively.

PART VI

PRACTISING LAW WITHOUT A LICENCE

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TAB 6.2

INFORMATION

PATHWAYS PILOT PROJECT EVALUATION PROCESS

Background

5. As part of the Pathways pilot project, Convocation approved a recommendation for an overall evaluation of the pilot, to commence during its third year and be completed by the end of that year.

6. The goals of the evaluation are to capture,

    a. objective data, to facilitate a determination of how well the two components of the pilot (the articling program and the LPP) are achieving their stated goals; and

    b. subjective data to enable insight into the needs and perceptions of candidates, instructors, articling Principals and others involved in the process.

7. In keeping with Convocation's approved focus for the evaluation on the components of the pilot project, the process will not compare or contrast the individual performance of candidates in the licensing process across those components.

8. The Articling Task Force Report provided that "full details of the evaluation measures will be developed as part of the implementation plan and for the PD&C Committee's approval."

9. To develop an approach for the Committee's consideration and approval, the Pathways Working Group #2 consulted with Dr. Sadiq Ali, a scientific psychometrician, to further its understanding of approaches to evaluation.

10. To develop an appropriate framework for the evaluation model Dr. Ali,

    a. reviewed the Pathways Report and the pilot project components and objectives,

b. consulted with the PD&C Department, which already tracks and reports on various licensing process indicators and has expertise on the compilation and analysis of qualitative and quantitative data;

c. facilitated a discussion with the working group to determine the type of information the group considered important to gather as part of the evaluation; and

d. considered other relevant data points and analysis being done within the Law Society to enhance the analysis of information collected in the evaluation model, in accordance with Convocation's objectives. So, for example, to consider equity-related issues within the Pilot, the evaluation may take advantage of and build upon relevant data obtained by the Equity Department and the Challenges Faced by Racialized Licensees Working Group.

11. In keeping with the Pathways Report recommendation, which Convocation approved, the Committee considered and approved the proposed multi-phased evaluation model set out at **TAB 6.2.1: Evaluation Process Report**. The approval of the framework model will enable the PD&C Department to move forward with the development of the specific evaluation tools and activities essential to ensuring that the evaluation can be implemented in time for the fall of 2014.

Evaluation of the Pathways to the Profession Pilot Project

Submitted to: Pathways Working Group #2

Submitted by: Diana C. Miles, Executive Director
Professional Development and Competence
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January 2014

PURPOSE OF REPORT

This report will provide information on the components and particulars of the evaluation plan for the Pathways to the Profession Pilot Project ("Pathways"), pursuant to Convocation's approval to implement a formal evaluation process to assist with an assessment of the results of the pilot in the final year of the project.

EVALUATING THE PILOT PROJECT

To provide context for the development of the evaluation plan, a statement of purpose for the Pathways Pilot Project is required to frame the development process. The statement of purpose acts a lens that will inform the scope and activities of evaluation. This purpose is as follows:

> *Having acknowledged that experiential training is an integral part of the licensing process for lawyers, and having accepted that the current experiential training pathway, articling, is no longer able to provide sufficient opportunities to support all candidates for licensing, the Law Society of Upper Canada will embark upon a three year plan of redevelopment in the licensing process that will address the expanded provision of transitional experiential learning. The response will be to develop an additional path to licensing, a Law Practice Program, and to concurrently enhance the existing Articling Program. The goal will be to gather evidenced-based information on the application and results of the two pathways with a view to measuring the effectiveness of those pathways to produce competent lawyers for entry into the profession. Ultimately, Convocation of the Law Society will use this information to assess the continuation of either or both of the pathways.*

EVALUATION PLAN DEVELOPMENT

The Professional Development and Competence (PD&C) Department licensing team retained expert consultants to review the pilot project components and objectives and recommend a plan for evaluation. A multi-phased approach was recommended to allow informed and ongoing discussion with relevant participants such as the members of the Pathways Working Group and PD&C Committee. Critical to any evaluation process is a determination of the outcomes, or expectations, of the pilot project and how those expectations can be reasonably measured and reported.

In September 2013, the Working Group approved a phased plan for the evaluation of Pathways.

Phase 1 - Outcome Determination

The outcome determination phase of the project was of vital importance as the outcomes form the basis for the evaluation. An outcome is defined as the state of behaviour, relationships,

activities or actions of the people, groups and organization with whom a program works directly to change, and the outcomes are ultimately logically linked to a program's activities. The outcomes for the evaluation of Pathways were determined through a facilitated outcomes development session with members of the Working Group in October 2014.

Phase 2 – Logic Model

Development of the logic model for the evaluation of Pathways (Appendix 1) required the confirmation of long-term and medium-term outcomes. These outcomes were then distilled into four broadly-termed objectives to provide focus. The four objectives for Pathways are:

1. To introduce a fair, objective, accessible and defensible competency-based Law Practice Program that provides candidates with an opportunity to obtain effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice, fulfilling the Regulator's requirement for an assessable experiential training component in the Licensing Process.

2. To institute defined skills and tasks considered necessary for entry-level practice, including formal reporting by Principals/Supervisors and candidates in the Articling Program so that the Regulator may evaluate the effectiveness of this transitional experiential training option.

3. To gather qualitative and quantitative data that will provide insight into the application, assessment results, and user perceptions of the two pathways of the pilot project, with specific reference to the impact upon candidates, including equity-seeking candidates, and also with reference to instructors, work placement supervisors, Articling Principals, and other stakeholders.

4. To gather and assess information and data about the effectiveness of each of the pathways, Articling Program and the LPP, including comparative analyses where applicable, that will allow Convocation to determine next steps in the provision of transitional experiential training for lawyer licensing candidates.

Using these objectives and the outcomes determined by the Working Group, specific long-, medium- and short-term outcomes for each of the pathways were derived.

Outcomes for the Law Practice Program (LPP)

Long-Term Outcomes	Medium-Term Outcomes	Short-Term Outcomes
• The LPP is an **effective** pathway to produce competent lawyers for entry to practice. • The LPP is a **valid** (defensible) additional pathway to lawyer licensing. • The Regulator is provided with data to evaluate the effectiveness of the LPP	• The LPP provides **fair**, **objective** and **accessible** transitional experiential training. • Candidates **demonstrate achievement of entry to practice level competency** in defined areas of stills and tasks for transitional experiential training as assessed in the LPP.	• User (candidates, instructors, work placement supervisors and employers) perceptions of fairness, objectivity and accessibility of the LPP are **measured**. • Candidates' learning in defined areas of skills and tasks for transitional experiential training are **assessed** in the LPP.

Outcomes for the Articling Program (AP)

Long-Term Outcomes	Medium-Term Outcomes	Short-Term Outcomes
• The AP has been **enhanced** in its fairness, objectivity, and accessibility. • The AP has been **enhanced** in its ability to report on candidates' exposure to defined skills and tasks and on performance in four core competencies. • The AP is an **effective** pathway to produce competent lawyers for entry to practice. • The Regulator is provided with data to evaluate the effectiveness of the AP.	• The AP provides **fair**, **objective** and **accessible** transitional experiential training. • Candidates **demonstrate improved performance** on appraisals by Articling Principals. • Candidates and Principals **report** on candidate exposure to defined sills and tasks during the AP. • Candidates' training **goals are considered sufficient and are achieved** in the AP.	• User (candidates, Articling Principals and employers) perceptions of fairness, objectivity and accessibility of the AP are **measured**. • Formal **performance appraisal** of candidates in the AP, using BARS-based tool by Articling Principals. • Formal skills and tasks **exposure measurement** using BARS-based tool completed by Articling Principals and candidates. • Training plans for candidates are submitted by Articling Principals.

In addition to the outcomes, the logic model indentifies the Inputs, the Activities (Processes) and the Products (Outputs) for Pathways.

See Appendix 1 for the logic model.

Phase 3 – Evaluation Framework

The Evaluation Framework (Appendix 2) includes the long-, medium- and short-term outcomes and is structured by addressing four high-level evaluation questions that the Law Society would like to answer as a result of implementing Pathways. The evaluation questions are:

1. Does the Law Practice Program provide licensing candidates with effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?

2. Does the Articling Program provide licensing candidates with effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?

3. How does each pathway, LPP and Articling, support the licensing candidates' opportunity to obtain the transitional experiential training requirement of the Licensing Process?

4. Is one Pathway, LPP or Articling, more effective in delivering transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?

The Framework identifies the information required for evaluation and specifies the evaluation activities that will be used to gather the information to answer each of the evaluation questions. Specifics on the evaluation activities, including target groups, methodology of data collection, dimension of the data gathered and timing of data collection activities are also included in the Framework. The Framework responds to the "who, what, how, when and why" questions about the data collection activities for evaluation.

While it is not specified on the Evaluation Framework, the PD&C Department has in the past and will continue to track and report upon a variety of indicators that will support and inform all information collection outlined in the framework. This ranges from demographic information through to individual performance information. This includes information on candidates who self-designate into equality-seeking categories, the educational background of all candidates, including Canadian or international, the law school they attended and, for international candidates, information on their citizenship (Canadian's returning or non-Canadians entering).

The licensing team will also continue to report on exemptions, abridgements and alternatives to traditional articling placements, along with the standard statistics regarding articling, such as

the number and location of articling placements and the number of unplaced candidates, and the completion of the online course during articling.

In addition, the team will begin to track the qualitative information that is provided in the mid-term and end of term evaluations that the candidate and Principal will be required to complete during the Articling Program.

See Appendix 2 for the Evaluation Framework.

Phase 4 – Evaluation Activities

Phase 4 is the implementation phase of the evaluation plan; it begins August 2014 and ends December 2017. The evaluation activities listed on the Framework will be undertaken in order to gather the required data to answer the evaluation questions.

Each of the evaluation activities listed is a discrete project requiring significant development time for instrument design, focus group protocol, pilot studies, data management and analysis.

Evaluation Question	Evaluation Activities
1. Does the Law Practice Program provide licensing candidates with effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?	a) ***LPP Entry Survey*** of candidates to determine a profile of LPP candidate including experiences and needs in September 2014, 2015 and 2016. b) ***LPP Survey*** of candidates, instructors and work placement supervisors to determine perceptions of the value of the LPP with focus on fairness, objectivity and accessibility in April 2015, 2016 and 2017. c) ***Post-entry to Practice Survey*** and ***Post-entry to Practice Focus Group*** of newly licensed lawyers (LPP) to determine perceptions of the value of the LPP with focus on rating of transitional skills training for entry to practice in November 2015, 2016 and 2017. d) ***LPP assessments*** on defined areas of skills and tasks to determine candidates' performance in the LPP as submitted by providers in January 2015, 2016 and 2017 (training course) and in May 2015, 2016 and 2017 (work placement). e) ***Employer Focus Group*** to determine employers' perceptions on quality of candidates from LPP in November 2015, 2016 and 2017.

Evaluation Question	Evaluation Activities
2. Does the Articling Program provide licensing candidates with effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?	a) ***Articling Program Survey*** of candidates and Articling Principals to determine perceptions of the value of the AP with focus on fairness, objectivity and accessibility in May 2015, 2016 and 2017. b) ***Post-entry to Practice Survey*** and ***Post-entry to Practice Focus Group*** of newly licensed lawyers (AP) to determine perceptions of the value of the AP with focus on rating of transitional skills training for entry to practice in December 2015, 2016 and 2017. c) ***Employer Focus Group*** to determine their perceptions on quality of candidates from AP in December 2015, 2016 and 2017. d) ***BARS-based performance appraisal*** of candidates by Articling Principals to determine the performance of candidates in four core competencies in August through May 2015, 2016 and 2017. e) ***BARS-based exposure measurement*** by candidates and Articling Principals to determine the skills and tasks candidates have been exposed to in the AP in August through May 2015, 2016 and 2017. f) ***Training Plan submissions and evaluations*** to determine the achievement and sufficiently of training goals in August through May 2015, 2016 and 2017.
3. How does each pathway, LPP and Articling, support the licensing candidates' opportunity to obtain the transitional experiential training requirement of the Licensing Process?	a) Integrated into **all of the above** for evaluation questions 1 and 2. b) ***Equity Candidates Focus Group*** of equity candidates to determine perceptions of the LPP and AP experiences for equity candidates in April and May 2015, 2016 and 2017.
4. Is one Pathway, LPP or Articling, more effective in delivering transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?	a) Integrated into **all of the above** for evaluation questions 1, 2 and 3.

SUMMATION OF EVALUATION ACTIVITIES FOR EACH PATHWAY

Law Practice Program	Articling Program
1. LPP Entry Survey	1. Articling Program Survey
2. LPP Survey	
3. LPP assessments	2. BARS-based performance appraisal of candidates by Principals
	3. BARS-based exposure measurement of candidates by Principals and candidates
	4. Training Plan submissions and evaluations
4. Equity Candidates Focus Group	5. Equity Candidates Focus Group
5. Post-entry to Practice Survey of new calls from LPP	6. Post-entry to Practice Survey of new calls from AP
6. Post-entry to Practice Focus Group of new calls from LPP	7. Post-entry to Practice Focus Group of new calls from AP
7. Employer Focus Group of employers of new calls from LPP	8. Employer Focus Group of employers of new calls from AP

EVALUATION REPORTING SCHEDULE

Convocation approved a plan of development and assessment that requires the PD&C Committee to receive the evaluative information and consider next steps in the licensing process during the final year of the pilot project.

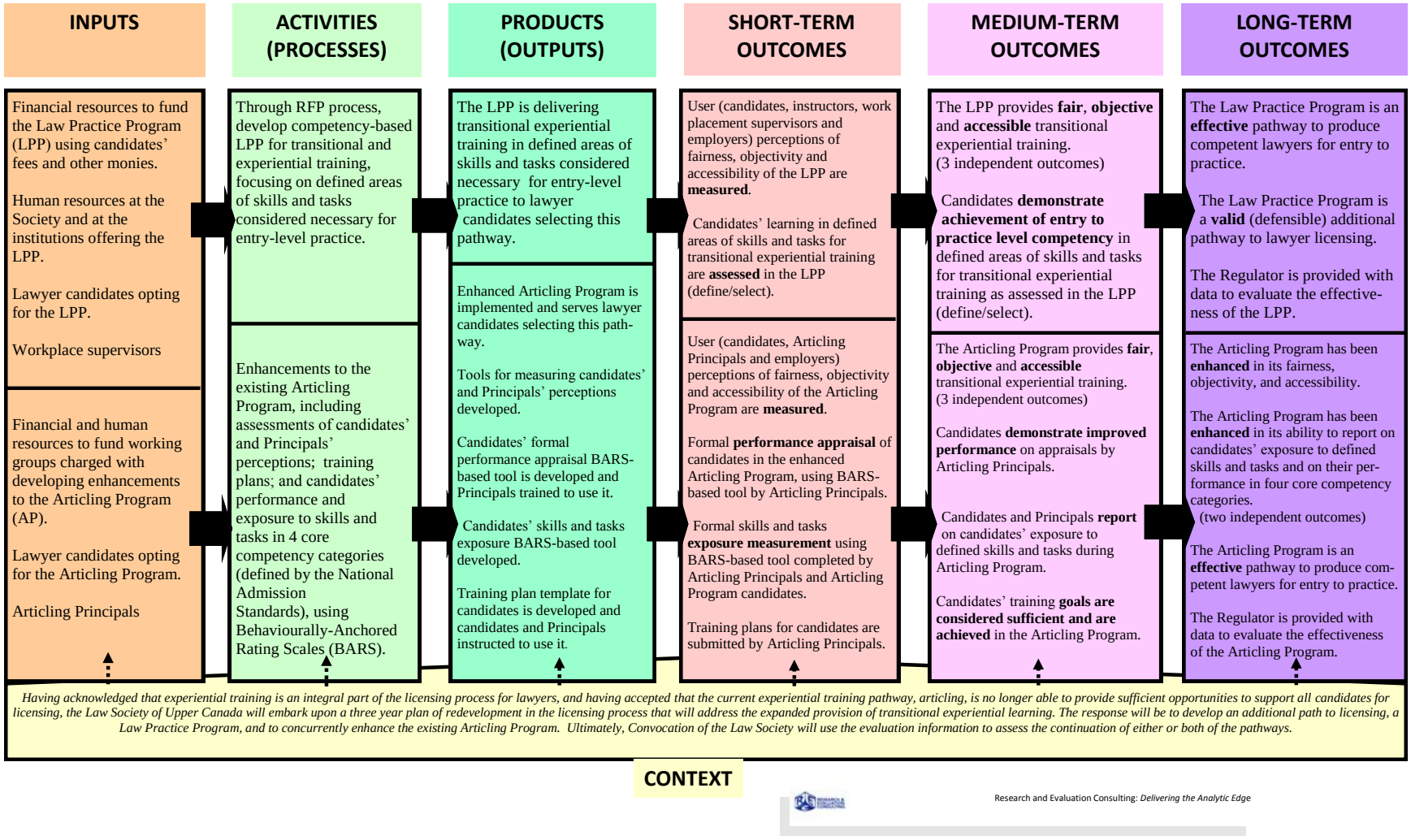
Assuming that there will be sufficient information upon which to base decisions in a three year, as opposed to a five year, pilot project, the final year of the project corresponds with a timeframe that starts on May 1, 2016 and ends on April 31, 2017.

The realities of operational changes to the licensing process will require decision-making about the pathways to be completed no later than the Fall of 2016 to have time to incorporate any required changes into the 2017-18 licensing year which commences May 1, 2017 (the first year following completion of the pilot project).

A report outlining the evaluation findings for the pilot based on years one and two will be provided to the PD&C Committee in September 2016 for discussion and decisions regarding any proposed changes to the pathways on or before the end of November 2016.

Appendix 1

The Law Society of Upper Canada *Pathways to the Profession Pilot Project* Logic Model—Version 4.1



The Law Society of Upper Canada *Pathways to the Profession Pilot Project* Evaluation Framework

Evaluation Question	Short-Term Outcomes	Medium-Term Outcomes	Long-Term Outcomes	Target Group	Methodology (Data Collection)	Dimension (Data)	Timelines
1. **Does the Law Practice Program (LPP) provide licensing candidates with effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?**	User (candidates, instructors, work placement supervisors and employers) perceptions of fairness, objectivity and accessibility of the LPP are **measured**.	The LPP provides **fair** transitional experiential training. The LPP provides **objective** transitional experiential training. The LPP provides **accessible** transitional experiential training.	The Law Practice Program is an **effective** pathway to produce competent lawyers for entry to practice.	Candidates	LPP Entry Survey	Profile of LPP candidate including experiences and needs	September 2014, 2015, 2016
				Candidates, Instructors, Work Placement Supervisors	LPP Survey	Perceptions of the value of the LPP with focus on fairness, objectivity and accessibility	April 2015, 2016, 2017
				New calls (LPP)	Post-Entry to Practice Survey Post-Entry to Practice Focus Group	Perceptions of the value of the LPP with focus on rating of transitional skills training for entry to practice	November 2015, 2016 and 2017
	Candidates' learning in defined areas of skills and tasks for transitional experiential training are **assessed** in the LPP (define/select).	Candidates **demonstrate achievement of entry to practice level competency** in defined areas of skills and tasks for transitional experiential training as assessed in the LPP (define/select).	The Law Practice Program is a **valid** (defensible) additional pathway to lawyer licensing.	Candidates	LPP assessments on defined areas of skills and tasks - submitted by LPP provider	Candidates' performance in the LPP	January 2015, 2016 and 2017 and in May 2015, 2016 and 2017
				Employers	Focus group for employers of new calls (LPP)	Perspectives on quality of candidates from LPP	November 2015, 2016 and 2017
			The Regulator is provided with data to evaluate the effectiveness of the LPP.				

Evaluation Question	Short-Term Outcomes	Medium-Term Outcomes	Long-Term Outcomes	Target Group	Methodology (Data Collection)	Dimension (Data)	Timelines
2. Does the Articling Program (AP) provide licensing candidates with effective transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?	User (candidates, Articling Principals and employers) perceptions of activities, fairness, objectivity and accessibility of the AP are **measured**.	The AP provides **fair** transitional experiential training. The AP provides **objective** transitional experiential training. The AP provides **accessible** transitional experiential training.	The AP has been **enhanced** in its fairness, objectivity, and accessibility. The AP is an **effective** pathway to produce competent lawyers for entry to practice.	Candidates and Articling Principals New calls (AP) Employers	Articling Program Survey Post-Entry to Practice Survey Post-Entry to Practice Focus Group Focus group for employers of post-call lawyers	Perceptions of the value of the AP with focus on fairness, objectivity and accessibility Perceptions of the value of the AP with focus on rating of transitional skills training for entry to practice Perspectives on quality of candidates from AP	May 2015, 2016, 2017 December 2015, 2016 and 2017 December 2015, 2016 and 2017
	Formal **performance appraisal** of candidates in the AP, using BARS-based tool by Articling Principals. Formal skills and tasks **exposure measurement** using BARS-based tool completed by Articling Principals and candidates. Training plans for candidates are submitted by Articling Principals.	Candidates **demonstrate improved performance** on appraisals by Articling Principals. Candidates and Principals **report** on candidates' exposure to defined skills and tasks during AP. Candidates' training **goals are considered sufficient and are achieved** in the AP.	The AP has been **enhanced** in its ability to report on candidates' exposure to defined skills and tasks and on performance in four core competency categories. (two independent outcomes) The Regulator is provided with data to evaluate the effectiveness of the AP.	Candidates Candidates Candidates	BARS-based performance appraisal by Principals BARS-based exposure measurement by Principals and candidates Training plan submissions and evaluations	Performance of AP candidates in four core competency categories The skills and tasks candidates have been exposed to in AP Achievement and sufficiency of training goals	August through May of each Articling year August through May of each Articling year August through May of each Articling year

Evaluation Question	Short-Term Outcomes	Medium-Term Outcomes	Long-Term Outcomes	Target Group	Methodology (Data Collection)	Dimension (Data)	Timelines
3. How does each pathway, LPP and Articling, support the licensing candidates' opportunity to obtain the transitional experiential training requirement of the Licensing Process?	All of the above for Evaluation Questions 1 and 2.	All of the above for Evaluation Questions 1 and 2.	All of the above for Evaluation Questions 1 and 2.	All of the above for Evaluation Questions 1 and 2. Candidates (Equity)	All of the above for Evaluation Questions 1 and 2. Equity Candidates' Focus Group	All of the above for Evaluation Questions 1 and 2. Perceptions of LPP and AP experiences for equity candidates.	See above. April/May 2015, 2016 and 2017.
4. Is one Pathway, LPP or Articling, more effective in delivering transitional experiential training in defined areas of skills and tasks considered necessary for entry-level practice?	All of the above for Evaluation Questions 1, 2, and 3.	All of the above for Evaluation Questions 1, 2, and 3.	All of the above for Evaluation Questions 1, 2, and 3.	All of the above for Evaluation Questions 1, 2, and 3.	All of the above for Evaluation Questions 1, 2, and 3.	All of the above for Evaluation Questions 1, 2, and 3.	See above.

TAB 6.3

INFORMATION

PD&C DEPARTMENT ANNUAL REPORT ON PROGRAMS AND RESOURCES

12. The PD&C Department Annual Report on Programs and Resources is set out at **TAB 6.3.1: PD&C Resources and Programs Report** for Convocation's information.

Professional Development and Competence Department Resource and Program Report

FOR INFORMATION ONLY

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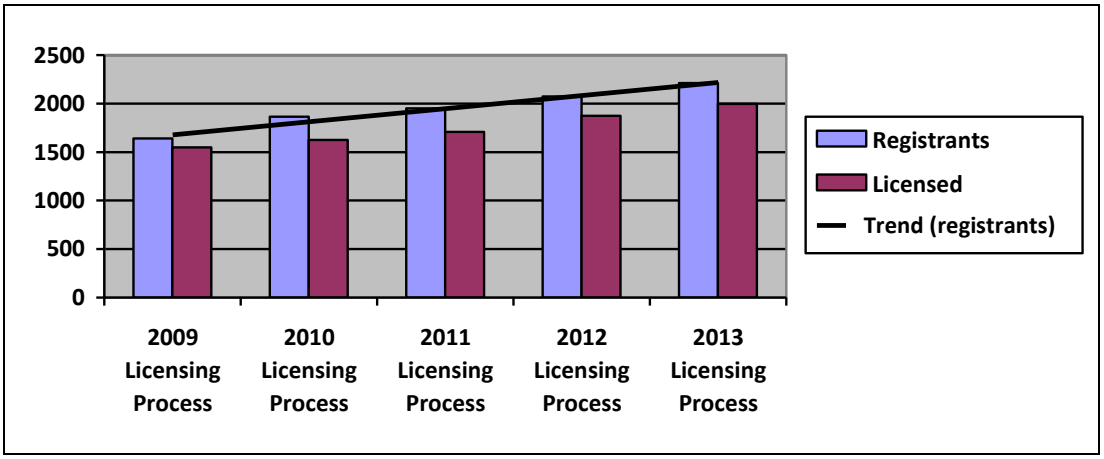
PROFESSIONAL DEVELOPMENT AND COMPETENCE DEPARTMENT

The Professional Development and Competence (PD&C) Department supports policy development and operational implementation for all activities, products and programs related to practice management and supports, continuing professional development, legal information services, the lawyer and paralegal licensing processes, and post-licensing quality assurance.

The Department focuses on the relationship between pre- and post-call substantive, procedural, practice management and professional responsibility competencies within the profession and strives to create a platform of services that assists lawyers and paralegals to maintain viable practices and provide competent service.

LICENSING AND ACCREDITATION: LAWYER LICENSING

The following chart indicates the number of candidate registrations, and the number of L1 licences issued in the past five years of the Licensing Process. The Process is governed by the three-year rule which requires a registered lawyer candidate to be called to the bar within three years from the time of their entry into a licensing year. For the calendar year 2013, there were 2212 candidates newly registered in the licensing process.



Articling Program

National/International Articles

Candidates may complete up to ten months of articles outside of Ontario (national) or outside of Canada (international). The total number of candidates who completed articles outside of Ontario is as follows:

Licensing Year	National Articles	International Articles
2009	15	23
2010	18	22
2011	16	16
2012	18	16
2013	19	16

Exemption from Articles and the Professional Conduct and Practice Course

In 2009, candidates became eligible to apply for and be granted a full exemption of articles if they have practice experience in a common law jurisdiction that exceeds 10 months.

Candidates who are exempted from articles must successfully complete a mandatory three-day course. The Professional Conduct and Practice course provides instruction on professional responsibility and practice management topics in an Ontario context using lectures, panel presentations and roundtable discussions. There were 159 candidates who attended the 2013 courses for a total of 498 exempted articling candidates who have completed the mandatory course since inception.

There have been eight sessions of the Professional Conduct and Practice course since it began in May 2009:

Year	May	December	Total
2009	22 attendees	19 attendees	41 attendees
2010	51 attendees	45 attendees	96 attendees
2011	42 attendees	53 attendees	95 attendees
2012	54 attendees	53 attendees	107 attendees
2013	77 attendees	82 attendees	159 attendees

Candidates exempted from articles must also successfully complete the two Licensing Examinations. As a result of this significant reform, candidates exempted from articles could be eligible for a call to the bar within six months depending on the timing of their receipt of the Certificate of Qualification from the National Committee on Accreditation.

Pathways Pilot Project

Since the approval of the Articling Task Force Report in November 2012, the PD&C department has been methodically working through the design and development of each of the components of the Pathways Pilot Project. This project is a three year pilot that will result in changes to the Law Society's licensing process that will be developed and implemented for the launch of the new system in 2014. These components include:

a) Creation of a Law Practice Program (LPP) as a path to licensing;

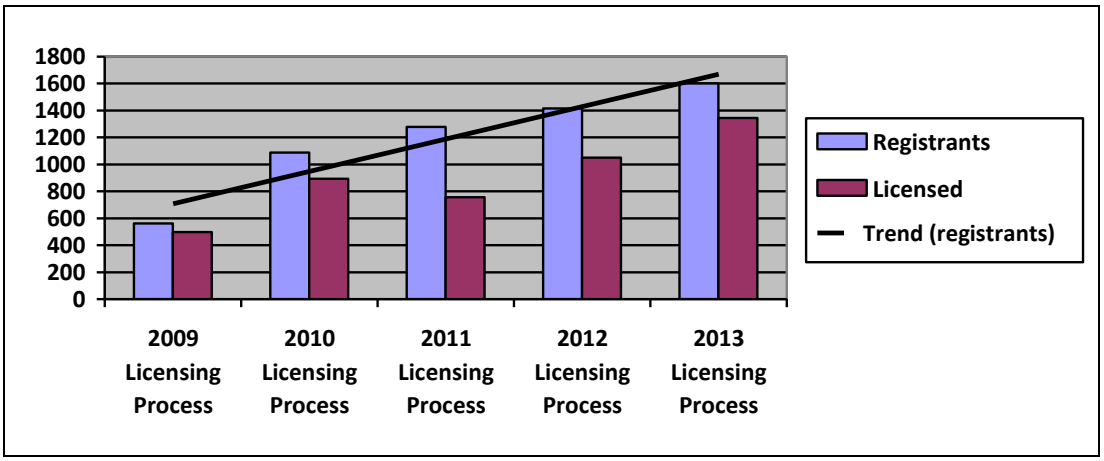
b) Enhancements to the Articling Program as a path to licensing;

c) Implementation of an evaluation framework for the pilot project.

The development work with respect to each of these components is both time sensitive and substantial. Work on these individual projects within the Pathways Pilot has been very intensive, taking significant time and effort of the licensing team and an extended group of the PD&C team, in order to meet the deadlines for the new process. That work will continue through to August/September 2014, at which time both the LPP and the newly enhanced articling program will be launched.

LICENSING AND ACCREDITATION: PARALEGAL LICENSING

The following chart indicates the number of candidate registrations, and the number of P1 licenses issued in the past five years in the Licensing Process. The Licensing Process for paralegal candidates is governed by the three-year rule which requires a registered paralegal candidate to complete licensing requirements within three years from the time of their entry into a licensing three-year term. For the calendar year 2013, there were 1600 candidates newly registered in the licensing process.



PD&C launched the Integration Licensing Process for the Exempted Group/Collection Agents on October 1, 2010. As of May 31, 2014 the three years allowed for the Integration Licensing Process will end for the Exempted Group/Collection Agents applicants.

The chart below indicates the distribution of candidates from the eligible groups for licensing as an exempted category identified in By-Law 4, and their current status.

Exempted Group Integration Category	Still Active	Licensed	Withdrawn
Appraisal Institute of Canada	11	1	0
Board of Canadian Registered Safety Professionals	12	16	3
Human Resources Professionals Association of Ontario	5	14	0
Trade union and/or Designated by OFL	8	13	0
Registered Collection Agent (Collection Agencies Act)	23	21	1
Advisor for Office of the Worker and Employer	25	14	1
Employee of a Legal Clinic (not a student)	15	31	7
In-house legal services provider	81	103	31
Injured Workers group funded by the WSIB	10	3	0
Legal services in a not-for-profit organization	11	11	8
Ontario Professional Planners Institute	1	0	0
Total	**202**	**227**	**51**

Note: 24 of the 34 withdrawals in the "in-house legal services provider" category represent 24 WSIB adjudicators who were assigned status by Convocation and are completing the paralegal licensing requirements under the new designation.

Paralegal College Program Accreditation

As part of its mandate to govern and regulate paralegals, the Law Society accredits paralegal education programs that have been approved by the Ministry of Training, Colleges and Universities. Institutions must submit a detailed application package and participate in a rigorous audit process in order to demonstrate that the program's curriculum, infrastructure and systems support the accreditation criteria. The Law Society provides the Ministry with copies of accreditation approvals or denials of all college programs, with reasons, and liaises with the Ministry on accreditation issues as required.

As of December 31, 2013, PD&C has approved the accreditation of 27 paralegal college programs at 44 college campus locations throughout Ontario. Applications continue to be received and reviewed by the accreditation team, including resubmissions from colleges that have revised their program content and re-applied. Currently there are an additional four applications for accreditation being reviewed by PD&C.

The audit process for accredited college paralegal programs began in November 2009. Audits consist of a documentation review and a two-day site visit at the institution to observe classes and facilities, and meet with program administrators, faculty and students. As of the end of December 2013, the paralegal accreditation team has conducted 27 college program audits. Audit and reporting processes are conducted in a standardized, fair and transparent manner, with a draft audit report to be sent to colleges for clarification prior to the report being finalized. Under the current framework, all colleges will be audited within three years of the date of their accreditation and at least once every five years thereafter.

Expansion of Paralegal Licensing Examination

PD&C continues to prepare for the expansion of the paralegal licensing examination to include substantive areas of law, as approved by Convocation in the fall of 2012. In 2013, the licensing team worked with psychometricians and members of the profession to develop a new set of substantive competencies and create a blueprint for the expanded licensing examination. The competencies were validated through various focus groups and a survey that was sent to

approximately 2500 paralegal members. The new paralegal licensing examination is on track to be launched for the August 2015 writing of the examination.

CONTINUING PROFESSIONAL DEVELOPMENT

CPD Accreditation and Policy Development

PD&C has continued to receive a high volume of applications for accreditation of programs and activities during the third year in which the CPD requirement has been in effect. As at the end of December 2013, 6288 applications had been processed.

This includes approximately 3900 applications for program accreditation from education providers including approximately 2,400 activity applications from members seeking accreditation of activities such as teaching, writing, mentoring and study groups.

A total of 3,725 education programs received accreditation by the end of December 2013. Program applications were received from major education providers, law firms and in-house legal departments, government legal divisions and related agencies, non-profit entities and a number of legal associations at a provincial and national level.

The following table provides information only on program activity within which professionalism content appears; it does not reflect any substantive program activity.

Category of Applicant	Number of Program Applications Received	Number of Program Applications Accredited
Education Providers (OBA, advocates' Society, etc.)	755	741
Law Firms In-House	926	908
Law Associations	844	808
Government In-House	521	509
Colleges and Universities	43	34
Private	815	725
TOTAL	**3,904**	**3,725**

The 2,384 applications received for accreditation of activities, as opposed to formal education programs, are broken down as follows:

Activity Type	Number of Activity Applications Received	Number of Activity Applications Accredited
Teaching	1,305	1,234
Writing/Editing	21	20
Mentoring/Articling	706	703
Study Groups	323	315
Other	29	27
TOTAL	**2,384**	**2,299**

The Licensing and Accreditation team has been preparing for implementation of changes to CPD requirement processes and policies arising from the two-year review of CPD announced by Convocation in May 2013. In September 2013, a live webcast was delivered to education providers to explain the changes, which include a new Accredited Provider Framework, elimination of the New Member Requirement, and streamlining of the Law Society Portal. The response from education providers to these outreach efforts has been very positive.

CPD Programs and Products

In 2013, PD&C produced 149 programs, including 111 combined substantive/professionalism programs and 38 free professionalism-only programs. Registration percentages for free (56%) and fee-based (44%) programs in 2013 very closely resembled the 2012 breakdown.

New professionalism programs for 2013 included “Dealing with the Self-Represented” (3,597 registrations) and “The First Client Interview” (2,258 registrations). While registrations for free programs are generally in the thousands, actual attendance can be as low as 50% of the registration total. In October 2013, Convocation approved charging a nominal fee of $25-$50 for professionalism-only programs, beginning in 2014. Professionalism programs are designed to give lawyers and paralegals the tools and information to avoid claims of negligence or misconduct. The assumption is that charging a small fee will increase the likelihood that members will honour their commitment to attend.

2013 CPD Registration Results

	2009	2010	2011	2012	2013
Total number of CPD programs (*all formats*)	69	94	164	145	**149**
Attendance at paid CPD programs (*all formats*)	15,382	19,785	33,504	36,118	**37,449**
Attendance at free CPD programs (*all formats*)	n/a	n/a	60,732	47,582	**51,244**
Total number of all attendees	15,382	19,785	94,236	83,700	**88,693**
Average attendance at CPD programs (*all formats*)	223	210	575	577	**595**

Program Formats and Materials

CPD provides members with a variety of flexible options for fulfilling their CPD Requirement. Seventy-seven of the 2013 programs were accessible solely via webcast; 67 were presented both in person and via webcast; and five (5) were presented in person only. Almost all programs are also available for purchase on demand after the original presentation date. CPD also schedules a number of replay dates to fit member schedules. Since the CPD Requirement was introduced in 2011, there has been a continual shift away from live attendance in favour of online viewing. In 2013, 90% of registrants viewed programs online.

Scheduled CPD programs all contain an interactive component, either in the form of a question and answer period, a poll of the audience or a live online chat. Closed captioning services are made available to members upon request. Both live attendees and webcast viewers receive access to the on demand video recording so they can review sections of the program if they wish. All registrants also receive access to the electronic program materials as part of their registration fee, with an option to purchase hard copy for a small additional fee. In 2013, only 8.8% of registrants purchased hard copy materials.

Live (in person) Programs

	2009	2010	2011	2012	2013
Total Number of programs	56	64	114	78	**72**
Total number of attendees	5,607	6,552	14,306	9,562	**8,595**
Average Attendance	**100**	**102**	**125**	**123**	**119**

Webcast

	2009	2010	2011	2012	2013
Total Number of programs	57	65	150	137	**144**
Total number of attendees	5,649	7,084	67,072	60,331	**63,622**
Average Attendance	**99**	**109**	**447**	**440**	**442**

Post-Program Products

Once programs are held, electronic and hard copy materials, on demand webcasts, and MP4 video files are made available for members to purchase. CPD also works with the County Law Associations to arrange local group replay sessions. In 2013, 18 counties ordered a total of 405 replays with a total of 771 members participating across the Province. In conjunction with the Great Library, CPD produces AccessCLE, an online repository of articles from CPD programs. In 2013, PD&C began making articles from programs held 18 months or more in the past available free of charge. Although the mix of post-program product purchases has changed dramatically, overall sales continue to grow.

	2009	2010	2011	2012	2013
On Demand	1,419	1,510	4,946	13,832	**16,476**
Hard Copy Publications	10,379	9,590	8,313	7,546	**6,770**
TOTAL	**11,798**	**11,100**	**13,259**	**21,378**	**23,246**

CPD Program Development Highlights

The CPD team works closely with volunteer lawyers and paralegals to develop relevant and timely programs. Programs are designed for a variety of practice areas and experience levels. In 2014, approximately 130 programs will be presented, including 40 live webcast programs and interactive online courses focusing on professional responsibility, ethics, and practice management issues in a variety of practice areas.

2013 CPD program highlights included the "Intensive Child Protection Training Program," a 4-day program presented in cooperation with the Association of Family and Conciliation Courts (AFCC). In conjunction with the Equity Department, CPD presented "Droit au but! Parlons grammaire," a legal writing program in French. "Enhancing Access to the Courts for People with Disabilities, Part II," presented in conjunction with the Courts Disabilities Accessibility Committee and The Advocates' Society, drew 1238 attendees. The 10th Annual Real Estate Law Summit attracted a record number of registrants for a fee-based program with 1,197 attendees.

PRACTICE MANAGEMENT

Practice Management Helpline

The Practice Management Helpline provides licensees with assistance and insight regarding the application of the *Rules of Professional Conduct,* the *Paralegal Rules of Conduct* and other Law Society regulations. The service is confidential and the Helpline strives to return all calls within 24 hours.

Representatives screen the call, assist the caller to identify the issue(s), refer the caller to existing resources such as articles, professional development programs, the online FAQs, and other resources (including transferring the call to other more appropriate departments for additional information or recommending alternatives for additional support, such as LAWPRO, Legal Aid, Teranet, etc.) and escalate the call to counsel, if necessary. Counsel will discuss the ethical issues, applicable legislation, potential options and the advantages and disadvantages of each option with the caller.

In 2013, the Practice Management Helpline received approximately 7,090 inquiries from licensees for an average of over 600 calls per month. Of the calls that were received, 85% were handled by representatives, meaning the question could be answered by reference to existing resources, fifteen per cent were answered by counsel, meaning an interpretation of the *Rules of Professional Conduct* or a discussion of ethical issues was required.

The calls received as at December 31, 2013 can be broken down by size of practice:

	Lawyers		Paralegals		Total Licensees	
	# of calls	% of total	# of calls	% of total	# of calls	% of total
Sole practitioners	2,740	46.0	604	53.3	3,344	**47.1**
Small Firms (2 to 5)	1,504	25.2	239	21.1	1,743	**24.6**
Medium Firms (6 to 10)	342	5.7	28	2.5	370	**5.2**
Larger Firms (>10)	597	10.0	17	1.5	614	**8.7**
Other	776	13.0	246	21.7	1022	**14.4**
Total calls for assistance	5,959	100	1,134	100	7,093	**100**

The majority of lawyers who called the Helpline in 2013 defined their primary areas of practice (more than 30% of their practice) as real estate law and civil litigation. The most frequent calls from lawyers by practice management issue were:

1. Conflicts of Interest
2. Confidentiality
3. Trust Accounts
4. Lawyer Annual Report
5. Client Identification and Verification
6. Withdrawal From Representation
7. Books and Record Keeping
8. Client Property
9. Fraud
10. File Ownership/Transfer

The majority of paralegals who called the Helpline in the same period defined their primary areas of practice as Small Claims Court and *Provincial Offences Act* matters.

The most frequent calls from paralegals by practice management issue were:

1. Paralegal Scope of Practice
2. Conflicts of Interest
3. Trust Accounts
4. Confidentiality
5. Withdrawal from Representation
6. Firm Name
7. Paralegal Annual Report
8. Advertising/Marketing

9. Practice Arrangements
10. File Ownership/Transfer

Practice Management Resources

By tracking frequently asked questions, the Helpline identifies areas of concern within the lawyer and paralegal professions and responds to those concerns by developing new resources and relevant information pieces through Practice Tips, the e-Bulletin or the Manage Your Practice section of the Law Society Web site. Counsel and representatives have direct contact with the members on a daily basis and are in a unique position to assess the Law Society's resources and identify, recommend and create new, valuable and necessary resources.

The Technology Practice Tips are podcasts that provide practical information on a variety of issues in MP3 format. In response to feedback from members, twelve new podcasts were developed in 2013, including tips on texting, clean devices internet printing, browsing, news readers and RSS feeds.

In 2013, counsel also began an intensive review of all existing lawyer and paralegal practice management resources to ensure their currency, relevance to the profession and effectiveness in the new Web site environment. Reviewing, revising and streamlining of the existing practice management resources will continue in 2014, including the update of all resources in preparation for the implementation of the Model Code.

Practice Mentoring Initiative

The Mentoring Initiative connects licensees to mentors where the caller's issue or matter falls outside the mandate of the Helpline. To be matched with a mentor, the licensee must have a unique and complex legal or procedural issue that the lawyer or paralegal has been unable to resolve through his or her own research. Though the program does not offer a traditional long term mentoring relationship, mentors are available for a focused discussion about the licensee's issue.

There are currently 174 lawyers and 7 paralegals on the Practice Mentoring roster, representing a number of practice areas. In 2013, 35 lawyers and 3 paralegals were each matched with a mentor.

CERTIFIED SPECIALIST PROGRAM

In order to qualify for the Certified Specialist Program, a lawyer must meet the following criteria:

- practised for a minimum of seven years prior to the date of the application
- substantial involvement in the specialty area during five of the seven years, i.e.,
  - mastery of substantive law, practices and procedures, and
  - concentration of practice in the specialty area;
- complied with the professional development requirements; and
- complied with the professional standards requirements.

The number of certified specialist lawyers in the profession has changed only marginally in

the past 10 years and remains low at approximately 2.5% of practising lawyers.

	2009	2010	2011	2012	2013
Number of Specialists	720	714	775	763	766
Specialists in Toronto Area	408	402	443	442	459
Specialists Outside Toronto	312	312	332	321	307
Number of Specialty Areas	15	15	15	15	15

The following chart breaks down the number of certified specialists by practice area in 2013.*

Areas of Specialization	Number of Specialists	Areas of Specialization	Number of Specialists
Bankruptcy and Insolvency Law	9	Family Law	64
Citizenship and Immigration Law	51	Health Law	19
Civil Litigation	294	Intellectual Property Law (Trademark/Patent/Copyright)	39
Construction Law	35	Labour Law	23
Corporate and Commercial Law	20	Municipal Law	30
Criminal Law	91	Real Estate Law	23
Environmental Law	39	Work Place Safety and Insurance Law	9
Estates and Trusts Law	39		

**The total number of specialists in this chart is slightly greater than the total number of specialists in 2013 (first chart above) as some specialists are certified in more than one area of law.*

The Certified Specialist Board continues to expend approximately $40,000 per annum on marketing efforts to increase awareness of the Certified Specialist designation in the public and the profession. In 2013, Specialists were provided with new promotional tools, including a lapel pin and series of bookmarks designed to provide key information about the program.

Other recent activities have included a series of notices in the Ontario Reports and articles in the Ontario Lawyers Gazette.

PD&C has begun planning for the development of the Aboriginal Law specialty area, as approved by Convocation in June 2013. Practitioners and subject matter experts have been engaged to assist with the creation of the practice experience competencies and learning criteria, and a list of potential working group members has been compiled for use in validation activities.

All of the ongoing program maintenance and promotional activities for the Certified Specialist program continue to be completed within an operating budget that maintains costs at the lowest possible levels. The program is supported by one full-time coordinator who is assisted by legal counsel in PD&C as required.

LEGAL INFORMATION

The Legal Information team supports research and information needs of Law Society licensees and staff. Lawyers and paralegals access the Great Library's large print collection and electronic databases, as well electronic resources available from their desktops. While the Great Library is the primary legal research resource for paralegals, lawyers also use the Great Library's services through their local law associations.

Library Services

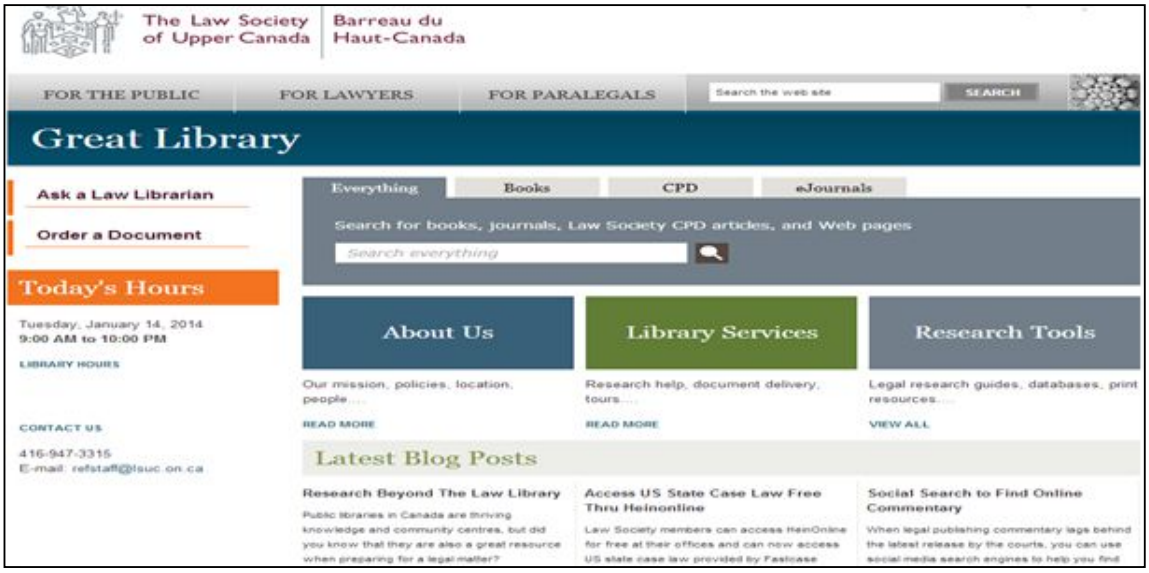
Lawyers and paralegals ask reference librarians for assistance with legal research. The Reference team works primarily with Toronto-based lawyers, articling candidates, and law firm administrators. The number of reference questions received in 2013 increased. The library team answered 23,504 questions in 2013, up from 21,157 in 2012.

Rebooted Web Site

The Great Library's team worked with the PD&C Web Content Management team to design a new, more streamlined Web site for the library. Reference staff culled much of the content from the old Web site, collapsing most of the content into a handful of pages. At the same time, they migrated pathfinders on how to find specific types of legal information to Libguides. This service is used by thousands of libraries to host this type of guide. By placing the Great Library's "finding" tools into Libguides, the Reference team achieves heightened visibility for those using the Libguides platform while also having an easier framework for maintaining these documents.

Library managers led the design process and usability testing to create a more modern and easy to navigate site. Visitors are presented with a variety of search tools as soon as they reach the library's home page. These tools highlight the depth of content that is accessible within the library, and much of this content can be accessed for free from anywhere.

The library team also started a blog on legal research topics for lawyers and paralegals. The Reference staff contributes a weekly post and the blog will act as a current awareness tool and proactive information sharing resource for Law Society members.

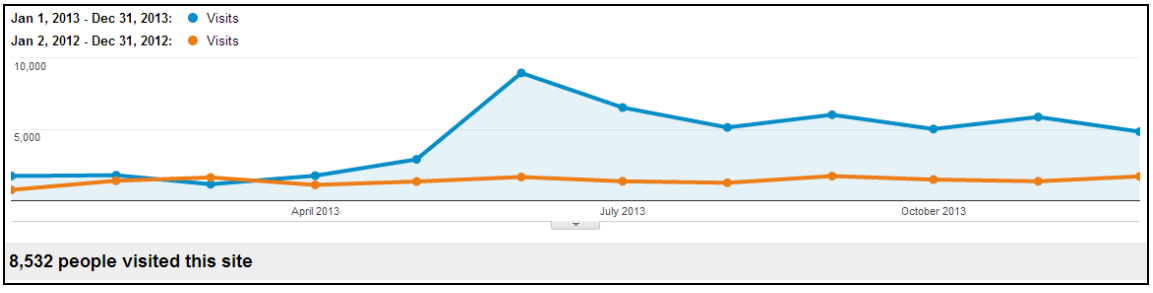


Searching More Content

Primo is the library's search tool, which provides access to a wide variety of information through the library's Infolocate.ca search site, and powers the Law Society's Web site search.

Convocation's minutes had been searchable in an outdated tool known as Folio Views and a replacement was required. Corporate Records and Archives converted the minutes into PDF documents, maintained the necessary security on *in camera* documents, and prepared them for access through Infolocate. The group worked with the systems team to import the content into the same database that provides access to the Law Society's CPD articles. The documents were then redefined so that Law Society staff will be able to search content securely while the public will be able to find minutes that are public records.

The library's collaboration with the CPD team on AccessCLE continued, with one significant change. Law Society CPD articles that are older than 18 months are now available to download for free. There was a huge surge of interest when the announcement occurred, and the policy change has increased the overall use of the service. There was an 83% increase in unique visitors to the site, from 4,649 in 2012 to 8,352 in 2013. These additional visitors led a 208% increase in visits and a 232% increase in page views.



Corporate Records and Archives

The Corporate Records and Archives team has been involved in various projects within the Law Society in 2013. The Corporate Records team has supported the initial stages of the Law Society's move towards enterprise content management. The Archivist also supported ongoing research by the Heritage Committee into historic discipline matters.

In addition to collaborations with the Great Library's systems team on Convocation's Minutes, the Archives have been extending the information on the Web. Ontarians interested in the Law Society's history can watch video clips on You Tube of historic CLE seminars with well-known members of the legal profession. The Archives team also maintains a blog for current awareness on items within their collection.

Web Content Management

The Web Content Management team focused on behind the scenes projects in 2013. Following the successful implementation of the Tribunals smart forms in 2012, the team adapted similar forms to enable Equity and Aboriginal Affairs staff to manage the Contract Lawyers Registry. The forms provide editorial control, to approve new positions or remove old ones, without requiring, technical expertise to make every change.

Another significant improvement will only be noticeable to those visitors who access the Law Society's Web site on mobile devices. The team converted the site to use responsive design, so that the Web pages resize depending upon the size of screen the visitor is using. Rather than creating a mobile version of the Law Society's Web site, it enables the Society to create one set of content, and the responsive design fits it to the particular device.

The team also worked on refreshing some sites. The Great Library Web site was migrated from its old server and into the content management system, and given a new look and feel that is more intuitive for users. At the same time, the team reconsidered the lay out of the Law Society's Intranet site. The revised navigation and functionality replaced the current site in early 2014.

QUALITY ASSURANCE: SPOT AUDIT, PRACTICE MANAGEMENT REVIEW AND PRACTICE AUDIT PROGRAMS

The audit and review programs of the Law Society are an integral part of the Law Society's quality assurance activities in the public interest. These programs have also received extremely positive feedback from lawyers and paralegals. The programs are making a measurable impact on law practices and legal services practices, with sole and small firm sustainability significantly improved for those firms that receive an audit.

Spot Audit Program: Lawyers

Spot Audit is a proactive quality assurance program that assesses a firm's compliance with financial record keeping requirements. The goal of the Spot Audit program in 2013 was to audit every law firm in the province once every five years. In 2013 over 1,815 audits were conducted.

The majority of the 2013 audit engagements found that the firm had either minor or no books and records' deficiencies (50%) or deficiencies that were readily remediated to the Law Society's satisfaction (44%).

Lawyers selected for an audit continue to report extremely high approval ratings for both the auditors (100%) and the overall experience (97%).

Some of the more significant books and records deficiencies are as follows:

Books and Records Issues	% Failed to Meet Requirements
Completeness of books and records information	86%
Completeness of client ID information	52%
All cash receipts recorded	52%
Inactive accounts managed	46%
Currency of records	21%
Transfer funds from trust account after delivery of fee bill	19%
Maintained security over E-reg diskette	18%

As of 2014, the audit routines will change in accordance with Convocation's recent approval to streamline these activities. The Law Society has recently conducted a review of its operations with the intention of improving efficiency in the delivery of its programs. As a result, the Spot Audit program has refined its risk management strategy to focus on sole practitioners and two lawyer firms with a real estate practice, as they are the group of practitioners posing the documented highest risk to the public. These firms will be audited every five years. The remaining lower risk sole practitioner and small firms (2-5 lawyers) will be audited every seven years, and the very low risk firms (mid-large sized firms) will be audited every ten years.

These changes to the Spot Audit program goals will generate savings of $500,000 over 2014 and 2015, resulting from 230 fewer audits in 2014 and a further reduction of 170 audits in 2015.

Practice Review Program

A Practice Review addresses an individual licensee's practice activities and management. The Law Society now conducts three separate types of reviews of a practice:

1) Focused Practice Review: for licensees showing significant signs of deterioration in their practices as evidenced by increases in complaints and other indicia. The number of focused reviews varies, but is generally between 20 and 40 per year;

2) Re-entry Review: replaced the former Private Practice Refresher Program. Lawyers re-entering the private practice of law after a hiatus of five (5) years are required to undergo a review within 12 months from their return to practice as a sole or small firm

practitioner. It is anticipated that the number of re-entry reviews for 2014 will be less than 20;

3) Practice Management Review (PMR): risk based random selection process of lawyers in their first eight years of practice, and which also ensures that those selected reflect the percentage of law firms presented in Law Society conduct matters, segregated by firm size (50% soles, 25% firms with 2 to 5 lawyers, etc.). Over 400 practice management reviews will be conducted in 2014;

4) Practice Audits (PA): combined financial audit and practice management review conducted on Paralegal practices. Over 75 originating practice audits, and an additional 50 revisits, will be conducted in 2014.

Practice Management Review Program: Lawyers

Practice management reviews ensure that practitioners meet competency standards and identify areas for improvement in managing the lawyer's practice. Reviewers provide practical suggestions on how to maintain practice at optimal levels, leading to greater efficiencies, high quality service and greater lawyer and client satisfaction.

The Practice Management Review unit conducts over 400 original random reviews on individual lawyers and up to an additional 40-60 focused and re-entry to practice reviews per year.

In 2013, 549 practice management reviews were conducted (433 initial reviews plus 116 revisits). Approximately, 25% of initial attendances found that lawyers were not meeting standards of professional competence: sole practices at 37%; small firms at 15%; mid/large firms at 5%. As a result, a revisit is required to assess the implementation of recommendations made in the initial reviewer's report.

Over 98% of lawyers that underwent a practice management review responded that they found the process to be constructive and value-added to managing their practice.

Common Practice Deficiencies: Lawyers

The majority of law firms in Ontario are either sole practices or small firms (2 to 5 lawyers), making up approximately 94% of all law firms in the province. The following charts provide information on the breakdown of deficiencies found in practice reviews of sole and small firm lawyers in 2013 compared to 2009 when the program first initiated a risk based approach in selecting lawyers, based on the percentage of law firms represented in Law Society conduct matters and LawPRO negligence claims. The specifics of each deficiency, the recommendations to remediate and reference to resources, are made in the Reviewer's report to the lawyer for response.

	% Failed to Meet Minimum Standards		
General Observations on Law Firm	**2009**	**2013**	**Difference**
Power of Attorney to another lawyer	78%	71%	(7%)
Written office manual	60%	34%	(26%)
Written business arrangements	49%	39%	(10%)
Contingency planning	34%	30%	(4%)
Data security	22%	12%	(10%)
Client Service and Communication			
Written retainer agreements	44%	26%	(18%)
Sufficiency of written retainers	34%	29%	(5%)
Phantom clients	32%	22%	(10%)
Conflicts management	29%	28%	(1%)
File Management			
Limitation periods and other key dates	27%	28%	1%
Key information in files	25%	9%	(16%)
Adequate documentation in file	17%	15%	(2%)
File management system	12%	10%	(2%)
Financial Management			
Duplicate cash receipts	45%	19%	(26%)
Books and records are current	24%	16%	(8%)
Manage financial health of the firm	23%	23%	(0%)
Trust reconciliations done monthly	18%	9%	(9%)

For many of these top practice management deficiencies, there has been a significant improvement for practitioners. A number of program initiatives have had a cumulative positive impact on making the membership more aware of the importance of effective practice management process in their firm and for their clients. The Review team had a presence at the annual Sole and Small Firm Conference, the Articling and Beyond Conference, and presented at many practice management CPD sessions. All have made a difference in getting the word out and making effective practice management top of mind.

Spot Audit and Practice Management Review Revisits: Lawyers

A revisit by an Auditor or Reviewer is required any time the lawyer (practice review) or law firm (spot audit) fails to meet minimal expectations of competence and the issues are significant enough (contrary to the public interest, could result in direct harm to clients) to warrant another visit to assure improvements have been made in the public interest.

Of those lawyers who underwent a revisit for a review, almost all of them (99%) were found to have implemented the recommendations from their initial practice management review report and were now meeting minimum competence standards.

Spot Audit History of Revisits for Sole and Small Firms	Number of Firms Audited	Return Visits Required	Revisit Percentage of Total
2009 – 2013	6, 862	499	7%
2002 – 2008	6, 172	341	6%

Practice Review History of Revisits for Sole and Small Firms	Number of Firms Audited	Return Visits Required	Revisit Percentage of Total
2011 – 2013	999	313	31%
2008 – 2010	709	203	29%

Noticeably, the rate of revisits in Practice Review for sole and small firms has increased over the most recent five year period.

Paralegal Practice Audits: Paralegals

Practice audits of paralegals mirror the format of practice management reviews for lawyers, with the goal of providing targeted advice to achieve effective and efficient practices.

In 2013, there were 181 practice audits of paralegal practices conducted (113 initial audits plus 68 revisits). The program has been well received by paralegals, with 100% of those who underwent a practice audit finding it to be constructive and value added.

Since the inception of the Practice Audit Program in late 2008 to December 31, 2013, 55% of initial attendances found that paralegals were not meeting standards of professional competence and a revisit would be required to assess the extent of remediation.

Practice Audits		
Number of paralegals reviewed since inception (2008 – 2013)	436	
Return visit required	238	55%

The top ten practice management deficiencies found in conducting a practice audit of paralegal practices in 2013 and compared to 2009 (the first full year of the practice audit program), are:

Paralegal Practices – Areas of Review	% Failed to Meet Minimum Standards		
	2009	2013	Difference
Power of Attorney to another legal services provider	87%	71%	(16%)
Written business arrangements	75%	31%	(44%)
Phantom clients	72%	30%	(42%)
Written office manual	80%	9%	(71%)
Time dockets	62%	30%	(32%)
Conflicts management	60%	34%	(26%)
Duplicate cash receipts	51%	48%	(3%)
Books and records comply with By-Law #9	53%	46%	(7%)
Data security	37%	12%	(25%)
File management	35%	27%	(8%)

The type of practice management deficiencies found in paralegal practices is similar to those found in practice reviews of lawyers. The major difference is in the extent of failure in each of the categories where paralegal practices have failed to meet minimum competence standards. The percentage of practice management deficiencies in every one of these practice areas has declined significantly over the past five years.

Spot Audit and Practice Review Educational Initiatives

General aggregated information and trends on areas of deficiency encountered in reviews of lawyer and paralegal practices is exchanged with other areas of PD&C for the purpose of developing resources and tools that will assist practitioners to avoid/address these problems. Reviewers have presented to local law associations on key practice management deficiencies, the steps to remediate and a list of applicable resources.

Practice Review has worked with other PD&C units to develop CPD programs on effective practice management processes. These seminars have been presented by experienced practice reviewers to various local law associations. Three such seminars were conducted in 2013, in addition to six presentations to specific associations (Hamilton Family Law Association, Halton District, Sudbury District, Hamilton Criminal Law Association, Licensed Paralegal Association of Ontario, Ontario Bar Association).

Spot Audit continues to be actively involved on a number of educational initiatives ranging from developing CPD courses and materials to presenting at CPD sessions on a variety of financial books and records topics to both lawyers and paralegals, providing their “on the ground” insights to ensure the resources are practical and user friendly.

Continuing Professional Development Compliance Audit Program

The CPD compliance audit program’s objective is to assess licensees’ compliance with the documentation requirements as proof of their CPD reported activities, as per section 5 of By-Law 6.1. The CPD Audit program’s goal is to conduct 1,000 CPD audits (lawyers: 900 and paralegals: 100) through a combination of desk audits and practice review engagements which assess a licensee’s compliance to the Law Society’s CPD documentation requirements.

Staffing complement for the CPD audits is included in the Practice Review and Practice Audits units. For 2013, the team conducted 1,034 CPD compliance audits, comprised of 591 CPD desk audits and 443 audits integrated into practice reviews.

Approximately 96% of licensees were in full compliance with the Law Society's CPD record keeping requirements, 3% were in partial compliance, and less than 1% were not compliant.

Detailed and specific information were provided to licensees to assist them in ensuring full compliance with their CPD record keeping requirements for future reported professional development activities.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 7

Report to Convocation
February 27, 2014

Compensation Fund Committee

Committee Members
Peter Wardle (Chair)
Seymour Epstein
Michelle Haigh
Jack Rabinovitch
Heather Ross

Purpose of Report: Decision and Information

Prepared by the Professional Regulation Division
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COMMITTEE PROCESS

1. The Committee discussed the matters in this report on April 10, 2013, June 19, 2013, August 28, 2013, December 2, 2013, January 15, 2014, and February 12, 2014. Committee members in attendance were Peter Wardle, Chair (all meetings), Seymour Epstein (all meetings), Michelle Haigh (all meetings except August 28, 2013, and February 12, 2014), Jack Rabinovitch (April 10, 2013) and Heather Ross (all meetings except April 10, 2013, and January 15, 2014). Staff in attendance were Zeynep Onen, Director, Professional Regulation (all meetings), Dan Abrahams, Manager, Compensation Fund (all meetings), Elliot Spears, Senior Counsel, Legal Affairs (April 10, 2013), Fred Grady, Manager, Finance (June 19, 2013, January 15, 2014, and February 12, 2014) and Roy Thomas, Director, Communications (January 15, 2014)

TAB 7.1

FOR DECISION

REPEAL AND REPLACEMENT OF GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE COMPENSATION FUND

Motion

2. That Convocation repeal the existing *General Guidelines for the Determination of Grants from the Compensation Fund* and the existing *Guidelines for the Determination of Grants from the Compensation Fund Relating to Paralegals*, set out at Tab 7.1.2, and replace them with new *General Guidelines for the Determination of Grants from the Compensation Fund Relating to Lawyers and Paralegals*, set out at Tab 7.1.1.

Overview

3. The Compensation Fund Committee has developed new Guidelines for the determination of grants from the Compensation Fund. This would replace both of the current Guidelines (one for lawyers and one for paralegals). The Guidelines are not binding; their purpose is to structure the exercise of the Law Society's discretion and promote consistency in determining grants from the Compensation Fund. The amended Guidelines are written to be clearer and more accessible but the underlying principles used to determine grants have not changed. Amendments are described in this Report and in more detail in the Concordance Tables set out at **Tabs 7.1.3** and **7.1.4.**

Background

4. The Compensation Fund was created in 1953. Its existence serves the Law Society's mandate of public protection. Pursuant to subsection 51(5) of the *Law Society Act*:

> Convocation may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,

(a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee; or

(b) dishonesty, before the amendment day, on the part of a person, while a member, in connection with his or her law practice or in connection with any trust of which he or she was or is a trustee.

5. Law Society By-Law 12 establishes the Compensation Fund Committee and sets out its mandate and responsibilities. Under the By-Law, the Committee is responsible for the administration of the Compensation Fund. The Committee provides general oversight for the Fund, considers grant recommendations for losses attributable to lawyer and paralegal dishonesty, and develops and proposes policies related to the Fund.

6. Convocation has previously approved two distinct sets of Guidelines, one dealing with losses attributable to dishonesty on the part of lawyers, and another set dealing with compensation for losses attributable to paralegal dishonesty. The two sets of Guidelines are very similar, though not identical.

7. The nature of the Guidelines was recently addressed by the Ontario Divisional Court. In *Tarek El Hennawy* et al. v. *The Law Society of Upper Canada* (January 28, 2014), 2014 ONSC 375 (attached at **Tab 7.1.6**), the Court stated, at paragraphs 30 and 31:

> Convocation's authority to establish these Guidelines is derived from its absolute discretion to make grants from the Fund. The Guidelines are a way of structuring the exercise of that discretion and providing some consistency. We agree that Convocation was entitled to establish these Guidelines and required no express statutory authority to do so. ... The Guidelines expand on the criteria regarding eligibility for grants from the Fund. They are not inconsistent with the *Act* because the *Act* does not provide that any claimant is *entitled* to receive a grant if they meet the threshold criteria in s.51(5). We find that the provisions of the statute and the Guidelines are consistent.

> Further the Guidelines are non-binding and do not fetter the Committee's discretion. Guidelines are helpful by allowing applicants to know in general terms what the policy and practices are. The case law recognizes the authority of statutory tribunals to pass guidelines governing their broad exercise of discretion so long as these guidelines are recognized as being non-binding. ... In this case the Committee accepted that it was free to depart from the Guidelines and the Committee properly considered the relationship of the Guidelines to the *Act* and the manner in which they were to be applied.

8. The purpose of the Guidelines is not to bind the Law Society or fetter its discretion but to structure the exercise of that discretion and provide consistency in decision-making. The Guidelines are intended to be helpful, as the Court said in *El-Hennawy*. The Guidelines also emphasize that access to the Fund is, for the most part, limited to circumstances where there is a connection between the licensee's dishonesty and his/her capacity as a licensee, specifically in the context of the practice of law or provision of legal services.

9. The Compensation Fund Committee has been reviewing the Guidelines used to assist in the determination of claims for compensation. The Committee reviewed a number of examples of guidelines and rules drawn from various jurisdictions in Canada and the United States. The Committee also considered the experience of the Fund itself.

10. If approved by Convocation, the new Guidelines will not change the manner in which the Law Society deals with claims for compensation for the Fund. They are better organized and more accessible and will more clearly assert the basis upon which compensation is paid (the need for a connection between the licensee's dishonesty and his or her practice of law and provision of legal services).

Key Principles

11. The following are principles identified by the Committee as key to the proposed new Guidelines , as well as the new Compensation Fund Policies and Procedures (approved by the Committee and appended for Convocation's information):

a. Accessibility and Clarity. The current Guidelines have been assembled over a number of years and have had a number of authors. The Committee feels that the Guidelines should be clearer and more accessible to those most likely to rely upon them: not just staff and benchers, but also licensees (whose alleged dishonesty may give rise to claims) and prospective claimants. Where feasible, plainer language has been adopted.
b. Transparency. Without fettering discretion, the Guidelines should nonetheless state as straightforwardly as possible what types of situations will generally permit claims for compensation and what should not.
c. Flexibility. The Guidelines are not binding. They are not intended to fetter the discretion of Convocation or, by delegation, the Compensation Fund Committee.
d. Symmetry. The lawyer and paralegal guidelines are already very similar. They serve an identical purpose in relation to the statue. While the two Funds are separately maintained, with distinct levies charged to licensees in both categories, there is no obvious reason for two sets of Guidelines.
e. Separation of Guidelines and Policies and Procedures. The Committee has opted to remove guidelines that are essentially "procedural" in nature, permitting the Guidelines to focus on substantive issues that assist in the application of statutory discretion.

The New Guidelines

12. The *Guidelines for the Determination of Grants from the Compensation Fund Relating to Lawyers and Paralegals* reorganize and restate the principles that are contained in the existing Guidelines. The new Guidelines are appended at **Tab 7.1.1** and the existing Guidelines are together appended at **Tab 7.1.2**.

13. Two concordances are also appended. One concordance, at **Tab 7.1.3**, lists the new Guidelines and compares them to the equivalent versions in the existing lawyer and paralegal Guidelines. It also provides a short explanation for why the Committee is proposing the new version. In some instances, guidelines and model rules used in other

jurisdictions in Canada and the United States have informed the choice of language proposed for the new Ontario Guidelines.

14. The second concordance, at Tab **7.1.4**, lists the existing Guidelines for both lawyers and paralegals and points to the closest equivalent in either the new Guidelines or in the Policies and Procedures or, in a few instances, both.

15. To promote clarity and transparency, the new Guidelines contain a number of structural and organizational enhancements. Notably, the Guidelines are now grouped into sections, as follows:

    A. Preface
    B. Who Can Claim
    C. Losses for Which Compensation May be Available
    D. Determining the Amount of Compensation that is Payable
    E. Losses for Which Compensation is Not Available

16. The Preface is especially important in articulating the general principles that led to the creation of the Compensation Fund and that have supported its continuation. In addition, the Preface makes clear that the purpose of the new or updated Guidelines is to restate and clarify existing core principles, not to change them. In this context, the Preface confirms that the new Guidelines will be applied to all outstanding Compensation Fund claims.

Policies and Procedures

17. New Policies and Procedures, at Tab **7.1.5**, have been created to supplement the statutory provisions and the Guidelines. Their major function is to describe the decision-making process at the Fund, rather than address substantive issues flowing from subsection 51(5) of the *Law Society Act*. The Policies and Procedures have been adopted by the Committee and are provided to Convocation for information. Unlike the Guidelines, which require the approval of Convocation, the Policies and Procedures can be amended

by the Committee, as required. Both the Guidelines and the Policies and Procedures will be made readily available to claimants, licensees and the public, via the Law Society's website and other means.

18. Some items that are contained in the existing Guidelines appear to reside more suitably in the Policies and Procedures. Items which have been moved to from the Guidelines to Policies and Procedures are identified in the concordance table at Tab 7.1.4, but are summarized as follows:

    a. The matter of costs, or counsel fees, that might be payable from the Fund in limited circumstances to counsel who assist claimants with the presentation of a claim. It confirms that costs are rarely payable from the Fund, except in circumstances where counsel has been involved in a Claims Officer hearing, pursuant to the new fact-finding mechanism adopted by Convocation and incorporated in By-Law 12 in 2013.
    b. The requirement to notify law enforcement when criminal conduct is suspected.
    c. The requirement that claims arise in Ontario and involve Ontario lawyers, save as provided in the National Mobility Agreement.

TAB 7.1.1

For Approval

NEW GENERAL GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE COMPENSATION FUND RELATING TO LAWYERS AND PARALEGALS

A. PREFACE

1. *General*:

These Guidelines outline the general principles that will guide the Compensation Fund in the exercise of its discretion pursuant to the *Law Society Act*, R.S.O. 1990, c.L.8, s.51, as am. These Guidelines are not rules, are not exhaustive and will not necessarily apply to every conceivable situation. The facts and circumstances of each case will be carefully considered as part of decision-making.

Grants are generally payable from the Compensation Fund to those who have suffered losses due to dishonesty on the part of lawyers or licensed paralegals. Most commonly, a loss for which compensation is payable results from theft or misappropriation of money that ought to be held in trust for a client as a retainer or as the proceeds from a settlement, a sale of property or an estate.

These Guidelines were adopted in this form by Convocation in 2014. The updated Guidelines are not intended to change the substantive considerations in determining a claim but are intended to restate and clarify, in plain language, the underlying principles and process that apply to the determination of Compensation Fund claims. The updated Guidelines apply to all outstanding Compensation Fund claims.

2. *Final decision*: A decision by the Compensation Fund to pay or not pay compensation is final.

3. *Proof:* To make a grant, the Compensation Fund must have satisfactory proof of loss. What is satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example:

- Receipts issued by the lawyer or paralegal
- Statements of account from the lawyer or paralegal
- Bank records of the claimant
- Cancelled cheques issued by the claimant or on the claimant's behalf

4. *Fund of last resort:* The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.

B. WHO CAN CLAIM

5. *Lawyer-client / paralegal client relationship:* Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or other similar fiduciary relationship with the person whose dishonesty is the reason for the loss.

6. *Exception – estate beneficiaries.* A beneficiary of an estate may claim for compensation, where a loss from the estate is because of the dishonesty of a lawyer who has acted as solicitor for the estate or estate trustee or both.

7. *Financial institutions and insurers:* The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance.

C. LOSSES FOR WHICH COMPENSATION MAY BE AVAILABLE

8. *Loss:* For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and accounted for, and/or returned to the claimant.

9. *Dishonest conduct*: The loss must result from a lawyer's or paralegal's dishonest conduct. Dishonest conduct includes wrongful acts committed by a lawyer or paralegal, such as theft or embezzlement of money that ought to be held in trust for a client, or the wrongful taking or conversion of money or property. It can also include wrongfully failing to return a retainer that has been paid by a client but not earned.

10. *Lawyer-client, paralegal-client or fiduciary relationship*: The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client.

11. *Practice of law / provision of legal services*: Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services, compensation will not be available.

12. *Legal entitlement:* The claimant must be legally or beneficially entitled to the money or property for which he or she is seeking compensation.

D. DETERMINING THE AMOUNT OF COMPENSATION THAT IS PAYABLE

13. *Amount of loss*: The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the

work or the disbursements. The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.

14. *Maximum grant*: Convocation will, from time to time, determine the maximum amount payable by the Fund. For losses resulting from funds given to a lawyer after April 22, 2008, the maximum grant is $150,000. Grants for such losses originating prior to April 22, 2008 are subject to the maximum in place at the time funds were advanced. The maximum grant is $10,000 for a loss resulting from dishonesty on the part of a paralegal licensee.

15. *Risk and carelessness:* The Compensation Fund will consider the extent to which the claimant was careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In assessing risk and carelessness, the Fund may consider, for example:

(a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise);
(b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and
(c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.

E. LOSSES FOR WHICH COMPENSATION IS NOT PAYABLE

16. *General:* The following losses will not result in compensation from the Fund:

(a) Losses by spouses, children, parents, grandparents, siblings, partners, associates and employees of the lawyer(s) or paralegal(s) causing the loss
(b) Losses covered by a bond, surety agreement, or insurance contract to the extent to which coverage applies
(c) Losses by any business entity controlled by the lawyer or paralegal
(d) Losses by any governmental entity or agency
(e) Losses by banks or other financial institutions
(f) Interest, damages, expenses, costs and other consequential or incidental losses

17. *Loans:* The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.

18. *Investments*: The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the investment itself.

TAB 7.1.2

GENERAL GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE COMPENSATION FUND

1. It must be shown that, at the time the lawyer licensee received funds or property of a claimant,

   a) a solicitor and client relationship existed between the claimant and the lawyer, and that

   b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, and that

   c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business*.

2. Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and the lawyer is not required,

   a) when it can be shown that the claimant relied on the lawyer and the loss was in consequence of dishonesty by the lawyer in connection with any trust related to the lawyer's professional business where the lawyer is or was a trustee; or

   b) when the claimant is a beneficiary of an estate of a deceased person whose personal representative has a solicitor and client relationship with the lawyer. Beneficiaries of an estate will be allowed to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim.

3. Money left with a lawyer to be used in a venture, in which the lawyer and the person advancing the money are both participants, is not money received by the lawyer in connection with his or her professional business, or in his or her capacity as a lawyer, despite the fact that the lawyer performs legal services in connection with the venture. Misappropriation by the lawyer of money left with the lawyer to participate in a venture with the lawyer, or failure to properly account by the lawyer, is not conduct for which relief from the Fund is available.

4. a) There shall be no recovery of money advanced to the lawyer if the purpose of such advance was known by the claimant to be a loan to the lawyer or in circumstances where the claimant should have known that the advance was a loan to the lawyer. It is deemed that the advance was to the lawyer, if it was for the lawyer personally or to the lawyer's spouse or a corporation, syndicate or

*Professional business means the practice of law and the business operations relating to it.

partnership in which the lawyer or lawyer's spouse or both of them directly or indirectly, have a substantial interest.

b) Notwithstanding the foregoing, if a claimant is induced to lend money to a lawyer because of a solicitor and client relationship, consideration can be given to making a grant when the loan is not repaid.

5. There must be satisfactory proof that money or money's worth was received by the lawyer from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.

6. Ordinarily,

a) the amount of the loss in respect of which a grant may be made is the difference between the amount received by the lawyer and the actual amount returned or otherwise accounted for to the claimant; and

b) all amounts paid to the claimant, even though purporting to be interest, or on account of interest, should be deducted in determining the amount of the grant, less the amount of any income tax paid on that interest.

Payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: $500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus $800. per day in the discretion of the Referee if a hearing is held.

7. The amount of a grant may be reduced in circumstances where the claimant expected or should reasonably be considered as having expected that the funds entrusted to the lawyer were to be invested in a risky investment that might not be recovered in full.

8. Carelessness, on the part of the claimant, which causes or contributes to a loss, is a factor which may be considered in making a grant from the Fund. It is not feasible to attempt to exhaustively define what constitutes carelessness. Each claim for a grant depends on its particular facts. It may be considered to be carelessness where a claimant advances or continues to advance money to a lawyer, if the claimant has knowledge of facts which reasonably should cause the claimant to doubt the integrity, or the financial reliability of the lawyer.

9. Where the dealings with the lawyer have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and

thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.

10. Where a claimant has a reasonable cause of action against some other person, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.

11. Where the lawyer would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof, can, in the discretion of the Referee, be deducted from the amount of the grant that would otherwise be made.

12. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the lawyer, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.

13. 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.

14. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an apparently dishonest lawyer will not be entitled to a grant unless the Law Society Compensation Fund and Discipline Departments have been informed before any such steps are taken.

15. In the case of a lawyer who conducts the practice of law 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 lawyer in connection with a matter that originated in that jurisdiction or in connection with a trust of which the lawyer was or is a trustee that originated outside Ontario.

Revised April 30, 2007

Approved (Convocation) September 2007

GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE COMPENSATION FUND RELATING TO PARALEGALS

1. In order to qualify for a grant from the Compensation Fund, it must be shown that,
    a. the paralegal licensee received funds or property of a claimant, in his or her capacity as a person licensed to provide legal services, and that
    b. the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business. Professional business means the provision of legal services and the business operations relating to it, as set out in the Law Society Act.

2. Notwithstanding the requirements of guideline 1(a) a paralegal and client relationship between the claimant and the paralegal is not required, when it can be shown that the claimant relied on the paralegal and the loss was in consequence of dishonesty by the paralegal in connection with any trust related to the paralegal's professional business where the paralegal is or was a trustee.

3. Money left with a paralegal to be used in a venture, in which the paralegal and the person advancing the money are both participants, is not money received by the paralegal in connection with his or her professional business, or in his or her capacity as a paralegal, despite the fact that the paralegal provides legal services in connection with the venture. Misappropriation by the paralegal of money left with the paralegal to participate in a venture with the paralegal, or failure to properly account by the paralegal, is not conduct for which relief from the Fund is available.

4.
    a. There shall be no recovery of money advanced to the paralegal if the purpose of such advance was known by the claimant to be a loan to the paralegal or in circumstances where the claimant should have known that the advance was a loan to the paralegal. It is deemed that the advance was to the paralegal, if it was for the paralegal personally or to his or her spouse or a corporation, syndicate or partnership in which the paralegal or the paralegal's spouse or both of them directly or indirectly, have a substantial interest.
    b. Notwithstanding the foregoing, if a claimant is induced to lend money to a paralegal because of a paralegal and client relationship, consideration can be given to making a grant when the loan is not repaid.

5. There must be satisfactory proof that money or money's worth was received by the paralegal from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.

6. Ordinarily,
    a. the amount of the loss in respect of which a grant may be made is the difference between the amount received by the paralegal and the actual amount returned or otherwise accounted for to the claimant; and

b. payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: $500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus $800. per day in the discretion of the Referee if a hearing is held.

7. Carelessness on the part of the claimant, or risk undertaken by the claimant, which cause or contribute to a loss, may be considered in making a grant from the Fund. Each claim for a grant depends on its particular facts. While it is not feasible to attempt to exhaustively define what constitutes carelessness, it may be considered to be careless where a claimant advances or continues to advance money to a paralegal, if the claimant has knowledge of facts that reasonably should cause the claimant to doubt the integrity, or the financial reliability of the paralegal.

8. Where the dealings with the paralegal have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.

9. Where a claimant has a reasonable cause of action against some other person, including the paralegal, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of Fund counsel and/or the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.

10. Where the paralegal would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof can be deducted from the amount of the grant that would otherwise be made.

11. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the paralegal, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.

12. 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.

13. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an apparently dishonest paralegal will not be entitled to a grant unless the Compensation Fund has been informed before any such steps are taken.

14. In the case of a paralegal who provides legal services 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 paralegal in connection with a matter that originated in that jurisdiction.

February 21, 2008

TAB 7.1.3

NEW GENERAL GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE COMPENSATION FUND RELATING TO LAWYERS AND PARALEGALS

CONCORDANCE WITH EXISTING GUIDELINES, AND EXPLANATORY NOTES

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
A.	**PREFACE**		
1.	*General*: These Guidelines outline the general principles that will guide the Compensation Fund in the exercise of its discretion pursuant to the *Law Society Act*, R.S.O. 1990, c.L.8, s.51, as am. These Guidelines are not rules, are not exhaustive and will not necessarily apply to every conceivable situation. The facts and circumstances of each case will be carefully considered as part of decision-making. Grants are generally payable from the Compensation Fund to those who have suffered losses due to dishonesty on the part of lawyers or licensed paralegals. Most commonly, a loss for which compensation is payable results from theft or misappropriation of money that	There is no direct equivalent in either the General Guidelines for the Determination of Grants from the Compensation Fund ("lawyer guidelines") or the Guidelines for the Determination of Grants from the Compensation Fund Relating to Paralegals ("paralegal guidelines").	For the sake of greater transparency and comprehensibility, the Committee believes it is important at the outset to assert the principles that led to the creation of the Compensation Fund and that have supported its continuation. The Committee also wishes to more clearly associate the Guidelines with the discretion conferred on the Law Society by statute. The language used in this guideline with respect to the most common basis for compensation reflects language already employed in routine correspondence with claimants and licensees. In the Committee's view, it fairly describes the purpose of the Fund as intended by the Legislature and by Convocation.

	NEW GENERAL GUIDELINES	**CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)**	**EXPLANATION**
	ought to be held in trust for a client as a retainer or as the proceeds from a settlement, a sale of property or an estate. These Guidelines were adopted in this form by Convocation in 2014. The updated Guidelines are not intended to change the substantive considerations in determining a claim but to restate and clarify, in plain language, the underlying principles and process that apply to the determination of Compensation Fund claims. The updated Guidelines apply to all outstanding Compensation Fund claims.		The transitional language in the final paragraph is inspired by similar language included in Alberta's Assurance Fund Guideline at the time of its last revision, in February 2008. Alberta's Guideline also begins with a preface stating its intent, which is "to guideline and assist all of those involved in a claim to understand the general requirements and process…to support all those deciding claims to make effective and consistent decisions and to offer helpful information to claimants, members and other interested parties to allow them to reasonably assess and respond to issues associated with their claims."
2.	*Final decision*: A decision by the Compensation Fund to pay or not pay compensation is final.	There is no direct equivalent to this provision in either the lawyer or paralegal guidelines. However, subsection 51(5) of the *Law Society Act* states in part that "Convocation *in its absolute discretion* may make grants from the Fund…"	The Committee believes it is useful for the Guidelines to restate the fact that Convocation's discretion, as delegated to the Committee and to staff pursuant to By-Law 12, is absolute (although it is fair to concede that the possibility of judicial review is not necessarily precluded).
3.	*Proof:* To make a grant, the Compensation Fund must have satisfactory proof of loss. What is	Guideline 5 of the lawyer guidelines states: *There must be satisfactory proof that*	The new version of the Guideline is intended to add substance. It codifies the existing requirements and frequently used

	NEW GENERAL GUIDELINES	**CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)**	**EXPLANATION**
	satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example: • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf	*money or money's worth was received by the lawyer from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.* Guideline 5 of the paralegal guidelines states: *There must be satisfactory proof that money or money's worth was received by the paralegal from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.*	examples for establishing that funds were indeed advanced to a licensee. This approach is not uncommon. See for example the Nova Scotia' Barristers Society stipulation that the requisite proof could include "copies of billings or invoices from the lawyer in relation to the service(s) for which the lawyer was retained, indicating any fees, disbursements, and other charges paid by the applicant; copies of receipts or cancelled cheques; and copies of relevant correspondence or legal documents, including deeds, wills, contracts, etc."
4.	*Fund of last resort:* The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.	Guideline 10 in relation to lawyers states: *Where a claimant has a reasonable cause of action against some other person, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of the Committee whether all reasonable steps have been taken, but*	The reformulated guideline aims for greater simplicity and transparency.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund. Guideline 9 of the paralegal guidelines states: *Where a claimant has a reasonable cause of action against some other person, including the paralegal, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of Fund counsel and/or the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.*	
B.	**WHO CAN CLAIM**		
5.	*Lawyer-client / paralegal client relationship:* Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or	Guideline 1(a) of the lawyer guidelines states: *It must be shown that, at the time the lawyer licensee received funds or property of a claimant,*	The Committee wishes to ensure that the requisite relationship is more clearly defined, since the existing guidelines do not in fact restrict compensation to those who have a licensee-client relationship *per*

	NEW GENERAL GUIDELINES	**CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)**	**EXPLANATION**
	other similar fiduciary relationship with the person whose dishonesty is the reason for the loss.	*a) a solicitor and client relationship existed between the claimant and the lawyer, …* Guideline 1(a) of the paralegal guidelines states: *In order to qualify for a grant from the Compensation Fund, it must be shown that,* *a) the paralegal licensee received funds or property of a claimant, in his or her capacity as a person licensed to provide legal services*,	*se*. The existing guidelines also provide for limited exceptions. The new version makes this clearer, and lays the foundation for appropriate exceptions by referencing the concept of a fiduciary relationship. This concept is to be found in rules and guidelines in other jurisdictions that pay compensation to victims of lawyer dishonesty. For instance, Rule 10A of the American Bar Association's Model Rules for Lawyers' Funds for Client Protection ("ABA Model Rules"), states in part that "[t]he loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and claimant."
6.	*Exception – estate beneficiaries*. A beneficiary of an estate may claim for compensation, where a loss from the estate is because of the dishonesty of a lawyer who has acted as solicitor for the estate or estate trustee or both.	Guideline 2(b) of the lawyer guidelines states: *Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and the lawyer is not required, …* *b) when the claimant is a beneficiary of an estate of a deceased person whose personal representative has a solicitor and client relationship with the lawyer. Beneficiaries of an estate will be allowed*	The new version is intended to simplify the existing wording for this exception, which reflects a policy choice made by Convocation several years ago. The effect of both versions is (1) to create a limited exception to the requirement for a direct lawyer-client relationship that is nonetheless generally consistent with the statutory purpose of the Compensation Fund; and (2) to permit aggregate claims for losses from an estate that could,

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim. There is no equivalent to this in the paralegal guidelines because estate work is not within the accepted paralegal scope of practice.	potentially, exceed the per-claimant limit.
7.	*Financial institutions and insurers:* The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance.	Guideline 13 of the lawyer guidelines states, in part: *No grant shall be made to a bank or other financial institution engaged in the business of lending money.* Guideline 12 of the paralegal guidelines states, in part: *No grant shall be made to a bank or other financial institution engaged in the business of lending money.*	The restriction on financial institutions is unchanged. The restriction on compensating insurers reflects a longstanding and well-accepted practice at the Fund. It is intended to discourage insurers, who have paid out on claims, from suing unwitting victims of fraud in order to force them to seek compensation from the Fund and thereby relieve the insurer. See also new Guideline 16, which excludes, among other things, claims for losses covered by insurance policies.
C.	**LOSSES FOR WHICH COMPENSATION MAY BE AVAILABLE**		
8.	*Loss:* For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and	Guideline 6 of the lawyer guidelines states, in part: *Ordinarily,* *a) the amount of the loss in respect of which a grant may be made is the*	The new formulation is intended to be more straightforward and comprehensible to claimants.

	NEW GENERAL GUIDELINES	**CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)**	**EXPLANATION**
	accounted for, and/or returned to the claimant.	*difference between the amount received by the lawyer and the actual amount returned or otherwise accounted for to the claimant; …* Guideline 6 of the paralegal guidelines states, in part: *Ordinarily,* *a) the amount of the loss in respect of which a grant may be made is the difference between the amount received by the paralegal and the actual amount returned or otherwise accounted for to the claimant;*	
9.	*Dishonest conduct*: The loss must result from a lawyer's or paralegal's dishonest conduct. Dishonest conduct includes wrongful acts committed by a lawyer or paralegal, such as theft or embezzlement of money that ought to be held in trust for a client, or the wrongful taking or conversion of money or property. It can also include wrongfully failing to return a retainer that has been paid by a client but not earned.	There is no direct equivalent to this provision in either the lawyer or paralegal guidelines.	The Committee wishes to reinforce the principles also contained in the Preface to these Guidelines. The examples given are by far the most common circumstances in which a claimant will be eligible to receive a grant from the Compensation Fund. The provision is deliberately not exhaustive of all potential types of licensee dishonesty. As noted above, the concept of "dishonest conduct" in the ABA Model Rules. In addition those Rules provide for a definition of dishonest conduct. R.10C

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
			states, in part: "As used in these Rules, dishonest conduct means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, including but not limited to: (1) Failure to refund unearned fees received in advance …;"
10.	*Lawyer-client, paralegal-client or fiduciary relationship*: The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client.	Guidelines 1(a) and (b) of the lawyer guidelines state: *It must be shown that, at the time the lawyer licensee received funds or property of a claimant,* *a) a solicitor and client relationship existed between the claimant and the lawyer, and that* *b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, …* Guideline 1(a) and (b) of the paralegal guidelines state: *In order to qualify for a grant from the Compensation Fund, it must be shown that,* a) *the paralegal licensee received funds or property of a claimant, in his or her*	The Committee wishes to stress the core principles that provide the basis for compensation – in this instance the nature of the relationship that must exist between the person claiming compensation and the person whose dishonesty is the basis for the claim.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		capacity as a person licensed to provide legal services, and that *b) the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business. Professional business means the provision of legal services and the business operations relating to it, as set out in the Law Society Act.*	
11.	*Practice of law / provision of legal services*: Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services,	Guideline 1(c) of the lawyer guidelines states: *It must be shown that, at the time the lawyer licensee received funds or property of a claimant,* … *c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business*.* **Professional business means the practice of law and the business operations relating to it.*	This is again intended to discourage claims for losses in which the dishonest person happens to be a lawyer or licensed paralegal, but the loss itself is generally unconnected to the practice of law or provision of legal services – for instance, a pure investment scheme in which a trust account is used for flow-through purposes. (See also new Guideline 18, below.)

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	compensation will not be available.	Guideline 3 of the lawyer guidelines states: *Money left with a lawyer to be used in a venture, in which the lawyer and the person advancing the money are both participants, is not money received by the lawyer in connection with his or her professional business, or in his or her capacity as a lawyer, despite the fact that the lawyer performs legal services in connection with the venture. Misappropriation by the lawyer of money left with the lawyer to participate in a venture with the lawyer, or failure to properly account by the lawyer, is not conduct for which relief from the Fund is available.* Guideline 1(b) of the paralegal guidelines states: *In order to qualify for a grant from the Compensation Fund, it must be shown that, …* *b) the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business.*	

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		Professional business means the provision of legal services and the business operations relating to it, as set out in the Law Society Act. Guideline 3 of the paralegal guidelines states: *Money left with a paralegal to be used in a venture, in which the paralegal and the person advancing the money are both participants, is not money received by the paralegal in connection with his or her professional business, or in his or her capacity as a paralegal, despite the fact that the paralegal provides legal services in connection with the venture. Misappropriation by the paralegal of money left with the paralegal to participate in a venture with the paralegal, or failure to properly account by the paralegal, is not conduct for which relief from the Fund is available.*	
12.	*Legal entitlement:* The claimant must be legally or beneficially entitled to the money or property for which he or she	Guideline 9 of the lawyer guidelines states: *Where the dealings with the lawyer have*	The Committee recommends a simpler and more straightforward formulation. The intent is to capture a number of situations

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	is seeking compensation.	*been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.* Guideline 8 of the paralegal guidelines states: *Where the dealings with the paralegal have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made,*	in which a claim might be made by someone whose entitlement is not immediately apparent.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.	
D.	**DETERMINING THE AMOUNT OF COMPENSATION THAT IS PAYABLE**		
13.	*Amount of loss*: The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the work or the disbursements. The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.	Guideline 11 of the lawyer guidelines states: *Where the lawyer would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof, can, in the discretion of the Referee, be deducted from the amount of the grant that would otherwise be made.* Guideline 10 of the paralegal guidelines	The Committee recommends a simpler and more straightforward formulation. The situation addressed in this guideline arises frequently at the Compensation Fund, particularly in the case of allegedly unearned retainers.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		states: *Where the paralegal would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof can be deducted from the amount of the grant that would otherwise be made.*	
14.	*Maximum grant*: Convocation will, from time to time, determine the maximum amount payable by the Fund. For losses resulting from funds given to a lawyer after April 22, 2008, the maximum grant is $150,000. Grants for such losses originating prior to April 22, 2008 are subject to the maximum in place at the time funds were advanced. The maximum grant is $10,000 for a loss resulting from dishonesty on the part of a paralegal licensee.	Compensation Fund limits are set from time to time by resolution of Convocation, on the recommendation of the Compensation Fund Committee, but are not currently included in the Guidelines.	This provision incorporates Convocation's most recent resolution with respect to the per claimant limit in the Guidelines. It would be amended by motion of Convocation in the event the per-claimant limit is increased.
15.	*Risk and carelessness:* The Compensation Fund will consider the extent to which the claimant was	Guideline 7 of the lawyer guidelines states: *The amount of a grant may be reduced in*	This guideline combines two guidelines into one. In many cases that come to the Fund, the distinction between risk and

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In assessing risk and carelessness, the Fund may consider, for example: (a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise); (b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and (c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.	*circumstances where the claimant expected or should reasonably be considered as having expected that the funds entrusted to the lawyer were to be invested in a risky investment that might not be recovered in full.* Guideline 8 of the lawyer guidelines states: *Carelessness, on the part of the claimant, which causes or contributes to a loss, is a factor which may be considered in making a grant from the Fund. It is not feasible to attempt to exhaustively define what constitutes carelessness. Each claim for a grant depends on its particular facts. It may be considered to be carelessness where a claimant advances or continues to advance money to a lawyer, if the claimant has knowledge of facts which reasonably should cause the claimant to doubt the integrity, or the financial reliability of the lawyer.* The concepts of risk and carelessness are already combined in the paralegal	carelessness is not readily apparent. In addition to simplifying and combining the two existing guidelines, which are conceptually related, the new version also provides more specific examples, to guide staff, Committee members and claimants. Much of the content of the examples is borrowed from the Alberta guideline, as adopted in 2008.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		guidelines, in Guideline 7: *Carelessness on the part of the claimant, or risk undertaken by the claimant, which cause or contribute to a loss, may be considered in making a grant from the Fund. Each claim for a grant depends on its particular facts. While it is not feasible to attempt to exhaustively define what constitutes carelessness, it may be considered to be careless where a claimant advances or continues to advance money to a paralegal, if the claimant has knowledge of facts that reasonably should cause the claimant to doubt the integrity, or the financial reliability of the paralegal.*	
E.	**LOSSES FOR WHICH COMPENSATION IS NOT PAYABLE**		
16.	*General:* The following losses will not result in compensation from the Fund: (a) Losses by spouses, children, parents, grandparents, siblings, partners, associates and employees	Most of this is new, although it reflects standard and longstanding practice at the Fund. The last sentence of Guideline 13 of the lawyer guidelines already prohibits claims by financial institutions, as set out above in the context of new Guideline 7.	This guideline is intended to incorporate standard practice at the Compensation Fund. It is influenced to some extent by the ABA Model Rules. R10D (the actual formulation or extent of which varies from state to state), proposes the following

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	of the lawyer(s) or paralegal(s) causing the loss (b) Losses covered by a bond, surety agreement, or insurance contract to the extent to which coverage applies (c) Losses by any business entity controlled by the lawyer or paralegal (d) Losses by any governmental entity or agency (e) Losses by banks or other financial institutions (f) Interest, damages, expenses, costs and other consequential or incidental losses	In addition, Guideline 6 of the lawyer guidelines provides, in part: *Payment of interest to the claimant, or costs … , expenses or damages incurred or suffered by the claimant will not be made out of the Fund.* Guideline 12 of the paralegal guidelines prohibits claims by financial institutions, as set out above. Guideline 6b of the paralegal guidelines states, in part: *[P]ayment of interest to the claimant, or costs …, expenses or damages incurred or suffered by the claimant will not be made out of the Fund.*	exclusions: "(1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of lawyer(s) causing the losses; (2) Losses covered by a bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest; (3) Losses incurred by any financial institution that are recoverable under a 'banker's blanket bond' or similar commonly available insurance or surety contract; (4) Losses incurred by any business entity controlled by the lawyer(s), any person or entity described in Subparagraph D(1), (2) or (3) of this Rule' (5) Losses incurred by any government entity or agency; (6) Losses arising from business or personal investments not arising in the course of the lawyer-client relationship [NB, see proposed

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
			Guideline 18, below]; and (7) Consequential or incidental damages, such as lost interest, or lawyer's fees or other costs incurred in seeking recovery of a loss."
17.	*Loans:* The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.	Guideline 4 of the lawyer guidelines states: *a) There shall be no recovery of money advanced to the lawyer if the purpose of such advance was known by the claimant to be a loan to the lawyer or in circumstances where the claimant should have known that the advance was a loan to the lawyer. It is deemed that the advance was to the lawyer, if it was for the lawyer personally or to the lawyer's spouse or a corporation, syndicate or partnership in which the lawyer or lawyer's spouse or both of them directly or indirectly, have a substantial interest.* *b) Notwithstanding the foregoing, if a claimant is induced to lend money to a lawyer because of a solicitor and client relationship, consideration can be given to making a grant when the loan is not repaid.* Guideline 4 of the paralegal guidelines states: *a) There shall be no recovery of money advanced to the paralegal if the purpose*	The new formulation is intended to more simply express the key concepts embedded in both the existing prohibition against compensation for loans and the exception thereto. As with Guideline 18, below, the focus is on the inducement that flows from a pre-existing lawyer-client or paralegal-client relationship.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		of such advance was known by the claimant to be a loan to the paralegal or in circumstances where the claimant should have known that the advance was a loan to the paralegal. It is deemed that the advance was to the paralegal, if it was for the paralegal personally or to his or her spouse or a corporation, syndicate or partnership in which the paralegal or the paralegal's spouse or both of them directly or indirectly, have a substantial interest. *b) Notwithstanding the foregoing, if a claimant is induced to lend money to a paralegal because of a paralegal and client relationship, consideration can be given to making a grant when the loan is not repaid.*	
18.	*Investments*: The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must	Compensation for investment-related losses, where the investment flows through the lawyer's trust account, is theoretically available because of Guideline 2(a) of the lawyer guidelines: *Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and*	The new formulation is again intended to reinforce a key principle underlying the Compensation Fund: that claims must arise on the basis of some type of lawyer-client relationship, even where the loss itself is tangential to that relationship. As with Guideline 18, below, the focus is on the inducement that flows from a pre-

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	exist separate and apart from the investment itself.	*the lawyer is not required,* *a) when it can be shown that the claimant relied on the lawyer and the loss was in consequence of dishonesty by the lawyer in connection with any trust related to the lawyer's professional business where the lawyer is or was a trustee; …* Investment claims involving the lawyer as a participant in the venture are also addressed by current Guideline 3, as set out above in the context of new Guideline 11. Guideline 2 of the paralegal guidelines states: *Notwithstanding the requirements of guideline 1(a) a paralegal and client relationship between the claimant and the paralegal is not required, when it can be shown that the claimant relied on the paralegal and the loss was in consequence of dishonesty by the paralegal in connection with any trust related to the paralegal's professional business where the paralegal is or was a trustee.* Similarly, Guideline 3 of the paralegal	existing lawyer-client or paralegal-client relationship.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		guidelines also speaks to investment claims, again as set out above.	

TAB 7.1.4

CONCORDANCE OF EXISTING GUIDELINES WITH NEW GUIDELINE AND POLICIES AND PROCEDURES EQUIVALENTS

A. ***General Guidelines for the Determination of Grants from the Compensation Fund***

Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
1. It must be shown that, at the time the lawyer licensee received funds or property of a claimant, a) a solicitor and client relationship existed between the claimant and the lawyer, and that b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, and that c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business*.	**Guidelines** 5. *Lawyer-client / paralegal client relationship:* Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or other similar fiduciary relationship with the person whose dishonesty is the reason for the loss. 10. *Lawyer-client, paralegal-client or fiduciary relationship*: The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client. 11. *Practice of law / provision of legal services*: Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services, compensation will not be available.
2. Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and the lawyer is not required, a) when it can be shown that the claimant	**Guidelines** *6. Exception – estate beneficiaries*. A beneficiary of an estate may claim for compensation, where a loss from the estate is because of the dishonesty of a lawyer who has

*Professional business means the practice of law and the business operations relating to it.

Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
relied on the lawyer and the loss was in consequence of dishonesty by the lawyer in connection with any trust related to the lawyer's professional business where the lawyer is or was a trustee; or b) when the claimant is a beneficiary of an estate of a deceased person whose personal representative has a solicitor and client relationship with the lawyer. Beneficiaries of an estate will be allowed to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim.	acted as solicitor for the estate or estate trustee or both. The major type of claim anticipated by Guideline 2 a) is partially addressed, in a more restrictive form, by the following: *18. Investments*: The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the investment itself.
3. Money left with a lawyer to be used in a venture, in which the lawyer and the person advancing the money are both participants, is not money received by the lawyer in connection with his or her professional business, or in his or her capacity as a lawyer, despite the fact that the lawyer performs legal services in connection with the venture. Misappropriation by the lawyer of money left with the lawyer to participate in a venture with the lawyer, or failure to properly account by the lawyer, is not conduct for which relief from the Fund is available.	See **Guidelines 11** and **18**, reproduced above.
4. a) There shall be no recovery of money advanced to the lawyer if the purpose of such advance was known by the claimant to be a loan to the lawyer or in circumstances where the claimant should have known that the advance was a loan to the lawyer. It is deemed that the advance was to the lawyer, if it was for the lawyer personally or to the lawyer's spouse or a corporation, syndicate or partnership in which the lawyer or lawyer's spouse or both of them directly or indirectly, have a substantial interest. b) Notwithstanding the foregoing, if a claimant is induced to lend money to a lawyer	**<u>Guidelines</u>** 17. *Loans:* The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.

Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
because of a solicitor and client relationship, consideration can be given to making a grant when the loan is not repaid.	
5. There must be satisfactory proof that money or money's worth was received by the lawyer from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.	**Guidelines** 3. *Proof:* To make a grant, the Compensation Fund must have satisfactory proof of loss. What is satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example: • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf. **Policies and Procedures** *10. Satisfactory proof:* The claimant is responsible for furnishing satisfactory proof of the claim. What is satisfactory proof will vary from case to case, depending on the nature of the allegations against the lawyer or licensed paralegal, as well as the degree of difficulty involved in obtaining evidence. Proof that funds were advanced to a lawyer or paralegal could include, for example: • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf
6. Ordinarily, a) the amount of the loss in respect of which a grant may be made is the difference between the amount received by the lawyer	**Guidelines** 8. *Loss:* For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and accounted

Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
and the actual amount returned or otherwise accounted for to the claimant; and b) all amounts paid to the claimant, even though purporting to be interest, or on account of interest, should be deducted in determining the amount of the grant, less the amount of any income tax paid on that interest. Payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: $500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus $800. per day in the discretion of the Referee if a hearing is held.	for, and/or returned to the claimant. Regarding interest, expenses and damages, new Guideline 16 provides in part: The following losses will not result in compensation from the Fund: … (f) Interest, damages, expenses, costs and other consequential or incidental losses. **<u>Policies and Procedures</u>** Following the example in other jurisdictions, in which costs and counsel fees are generally not paid out of the Fund except in rare circumstances, and also noting the recent amendment of By-Law 12 to effectively replace external Referees with Claims Officers, the Committee has elected to adopt a different approach to the issue of costs, as follows: **I. Costs** 29. *General:* The Compensation Fund will not generally compensate claimants or their representatives for the expenses involved in submitting a claim. 30. *Exception:* In rare circumstances, and at its sole discretion, the Fund may consider a small payment, not to exceed $500, to a claimant's counsel where that person has provided *pro bono* assistance to the claimant in preparing the claim. 31. *Costs in Claims Officers matters:* At his or her sole discretion, a Claims Officer who conducts an oral or other form of hearing may, upon receiving and considering submissions from the parties, recommend that the Compensation Fund Committee pay the costs of the hearing out of the Fund. In such circumstances, the Claims Officer shall not recommend that the Compensation Fund make payment of an amount that exceeds the tariff stipulated for costs in Law Society Tribunal matters, as set out in the pertinent Rules of

	Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
		Practice and Procedure.
7.	The amount of a grant may be reduced in circumstances where the claimant expected or should reasonably be considered as having expected that the funds entrusted to the lawyer were to be invested in a risky investment that might not be recovered in full.	**Guidelines** *15. Risk and carelessness:* The Compensation Fund will consider the extent to which the claimant was careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In assessing risk and carelessness, the Fund may consider, for example: (a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise); (b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and (c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.
8.	Carelessness, on the part of the claimant, which causes or contributes to a loss, is a factor which may be considered in making a grant from the Fund. It is not feasible to attempt to exhaustively define what constitutes carelessness. Each claim for a grant depends on its particular facts. It may be considered to be carelessness where a claimant advances or continues to advance money to a lawyer, if the claimant has knowledge of facts which reasonably should cause the claimant to doubt the integrity, or the financial reliability of the lawyer.	See **Guideline 15**, reproduced above**.**
9.	Where the dealings with the lawyer have been conducted by a trustee or agent for or on behalf of another	**Guidelines** 12. *Legal entitlement:* The claimant must be legally or beneficially entitled to the money or property for which he or she is seeking

	Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
	person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.	compensation.
10.	Where a claimant has a reasonable cause of action against some other person, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.	**Guidelines** 4. *Fund of last resort:* The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation. **Policies and Procedures** 14. *Fund of last resort:* The Compensation Fund is a fund of last resort. Before considering a claim for compensation, the Fund may ask for proof that other reasonably available avenues for recovery have been exhausted. The Fund will sometimes postpone a decision on a claim until the conclusion of external legal proceedings, for instance a civil lawsuit against a lawyer or paralegal licensee.
11.	Where the lawyer would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof, can, in the discretion of the	**Guidelines** 13. *Amount of loss*: The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the work or the disbursements.

	Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
	Referee, be deducted from the amount of the grant that would otherwise be made.	The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.
12.	Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the lawyer, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.	**Policies and Procedures** 15. *Criminal conduct:* Where a claim arises in circumstances suggesting criminal conduct on the part of a lawyer, paralegal or any other individual, the Law Society may, before considering the claim, require proof that the matter has been reported to law enforcement. Such proof might include, for example, a copy of a formal police report.
13.	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.	**Guidelines** 7. *Financial institutions and insurers:* The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance. The Committee has opted not to replicate the financial hardship provision. It is implicit in the exercise of overriding discretion.
14.	Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an apparently dishonest lawyer will not be entitled to a grant unless the Law Society Compensation Fund and Discipline Departments have been informed before any such steps are taken.	There is no equivalent to this provision in either the new Guidelines or the Policies and Procedures. Its meaning is ambiguous in relation to the purpose of the Fund, and it has not been applied in recent memory.
15.	In the case of a lawyer who conducts the practice of law 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	**Policies and Procedures** 4. Apart from claims made pursuant to the National Mobility Agreement, as specified in that Agreement, the Compensation Fund does not deal with claims where the lawyer or licensed paralegal is practising outside Ontario

Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
out of the Fund when the funds or property of the claimant were received by or on behalf of the lawyer in connection with a matter that originated in that jurisdiction or in connection with a trust of which the lawyer was or is a trustee that originated outside Ontario.	and the loss resulting from that person's dishonesty happened outside Ontario.

B. ***Guidelines for the Determination of Grants from the Compensation Fund Relating to Paralegals***

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
1. In order to qualify for a grant from the Compensation Fund, it must be shown that, a. the paralegal licensee received funds or property of a claimant, in his or her capacity as a person licensed to provide legal services, and that b. the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business. Professional business means the provision of legal services and the business operations relating to it, as set out in the *Law Society Act*.	**<u>Guidelines</u>** 5. *Lawyer-client / paralegal client relationship:* Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or other similar fiduciary relationship with the person whose dishonesty is the reason for the loss. 10. *Lawyer-client, paralegal-client or fiduciary relationship*: The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client. 11. *Practice of law / provision of legal services*: Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services, compensation will not be available.
2. Notwithstanding the requirements of guideline 1(a) a paralegal and client relationship between the claimant and the paralegal is not required, when it can be shown that the claimant relied on the paralegal and the loss was in consequence of dishonesty by the paralegal in connection with any trust related to the paralegal's professional business where the paralegal is or was a trustee.	**<u>Guidelines</u>** The major type of claim anticipated by Guideline 2 is partially addressed, in a more restrictive form, by the following: *18. Investments*: The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the investment itself.
3. Money left with a paralegal to be used	See **Guidelines 11** and **18**, reproduced above.

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
in a venture, in which the paralegal and the person advancing the money are both participants, is not money received by the paralegal in connection with his or her professional business, or in his or her capacity as a paralegal, despite the fact that the paralegal provides legal services in connection with the venture. Misappropriation by the paralegal of money left with the paralegal to participate in a venture with the paralegal, or failure to properly account by the paralegal, is not conduct for which relief from the Fund is available.	
4. a. There shall be no recovery of money advanced to the paralegal if the purpose of such advance was known by the claimant to be a loan to the paralegal or in circumstances where the claimant should have known that the advance was a loan to the paralegal. It is deemed that the advance was to the paralegal, if it was for the paralegal personally or to his or her spouse or a corporation, syndicate or partnership in which the paralegal or the paralegal's spouse or both of them directly or indirectly, have a substantial interest. b. Notwithstanding the foregoing, if a claimant is induced to lend money to a paralegal because of a paralegal and client relationship, consideration can be given to making a grant when the loan is not repaid.	**Guidelines** 17. *Loans:* The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.
5. There must be satisfactory proof that	**Guidelines**

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
money or money's worth was received by the paralegal from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.	3. *Proof:* To make a grant, the Compensation Fund must have satisfactory proof of loss. What is satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example: • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf. **Policies and Procedures** *10. Satisfactory proof:* The claimant is responsible for furnishing satisfactory proof of the claim. What is satisfactory proof will vary from case to case, depending on the nature of the allegations against the lawyer or licensed paralegal, as well as the degree of difficulty involved in obtaining evidence. Proof that funds were advanced to a lawyer or paralegal could include, for example: • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant Cancelled cheques issued by the claimant or on the claimant's behalf
6. Ordinarily, a. the amount of the loss in respect of which a grant may be made is the difference between the amount received by the paralegal and the actual amount returned or otherwise accounted for to the claimant; and b. payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred	**Guidelines** 8. *Loss:* For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and accounted for, and/or returned to the claimant. Regarding interest, expenses and damages, new Guideline 16 provides in part: The following losses will not result in compensation from the Fund:

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: $500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus $800. per day in the discretion of the Referee if a hearing is held.	… (f) Interest, damages, expenses, costs and other consequential or incidental losses. **<u>Policies and Procedures</u>** Following the example in other jurisdictions, in which costs and counsel fees are generally not paid out of the Fund except in rare circumstances, and also noting the recent amendment of By-Law 12 to effectively replace external Referees with Claims Officers, the Committee has elected to adopt a different approach to the issue of costs, as follows: **I. Costs** 29. *General:* The Compensation Fund will not generally compensate claimants or their representatives for the expenses involved in submitting a claim. 30. *Exception:* In rare circumstances, and at its sole discretion, the Fund may consider a small payment, not to exceed $500, to a claimant's counsel where that person has provided *pro bono* assistance to the claimant in preparing the claim. 31. *Costs in Claims Officers matters:* At his or her sole discretion, a Claims Officer who conducts an oral or other form of hearing may, upon receiving and considering submissions from the parties, recommend that the Compensation Fund Committee pay the costs of the hearing out of the Fund. In such circumstances, the Claims Officer shall not recommend that the Compensation Fund make payment of an amount that exceeds the tariff stipulated for costs in Law Society Tribunal matters, as set out in the pertinent Rules of Practice and Procedure.
7. Carelessness on the part of the claimant, or risk undertaken by the claimant, which cause or contribute to a loss, may be considered in making a grant from the Fund. Each claim for a grant depends on its particular facts.	**<u>Guidelines</u>** *15. Risk and carelessness:* The Compensation Fund will consider the extent to which the claimant was careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In

	Existing Guideline	**Closest New Guideline and/or Policies and Procedures Equivalent**
	While it is not feasible to attempt to exhaustively define what constitutes carelessness, it may be considered to be careless where a claimant advances or continues to advance money to a paralegal, if the claimant has knowledge of facts that reasonably should cause the claimant to doubt the integrity, or the financial reliability of the paralegal.	assessing risk and carelessness, the Fund may consider, for example: (a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise); (b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and (c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.
8.	Where the dealings with the paralegal have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.	**Guidelines** 12. *Legal entitlement:* The claimant must be legally or beneficially entitled to the money or property for which he or she is seeking compensation.
9.	Where a claimant has a reasonable cause of action against some other person, including the paralegal, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to	**Guidelines** 3. *Fund of last resort:* The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of Fund counsel and/or the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.	**Policies and Procedures** 14. *Fund of last resort:* The Compensation Fund is a fund of last resort. Before considering a claim for compensation, the Fund may ask for proof that other reasonably available avenues for recovery have been exhausted. The Fund will sometimes postpone a decision on a claim until the conclusion of external legal proceedings, for instance a civil lawsuit against a lawyer or paralegal licensee.
10. Where the paralegal would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof can be deducted from the amount of the grant that would otherwise be made.	**Guidelines** 13. *Amount of loss*: The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the work or the disbursements. The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.
11. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the paralegal, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.	**Policies and Procedures** 15. *Criminal conduct:* Where a claim arises in circumstances suggesting criminal conduct on the part of a lawyer, paralegal or any other individual, the Law Society may, before considering the claim, require proof that the matter has been reported to law enforcement. Such proof might include, for example, a copy of a formal police report.
12. 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.	**Guidelines** 7. *Financial institutions and insurers:* The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance. The Committee has opted not to replicate the financial hardship provision. It is implicit in the exercise of overriding discretion.
13. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an	There is no equivalent to this provision in either the new Guidelines or the Policies and Procedures. Its meaning is ambiguous in

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
apparently dishonest paralegal will not be entitled to a grant unless the Compensation Fund has been informed before any such steps are taken.	relation to the purpose of the Fund, and it has not been applied in recent memory.
14. In the case of a paralegal who provides legal services 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 paralegal in connection with a matter that originated in that jurisdiction.	**Policies and Procedures** 4. Apart from claims made pursuant to the National Mobility Agreement, as specified in that Agreement, the Compensation Fund does not deal with claims where the lawyer or licensed paralegal is practising outside Ontario and the loss resulting from that person's dishonesty happened outside Ontario.

TAB 7.1.5

COMPENSATION FUND – POLICIES AND PROCEDURES AS OF FEBRUARY 2014

A. GENERAL

1. These Policies and Procedures describe how claims for compensation will be reviewed and decided at the Compensation Fund. They should be read in conjunction with the Guidelines, which assist in the exercise of the Fund's discretion pursuant to the *Law Society Act*, R.S.O. 1990, c.L.8, s.51, as amended.

B. NOTICE TO THE COMPENSATION FUND

2. *General two-year limitation:* Any person who believes that they may be eligible for compensation for a loss due to dishonesty by a lawyer or licensed paralegal should contact the Compensation Fund in writing, as soon as possible after the loss is discovered. The *Law Society Act* says that notice must be given within a maximum of two years after the loss came to the knowledge of the person suffering it.

3. *Deemed notice:* Notice is deemed to be given to the Compensation Fund when information about a potential claim is received by the Law Society. This could be in the context of a complaint about a lawyer's or licensed paralegal's alleged misconduct

C. LIMITED TO ONTARIO

4. Apart from claims made pursuant to the National Mobility Agreement, as specified in that Agreement, the Compensation Fund does not deal with claims where the lawyer or licensed paralegal is practising outside Ontario and the loss resulting from that person's dishonesty happened outside Ontario.

D. INQUIRIES AND POTENTIAL CLAIMS

5. *Determining jurisdiction:* The first step in assessing a potential claim is to determine if the claim falls within the Compensation Fund's mandate, or jurisdiction. If so, the Fund will send the claimant an application form which must be completed and sworn in front of a Commissioner for Oaths and Affidavits. If not, staff will send a letter explaining why not. Sometimes staff will ask for additional information from the claimant to help determine whether or not the claim is within the Fund's mandate.

6. *Deadline for returning application form:* An application form sent to a claimant should be completed and returned to the Compensation Fund within six (6) months. The Fund reserves the

right to refuse to consider a claim after the six-month period has expired, unless the claimant provides a satisfactory, written explanation for the delay and requests an extension.

E. APPLICATION FORM

7. *Completion of application form:* The claimant must complete the application form truthfully and thoroughly, to the best of his or her ability. The application is a sworn document. Any deliberate falsehood or misrepresentation will automatically result in the denial of the claim.

8. *Proof of authority to apply on behalf of another:* A person applying for a grant on behalf of another person or on behalf of an estate is expected to provide proof of his or her authority to do so. Such proof could include a copy of a will naming a personal representative, a power of attorney, a court order, etc.

9. *Licensee's opportunity to comment on application:* Where feasible, the Fund will give a copy of the application form to the lawyer or paralegal whose alleged dishonesty is the subject of the claim. That person will be given an opportunity to comment on the application.

F. EVIDENCE

10. *Satisfactory proof:* The claimant is responsible for furnishing satisfactory proof of the claim. What is satisfactory proof will vary from case to case, depending on the nature of the allegations against the lawyer or licensed paralegal, as well as the degree of difficulty involved in obtaining evidence. Proof that funds were advanced to a lawyer or paralegal could include, for example:

- Receipts issued by the lawyer or paralegal
- Statements of account from the lawyer or paralegal
- Bank records of the claimant
- Cancelled cheques issued by the claimant or on the claimant's behalf

11. *Lack of cooperation:* Because the Compensation Fund is discretionary, the Law Society reserves the right to refuse to consider a claim if the evidence requested is not provided in a timely fashion or if a claimant is otherwise uncooperative.

12. *Evidence from other Law Society activities:* In considering a claim to the Compensation Fund, staff may obtain and consider evidence assembled by the Law Society in the course of other regulatory proceedings involving the same licensee, including complaints, investigations, discipline proceedings and trusteeships.

G. DECISIONS

13. *Basis for exercising discretion:* The Law Society will apply its discretion to pay or refuse to pay a grant in a manner consistent with the *Law Society Act* and the Guidelines. A decision to pay or not pay is final.

14. *Fund of last resort:* The Compensation Fund is a fund of last resort. Before considering a claim for compensation, the Fund may ask for proof that other reasonably available avenues for recovery have been exhausted. The Fund will sometimes postpone a decision on a claim until the conclusion of external legal proceedings, for instance a civil lawsuit against a lawyer or paralegal licensee.

15. *Criminal conduct:* Where a claim arises in circumstances suggesting criminal conduct on the part of a lawyer, paralegal or any other individual, the Law Society may, before considering the claim, require proof that the matter has been reported to law enforcement. Such proof might include, for example, a copy of a formal police report.

16. *Timing of grant decision in relation to other proceedings:* The timing of when a claim will be decided will vary from case to case. In some situations, there will be enough persuasive evidence to justify a grant even before an investigation or formal discipline has finished. In other situations, the Compensation Fund will have to wait for the completion of an investigation and possibly the conclusion of formal discipline before a claim can be decided. This is likely to happen, for example, when there are serious disputes as to the credibility of the claimant or the lawyer or paralegal licensee, or both. It can also happen when the Compensation Fund needs to rely on a formal finding by a Hearing Panel that the lawyer or paralegal was dishonest before making a grant.

17. *Staff and Committee roles:* Staff counsel have discretion to authorize the payment of grants of $5000 or less in respect of lawyer dishonesty and $1500 or less in respect of paralegal dishonesty. Grants in excess of these amounts must be approved by the Compensation Fund Committee on the written recommendation of staff. The Committee has the discretion to accept or reject a staff recommendation, to refer certain issues to a Claims Officer, as set out below, or to send a claim back to staff for further review and/or analysis.

18. *Licensee's opportunity to comment on recommendation:* Where feasible, the Fund will give a copy of a draft decision or recommendation to pay a grant to the lawyer or paralegal whose dishonesty is the basis for the grant. That person will have a reasonable opportunity to comment on the recommendation.

19. *Claimant's opportunity to comment:* A staff decision not to recommend payment of a grant will be communicated to the claimant in writing. The claimant will have a reasonable opportunity to respond and explain the basis for any objection to the decision not to recommend a grant. The claimant's response will be reviewed and considered by the Fund and the claimant will be informed of the outcome of the review.

20. *Releases, waivers and assignment:* Before a claimant can receive a grant, he or she must fill out and sign the releases, waivers and assignments that the Fund supplies. If a judgement or right of action is assigned to the Fund, this means that the claimant will give up some of his or her own rights to recover from the lawyer or paralegal in exchange for the grant from the Fund.

H. CLAIMS OFFICERS

20. *Roster of Claims Officers:* Pursuant to section 4.2 of By-Law 12, the Compensation Fund Committee will, from time to time, appoint a roster of persons eligible to serve as Claims Officers and will specify the term for which each Claims Officer will serve.

21. *Selection of Claims Officer:* The Committee may, at its sole discretion, appoint a Claims Officer from the roster to assist with the Committee's determination of any claim for compensation, the estimated potential value of which exceeds five thousand dollars ($5000) for a claim involving a lawyer licensee or fifteen hundred dollars ($1500) for a claim involving a paralegal licensee.

22. *Basis for appointment:* The Committee may appoint a Claims Officer either on its own initiative or at the recommendation of staff.

23. *Appointment decision is final:* The Committee's decision to appoint or not appoint a Claims Officer to assist with the determination of a claim is final and not subject to further review.

24. *Issues that may be referred*: The Committee may refer any question, other than a question of law, to the Claims Officer to assist the Committee in determining a claim for compensation. The following are examples of issues that could be referred to a Claims Officer:

a. An issue with respect to whether the claimant has in fact suffered a loss.

b. An issue with respect to whether the claimant's loss is the result of the licensee's dishonesty, and/or some other factor(s).

c. An issue with respect to the claimant's credibility.

d. An issue with respect to whether a licensee has been "dishonest" in his or her handling of funds advanced by *this* claimant.

e. A discrete factual issue with respect to the applicability of one or more guidelines (for instance, was the claimant careless? was this an investment scheme? etc.)

f. An issue as to when the loss came to the attention of the claimant, i.e., was the Fund notified outside the limitation specified in section 51 of the *Law Society Act*

g. Any other issue requiring a Claims Officer to receive and consider oral testimony by a claimant, licensee or other person, or receive oral and/or written submissions from parties, including the Law Society, and make recommendations for the Committee's consideration

25. *Referral memorandum:* Where a Claims Officer is appointed the Committee will set out in a written memorandum to the Claims Officer, with copies to the claimant, the licensee whose alleged dishonesty is the subject of the claim, and the representative of the Law Society :

a. The specific issues of fact and/or mixed law and fact to be considered by the Claims Officer
b. The mode of procedure and process to be followed by the Claims Officer including whether an oral or other form of hearing is required
c. The deadline for the Claims Officer to report to the Committee
d. Any other instructions that the Committee considers relevant to the work of the Claims Officer and to its ultimate determination of the claim for compensation.

26. *Further instructions:* The Claims Officer may, at any time, ask for further instructions from the Committee or for clarification of existing instructions.

27. *Hearings in accordance with SPPA:* Where a Claims Officer has instructions from the Committee to conduct a hearing, the hearing shall be conducted in accordance with the *Statutory Powers and Procedures Act*, as amended.

28. *Opportunity to comment on report:* Prior to submitting a report to the Committee, the Claims Officer shall provide the report to the claimant, to the representative of the Law Society, and to the lawyer or paralegal licensee whose dishonesty is the subject of the claim for compensation. The Claims Officer shall invite the parties to make written submissions on the Claims Officer's report within three (3) weeks or such longer time as the Claims Officer may stipulate. Any such submissions shall accompany the report when it is submitted to the Committee by the Claims Officer.

I. COSTS

29. *General:* The Compensation Fund will not generally compensate claimants or their representatives for the expenses involved in submitting a claim.

30. *Exception:* In rare circumstances, and at its sole discretion, the Fund may consider a small payment, not to exceed $500, to a claimant's counsel where that person has provided *pro bono* assistance to the claimant in preparing the claim.

31. *Costs in Claims Officers matters:* At his or her sole discretion, a Claims Officer who conducts an oral or other form of hearing may, upon receiving and considering submissions from the parties, recommend that the Compensation Fund Committee pay the costs of the hearing out of the Fund. In such circumstances, the Claims Officer shall not recommend that the Compensation Fund make payment of an amount that exceeds the tariff stipulated for costs in Law Society Tribunal matters, as set out in the pertinent Rules of Practice and Procedure.

CITATION: Tarek El-Hennawy et al. v. The Law Society of Upper Canada, 2014 ONSC 375
DIVISIONAL COURT FILE NO.: 59/13
DATE: 20140128

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN R.S.J., HIMEL AND SACHS JJ.

BETWEEN:	)	
	)	
TAREK EL-HENNAWY, REEM EL-HENNAWY, SUZAN FARESS, MOHAMED FARESS, SIHAM EL-HENNAWY, DALIA MOHAMED, AND FARES EL-HENNAWY (INFANT) AND OMAR EL-HENNAWY (INFANT) BY THEIR LITIGATION GUARDIAN DALIA MOHAMED	)	*Victor L. Freidin, Q.C.*, for the Applicants
Applicants	)	
– and –	)	
THE LAW SOCIETY OF UPPER CANADA	)	
Respondent	)	*M. Jill Dougherty* and *Jordan S. Glick*, for the Respondent
	)	**HEARD:** December 3, 2013

HIMEL J.:

[1] The applicants apply for judicial review of a decision of the Compensation Fund Committee (the "Committee") of the Law Society of Upper Canada ("LSUC") dated May 9, 2012. In the decision, the Committee awarded compensation to two claimants, but denied compensation for the remaining claimants (the "applicants"). The applicants request that the Committee's decision be quashed, and that the court order the payment of grants as

recommended by the Law Society's Referee. Alternatively, the applicants request that the matter be referred back to the Committee with directions. They also seek an increase in the costs recommended by the Referee and ordered by the Committee, or alternatively, to have the issue of costs referred back to the Committee with directions. The respondent LSUC opposes the application for judicial review and asks that it be dismissed.

Factual Background

The Nature of the Claims

[2] The applicants are all members of the same extended family. They lost money as a result of lawyer Mariano Mazzucco's ("Mazzucco") dishonesty. For many years, he had been the lawyer for the family patriarch, Hussein El-Hennawy ("El-Hennawy"), and Lakefront Star ("LFS"), a corporation controlled by El-Hennawy. Mazzucco's practice was seized by the LSUC on March 27, 2008. El-Hennawy says that between November 14, 2007 and February 29, 2008, he assigned a total of approximately $930,000 to Mazzucco. The reason for this was that he was experiencing delays and having difficulty in his dealings with conventional banks since the terrorist attacks on September 11, 2001, following which regulations were enacted to curb the international transfer of large amounts of cash. El-Hennawy claims that he assigned much of these funds (which remained on deposit with Mazzucco) to his family members.

[3] The assignments were documented and had acknowledgment letters signed by the adult assignees and Mazzucco. The letters confirmed the amounts assigned, and stated that Mazzucco was holding the funds in trust for specified applicants. They contained a description of the type of transaction intended for the funds, as well as the planned involvement of Mazzucco as the assignee's solicitor on each transaction. For example, the funds held for Reem El-Hennawy and Walid Darwish were for a house purchase, while Mohamed Faress, Suzan Faress, Siham El-Hennawy, Tarek El-Hennawy and Dalia Mohammed were looking for an income-producing property.

[4] The LSUC received information from the Royal Bank following an investigation that revealed that Mazzucco had engaged in mortgage fraud activities and other improprieties. The LSUC obtained a trusteeship order over Mazzucco's practice on March 26, 2008. By this time, the applicants' monies were gone.

[5] Mazzucco had signed promissory notes acknowledging he was holding the money in trust, that he was acting as solicitor and that the monies were to be used for legal transactions. The employee of the LSUC who was charged with carrying out the terms of the trusteeship order went to the office of Mazzucco and took possession of it. She testified that she located hundreds of promissory notes in his office and located 45 to 50 files dealing with the applicants, but these files did not contain any promissory notes. It was only after the trusteeship order was made on March 26, 2008, and after the removal of the documents and files from the lawyer's office, that the promissory notes signed by him in favour of the applicants began to appear.

The Compensation Fund

[6] The applicants filed separate claims under s. 51 of the *Law Society Act*, R.S.O. 1990, c. L. 8 (the "*Act*") to recover their losses from the LSUC's Compensation Fund (the "Fund"). The Fund is intended to provide compensation to individuals for losses sustained as a result of a lawyer's dishonesty. Each claimant for compensation can claim a maximum of $100,000. Section 51(5)(a) of the *Act* provides as follows:

> Grants
>
> (5) Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,
>
> (a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee.

[7] Convocation has delegated its discretion to make grants in excess of $5,000 to the Committee. Convocation has also issued "General Guidelines for the Determination of Grants from the Compensation Fund" to ensure consistency in the administration of the Fund. The Guidelines provide as follows:

1. It must be shown that, at the time the lawyer licensee received funds or property of a claimant,

(a) a solicitor and client relationship existed between the claimant and the lawyer, and that

(b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, and that

(c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business.

The Report of the Referee

[8] The claims were assigned to Referee C. Anthony Keith, Q.C. (the "Referee") to conduct an inquiry and deliver a report with non-binding recommendations to the Committee. After a ten-day hearing, the Referee recommended payment to each applicant. In his report, he outlined the relevant statutory provisions and Guidelines that apply to payment of grants from the Fund. He accepted the validity of the claims that El-Hennawy had assigned money to each of his family members, and found that the applicants' uses of Mazzucco's services were related to the practice of law. Given the difficulties that El-Hennawy had with conventional banks, the Referee found it was reasonable for the applicants to keep their money in trust with Mazzucco for use in future transactions. The Referee described this practice as using Mazzucco as a "bank of convenience". While he mentioned the Guidelines, the Referee did not analyze whether the applicants had satisfied them.

[9] The Referee noted that an LSUC employee gave evidence that none of the promissory notes documenting the assignment of money from El-Hennawy were recovered from Mazzucco's office, and that this was a departure from Mazzucco's practice of keeping related documents together. The Referee characterized the LSUC as having an "underlying suspicion…that the claims…had been carefully arranged so as to avoid the per claimant limits for payments out of the Fund." However, the Referee concluded that he was unable to make that finding, and that he must accept the evidence supporting the claims and recommend that the grants be paid as claimed. The Referee recommended payment of the full amount of the claims up to the $100,000 limit of the Fund. He recommended that a total of $905,000 be paid to the various claimants.

The Compensation Fund Committee's Decision

[10] The Committee did not have the entire transcript of the inquiry conducted by the Referee before it. It received his report and gave the parties an opportunity to make written submissions with references to the transcript and exhibits. In its decision, the Committee did not accept all of the Referee's recommendations. The Committee began by noting that the Referee's recommendations were non-binding, but that it owed the Referee's findings of fact a degree of respect and deference. It also noted that Convocation had "absolute discretion" as to whether a grant is issued, and was therefore entitled to issue guidelines that narrowed the scope of that discretion. The Committee also said that it has exclusive jurisdiction to make awards from the Fund over $5,000, and that it was at liberty to accept or reject the Referee's recommendations in whole or in part. The Committee noted that it was free to depart from the Guidelines if warranted in the circumstances.

[11] The Committee accepted the Referee's recommendation regarding Hussein El-Hennawy and LFS, and awarded each $100,000. The Committee did not accept the Referee's recommendation to pay the claims of the other claimants. It held that the Referee had failed to adequately consider the requirements and implications of the Guidelines adopted by Convocation. The Committee's decision was based on its finding that the applicants' misappropriated monies were not received by Mazzucco "in his capacity as a lawyer", and that their loss was not a result of Mazzucco's dishonesty "in connection with his professional business", as described in the Guidelines.

[12] The Committee held that most of the cash deposited by El-Hennawy was not deposited in anticipation of Mazzucco performing any specific legal services. The monies were deposited simply for safekeeping. On that basis, it held that Mazzucco was receiving money in his capacity as a bank or banker, and not as a lawyer. The Committee found that the funds assigned were not sufficiently connected to Mazzucco's practice of law, but rather in connection with his unorthodox business of acting as a custodian or banker. They were never part of his trust account, not received as a retainer and not delivered for any specific professional engagement. The funds were not given to Mazzucco with any specific instructions, such as to invest them; Mazzucco was simply told to hold them pending further instructions. While the losses of LFS and El-Hennawy were in connection with Mazzucco's practice of law, the Committee held that

the losses of the other applicants were not. The Committee dismissed the claims of the other applicants.

The Supplementary Report of the Referee and the Committee's Decision on Costs

[13] Section 51(12) of the *Act* allows the payment of costs of administering the Fund, including the costs of "investigations and hearings and all other costs, salaries and expenses necessarily incidental to the administration of the Fund" to be paid out of the Fund. The Guidelines provide that ordinarily, the payment of interest or costs, expenses or damages to claimants will not be made out of the Fund. There are some exceptions. The Guidelines allow for a discretionary payment for counsel fees of $500. This amount may be increased in complicated cases for preparation of claim documents and final resolution of the claim. The Guidelines also allow payment of $800 per day in the discretion of the Referee if a hearing is held.

[14] The applicants requested disbursements of $40,576.33, of which $33,934.98 was paid for an expert report prepared by an accountant. They requested a significantly larger amount for their legal costs. In a Supplementary Report, the Referee held that he had no jurisdiction to recommend compensation for disbursements in preparing the claims. This was despite the fact that the Referee had questioned during the hearing whether anyone had thought about having an independent accountant review the situation.

[15] The Referee noted that the applications and the hearing were "complicated" and warranted an increase from the suggested limit of $500 for counsel fees. He recommended $41,250 in counsel fees to the applicants for the preparation of claim documents. This amount was based on the Referee's recommendation that counsel be compensated for 275 hours at a rate of $150 per hour. Although the applicants had requested approximately 550 hours at a rate of $395 per hour, the Referee noted that the upper limit for the claims was $100,000 regardless of the loss, and that standard rates paid to referees by the LSUC are modest. He also recommended a further $7,600 for 9.5 days of hearing at $800 per day. He held that he had no discretion to change the $800 counsel fee. The total amount recommended was $48,850. The applicants allege that this effectively represents a rate of $75 per hour, and only 17% of the total amount claimed.

[16] The Committee adopted the Referee's analysis, but reduced the award for fees to $6,875 to reflect its decision to deny 5/6 of the claims (10 of 12 claimants). The Committee did not disturb the counsel fee award of $7,600, and did not comment on the Referee's statement that he did not have jurisdiction to award disbursements. The total costs award made by the Committee was $14,475 ($7,237.50 for each successful claimant).

Issues on this Application

[17] The issues raised in this application are as follows: (1) whether Convocation had jurisdiction to establish Guidelines to structure the Committee's exercise of discretion in making

grants from the Compensation Fund; and (2) whether the Committee acted properly in deciding to apply the Guidelines in this case.

Positions of the Parties

[18] The applicants submit that the Guidelines are *ultra vires* because they are inconsistent with the *Act*. In this regard, the applicants argue that the Guidelines impose stricter requirements for obtaining compensation than required by the *Act*.

[19] The applicants also argue that the money they gave to Mazzucco was for specific transactions. They intended Mazzucco to act as their solicitor on these transactions. They argue that they left money with him because they trusted him as a lawyer. Moreover, they could not earn interest on money put into a bank and they thought it best to leave the monies with him. Mazzucco signed a "global" promissory note for $425,000 on March 26, 2008, because the applicants were going to purchase an income producing property—they were close to buying something and wanted to make sure that all the investors were 100% committed to the purchase.

[20] The applicants submit that the conclusion of the Committee did not meet the standard of correctness, nor did it fall within the range of acceptable outcomes. The conclusion did not give effect to the intent and purpose of the Fund of providing compensation to persons harmed by a lawyer's dishonesty. They argue that not only is this a personal loss to the applicants, the public's confidence in the Compensation Fund and the legal system will be adversely affected if the decision is not quashed and the costs award is not increased.

[21] The respondent takes the position that Convocation was entitled to establish the Guidelines to structure the exercise of its broad discretion to make grants from the Compensation Fund. It did not require express statutory authority to do so. It argues that the Guidelines are consistent with the provisions of the *Act*, and more broadly with the purpose and intent of the *Act* and the Fund. The Guidelines contemplate that there must be some nexus between the dishonesty of the lawyer and his or her capacity as a lawyer and legal practice before access to the Fund may be granted. The Fund is not designed to provide complete compensation to persons harmed by the dishonesty of anyone who happens to be a lawyer in whatever capacity. Rather, it is intended to enable Convocation to relieve or mitigate on a discretionary basis certain losses that are a consequence of a lawyer's dishonesty in connection with his or her professional business, being the practice of law. Requiring such a nexus is consistent with the statutory framework, the purpose of the Fund and the fact that there are limited resources with respect to the Fund.

Standard of Review

[22] The applicants acknowledge the presumptive standard of review applicable to a decision of a tribunal is reasonableness when it is interpreting its home statute. However, where the matter involves questions of law that are of central importance to the legal system and outside the adjudicator's expertise, the correctness standard applies. They argue that the Committee

does not have any greater expertise than a court on the issues of whether Mazzucco was acting in his capacity as a lawyer, whether the Guidelines are *ultra vires*, whether the loss sustained was in connection with the lawyer's professional business and whether the decision is inconsistent with the intent and purpose of the *Act*. Therefore, the Committee's decision is subject to review on a standard of correctness.

[23] The respondent asserts that the validity of the *Guidelines* is a question of law concerning statutory interpretation and alleged unlawful fettering of discretion. They agree that that aspect of the Committee's decision is reviewable on the correctness standard. All other aspects of the Committee's decision are reviewable on the reasonableness standard. The respondent submits that considerable deference should be given to the Committee's decision in its exercise of discretion. This includes deciding whether to apply the Guidelines, whether to make or decline grants from the Fund, whether to award costs, as well as the Committee's interpretation of the *Act* and the Guidelines.

[24] We agree with the respondent that when the Committee is interpreting its home statute, its decisions are reviewable on a reasonableness standard. Considerable deference should be given to the Committee's exercise of discretion and application of the *Act* to the decision-making function: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. For the correctness standard to apply, the question has to be not only one of central importance to the legal system, but also outside the adjudicator's specialized area of expertise: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 39, 46. We conclude that the matters before the Committee (other than the issue of alleged unlawful fettering of discretion) fell within its area of expertise and that the appropriate standard of review of its decision is one of reasonableness.

[25] We further conclude that the appropriate standard of review of the Committee's decision on costs is reasonableness. The question of costs falls within the core function and expertise of the Committee relating to the interpretation and application of its enabling statute: see *Dunsmuir* at para. 54; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 25-27.

Decision

Does Convocation have jurisdiction to pass Guidelines, and does the Guidelines' requirement for a nexus between the loss and the lawyer's professional business fetter the discretion of the Committee?

[26] Section 51(5) of the *Act* provides as follows:

> Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,

> (a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee;

[27] Pursuant to section 51(10) of the *Act*, Convocation may delegate any of those powers to a committee of Convocation. Convocation has delegated the discretion to make grants from the Fund in amounts over $5,000 to the Compensation Fund Committee. The Committee is authorized by LSUC By-law No. 12 to "make such arrangements and take such steps as it considers advisable to carry out its responsibilities": see Law Society of Upper Canada, By-law No. 12, *Compensation Fund* (May 1, 2007), s. 4.1. Grants are discretionary. The *Act* contemplates that to be eligible for compensation from the Fund, the claimant's loss must arise from the lawyer's dishonesty in connection with his or her legal practice and related business operations. The *Rules of Professional Conduct* and the by-laws contemplate that lawyers are only to use their trust accounts for purposes related to the provision of legal services, and thus the references to a trust in the Guidelines and the *Act* also require a nexus with the lawyer's professional business.

[28] The intent of the Compensation Fund is to protect the public in its dealings with members of the LSUC. The Guidelines are reflective of the policy requiring a nexus between the dishonesty and the lawyer's professional business.

[29] Guideline 1(b) states that:

> It must be shown that, at the time the lawyer licensee received funds or property of a claimant, the lawyer received funds or property of the claimant in his or her capacity as a lawyer.

[30] Convocation's authority to establish these Guidelines is derived from its absolute discretion to make grants from the Fund. The Guidelines are a way of structuring the exercise of that discretion and providing some consistency. We agree that Convocation was entitled to establish these Guidelines and required no express statutory authority to do so. The Guidelines recognize that there must be some nexus between the lawyer's dishonesty and his or her capacity as a lawyer and legal practice before there will be access to the Fund. The Fund is not unlimited, and outlining this nexus is consistent with the statutory framework. We respectfully disagree with the applicants' position that the Guidelines are *ultra vires* because they apply an additional and stricter requirement than the *Act* concerning the nexus between the dishonesty of the lawyer and his or her professional business. The Guidelines expand on the criteria regarding eligibility for grants from the Fund. They are not inconsistent with the *Act* because the *Act* does not provide that any claimant is *entitled* to receive a grant if they meet the threshold criteria in s. 51(5). We find that the provisions of the statute and the Guidelines are consistent.

[31] Further, the Guidelines are non-binding and do not fetter the Committee's discretion. Guidelines are helpful by allowing applicants to know in general terms what the policy and practices are. The case law recognizes the authority of statutory tribunals to pass guidelines

governing their broad exercise of discretion so long as these guidelines are recognized as being non-binding.: see *Maple Lodge Farms v. Canada* [1982], 2 S.C.R. 2, at pp. 4-5; and *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.), at pp. 83-86. In this case, the Committee accepted that it was free to depart from the Guidelines and the Committee properly considered the relationship of the Guidelines to the *Act* and the manner in which they were to be applied.

Was the decision to decline a grant of funds to the Applicants reasonable?

[32] The applicants argue that the Committee's decision that Mazzucco was not acting in his capacity as a lawyer is unreasonable. According to the applicants, the fact that the recipient of the funds was a licensed solicitor should satisfy any capacity issue. Alternatively, the issue should be determined based upon the belief of the parties. The applicants submit that the only reasonable conclusion is that Mazzucco was acting in his capacity as a lawyer given that accepting money from an individual for investment purposes is regarded as a traditional function of a lawyer by the LSUC. The applicants submit that the Committee's conclusion is not in keeping with the jurisprudence, and reliance on the case of *Patchett v. Law Society of B.C.* (1979), 92 D.L.R. (3d) 12 (BCSC) is not justified.

[33] The applicants further argue that the Committee erred in characterizing Mazzucco's function as a "banker", and that the claimants used Mazzucco as a "bank of convenience." They submit that the Referee was only referring to Hussein El-Hennawy in this regard because he deposited cash with the lawyer for the purpose of avoiding difficulties encountered with Canadian banks. They further argue that even if Mazzucco was holding the funds as a banker, the Committee failed to consider whether a lawyer could hold trust funds in the capacity of both a banker and a lawyer. They submit that Mazzucco received the money in this dual capacity. They argue that it is unfair and unreasonable to prejudice the applicants' claims because Mazzucco did not deposit the trust funds in his trust account.

[34] The respondent argues that the Committee's conclusion that Mazzucco did not receive funds in his capacity as a lawyer or in connection with his professional business is reasonable. It submits that the finding is consistent with the jurisprudence, and should not be disturbed.

[35] The standard of reasonableness is a deferential standard that "shows respect for an administrative decision-maker's experience and expertise": see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* at para. 29. The Supreme Court explained that "[d]eference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (*Macklin*, at p. 205)."

[36] The Committee applied the Guideline concerning the nexus between the loss and the dishonesty of the lawyer acting in his professional capacity, as contained in the *Act*. It found that the nexus did not exist in the case of the applicants, but did exist in the case of Hussein El-Hennawy and LFS. It based its conclusion on the evidence before it concerning the relationships

between Mazzucco and the parties, as well as the nature of the legal services provided to Hussein and LFS. The Committee determined that Mazzucco did not receive the funds from the applicants in his capacity as a lawyer or in connection with his professional business.

[37] This conclusion is consistent with other jurisprudence that recognizes the different capacities in which a lawyer may act, and that the capacity in which the lawyer received the money is the relevant question in deciding whether compensation should be granted: see *Singh v. Law Society (Alberta)*, 2008 ABCA 260, [2001] 3 W.W.R. 419, at para. 36; *Riviera Development Corporation v. Law Society (Saskatchewan)* (1992), 91 D.L.R. (4th) 417, at pp. 431-432. In *Patchett*, the Supreme Court of British Columbia outlined, at p. 45, circumstances where funds could be regarded as being received in the solicitor's capacity as a lawyer. That the person receiving the funds was a lawyer at the time of receipt is not the determining factor. Rather, the question is whether the funds were received in connection with the provision of "professional services": see *Cassels Brock & Blackwell LLP v. LawPRO* (2007), 85 O.R. (3d) 318 (C.A.), at paras. 7-8.

[38] The Committee analyzed all of the appropriate factors in coming to its decision. It considered whether Mazzucco had provided legal services to the applicants, whether the funds were provided in connection with any particular transaction and the capacity in which Mazzucco received the funds. It noted that he had not been retained to perform legal services, or retained with respect to a specific legal transaction, nor was he retained to assist with or advise on an investment process. He was merely told to hold the funds pending further instruction, and he never provided any investment or legal services concerning the funds. They were not deposited to a trust account, were not received as a retainer and were not earmarked for any particular transaction. The Committee found that the applicants' intended uses of the lawyer's services following the assignments were "extremely vague". The Committee concluded that the claimants' losses were not in consequence of dishonesty in connection with the lawyer's professional business. Given the long standing relationship between Hussein and Mazzucco, the Committee refused to find that his practice of depositing cash with the lawyer in trust was careless. In light of the history of legal services that Mazzucco had provided to Hussein and Lakefront (in contrast to the lack of legal services that Mazzucco had provided to the other applicants), the Committee upheld the grants to Hussein and Lakefront Star and dismissed the other applications.

[39] In reaching this conclusion, the Committee considered factors that were consistent with the jurisprudence. While the term "in connection with" is to be given a "plain but expansive meaning": see *725410 Ontario Inc. v. Gertner*, 2011 ONSC 6121, at para. 32, the term is not so broad as to include the deposit of funds not related to a legal transaction or to the provision of some legal service. Accordingly, the Committee's decision was reasonable. It was justified, transparent and intelligible, and fell within a range of possible and acceptable outcomes that are defensible in respect of the facts and law: see *Dunsmuir*, at para. 47. We see no basis to interfere with that conclusion.

Was the decision of the Committee on costs reasonable?

[40] Section 51(12) of the *Act* provides:

> There may be paid out of the Fund the costs of its administration, including the costs of investigations and hearings and all other costs, salaries and expenses necessarily incidental to the administration of the Fund.

[41] In his report, the Referee wrote that he did not have jurisdiction under the *Act* to award disbursements to a party. The Committee did not disagree with that conclusion. Section 51(12) does not contemplate an award of disbursements incurred by the parties. Rather, it refers to costs that are "necessarily incidental to the administration of the fund". Neither the *Act* nor the Guidelines refer to the payment of disbursements. The Guidelines do provide for the payment of counsel fees, but state that the payment of "costs, expenses or damages incurred or suffered by the claimant will not be made out of the Fund". Counsel fees may be allowed up to a total of $500, and this may be increased in complicated cases for preparation of claim documents and final resolution of the claim. An additional $800 per day in the discretion of the referee may be paid for attendance at a hearing.

[42] The Committee's decision not to interfere with the Referee's recommendation concerning the lack of jurisdiction to award disbursements is a conclusion that falls within the range of possible and acceptable outcomes.

[43] With reference to the Committee's decision on costs, the Committee was not bound to accept the Referee's report. It considered appropriate factors in exercising its discretion, including the success of the parties, the legislation and the Guidelines, the amount of money at issue and the purpose and spirit of the Fund. It exercised its discretion to award costs higher than the Guidelines because of the complicated nature of the case. The Guidelines contemplate modest counsel fees and costs for preparing documents. The Committee accepted the Referee's view that enhanced costs were justified by awarding $6,875 instead of the $500 contemplated by the Guidelines, for a total of $14,475 to El-Hennawy and LFS. The Committee reasonably reduced the amount recommended by the Referee to reflect the success of the applicants. That decision was reasonable and should not be disturbed.

Result

[44] For the reasons outlined above, the application for judicial review of the Compensation Fund Committee's decision refusing the applicant's claims is dismissed. The application for judicial review of the Compensation Committee's decision concerning the issue of costs is also dismissed.

[45] If the parties are unable to agree on the issue of costs, they may file written submissions according to the following timetable: the LSUC shall file submissions by February 20, 2014, and the applicants by February 28, 2014.

THEN R.S.J.

HIMEL J.

SACHS J.

Released: January 28, 2014

CITATION: Tarek El-Hennawy et al. v. The Law Society of Upper Canada, 2013 ONSC 375
DIVISIONAL COURT FILE NO.: 59/13
DATE: 20140128

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN R.S.J., HIMEL AND SACHS JJ.

BETWEEN:

TAREK EL-HENNAWY, REEM EL-HENNAWY, SUZAN FARESS, MOHAMED FARESS, SIHAM EL-HENNAWY, DALIA MOHAMED, AND FARES EL-HENNAWY (INFANT) AND OMAR EL-HENNAWA (INFANT) BY THEIR LITIGATION GUARDIAN DALIA MOHAMED

Applicants

– and –

THE LAW SOCIETY OF UPPER CANADA

Respondent

REASONS FOR JUDGMENT

Himel J.

Released: January 28, 2014

TAB 7.2

FOR INFORMATION

GRANTS PAID FROM THE FUND

Since the last report to Convocation in April 2013, grants have been paid from the Fund in the amounts shown in the attached chart. This report covers the period from April 17, 2013, to January 31, 2014. (Licensees whose discipline proceedings are completed, or who are not subject to discipline, are identified by name). Additional information about specific claims is made available to the Committee on request.

Lawyers	**Number of Claimants**	**Total Grants Paid**
Solicitor #233 (Suspended December 2010)	1	$ 5,000.00
Solicitor #237 (Suspended November 2012)	3	$ 161,984.93
Solicitor #239 (Suspended June 2012)	3	$ 10,020.00
Solicitor #238 (Suspended June 2012)	1	$ 10,000.00
Solicitor #234 (Suspended March 2011)	1	$ 3,000.00
Solicitor #230 (Associate August 2010)	1	$ 145,214.89
Campbell, Colin (Licence Revoked September 2011)	1	$ 90,000.00
Cohen, Stephen (Deceased February 2012)	1	$ 2,825.00
Deane, Robert (Deceased May 2009)	1	$ 3,900.39
Gray, William (Licence Revoked September 2011)	2	$ 55,979.47
Harris, David (Licence Revoked September 2011)	2	$ 4,500.00
Hatcher, Ron (Licence Revoked November 2012)	2	$ 69,120.00
Jones, Donna (Licence Revoked October 2011)	1	$ 1,000.00
Kwaw, Edmund (Licence Revoked July 2010)	1	$ 100,000.00
Line, John (Licence Revoked January 2014)	1	$ 4,500.00
MacKay, Michael (Licence Revoked June 2013)	1	$ 21,238.78
Mazzucco, Mariano (Licence Revoked November 2010)	2	$ 165,000.00
Mossman, Ronald (Licence Revoked January 2012)	1	$ 150,000.00
Mundulai, Aliamisse (Licence Revoked February 2012)	1	$ 4,000.00
Slocombe, Paul (Licence Revoked November 2011)	1	$ 5,500.00
White, Jennifer (Licence Revoked July 2013)	2	$ 99,569.48
Wilson, Graham (Licence Revoked May 2013)	5	$ 16,589.00
Sub-total (Lawyers)	***35***	***$1,128,941.94***
Paralegals		
Paralegal #11 (Suspended April 2012)	1	$ 250.00
Gowling, Allison (Licence Revoked October 2013)	1	$ 1,500.00
Jackson, Donna (Deceased December 2011)	4	$ 5,750.00
Kryvenko, Oleg (Licence Revoked March 2011)	1	$ 800.00
Oostwoud, Gerard (Deceased January 2012)	1	$ 250.00
Sub-total (Paralegals)	***8***	***$ 8,550.00***
TOTAL GRANTS PAID	**43**	**$ 1,137,491.94**

The Law Society of Upper Canada | Barreau du Haut-Canada

LET RIGHT PREVAIL

Report to Convocation

February 27, 2014

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

Committee Members
Howard Goldblatt, Chair
Julian Falconer, Vice-Chair
Susan Hare, Vice Chair
Raj Anand
Constance Backhouse
Mary Louise Dickson
Avvy Go
Michelle Haigh
Janet Minor
Judith Potter
Susan Richer
Paul Schabas
Baljit Sikand
Beth Symes

Purposes of Report: Decision and Information

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

TABLE OF CONTENTS

For Decision

For Information

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the "Equity Committee") met on February 13, 2014. Committee members Howard Goldblatt, Chair, Julian Falconer, Vice-Chair, Susan Hare, Vice-Chair, Raj Anand, Constance Backhouse, Mary Louise Dickson, Avvy Go, Judith Potter and Beth Symes participated. Julie Lassonde, representative of the Association des juristes d'expression française de l'Ontario, and Sandra Yuko Nishikawa and Paul Saguil, representatives of the Equity Advisory Group, also participated. Staff members Sally Ashton, Josée Bouchard, Marisha Roman, Grant Wedge and Sheena Weir also attended.

TAB 8.1

FOR DECISION

HUMAN RIGHTS MONITORING GROUP REQUEST FOR INTERVENTIONS

MOTION

2. **That Convocation approve the letters and public statements in the following cases:**

   a. **lawyer Nimalka Fernando – Sri Lanka– letters and public statement presented at TAB 8.1.1;**

   b. **lawyer Le Quoc Quan – Vietnam - letter and public statement presented at TAB 8.1.2;**

   c. **lawyer Xu Zhiyong – China – letters and public statement presented at TAB 8.1.3;**

   d. **Chief Magistrate and Supreme Court Registrar Peter Law and Chief Justice Geoffrey Eames – Nauru – letters and public statement presented at TAB 8.1.4;**

   e. **lawyers in Uganda – letters and public statement presented at TAB 8.1.5;**

   f. **lawyers in Nigeria – letters and public statement presented at TAB 8.1.6**

   g. **letter proposing collaboration between the Law Society of Zimbabwe and the Law Society of Upper Canada presented at TAB 8.1.7.**

MANDATE OF THE HUMAN RIGHTS MONITORING GROUP

3. The mandate of the Human Rights Monitoring Group (the "Monitoring Group") is,

   a. to review information that comes to its attention about human rights violations that target members of the profession and the judiciary, here and abroad, as a result of the discharge of their legitimate professional duties;

   b. to determine if the matter is one that requires a response from the Law Society; and

   c. to prepare a response for review and approval by Convocation.

4. The mandate further states that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in

Convocation's place and take such steps as he or she deems appropriate. In such instances, the Monitoring Group shall report on the matters at the next meeting of Convocation.

5. On September 20, 2007, Convocation approved the recommendation that the Monitoring Group explore the possibility of developing a network of organizations, and work collaboratively with them, to address human rights violations against judges and lawyers.

SRI LANKA – HARASSMENT OF HUMAN RIGHTS LAWYER NIMALKA FERNANDO

Sources of Information

6. The background information for this report was taken from the following sources.
   a. Asian Human Rights Commission;[1]
   b. Front Line Defenders;[2]
   c. Law Society of England and Wales;
   d. Observatory for the Protection of Human Rights Defenders;[3] and
   e. Women Human Rights Defenders International Coalition.[4]

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[1] The Asian Human Rights Commission (AHRC) is an independent, non-governmental body, which seeks to promote greater awareness and realisation of human rights in the Asian region, and to mobilise Asian and international public opinion to obtain relief and redress for the victims of human rights violations. It was founded in 1986 by a prominent group of jurists and human rights activists in Asia and serves to promote civil and political rights, as well as economic, social and cultural rights.

[2] Front Line Defenders or The International Foundation for the Protection of Human Rights Defenders is an Irish-based human rights organisation founded in Dublin, Ireland in 2001 to protect human rights defenders at risk, i.e. those who work non-violently to uphold the human rights of others as outlined in the Universal Declaration of Human Rights.

[3] To protect defenders, The International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT) created the Observatory for the Protection of Human Rights Defenders.[5] Its role: establish the facts, alert the international community, hold discussions with national authorities and promote the strengthening of mechanisms to protect human rights defenders at national, regional and international levels.

[4] The WHRD IC is a resource and advocacy network for the protection and support of women human rights defenders worldwide. An international initiative created out of the international campaign on women human rights defenders launched in 2005, the Coalition calls attention to the recognition of women human rights defenders. It asserts that those advocating for women's human rights - no matter what gender or sexual orientation they claim - are in fact human rights defenders. Their gender or the nature of their work has made them the subject of attacks,

Background

7. During a November 4, 2013, radio program titled "The Way the Country is Moving (*Rat Yana Atha*)", death threats and derogatory comments were directed by callers toward human rights lawyer Dr. Nimalka Fernando. The radio program was broadcast on state-owned Sri Lanka Broadcasting Corporation (SLBC) and produced by the Chairman of the SLBC, Mr. Hudson Samarasinghe. The subtitle of the program was "Stoning the Sinner Woman".

8. Statements that Dr. Fernando had made to a TV channel on the previous day were broadcast on the radio program. The TV interview was related to a public debate that was sparked by Dr. Fernando's call for the abolition of abortion laws in Sri Lanka, the promotion of safer sex and a more protective reproductive health approach. She had also stated that she objected to the use of the word "prostitution".

9. Listeners to the SLBC radio program had the opportunity to call in and give their opinion. Statements from callers included:
   a. "We cannot allow persons like Nimalka Fernando to live in this society"
   b. "If we do something to them the government will be blamed by the human rights people. We should use a lorry and cause an accident."
   c. "There is something called cleaning in the army...We should hand her over to the cleaning system."

10. Dr. Fernando was described as a 59-year-old divorced woman who had served 30 different organizations and since 1989 had "carried tales". She was also referred to as a "prostitute". Most of the callers were men and some identified themselves as retired

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requiring gender-sensitive mechanisms for their protection and support. The Coalition involves women activists as well as men who defend women's rights and lesbian, gay, bi-sexual, and transgender (LGBT) defenders and groups committed to the advancement of women's human rights and sexual rights.

members of the armed forces. According to reports, Mr. Samarasinghe did not stop callers from making these statements and in fact seemed to encourage them.

11. Dr. Fernando has lodged a complaint with the Human Rights Commission of Sri Lanka and the Inspector General of Police. Reports indicate that this is not the first time Dr. Fernando has faced harassment as a result of her human rights work. In March 2012, Dr. Fernando, along with three other human rights defenders, was accused of being a traitor and working against the interests of the country to obtain "dollars". Additionally, the Minister of Public Relations threatened to "break the limbs" of Dr. Fernando and other three human rights defenders.

12. Dr. Fernando is the President of the International Movement against All Forms of Discrimination and Racism (IMADR) and is a prominent human rights activist. She is involved in a number of human rights organizations. She has also actively participated and contributed to UN Human Rights mechanisms, including participating in treaty body committee meetings (committees of independent experts to monitor the implementation of treaties) and session of the Human Rights Council for over three decades.

For Convocation's Consideration

13. Convocation may wish to consider the following factors when making a decision about this case:
    a. There are no concerns about the quality of sources used for this report. The Law Society of England and Wales has also intervened in this case.
    b. The harassment of lawyers as a result of their human rights work falls within the mandate of the Monitoring Group.

VIETNAM – CONVICTION AND IMPRISONMENT OF HUMAN RIGHTS LAWYER LE QUOC QUAN

Sources of Information

14. The background information for this report was taken from the following sources:

a. British Broadcasting Corporation (BBC);[5]

b. Front Line Defenders;

c. Human Rights Watch (HRW);[6]

d. Lawyers for Lawyers;[7]

e. Lawyers' Rights Watch Canada;[8]

f. PEN International;[9]

g. Reporters Without Borders[10]

h. The Guardian;[11]

i. The Law Society of England and Wales;

j. The Observatory for the Protection of Human Rights Defenders;

k. UN News Centre;[12]

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[5] The British Broadcasting Corporation (BBC) The British Broadcasting Corporation (BBC) is a British public service broadcaster headquartered at Broadcasting House in the City of Westminster, London. It is the largest broadcaster in the world, with about 23,000 staff. Its main responsibility is to provide impartial public service broadcasting in the United Kingdom, Channel Islands and Isle of Man.

[6] Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. By focusing international attention where human rights are violated, the organization gives a voice to the oppressed and holds oppressors accountable for their crimes. Its rigorous, objective investigations and strategic, targeted advocacy build intense pressure for action and raise the cost of human rights abuse. For 30 years, Human Rights Watch has worked to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world.

7 In conformity with international law and the *Universal Declaration of Human Rights*, the *Basic Principles on the Role of Lawyers* and the *Declaration on Human Rights Defenders* of the United Nations, L4L has committed itself to enable lawyers to practice law in freedom and independence, always and everywhere, even when that does not suit the local government, bar association or establishment.

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

[9] PEN International (known as International PEN until 2010) is a worldwide association of writers, founded in London in 1921[2] to promote friendship and intellectual co-operation among writers everywhere. PEN International now has autonomous Centres in over 100 countries.

[10] Reporters Without Borders (RWB), or Reporters Sans Frontières (RSF), is a France-based international non-profit, non-governmental organization that promotes and defends freedom of information and freedom of the press. The organization has consultant status at the United Nations.

[11] The Guardian is a British national daily newspaper owned by the Guardian Media Group.

[12] The United Nations News Centre is located in New York.

l. United Press International;[13] and

m. Washington Post.[14]

Background

15. Human rights lawyer and blogger Le Quoc Quan, from Vietnam, has long been persecuted by authorities for his human rights work. In 2007, Le Quoc Quan was detained for three months when he returned from an American government-funded fellowship in Washington. Following his release, he was arrested three more times. He was also disbarred and placed under constant surveillance. Despite this he continued to blog on issues of human rights, democracy and social justice and took part in demonstrations.

16. In August 2012, Le Quoc Quan was beaten by two unidentified men with iron bars outside his home in Hanoi. In October 2012, security police and plain-clothed militia forced entry into the office of a firm that belongs to Le Quoc Quan and his two brothers. Police allegedly seized files and documents belonging to the firm, assaulted the staff and detained the brothers for interrogation. They returned at a later date and arrested Le Quo Quan's brother, Le Dinh Quan, who is currently detained in Hoa Lo Prison No. 3.

17. Recently, Prime Minister Nguyen Tan Dung ordered that authorities renew the fight against anyone using the Internet to "defame and spread propaganda against the State". Le Quoc Quan is the author of a popular blog exposing human rights abuses and other issues not covered by the state media. On December 18, 2012, he wrote an article entitled, "Constitution or a contract for electricity and water service?", which criticized the State. The piece was published by the BBC.

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[13] Since 1907, UPI has been providing information to media outlets, businesses, governments and researchers worldwide. UPI is a global operation with offices in Beirut, Hong Kong, London, Santiago, Seoul and Tokyo. The headquarters is located in downtown Washington, DC.

14 The Washington Post is a leading American daily newspaper. It is the most widely circulated newspaper published in Washington, D.C., and oldest extant in the area, founded in 1877. Located in the capital city of the United States, The Post has a particular emphasis on national politics. Daily editions are printed for the District of Columbia, Maryland, and Virginia.

18. On December 27, 2012, Le Quoc Quan was arrested by the police in Hanoi while dropping off his daughter at school. It has been reported that police also searched his office and home and confiscated documents. The police read out a warrant but did not give the warrant to Le Quoc Quan's family. The police advised the family that he would be charged under Article 161 of the *Criminal Code*, which relates to tax evasion. If he is convicted, he risks three years in prison and a heavy fine.

19. Le Quoc Quan was detained incommunicado in Hoa Lo Prison No. 1. He began a hunger strike on December 28, 2012. Neither his family nor his lawyer were able to visit him.

20. In February 2013, the Law Society intervened in the case of Le Quoc Quan. Le Quoc Quan remains in detention. On October 2, 2013, he was convicted of evading corporate income tax. The trial took only one day. He was sentenced to 30 months in prison and a fine of 1.2 billion dongs (approximately $59,000 USD) was levied against the company of which Le Quoc Quan is a director. Le Quoc Quan has appealed the decision and some reports note that the appeal is to be heard at the end of February 2014.

21. Following his conviction, Le Quoc Quan's wife and mother were able to speak to him briefly at the camp where he is being held. His wife reported that he is in poor health but that his morale remains high.

22. His conviction is believed to be politically motivated and intended to prevent him from continuing his legitimate human rights work.

For Convocation's Consideration

23. Convocation may wish to consider the following factors when making a decision about this case:

a. There are no concerns about the quality of sources used for this report. Lawyers' Rights Watch and the Law Society of England and Wales have intervened in this case.

b. The arrest, detention and conviction of lawyers as a result of their human rights work falls within the mandate of the Monitoring Group.

CHINA – ARREST, TRIAL AND SENTENCING OF HUMAN RIGHTS LAWYER XU ZHIYONG

Sources of Information

24. The background information for this report was taken from the following sources:

a. Lawyers for Lawyers;

b. The Law Society of England and Wales;

c. Amnesty International;[15]

d. The Guardian; and

e. South China Morning Post.[16]

Background

25. Xu Zhiyong is a forty year old human rights lawyer and university professor who was sentenced to four years in prison on January 27, 2014. Xu Zhiyong is a highly regarded legal scholar and anti-corruption campaigner.[17] Xu Zhiyong has been detained in Beijing since July 2013.[18] He was arrested and tried on criminal charges of "gathering crowds to disrupt public order".[19] The charges relate to a small scale peaceful street protest by

15 Amnesty International began in 1961. Its work focuses on uncovering the truth about human rights abuses and mobilizing individuals to take action. More than three million people worldwide take action and support Amnesty International. It has made appeals on behalf of thousands of individual victims of human rights abuses. It is an independent organization that is supported by its members and through fundraising initiatives. Amnesty International's reports on human rights abuses are recognized as accurate, unbiased and credible.

16 South China Morning Post is the first English language Hong Kong Newspaper. It was founded in 1903 and is owned by Kerry Media. Although there are suggestions that the Malaysian based owners are pro-Beijing, the newspaper has reported on commemorations of the Tiananmen Square Massacre has and run editorials criticizing China's one child policy.

17 "Profession condemns trial of Xu Zhiyong", *The Law Society Gazette*, The Law Society of England and Wales (January 22, 2014) online: http://www.lawgazette.co.uk/law/profession-condemns-trial-of-xu-zhiyong/5039500.article

18 "Xu Zhiyong sentenced to four years", *The Law Society Gazette*, The Law Society of England and Wales (January 27, 2014) online: http://www.lawgazette.co.uk/law/chinas-rule-of-law-called-into-question/law/xu-zhiyong-sentenced-to-four-years/5039598.article

19 "Xu Zhiyong sentenced to 4 years in prison", *Lawyers for Lawyers* (January 29, 2014) online: http://www.advocatenvooradvocaten.nl/8767/china-xu-zhiyong-sentenced-to-4-year-prison-sentence/

members of the New Citizens' Movement who were calling for educational equality and for government officials to declare their assets.[20] Xu Zhiyong co-founded the New Citizens' Movement. In April 2013, he was placed under house arrest for signing a letter in support of other detained activists.[21]

26. Xu Zhiyong has described the New Citizens' Movement "as a peaceful cultural, social and political campaign."[22] In May 2012, Xu Zhiyong wrote an article titled "China Needs a New Citizens' Movement".[23] According to Amnesty International, the article is "credited with spurring a loose network of activists who aim to promote government transparency and expose corruption."[24] Some of the suggested activities for the New Citizens' Movement include participating in a civic life by holding meetings to discuss the political situation, helping the weak, and doing good for society. In the beginning of 2013, the New Citizens' Movement started campaigning for increased government transparency and advocated against corruption and abuses of power.

27. During Xu Zhiyong's trial, the court denied his defence counsel the right to call witnesses. They barred his defence counsel from calling any of their 68 defence witnesses. The court also refused to summon prosecution witnesses so his defence counsel and the presiding judges could question them.[25] Additionally, Xu Zhiyong was tried separately from his colleagues who were being prosecuted for the same offence. This contravened the Criminal Procedure Law requirement that persons charged with the same offence be tried jointly. This also ensured that none of Xu Zhiyong's colleagues could support his case through their participation. Finally, the court cut off Xu Zhiyong during his closing statement when he called for democracy, the rule of law, freedom, justice and love and ended his hearing.

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20 Tania Branigan "China jails activist Xu Zhiyong for four years for 'disturbing public order'" *The Guardian* (January 26, 2014) online: http://www.theguardian.com/world/2014/jan/26/china-jails-activist-xu-zhiyong
21 Associated Press "Chinese lawyer Xu Zhiyong arrested". *The Guardian* (July 17 2013) online: http://www.theguardian.com/world/2013/jul/17/china-lawyer-xu-zhiyong-arrested
22 "Xu Zhiyong four year jail sentenced 'shameful'" *Amnesty International* (January 26, 2014) online: http://www.amnesty.org/en/news/china-xu-zhiyong-four-year-jail-sentence-shameful-2014-01-26
23 *Ibid*.
24 *Ibid*.
25 Jerome A. Cohen. "Xu Zhiyong's trial makes a mockery of Beijing's pledge to enforce rule of law" *South China Morning Post* (January 29, 2014) online: http://www.scmp.com/comment/insight-opinion/article/1416497/xu-zhiyongs-trial-makes-mockery-beijings-pledge-enforce-rule

28. The court barred diplomats from attending the trial and police and plainclothes officers harassed the journalists outside of the courthouse. Xu Zhiyong's case was the highest profile case of its kind since a Beijing court convicted writer and dissident Liu Xiaobo. Human rights lawyers in China frequently report threats, physical violence and unfair trials. The Law Society of England and Wales has condemned Xu Zhiyong's trial and sentence. It has also stated that Xu Zhiyong's case as "a prime example of how lawyers are being tried on charges that have arisen out of their work on politically sensitive cases." The Law Society of England and Wales is calling for Xu Zhiyong's immediate release.[26]

For Convocation's Consideration

29. Convocation may wish to consider the following factors when making a decision about this case:
    a. There are no concerns about the quality of sources used for this report.
    b. The arrest, detention and conviction of lawyers as a result of their human rights work falls within the mandate of the Monitoring Group. The Law Society has intervened in the cases of lawyers in China in the past where lawyers were being persecuted for representing clients accused of crimes against the state, terrorism and members of minority groups. Additional past interventions also include cases where lawyers were targeted for their human rights work and protesting.

NAURU – REMOVAL AND DEPORTATION OF THE MAGISTRATE OF LAW AND REVOCATION OF THE CHIEF JUSTICE'S VISA

Sources of Information

30. The background information for this report was taken from the following sources:

26 "Xu Zhiyong sentenced to four years", *The Law Society Gazette*, The Law Society of England and Wales (January 27, 2014) online: http://www.lawgazette.co.uk/law/chinas-rule-of-law-called-into-question/law/xu-zhiyong-sentenced-to-four-years/5039598.article

a. Australian Broadcasting Corporation News ("ABC News");[27]

b. The Sydney Morning Herald;[28]

c. Commonwealth Lawyers Association ("CLA").[29]

d. Wall Street Journal;[30]

e. CCTV.com English;[31]

f. The Australian;[32]

g. The Age;[33] and

h. Island Business Magazine.[34]

Background

31. Nauru is located in the South Pacific Ocean, south of the Marshall Islands. Post World War II, Nauru became a United Nations ("UN") trust territory. In 1968, it became independent. Nauru joined the UN in 1999 as the world's smallest republic. The total population of Nauru is approximately 9,434.[35] Nauru does not have an official capital and uses the Australian dollar as its currency. The total area of the island is 21 square kilometers.

32. In an effort to boost its economy and reduce its unemployment, Nauru agreed to host an Australian detention center. Australia sends individuals intercepted en route to Australia

27 ABC News is Australia's national news service. While it is owned and funded by the Australian government, the broadcaster's editorial independence is ensured through the 1983 Australian Broadcasting Corporation Act. ABC has reported extensively about the removal of Peter Law, the Chief Magistrate and revoking the visa of Chief Justice Eames.

28 The Sydney Morning Herald was founded in 1831and is Australia's oldest continuously published newspaper. The Sydney Morning Herald has attempted to spearhead political campaigns regarding the environment through Earth Hour as well as "Campaign for Sydney" regarding planning and transport.

29 The Commonwealth Lawyers Association ("CLA") is a pan-Commonwealth body and "exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession serves the people of the Commonwealth." The first conference was held in London in 1955.

30 The Wall Street Journal is an American international daily newspaper with a focus on business and economic news. It has a circulation of 2.4 million copies. It has been continuously in print since 1889.

31 CCTV.com English is a Chinese web-based TV broadcaster providing "users with a globalized, multilingual and multi-terminal public webcast service platform. It offers interactive audiovisual services, integrating features of internet-based operations with those of TV programming."

32 The Australian is a national news paper launched in 1964. In addition to covering national and global news, it focuses on news business reporting.

33 The Age is a daily newspaper published in Melbourne since 1854. It serves primarily Victoria, Tasmania, the Australian Capital Territory and border regions of Southern Australia and Southern New South Wales.

34 Island Business Magazine is based in Fiji. It is 30 years old and is the premier publishing group in the Pacific Islands region.

35 Nauru The World Factbook, CIA,(January 28, 2014) online: https://www.cia.gov/library/publications/the-world-factbook/geos/nr.html

to detention centres in Nauru.[36] The issue of asylum seekers is a major political issue in Australia. The government's tough stance on asylum seekers is widely supported by Australians. However, Gillian Triggs, the Australian Human Rights Commissioner, has reiterated her call for all asylum seekers on Nauru and Manus Islands to be returned to Australian.[37] Nauru has become an Australian satellite described as "a quasi-dependency acting under the close control of Australia."[38]

33. Nauru's legal system is a combination of English common law and customary law. Its Supreme Court consists of a Chief Justice and one judge. Nauru has two lower courts: the District Court and Family Court. Nauru's President appoints judges who serve until they are 65 years old. The Chief justice serves until he/she is 75 years old. Many of the lawyers, barristers and judges in the Nauruan legal system are Australian. Peter Law, the Chief Magistrate and Supreme Court Register of Nauru, and the Chief Justice Geoffrey Eames, are Australian citizens. Recently, Australian human rights lawyers have launched a constitutional challenge in Nauru to release 10 detained asylum seekers claiming their detention is unlawful.[39] The 10 detainees have been detained since September 2012 without access to lawyers or a fair hearing.

34. Nauru's President Baron Waqa fired Peter Law, the Chief Magistrate and Supreme Court Register of Nauru, on January 19, 2014. The government terminated his employment, took him into police custody and then transported him to the airport. Peter Law was not given time to pack. In an attempt to stop Peter Law's deportation, Nauru's Chief Justice Geoffrey Eames issued an injunction preventing his removal. The Nauru government

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36 Nauru Dislodges Judicial Officials Ahead of Asylum-Seeker Case: Critics Say Move May Signal a Hardening of Australia's Offshore Refugee-Detention System". *The Wall Street Journal* (January 20, 2014). online:http://online.wsj.com/news/articles/SB10001424052702304027204579331813836739646

37 "Australian High Commission expresses concerns to Nauru over magistrate's deportation". *The Sydney Morning Herald*. (January 20, 2014). online: http://www.smh.com.au/federal-politics/political-news/australian-high-commission-expresses-concerns-to-nauru-over-magistrates-deportation-20140121-316hp.html

38 Ben Saul "Constitutional crisis: Australia's dirty fingerprints are all over Nauru's system", *The Guardian* (January 21, 2014) online: http://www.theguardian.com/commentisfree/2014/jan/21/constitutional-crisis-australias-dirty-fingerprints-are-all-over-naurus-system

39 Sarah Whyte "Lawyers launch constitutional challenge in Nauru over detainees". *The Sydney Morning Herald*. (February 7, 2014). online: http://www.smh.com.au/federal-politics/political-news/lawyers-launch-constitutional-challenge-in-nauru-over-detainees-20140206-324m3.html

ignored that order and revoked Chief Justice Eames's visa.[40] The government accused Peter Law of a number of misdemeanours, including improper conduct with staff and being drunk and disorderly.[41]

35. In the past, Peter Law had issued two injunctions stopping the Nauru government from deporting two of its residents. The residents were not given reasons for their deportation or the right to challenge the action.[42] Peter Law was scheduled to adjudicate in the direction hearings of about 40 to 60 asylum seekers who were charged with rioting and wilful damage at Nauru's detention centre.[43]

36. Geoffrey Eames has been Chief Justice of Nauru for three years. During that time he has expressed concerns to the Nauru government about the conditions under which asylum seekers sent by the Australian authorities to the Nauru are held. Chief Justice Eames opposed the Nauru government's move to hear the cases at the detention center and close the proceedings to the media.[44] Chief Justice Eames also expressed concerns about Mr. Law's dismissal and an abuse of the rule of law.

37. Under the terms of his appointment, Chief Justice Eames will remain Nauru's Chief Justice until the age of 75. He is currently 68 years old. The Nauru government can remove him with a two-thirds vote of the parliament on the grounds of proven incapacity or misconduct. Chief Justice Eames has stated he will not resign. More than 100 asylum seeker cases are in limbo, including the controversial cases of those asylum seekers accused of rioting in 2013.[45]

40"Nauru sacks its sole magistrate, leaving detainees in limbo." *Theage.com*. (January 20, 2014). Online:http://m.theage.com.au/federal-politics/political-news/nauru-sacks-its-sole-magistrate-leaving-detainees-in-limbo-20140119-312tn.html.
41 "Nauru beak has colourful record". *The Australian* (January 27, 2014). Online: http://www.theaustralian.com.au/business/legal-affairs/nauru-beak-has-colourful-record/story-e6frg97x-1226810866954#
42 "Courts in crisis as Nauru sacks its only magistrate an, bars Chief Justice". *Islandbusness.com* (January 20, 2014).Online: http://www.islandsbusiness.com/news/nauru/4314/courts-in-crisis-as-nauru-sacks-its-only-magistrat/
43 Courts in crisis as Nauru sacks its only magistrate." *The Sydney Morning Herald*. (January 20, 2014). Online: http://www.smh.com.au/federal-politics/political-news/courts-in-crisis-as-nauru-sacks-its-only-magistrate-20140119-312u1.html
44 "Nauru expels Australian magistrate, chief justice". *CCTV.com* (January 20, 2014). Online: http://asiapacific.cntv.cn/20140120/103177.shtml
45 "Morrison denies boat link to Nauru sacking". *The Sydney Morning Herald*. (January 20, 2014),. Online:http://news.smh.com.au/breaking-news-national/morrison-denies-boat-link-to-nauru-sacking-20140120-313cc.html

38. The Australian Bar Association has stated that the removal of Peter Law is an affront to the legal protections in Nauru and the independence of the country's judiciary. The South Pacific Lawyers Association also expressed concerns and noted the government's conduct was inconsistent with the rule of law.[46] The Commonwealth Lawyers Association has issued a statement condemning the removal and deportation of Peter Law as well as the revocation of the Chief Justice's visa.[47]

For Convocation's Consideration

39. Convocation may wish to consider the following factors when making a decision about this case:
    a. There are no concerns about the quality of sources used for this report.
    b. The expulsion of Peter Law, former Chief Magistrate, and the revocation of the visa of Chief Justice Eames fall within the mandate of the Monitoring Group. The Law Society has never intervened in cases of lawyers or members of the judiciary in Nauru.

LAWYERS IN UGANDA

Sources of Information

40. The background information for this report was taken from the following sources:
    a. BBC News;
    b. Aljazeera.com;[48]
    c. Daily Monitor;[49]

46"Nauru's chief justice Geoffrey Eames says visa cancellation is politically motivated". *ABC New*, (January 20, 2014),: Online:http://www.abc.net.au/news/2014-01-20/nauru-chief-justice-visa-cancelled-politically-motivated/5208540

47 Commonwealth of Lawyers Association. Public Statement, "Statement on the removal and deportation of Magistrate Law and the revocation of the Chief Justice's via by the Nauru authorities". (January 22, 2014).

[48] Al Jazeera is based in Qatari and owned by the Al Jazerra Media Network. Originally launched as an Arabic news and current affairs satellite TV channel, Al Jazeera has expanded into a network of media outlets. Al Jazeera English is an international 24 hour English language new and current affairs channel. The network's stated objective is "to give voice to untold stories, promote debate, and challenge established perceptions". Al Jazeera America is the sister channel to Al Jazerra English.

[49] The Daily Monitor is Uganda's leading independent newspaper. The paper is owned by the Nation Media Group based in Nairobi. In May 2013, Uganda's police raided and occupied the paper. The police have prohibited the printing of the paper, but the Daily Monitor website is online and updated. It is unclear if the police still occupy the Daily Monitor's offices.

d. Innovating Justice Forum;[50]

e. Psychological Society of South Africa.[51]

f. International Bar Association Human Rights Institute;[52]

g. Human Rights Awareness and Promotion Forum;[53]

h. The Civil Society Coalition on Human Rights and Constitutional Law;[54]

i. Wink FM Uganda;[55]

j. Associated Press;[56] and,

k. TVC News.[57]

Background

41. Uganda's lesbian, gay, bisexual, transgender and intersex (LGBTI) community is highly stigmatized and marginalized. Many in sub-Saharan Africa view homosexuality as "un-African", "foreign" and a "white import".[58] In some traditional African beliefs, LGBTI persons are considered cursed or bewitched. The demonization and view of homosexuality as "foreign" has created a hostile environment for LGBTI persons and organizations.

[50] Innovating Justice Forum is a body of legal professionals, policy makers, academics, entrepreneurs, NGOs and funders who are involved in improving the Rule of Law. They connect viable projects with expert knowledge, networks and funding. The Innovating Justice Forum was launched in 2009 as a collaborative effort by the Hague Institute for the Internationalization of Law (HiiL), the Microjustice Initiative (MJI), the European Academy for Law and Legislation (EALL) and the Center for International Legal Cooperation (CILC). It is subsidized by NL Agency, a division of the Dutch Ministry of Economic Affairs, Agriculture and Innovation and the city of The Hague.

[51] The Psychological Society of South Africa (PsySSA) is the professional body representing psychologists in South Africa. It was formed in 1994. As the representative body of psychologists in South Africa it operates as a trade union for the discipline.

[52] The International Bar Association's Human Rights Institute (IBAHRI) works "to promote and protect human rights under a just rule of law." It was established in 1995 under the honorary presidency of Nelson Mandela.

[53] The Human Rights Awareness and Promotion Forum – Uganda (HRAPF) is a non-governmental organization founded in 2008 by a group of lawyers and other professionals. HRAPF's mission is "to promote respect and observance of human rights of marginalized groups through legal and legislative advocacy, research and documentation, legal and human rights awareness, capacity building and partnerships."

[54] The Civil Society Coalition on Human Rights and Constitutional Law is a coalition established in October 2009 in response to the Anti-Homosexuality Bill. There are 51 Ugandan civil society organizations, including human rights, feminist, HIV focused, LGBTI, media and refugee organizations and groups.

55 Wink FM Uganda is a radio station located in Kampala, Uganda. It provides listeners with music and information.

56 The Associated Press ("AP") is on the largest independent global news gathering organization in the world. Founded in 1846, AP has covered all the major news events of the past 165 years. It has received 51 Pulitzer prizes for journalism excellence.

[57] TVC News us a 24 hour news channel owned by Continental Broadcasting Service Nigeria Ltd and employs 350 people. It follows the same model of 24 hour news reporting as Al Jazeera, British Broadcasting Corp and Cable News Network.

[58] Psychological Society of South Africa, *An open statement from the Psychological Society of South Africa to the People and Leaders of Uganda Concerning the Anti-Homosexuality Bill 2009*, (undated).

42. Challenges faced by LGBTI persons include arbitrary arrests, threats, physical assaults, illegal detentions, blackmail, eviction by landlords and dismissal from employment.[59] In Uganda there are "consistently high rates of anti-homosexual harassment and violence, both state sanctioned and extrajudicial." Socially sanctioned discrimination leads "service providers to discount, ignore and neglect the needs of lesbian, gay and bisexual people." This increases the marginalization of LGBTI persons. The level of discrimination worsens for LGBTI persons with criminalization on the basis of sexual orientation.

43. Around the early 2000s, there was a debate regarding the legality of same sex relationships. The conclusion was that Uganda's laws against homosexuality needed strengthening. Support and legislative action for the *Anti-Homosexuality Bill* ("AHB") began in early 2009. Uganda's Family Life Network led by Pastor Stephen Langa along with three American evangelists led by Scott Lively of Exodus International held a three day seminar in Kampala, Uganda's capital.[60] The seminar spread anti-LGBTI propaganda. The American group then met with Ugandan legislators. Shortly after, the Honorable James Nsaba Buturo, former Minister of Ethics and Integrity, announced the creation of a new and stronger law against homosexuality. The AHB was tabled as a private member's bill in 2010 by the Hon. David Bahati, MP for Ndorwa East Constituency, Kabale District.[61]

44. The AHB was passed in December 2013, but it has yet to come into force. In December 2013, the President wrote a letter to Uganda's parliamentary speaker criticizing her for allowing the *Bill* to pass.[62] In January, President Museveni stated he will only sign the

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[59] Innovating Justice Forum. *Legal aid for LGBTI community in Uganda*, (no post date provided), Online: <http://www.innovatingjustice.com/innovations/legal-aid-for-lgbtl-community-in-Uganda?view_content=intro>.

[60]. Human Rights Awareness and Promotion Forum (HRAPF) and The Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), *Protecting 'Morals' by Dehuamnising Suspected LGBTI Persons? A Critique of the Enforcement of the Laws Criminalising Same-Sex Conduct in Uganda.* (United Kingdom: Institute for Development Studies, October 2013) at page 22.

[61] The AHB was first introduced in late 2008 but it was sent to the Legal and Parliamentary Affairs Committee. The Bill came back in 2009 with changes. The death penalty was removed as the punishment for many of the offences. Instead, it was replaced by life imprisonment. The 2009 draft of the AHB was passed by Uganda's Parliament in 2013.

[62]. The AHB should have died on the order paper. It was not tabled before the end of the 8th Parliament. The Speaker for the 9th Parliament Hon. Rebecca Kadaga allowed a motion to "save" all bills from the 8th parliament. The Legal and Parliamentary Affairs Committee presented its report and the original bill. The AHB was reintroduced by a resolution to the Parliament on

AHB "after scientists prove to him that [homosexuality] is a normal behaviour."[63] In February he announced that he would approve the *Bill* as he had received a report indicating that homosexuality may be learned. If the President does not sign the AHB, Uganda's Parliament could possibly enact the AHB through a two thirds vote of the Parliament.[64]

45. A global protest against Uganda's *Anti-Homosexuality Bill* has been launched. On February 10, 2014, members of Kenya's LGBTI community wore rainbow masks and wigs during their protest held in support of Uganda's LGBTI community.[65] The U.S. based American Jewish World Service, which supports groups working to advance human rights of vulnerable and marginalized communities, also promoted the global protest. The Associate Press reports that LGBTI refugees are fleeing to a Kenyan refugee camp over the border.[66] On February 13, 2014, Ugandan Member of Parliament for West Budama, Fox Odoi, wrote President Yoweri and urged him to reject the *Bill*.[67] Fox Odoi along with the Civil Liberties Organisation-Chapter Four, commissioned an independent legal opinion on the constitutionality of the *Bill*. The legal opinion confirmed that the *Bill* is unconstitutional. The stigma and sensitive nature of the *Bill* prompted a law firm, offering the opinion, to decline being named.

46. Lawyers serving LGBTI clients and organizations face stigmatization, which is creating a chilling effect as fewer lawyers are willing to represent the LGBTI community. Adrian Jjuuko, a human rights lawyer in Uganda, founded the first legal aid clinic for LGBTI persons. The legal aid clinic offers walk in and outreach services along with advocacy, awareness sessions and paralegal training. The majority of LGBTI legal aid clients are

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October 31, 2011. It was referred back to the parliamentary committee, and then passed by Uganda's Parliament on December 20, 2013.

63. "Museveni now takes gays Bill to scientists". *The Daily Monitor* (January 29, 2014).

64 BBC News "Uganda President Yoweri Museveni blocks anti-gay law" http://www.bbc.co.uk/news/world-africa-25775002.

65 Jason Straziuso and Rodeny Muhumuza, "Wearing rainbow masks and wigs, gays in Kenya protest against homosexuality bill in Uganda" Associated Press (February 10, 2014) online: http://www.usnews.com/news/world/articles/2014/02/10/gays-in-kenya-protest-against-ugandan-bill ; TVC News "Kenya gay community protests Uganda homosexuality bill" online: http://www.youtube.com/watch?v=UkloTTH4pdI&feature=youtu.be

66 *Ibid* at note 25.

67 "Fox Odoi to M7: Trash Anti-gay Bill", *Wink FM* (February 13, 2014) online: http://winkfm.net/fox-odoi-to-m7-trash-anti-gay-bill.html

poor and cannot afford a lawyer. Even if a LGBTI person could afford a lawyer, the level of stigmatization makes it difficult to obtain legal counsel. There is a high turnover in lawyers at the legal aid clinic due to the stigma and personal risk. Before Adrian Jjuuko's legal aid clinic was established, only the legal aid clinic dealing with refugees would provide services to LGBTI persons. Adrian Jjuuko's legal aid clinic handles over 250 cases a year.

47. Adrian Jjuuko is lead counsel for a group that is spearheading a constitutional challenge to Uganda's *Anti-Homosexuality Bill*. By working on behalf of LGBTI persons and community organizations, it is believed that Adrian Jjuuko risks harassment, possible detention and arrest. Although there are no documented reports indicating this, the chilling effect as a result of well founded fears of harassment, detention and persecution has left Uganda's LGBTI community with barriers to accessing the justice system

For Convocation's Consideration

48. Convocation may wish to consider the following factors when making a decision about this case:
    a. There are no concerns about the quality of sources used for this report.
    b. While there is no documented reported arrest, detention and conviction of lawyers as a result of their human rights work with Uganda's LGBTI community, the *Anti-Homosexuality Bill* has had a chilling effect on lawyers. Human rights lawyers are justifiably frightened to represent LGBTI clients. This is a case where government legislation is intimidating lawyers to turn away from promoting the rule of law. The Law Society has never intervened in cases of lawyers or members of the judiciary in Uganda.

NIGERIA – POTENTIAL THREAT TO SECURITY OF LAWYERS WORKING WITH NIGERIA'S LGBTI CLIENTS AND COMMUNITY

Sources of Information

49. The background information for this report was taken from the following sources:

a. BBC News;

b. Time;[68]

c. The Guardian;[69]

d. International Bar Association Human Rights Institute;

e. Pew Research Center;[70]

f. Associated Press;

g. Huffington Post;[71]

h. The Telegraph;[72] and,

i. International Business Times.[73]

Background

50. Nigeria enacted the *Same Sex Marriage (Prohibition) Act* ("SSMPA") on January 7, 2014.[74] The *SSMPA* prohibits not only same sex marriage, but also the witnessing, abetting and aiding in the solemnization of a same sex marriage and public displays of affection. It prohibits any person or group from providing services to anyone perceived to be homosexual as well as supporting the registration, operation and support of gay

[68] Time (Time.com) is a weekly American news magazine published online and in print. It was founded in 1923 and has the world's largest circulation for a weekly news magazine. The readership is estimated at 25 million with 20 million readers within the United States.

[69] The Guardian is a national daily newspaper in Britain. It was founded in 1821. It is an international media company with a reputation for breaking international stores such as revealing the existence of the PRISM surveillance program which was leaked by Edward Snowden.

70 The Pew Research Center is an American think tank based in Washington D.C. and issues reports and information on social issues, public opinion and demographic trends shaping both the United States and the world.

[71] The Huffington Post is an online news aggregator and blog that offers news, blogs and original content. It was launched in 2005 and in 2012 was the first digital media enterprise to win a Pulitzer Prize.

[72] The Telegraph is an internationally published newspaper based in London, England. It was established in 1855. It has a daily circulation of 552, 065.

[73] International Business News provides global business journalism in 10 languages in 16 country editions. Launched in 2005, the International Business News reaches over 10,000 0000 monthly readers. Headquartered in New York City, the company's mission is to foster global economic growth by empowering people everywhere with excellent news, analysis and information.

[74] "Nigeria's anti-gay laws: fears over new legislation", *BBC News Africa* (January 14, 2014) online: http://www.bbc.co.uk/news/world-africa-25728845.

clubs, societies, organizations, processions or meetings in Nigeria.[75] Individuals providing services to the lesbian, gay, bisexual, transgender and intersex (LGBTI) community upon conviction may receive 10 years in prison. The *Act* does not define what is meant by "providing services". This ambiguity has a chilling effect on Nigerian lawyers and increases the likelihood that Nigeria's LGBTI community will not receive legal services.

51. Nigeria's *Criminal Code*, which dates back to British colonial rule, makes it illegal for LGBTI persons to engage in same sex sexual relations.[76] However, Nigeria's homophobia is attributed to a mixture of cultural and religious traditions which range from fundamental Christian and Islamic teachings to old tribal norms.[77] These traditions shape Nigeria's court system through the operation of multiple legal systems in one geographic region.[78] In parts of Nigeria, Sharia law operates alongside Nigerian law. In other areas, unwritten customary law, enforced by customary courts, augment Nigerian law. LGBTI persons are first charged and tried under the Nigerian law, but they may also be subject to Sharia or customary law. While entitled to legal representation throughout the process, the issue is whether a person charged under the *SSMPA* will find a lawyer willing to represent him or her given Nigeria's homophobic climate.

52. In Nigeria's rural areas, suspected LGBTI persons are often subject to violent persecution. Last month, the Associated Press reported that thousands of protestors gathered outside the Sharia Court in Bauchi and began throwing stones. They demanded speedier convictions for seven men who belong to LGBTI organizations.[79] Previously, the same court convicted a young man of sodomy. He was to be publically whipped and

[75] *Same Sex Marriage (Prohibition) Bill*, 2013. (SB.05) online: http://www.gaylawnet.com/laws/legislation/SB.05_NG_2011.pdf
[76] Nate Rawlings, "Anti-Gay Law Takes Effect in Africa's Most Populous Country", *Time.com* (January 15, 20144) online: http://world.time.com/2014/01/15/nigeria-anti-gay-law/
[77] "The Global Divide on Homosexuality: Greater Acceptance in More secular and Affluent Countries". *Pew Research Center*, (June 4, 2013) online: http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf
[78] Owen Bowcott, "Nigeria arrests dozens as anti-gay law comes into force", *The Guardian* (January 14, 2014) online: http://www.theguardian.com/world/2014/jan/14/nigeria-arrests-dozens-anti-gay-law.
[79] Associated Press, "Nigeria Gay Trial Disrupted by Thousands of Protesters", *Huffingtonpost.com*, (January 22, 2014) online: http://www.huffingtonpost.com/2014/01/22/nigeria-gay-trial-protest_n_4645942.html; Conor Adams Sheets "Gay in Nigeria: LGBT Life In One of the World's Most Homophobic Nations", *International Business Times* (September 12, 2013) online: http://www.ibtimes.com/gay-nigeria-lgbt-life-one-worlds-most-homophobic-nations-1405130

given 20 lashes. While the young man was also tried under Islamic law, he was first convicted under Nigerian law, which criminalises homosexuality.[80] Nigeria's Bauchi state includes Nigerian penal law and sharia law. Under sharia law, the act of sodomy carries the death sentence and punishable by stoning.[81] It is reported that people from the community help round up suspected gay men.[82] Police in the Northern Nigerian city of Bauchi have a list of 168 allegedly gay men. They have taken 38 to 40 men into custody.[83] It is unclear if any of these men will received their constitutionally mandated right to legal representation or a fair trial.

53. Even though Nigeria's constitution guarantees its citizens basic freedoms held under international human rights law, Nigeria criminalized same sex unions and associations.[84] The International Bar Association's Human Rights Institute released a statement condemning Nigeria's actions and arrests under the new law. The level of discrimination worsens for LGBTI persons with the criminalization on the basis of sexual orientation.[85] As a member of the United Nations, the Commonwealth of Nations and the African Union, Nigeria has signed a number of international treaties and declarations supporting international human rights. Nigeria's persecution of the LGBTI community violates these treaties.

54. According to the Pew Research Center's report entitled "The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries", 98 percent of Nigerians think homosexuality is socially unacceptable.[86] There are

[80] *Ibid* at note 17.
[81] *Ibid*.
[82] Nigeria's anti-gay laws: fears over new legislation", *BBC News Africa* (January 14, 2014) online: http://www.bbc.co.uk/news/world-africa-25728845; Monica Mark, "The Nigerians who dare to speak of love as a tide of anti-gay hatred rises", *The Guardian* (January 18, 2014) online: http://www.theguardian.com/world/2014/jan/18/nigerians-gay-hatred-sexual-freedom
[83] Bernd Debusmann " Dozens arrested after anti-gay law passed in Nigeria", *The Telegraph* (January 14, 2014) online: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10571660/Dozens-arrested-after-anti-gay-law-passed-in-Nigeria.html; Owen Bowcott, "Nigeria arrests dozens as anti-gay law comes into force", *The Guardian* (January 14, 2014) online: http://www.theguardian.com/world/2014/jan/14/nigeria-arrests-dozens-anti-gay-law
[84] "Nigeria's criminalization of same-sex unions and associations condemned by IBAHRI", International Bar Association's Human Rights Institute. January 30, 2014.
[85] *Ibid*.
[86] "The Global Divide on Homosexuality: Greater Acceptance in More secular and Affluent Countries". *Pew Research Center*, (June 4, 2013) online: http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-

suggestions that the government may be using the *SSMPA* to distract Nigerians from the economic under-development, corruption, religious tensions and armed conflicts.[87] Also, the *SSMPA* and President Jonathan's support of the *Act* is overwhelmingly supported by Nigerians and he is running for re-election in 2015. This government sanctioned homophobia has created a hazardous environment for lawyers working with LGBTI persons and the community.

55. Lawyers serving LGBTI clients and organizations face stigmatization which is creating a chilling effect as fewer lawyers are willing to represent LGBTI persons, who are often marginalized and impoverished. The *SSMPA* limits the LGBTI community's access to justice as increasingly lawyers are frightened that they will be charged under the SSMPA or found guilty by association.

For Convocation's Consideration

56. The following are issues that Convocation may wish to consider when making a decision about this case.

a. There are no concerns about the quality of sources used for this report.

b. While there is no documented reports of the arrest, detention and conviction of lawyers as a result of their human rights work with Nigeria's LGBTI community, the *Same Sex Marriage (Protection) Act* has had a chilling effect on lawyers. Human rights lawyers are justifiably frightened to represent LGBTI clients. This is a case where government legislation is intimidating lawyers to turn away from providing access to justice and promoting the rule of law. The Law Society has not intervened in Nigeria in the past where lawyers were being persecuted for representing clients accused of crimes against the state, terrorism and members of minority groups.

2013.pdf

[87] Monica Mark, "The Nigerians who dare to speak of love as a tide of anti-gay hatred rises", *The Guardian* (January 18, 2014) online: http://www.theguardian.com/world/2014/jan/18/nigerians-gay-hatred-sexual-freedom

LETTER OFFERING COLLABORATION WITH LAW SOCIETY OF ZIMBABWE

57. On September 20, 2007, Convocation approved the following recommendation: "That the Monitoring Group be authorized to collaborate with the Law Society of Zimbabwe (the "LSZ") to assist it in strengthening its self-regulation capabilities and the independence of the profession."

58. The recommendation to collaborate with the LSZ was approved in part as a result of a request made by Arnold Tsunga, then Acting Executive Secretary of the Law Society of Zimbabwe, for assistance for lawyers in Zimbabwe. The Law Society of Upper Canada made numerous attempts to contact Mr. Tsunga and his colleagues following the adoption of the recommendation, but all attempts failed. Mr. Tsunga no longer works for the LSZ. He is now the Dangamvura-Chikanga Member of Parliament and responsible for the Parliamentary Portfolio Committee on Education, Sport, Arts and Culture.

59. Because time has passed and the legal, political and social situation in Zimbabwe has evolved since the adoption of the 2007 recommendation, no further action has been taken to implement this recommendation. However, the Law Society has continued to monitor the situation in Zimbabwe. In June 2008, the Law Society of Upper Canada issued a public statement expressing grave concerns about escalating human rights violations against lawyers in Zimbabwe and the threats to the rule of law. In April 2013, the Law Society issued a public statement and wrote a letter to Zimbabwean authorities opposing the harassment of human rights lawyer Beatrice Mtetwa. In July 2013, the Law Society issued a public statement and wrote a letter to Zimbabwean authorities condemning the arrest of Arnold Tsunga.

60. It is the Monitoring Group's view that renewed attempts to offer to collaborate with the LSZ should be made.

FOR INFORMATION – LAWYER RAZAN ZAITOUNEH IN SYRIA

61. In light of the urgency of the situation, Treasurer Conway approved the release of a public statement indicating the Law Society of Upper Canada's grave concerne about the abduction of human rights lawyer Razan Zaitouneh in Syria. The public statement is available online at http://www.lsuc.on.ca/with.aspx?id=622

62. Reliable reports indicate that on December 9, 2013, award-winning human rights lawyer and writer, Razan Zaitouneh, along with her husband, Wa'el Hamada, and two colleagues, Nazem Hamadi and Samira Khalil, was abducted by unknown individuals from a joint office of the Violations Documentation Centre (VDC) and the Local Development and Small Projects Support (LDSPS) in the Damascus suburb of Douma.[88] The VDS is an independent non-governmental organization that documents human rights abuses committed by the Syrian government. The LDSPS provides humanitarian assistance.

63. Ms. Zaitouneh has won several awards for her human rights work, including the 2013 International Women of Courage Award and the 2011 Sakhorov Prize for Freedom of Thought. She largely defends political prisoners. Ms. Zaitouneh is a co-founder of both the VDC and the LDSPS.

64. According to reports, in 2011, Ms. Zaitouneh was forced into hiding after receiving threats from the Syrian authorities. In recent months, she has received threats from at least one armed opposition group in Eastern Ghouta. Reports indicate that the abduction of Ms. Zaitouneh and her colleagues is linked to their human rights work.

65. The Law Society of Upper Canada called on the Syrian authorities to,

a. investigate the disappearance of Razan Zaitouneh and her colleagues and secure their immediate release;

88 Douma is located in Eastern Ghouta, an area under the control of a number of armed opposition groups that is being besieged by government forces.

b. guarantee in all circumstances the physical and psychological integrity of Razan Zaitouneh and her colleagues;

c. put an end to all acts of harassment Razan Zaitouneh and other human rights defenders in Syria;

d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and

e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments

TAB 8.1.1

Proposed Letters of Intervention and Public Statement
Human Rights Lawyer Dr. Nimalka Fernando – Sri Lanka

His Excellency President Mahinda Rajapakse
President of Sri Lanka
Presidential Secretariat
C/ - Office of the President
Temple Trees 150
Galle Road
Colombo 3, SRI LANKA

Your Excellency:

Re: Harassment of Human Rights Lawyer Dr. Nimalka Fernando

I write on behalf of the Law Society of Upper Canada* to voice our grave concern over the case of human rights lawyer Dr. Nimalka Fernando. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

Reliable reports indicate that during a November 4, 2013, radio program titled "The Way the Country is Moving (Rat Yana Atha)", death threats and derogatory comments were directed by callers toward Dr. Nimalka Fernando. The radio program was broadcast on state-owned Sri Lanka Broadcasting Corporation (SLBC) and was produced by the Chairman of the SLBC, Mr. Hudson Samarasinghe. The subtitle of the program was "Stoning the Sinner Woman".

Statements that Dr. Nimalka Fernando had made to a television channel on the previous day were broadcast on the radio program. The television interview was related to a public debate that was prompted by her call for the abolition of abortion laws in Sri Lanka, the promotion of safer sex and a more protective reproductive health approach. She had also stated that she objected to the use of the word "prostitution".

Listeners to the SLBC radio program had the opportunity to call in and give their opinion. Statements from callers included the following:

- "We cannot allow persons like Nimalka Fernando to live in this society."
- "If we do something to them the government will be blamed by the human rights people. We should use a lorry and cause an accident."
- "There is something called cleaning in the army...We should hand her over to the cleaning system."

Dr. Nimalka Fernando was described as a 59-year-old divorced woman who had served 30 different organizations and since 1989 had "carried tales". She was also referred to as a "prostitute". Most of the callers were men and some identified themselves as retired members of

the armed forces. According to reports, Mr. Samarasinghe did not stop callers from making these statements and, in fact, seemed to encourage them.

Dr. Nimalka Fernando has lodged a complaint with the Human Rights Commission of Sri Lanka and the Inspector General of Police. Reports indicate that this is not the first time she has faced harassment as a result of her human rights work. In March 2012, Dr. Nimalka Fernando, along with three other human rights defenders, was accused of being a traitor and working against the interests of the country to obtain "dollars". Additionally, the Minister of Public Relations threatened to "break the limbs" of Dr. Nimalka Fernando and three other human rights defenders.

Dr. Nimalka Fernando is the president of the International Movement Against All Forms of Discrimination and Racism (IMADR) and is a prominent human rights activist. She is involved in a number of human rights organizations. She has also actively participated in and contributed to the human rights work of the United Nations, including participating in treaty body committee meetings (committees of independent experts to monitor the implementation of treaties) and sessions of the Human Rights Council for over three decades.

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

The Law Society of Upper Canada calls on the Sri Lankan authorities to,

a. order a thorough and transparent investigation of the complaint lodged by Dr. Nimalka Fernando;
b. guarantee in all circumstances the physical and psychological integrity of Dr. Nimalka Fernando;
c. put an end to all acts of harassment and intimidation against Dr. Nimalka Fernando and other human rights defenders in Sri Lanka;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

Yours very truly,

Thomas G. Conway
Treasurer

**The Law Society of Upper Canada is the governing body for some 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada, and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.*

Proposed Public Statement

The Law Society of Upper Canada Expresses Grave Concerns about the Harassment of Human Rights Lawyer Dr. Nimalka Fernando

The Law Society of Upper Canada is gravely concerned about the harassment of human rights lawyer Dr. Nimalka Fernando in Sri Lanka.

Reliable reports indicate that during a November 4, 2013, radio program titled "The Way the Country is Moving (Rat Yana Atha)", death threats and derogatory comments were directed by callers toward Dr. Nimalka Fernando. The radio program was broadcast on state-owned Sri Lanka Broadcasting Corporation (SLBC) and was produced by the Chairman of the SLBC, Mr. Hudson Samarasinghe. The subtitle of the program was "Stoning the Sinner Woman".

Statements that Dr. Nimalka Fernando had made to a television channel on the previous day were broadcast on the radio program. The television interview was related to a public debate that was prompted by her call for the abolition of abortion laws in Sri Lanka, the promotion of safer sex and a more protective reproductive health approach. She had also stated that she objected to the use of the word "prostitution".

Listeners to the SLBC radio program had the opportunity to call in and give their opinion. Statements from callers included:

- "We cannot allow persons like Nimalka Fernando to live in this society."
- "If we do something to them the government will be blamed by the human rights people. We should use a lorry and cause an accident."
- "There is something called cleaning in the army...We should hand her over to the cleaning system."

Dr. Nimalka Fernando was described as a 59-year-old divorced woman who had served 30 different organizations and since 1989 had "carried tales". She was also referred to as a "prostitute". Most of the callers were men and some identified themselves as retired members of the armed forces. According to reports, Mr. Samarasinghe did not stop callers from making these statements and, in fact, seemed to encourage them.

Dr. Nimalka Fernando has lodged a complaint with the Human Rights Commission of Sri Lanka and the Inspector General of Police. Reports indicate that this is not the first time she has faced harassment as a result of her human rights work. In March 2012, Dr. Nimalka Fernando, along with three other human rights defenders, was accused of being a traitor and working against the interests of the country to obtain "dollars". Additionally, the Minister of Public Relations threatened to "break the limbs" of Dr. Nimalka Fernando and three other human rights defenders.

Dr. Nimalka Fernando is the president of the International Movement Against All Forms of Discrimination and Racism (IMADR) and is a prominent human rights activist. She is involved in a number of human rights organizations. She has also actively participated in and contributed to the human rights work of the United Nations, including participating in treaty body committee

meetings (committees of independent experts to monitor the implementation of treaties) and sessions of the Human Rights Council for over three decades.

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

Therefore, the Law Society of Upper Canada calls on the Sri Lankan authorities to,

a. order a thorough and transparent investigation of the complaint lodged by Dr. Nimalka Fernando;

b. guarantee in all circumstances the physical and psychological integrity of Dr. Nimalka Fernando;

c. put an end to all acts of harassment and intimidation Dr. Nimalka Fernando and other human rights defenders in Sri Lanka;

d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and

e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

The Law Society of Upper Canada is the governing body for some 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada, and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.

The Law Society urges the legal community to intervene in support of members of the legal profession in their effort to advance the respect of human rights and to promote the rule of law.

Commonwealth Lawyers Association
President Mark Stephens
Institute of Commonwealth Studies
17 Russell Square
London
WC1B 5DR, UK

Dear President Stephens,

Re: Harassment of Human Rights Lawyer Dr. Nimalka Fernando

The Law Society of Upper Canada* Human Rights Monitoring Group has a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Sri Lanka expressing our deep concern about the harassment of human rights lawyer Dr. Nimalka Fernando.

In view of the fact that your organization represents the interests of Commonwealth lawyers, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers may be experiencing in Sri Lanka.

We would also value the opportunity to collaborate with you to address issues and problems that lawyers in Sri Lanka may be experiencing in relation to their work. We would appreciate speaking with you to hear your views and your assessment of the situation in order to determine how our two organizations can work together.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

**The Law Society of Upper Canada is the governing body for more than 46,200 lawyers and 6,000 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar.*

TAB 8.1.2

Proposed Letter of Intervention and Public Statement

Human Rights Lawyer Le Quoc Quan - Vietnam

H.E. Mr. Ha Hung Cuong, Minister of Justice
56-60 Tran Phu St., Ba Dinh District
Hanoi, Vietnam

Dear Minister:

Re: Arrest and Detention of Human Rights Lawyer Le Quoc Quan

I write on behalf of the Law Society of Upper Canada* further to our letter to you dated February 7, 2013, expressing our deep concern about the case of human rights lawyer Le Quoc Quan.

It is our understanding that Le Quoc Quan remains in detention. According to reliable reports, on October 2, 2013, he was convicted of evading corporate income tax. The trial took only one day. Le Quoc Quan was sentenced to 30 months in prison and a fine of 1.2 billion dongs (approximately $59,000 USD) was levied against the company of which he is a director. Le Quoc Quan appealed the decision and is waiting for his trial. Our sources also note that Le Quoc Quan's wife has reported that he is in poor health. Le Quoc Quan's conviction is believed to be politically motivated and intended to prevent him from continuing his legitimate human rights work.

The Law Society is deeply concerned about situations where lawyers who work for the protection and respect of human rights are themselves targeted for exercising their freedoms and rights under international law. International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

Therefore, the Law Society of Upper Canada calls on the Vietnamese authorities to,

a. quash the conviction of Le Quoc Quan, release him immediately and guarantee in all circumstances his physical and psychological integrity;

b. ensure that Le Quoc Quan receives immediate medical attention;
c. put an end to all acts of harassment and intimidation against Le Quoc Quan and other human rights defenders in Vietnam;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

Yours very truly,

Thomas G. Conway
Treasurer

** The Law Society of Upper Canada is the governing body for 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada, and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.*

Proposed Public Statement

The Law Society of Upper Canada Expresses Grave Concerns about the Recent Conviction and Continued Imprisonment of Human Rights Lawyer Le Quoc Quan

The Law Society of Upper Canada is concerned about the recent conviction and continued imprisonment of human rights lawyer Le Quoc Quan of Vietnam.

The Law Society first intervened in this case in February 2013. Reliable reports indicated that on December 27, 2012, Le Quoc Quan, human rights lawyer and blogger, was arrested by the police while dropping off his daughter at school and charged under Article 161 of the Vietnamese Criminal Code, which relates to tax evasion. Le Quoc Quan writes a popular blog about human rights abuses. The Law Society's understanding is that he has been subject to arbitrary arrests and ongoing surveillance and harassment as a result of his human rights work. Le Quoc Quan was disbarred following his return to Vietnam from the United States in 2007.

The Law Society understands that Le Quoc Quan remains in detention. On October 2, 2013, he was convicted of evading corporate income tax. The trial took only one day. Le Quoc Quan was sentenced to 30 months in prison and a fine of 1.2 billion dongs (approximately $59,000 USD) was levied against the company of which he is a director. Le Quoc Quan appealed the decision and is awaiting his trial. Our sources also note that Le Quoc Quan's wife has reported that he is in poor health. Le Quoc Quan's conviction is believed to be politically motivated and intended to prevent him from continuing his legitimate human rights work.

The Law Society is deeply concerned about situations where lawyers who work for the protection and respect of human rights are themselves targeted for exercising their freedoms and rights under international law. International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

Therefore, the Law Society of Upper Canada calls on the Vietnamese authorities to,

a. quash the conviction of Le Quoc Quan, release him immediately and guarantee in all circumstances his physical and psychological integrity;
b. ensure that Le Quoc Quan receives immediate medical attention;
c. put an end to all acts of harassment Le Quoc Quan and other human rights defenders in Vietnam;

d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

The Law Society of Upper Canada is the governing body for 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada, and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.

The Law Society urges the legal community to intervene in support of members of the legal profession in their effort to advance the respect of human rights and to promote the rule of law.

TAB 8.1.3

Proposed Letters of Intervention and Public Statement
People's Republic of China

[Date]

His Excellency President Xi Jinping
President of the People's Republic of China
People's Republic of China
Zhongnanhai, Xichengqu, Beijing

Your Excellency:

Re: The Arrest, Trial and Sentencing of Xu Zhiyong

I write on behalf of the Law Society of Upper Canada* to voice our grave concern over the arrest, trial and sentencing of Xu Zhiyong. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

According to reliable reports, Xu Zhiyong, a prominent legal scholar and human rights lawyer, was arrested, tried on criminal charges of "gathering crowds to disrupt public order" and sentenced to four years in prison. The charges relate to a small scale peaceful street protest by members of the New Citizens' Movement who were calling for educational equality and for government officials to declare their assets.

During Xu Zhiyong's trial, the court denied his defence counsel the right to call witnesses. The court also refused to summon prosecution witnesses to prevent Xu Zhiyong's defence counsel and the presiding judges from questioning them. Additionally, Xu Zhiyong was tried separately from his colleagues who were being prosecuted for the same offence. This contravened the Chinese *Criminal Procedure Law* requirement that persons charged with the same offence be tried jointly. These irregularities during Xu Zhiyong's trial raise questions regarding the fairness and due process of his trial.

The Law Society is deeply concerned about situations where lawyers are targeted in the legitimate exercise of their duties. International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Article 18 states "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

The Law Society urges the government of China to,

a. guarantee all the procedural rights that should be accorded to Xu Zhiyong and other human rights defenders in China;
b. guarantee in all circumstances the physical and psychological integrity of Xu Zhiyong;
c. put an end to all acts of harassment and intimidation against Xu Zhiyong and other human rights defenders in China;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

Yours very truly,

Thomas G. Conway
Treasurer

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The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.

Proposed Public Statement

The Law Society of Upper Canada Expresses Grave Concerns about the Arrest, Trial and Sentencing of Chinese Human Rights Lawyer Xu Zhiyong

The Law Society of Upper Canada is gravely concerned about the arrest, trial and sentencing of Xu Zhiyong to four years in prison.

Xu Zhiyong is a prominent legal scholar and human rights lawyer who has spoken out on issues concerning justice, the rule of law and government corruption. He was arrested and tried on criminal charges of "gathering crowds to disrupt public order". The charges related to a small scale peaceful street protest by members of the New Citizens' Movement who were calling for educational equality and for government officials to declare their assets.

During Xu Zhiyong's trial, the court denied his defence counsel the right to call 68 defence witnesses and barred them from appearing on his behalf. The court also refused to summon prosecution witnesses in order to prevent Xu Zhiyong's defence counsel and the presiding judges from questioning them. Additionally, Xu Zhiyong was tried separately from his colleagues who were being prosecuted for the same offence. This contravened the Chinese *Criminal Procedure Law* requirement that persons charged with the same offence be tried jointly. This also ensured that none of Xu Zhiyong's colleagues could support his case through their participation. The court also cut off Xu Zhiyong during his closing statement when he called for democracy, the rule of law, freedom, justice and love and ended his hearing.

Diplomats were barred from attending the trial and police and plainclothes officers harassed the journalists outside of the courthouse. Xu Zhiyong's case was the highest profile case of its kind since a Beijing court convicted the writer and dissident Liu Xiaobo. Human rights lawyers in China frequently report threats, physical violence and unfair trials. These irregularities during Xu Zhiyong's trial raise questions regarding the fairness and due process of his trial

The Law Society is deeply concerned about situations where lawyers who work for the protection and respect of human rights are themselves targeted for exercising their freedoms and rights under international law. International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Article 18 states "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

The Law Society urges the government of China to,

a. Guarantee all the procedural rights that should be accorded to Xu Zhiyong and other human rights defenders in China;

b. guarantee in all circumstances the physical and psychological integrity of Xu Zhiyong;
c. put an end to all acts of harassment and intimidation against Xu Zhiyong and other human rights defenders in China;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

The Law Society of Upper Canada is the governing body for 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.

The Law Society urges the legal community to intervene in support of members of the legal profession in their effort to advance the respect of human rights and to promote the rule of law.

President Wang Junfeng
All China Lawyers Association
5th Floor Qinglan Mansion
No 24 Dongi Shitiao
Dongsheng District
Beijing 100007, People's Republic of China

Dear President Wang Junfeng,

Re: The Arrest, Trial and Sentencing of Human Rights Lawyer Xu Zhiyong

The Law Society of Upper Canada* created the Human Rights Monitoring Group in 2006. The mandate of the Human Rights Monitoring Group is to review information on human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that, on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the Chinese government expressing our deep concerns over the arrest and conduct of Xu Zhiyong's trial and his sentence of four years imprisonment.

In view of the fact that your organization represents the interests of lawyers in China, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers may be experiencing in China.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence by regular mail to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6
or by email to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

** The Law Society of Upper Canada is the governing body for more than 46,200 lawyers and 6,000 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar.*

Albert Ho Chun-yan
Chairman, China Human Rights Lawyers Concern Group
3/F, 6 Portland Street, Yaumatei,
Kowloon, Hong Kong
People's Republic of China

Email: info@chrlcg-hk.org

Dear Chairman,

Re: The Arrest, Trial and Sentencing of Human Rights Lawyer Xu Zhiyong

The Law Society of Upper Canada* created the Human Rights Monitoring Group in 2006. The mandate of the Human Rights Monitoring Group is to review information on human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that, on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the Chinese government expressing our deep concerns over the arrest and conduct of Xu Zhiyong's trial and his sentence of four years imprisonment.

In view of the fact that your organization advocates for the protection of the human rights lawyers and legal rights defenders in China, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers may be experiencing in China.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence by regular mail to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6
or by email to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

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TAB 8.1.4

Proposed Letters of Intervention and Public Statement
The Republic of Nauru

His Excellency President Baron Waga
President of Nauru
Government Offices
Yaren District
The Republic of Nauru, Central Pacific

Your Excellency:

Re: Removal and Deportation of the Magistrate of Law and Revocation of the visa of the Chief Justice

I write on behalf of the Law Society of Upper Canada* to voice our grave concern over the removal and deportation of Peter Law, the Chief Magistrate and Supreme Court Register of Nauru, and the revocation of the visa of the Chief Justice Geoffrey Eames. When serious issues of apparent injustice to lawyers and the judiciary come to our attention, we speak out.

On January 19, 2014, Peter Law's employment was terminated. The police then took him into custody and to the airport where he was deported. The Chief Justice of Nauru, Geoffrey Eames, issued an injunction preventing the removal of Mr. Law from his position as Chief Magistrate and Supreme Court Register of Nauru. In response, the visa of the Chief Justice was revoked and he was barred from entering Nauru.

The Law Society of Upper Canada understands that both the removal and deportation of Peter Law and the revocation of the visa of the Chief Justice are linked to their administration and adjudication of asylum seeker cases. Prior to his removal and deportation Peter Law was scheduled to hear the direction hearings of about 40 to 60 asylum seekers charged with rioting in 2013. As well, the revocation of the visa of Chief Justice Eames follows his issuance of an injunction stopping the Nauru government from removing and deporting Peter Law.

The Law Society is deeply concerned about situations where members of the judiciary are themselves targeted in the legitimate exercise of their duties. The Law Society believes strongly in the importance of protecting judicial independence. Judges frequently have to rule on controversial matters and interpret the law in areas where there is legal uncertainty. Judges must be able to make controversial, and even unpopular, rulings without fear of politically motivated sanctions.

The Law Society urges the government of Nauru to,

a. take steps to ensure that judges are not subject to politically-motivated sanctions as a result of issuing decisions;

b. publicly recognize the importance and legitimacy of the work of judges and their contributions to the strengthening of democracy and the rule of law;
c. ensure that all judges can carry out their peaceful and legitimate duties and activities without fear of removal from office; and
d. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments

Yours very truly,

Thomas G. Conway
Treasurer

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cc:
Minister for Justice
Hon. David Adeang
Government Offices
Yaren District
The Republic of Nauru, Central Pacific

cc:
Hon. Julie Bishop
Minister for Foreign Affairs Pacific Islands Branch
R.G Casey Building
John McEwen Crescent
BARTON ACT 0221
Australia

Ms. Gabriela Carina Knaul de Albuquerque Silva
UN Special Rapporteur on the Independence of Judges and Lawyers
United Nations Office at Geneva
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland

Proposed Public Statement

The Law Society of Upper Canada Expresses Concerns about Removal and Deportation of Nauru's Magistrate of Law and Revocation of the Visa of the Chief Justice

The Law Society of Upper Canada is gravely concerned over the removal and deportation of Peter Law, Chief Magistrate and Supreme Court Register of Nauru, and the revocation of the visa of the Chief Justice Geoffrey Eames.

On January 19, 2014, Peter Law's employment was terminated. The police then took him into custody and to the airport where he was deported. Chief Justice Geoffrey Eames issued an injunction preventing the removal of Peter Law from his position as Chief Magistrate and Supreme Court Register of Nauru. In response, the visa of the Chief Justice was revoked and he was barred from entering Nauru.

Both the removal and deportation of Peter Law and the revocation of the visa of the Chief Justice are linked to their administration and adjudication of asylum seeker cases Prior to Peter Law's removal and deportation, he was scheduled to hear the direction hearings of about 40 to 60 asylum seekers charged with rioting in 2013. As well, the revocation of the visa of Chief Justice Eames follows immediately after he issued an injunction stopping the Nauru government from removing and deporting Peter Law.

The Law Society is deeply concerned about situations where members of the judiciary are themselves targeted in the legitimate exercise of their duties. The Law Society believes strongly in the importance of protecting judicial independence. Judges frequently have to rule on controversial matters and interpret the law in areas where there is legal uncertainty. Judges must be able to make controversial, and even unpopular, rulings without fear of politically motivated sanctions.

The Law Society urges the government of Nauru to,

a. take steps to ensure that judges are not subject to politically-motivated sanctions as a result of issuing decisions;
b. publicly recognize the importance and legitimacy of the work of judges and their contributions to the strengthening of democracy and the rule of law;
c. ensure that all judges can carry out their peaceful and legitimate duties and activities without fear of removal from office; and
d. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments

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The Law Society urges the legal community to intervene in support of members of the legal profession in their effort to advance the respect of human rights and to promote the rule of law.

[Date]

Commonwealth Lawyers Association
President Mark Stephens
Institute of Commonwealth Studies
17 Russell Square
London
WC1B 5DR, UK

Dear President Stephens,

Re: Removal and Deportation of the Magistrate of Law and Revocation of the visa of the Chief Justice

The Law Society of Upper Canada* created the Human Rights Monitoring Group in 2006. The mandate of the Human Rights Monitoring Group is to review information on human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Nauru expressing our deep concerns about the removal and deportation of Peter Law the Chief Magistrate and Supreme Court Register of Nauru and the revocation of the visa of the Chief Justice Geoffrey Eames.

In view of the fact that your organization represents the interests of lawyers throughout the Commonwealth, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers or members of the judiciary may be experiencing in Nauru.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

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[Date]

President Mark Livesey
Australian Bar Association
Level 5
205 William Street
Melbourne Victoria
Australia

Dear President Livesey,

Re: Removal and Deportation of the Magistrate of Law and Revocation of the visa of the Chief Justice

The Law Society of Upper Canada* created the Human Rights Monitoring Group in 2006. The mandate of the Human Rights Monitoring Group is to review information on human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Nauru expressing our deep concerns about the removal and deportation of Peter Law the Chief Magistrate and Supreme Court Register of Nauru and the revocation of the visa of the Chief Justice Geoffrey Eames.

In view of the fact that your organization represents the interests of lawyers in Australia, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers or members of the judiciary may be experiencing in Nauru.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

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[Date]

Mr. Ross Ray QC
Chair
South Pacific Lawyers Association
GPO Box 1989
Canberra ACT 2601
Australia

Dear Chair Ray,

Re: Removal and Deportation of the Magistrate of Law and Revocation of the visa of the Chief Justice

The Law Society of Upper Canada* created the Human Rights Monitoring Group in 2006. The mandate of the Human Rights Monitoring Group is to review information on human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Nauru expressing our deep concerns about the removal and deportation of Peter Law the Chief Magistrate and Supreme Court Register of Nauru and the revocation of the visa of the Chief Justice Geoffrey Eames.

In view of the fact that your organization represents the interests of lawyers in the South Pacific, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers or members of the judiciary may be experiencing in Nauru.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6
or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

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TAB 8.1.5

Proposed Letters of Intervention and Public Statement

Uganda

His Excellency President Kaguta Yoweri Museveni
President of the Republic of Uganda
Office of the President
P.O. Box 7168
Kampala, Uganda

Your Excellency:

Re: Republic of Uganda's *Anti-Homosexuality Bill* and the Security of Lawyers

I write on behalf of the Law Society of Upper Canada* to voice our grave concern over the threat to the security of lawyers seeking to challenge Uganda's *Anti-Homosexuality Bill,* passed by the Parliament in 2013. When serious issues such as the security of lawyers come to our attention, we speak out.

Ugandan and international human rights lawyers working with Uganda's lesbian, gay, bisexual, transgender and intersex (LGBTI) community and non-governmental organizations are looking to challenge the constitutionality of the *Anti-Homosexuality Bill*. While the *Bill's* provisions criminalize homosexuality, it also prohibits Uganda's Parliament from ratifying any international treaties, conventions, protocols, agreements and declarations that are contrary or inconsistent with the provisions of the *Bill*. This means that the international safeguards currently protecting lawyers may not shield those working on this issue from prosecution and harassment.

The Law Society understands that lawyers and paralegals working with Uganda's LGBTI community are stigmatized. As a result of the government's *Bill* there is a chilling effect as lawyers are refusing to represent LGBTI clients because of the fear of persecution. Recently, a law firm retained by Fox Odoi, West Budama North Member of Parliament, and the Civil Liberties Organisation-Chapter Four, to provide a legal opinion on the constitutionality of the Bill, declined to be named.

The Law Society is deeply concerned that lawyers who work for the protection and respect of human rights in Uganda will themselves be targeted for exercising their freedoms and rights under international law.

International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with,

prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Article 18 states "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

The Law Society urges the government of Uganda to,

a. guarantee all the procedural rights that should be accorded to any lawyers that are arrested and to release them immediately if it appears that no charges should be laid against them;
b. guarantee in all circumstances the physical and psychological integrity of the lawyers;
c. put an end to all acts of harassment and intimidation against lawyers and other human rights defenders in Uganda;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

Yours very truly,

Thomas G. Conway
Treasurer

**The Law Society of Upper Canada is the governing body for 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada. The Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.*

cc:
Prime Minister Amama Mbabazi
Office of the Prime Minister
Plot 9-11 Apollo Kaggawa Road
P.O. Box 341
Kampala, Uganda

Ms. Margaret Lucy Kyogire
Acting High Commissioner for the Republic of Uganda
231 Cobourg Street
Ottawa, Ontario K1N 8J2

The Law Society of Upper Canada Expresses Concern that Human Rights Lawyers Challenging Uganda's *Anti-Homosexuality Bill* Face Possible Harassment

The Law Society of Upper Canada is concerned that human rights lawyers seeking to challenge Uganda's *Anti-Homosexuality Bill* will face harassment. Some of the *Bill's* provisions raise serious questions regarding the ability of lawyers working in Uganda to advocate safely and effectively for their clients.

Lawyers and paralegals working with Uganda's lesbian, gay, bisexual, transgender and intersex (LGBTI) community are stigmatized. As a result of the government's *Bill* there is a chilling effect as lawyers are refusing to represent LGBTI clients because of the fear of persecution. Recently, a law firm retained by Fox Odoi, West Budama North Member of Parliament, and the Civil Liberties Organisation-Chapter Four, to provide a legal opinion on the constitutionality of the Bill, declined to be named.

While the *Bill's* provisions criminalize homosexuality, it also prohibits Uganda's Parliament from ratifying any international treaties, conventions, protocols, agreements and declarations that are contrary or inconsistent with the provisions of the *Bill*. This means that the international safeguards currently protecting lawyers may not shield those working on this issue from prosecution and harassment.

The Law Society is deeply concerned that lawyers who work for the protection and respect of human rights in Uganda will themselves be targeted for exercising their freedoms and rights under international law as they prepare to challenge the constitutionality of the *Bill*.

International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Article 18 states "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

The Law Society urges the government of Uganda to,

a. guarantee all the procedural rights that should be accorded to any lawyers that are arrested and to release them immediately if it appears that no charges should be laid against them;
b. guarantee in all circumstances the physical and psychological integrity of the lawyers;
c. put an end to all acts of harassment against lawyers and other human rights defenders in Uganda;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and

e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

The Law Society of Upper Canada is the governing body for 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.

The Law Society urges the legal community to intervene in support of members of the legal profession in Uganda in their effort to advance the respect of human rights and to promote the rule of law.

Innovating Justice Forum
Maurits Barendrecht
Chairman, Executive Board
Hague Institute for the Internationalization of Law
Bezuidenhoutseweg 16A
P.O. Box 93033
2594 AV The Hague, The Netherlands

Dear Chairman Barendrecht,

Re: Republic of Uganda's *Anti-Homosexuality Bill* and the Security of Lawyers

The Law Society of Upper Canada is the governing body for more than 46,200 lawyers and 6,000 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar. Due to this commitment, the Law Society established a Human Rights Monitoring Group ("Monitoring Group"). The Monitoring Group has a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that, on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Uganda expressing our deep concerns for the circumstances faced by lawyers serving the LGBTI community.

In view of the fact that your organization represents the interests of lawyers working with Uganda's lesbian, gay, bisexual, transgender and intersex (LGBTI) community, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers or members of the judiciary may be experiencing in Uganda as a result of their work with LGBTI clients and organizations.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

[Date]

Commonwealth Lawyers Association
President Mark Stephens
Institute of Commonwealth Studies
17 Russell Square
London
WC1B 5DR, UK

Dear President Stephens,

Re: Republic of Uganda's *Anti-Homosexuality Bill* and the Security of Lawyers

The Law Society of Upper Canada* Human Rights Monitoring Group has a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Uganda expressing our deep concerns for the circumstances faced by lawyers serving the lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

In view of the fact that your organization represents the interests of Commonwealth lawyers working with Uganda's LGBTI community, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers or members of the judiciary may be experiencing in Uganda as a result of their work with LGBTI clients and organizations.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

We look forward to our future work together.

Sincerely,

Paul Schabas

Chair, Human Rights Monitoring Group

**The Law Society of Upper Canada is the governing body for more than 46,200 lawyers and 6,000 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar.*

[Date]

Law Society of England and Wales
President Nick Fluck
The Law Society's Hall
113 Chancery Lane
London WC2A 1PL

Dear President Fluck,

Re: Republic of Uganda's Proposed *Anti-Homosexuality Bill* and the Security of Lawyers

The Law Society of Upper Canada* Human Rights Monitoring Group has a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Uganda expressing our deep concerns for the circumstances faced by lawyers serving the lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

We would value the opportunity to collaborate with you to address issues and problems that lawyers in Uganda may be experiencing in relation to their work with the LGBTI community. We would appreciate speaking with you to hear your views and your assessment of the situation in order to determine how our two Law Societies can work together.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

We look forward to our future work together.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

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TAB 8.1.6

Proposed Letters of Intervention and Public Statement
Federal Republic of Nigeria

His Excellency President Goodluck Ebele Jonathan
President, Federal Republic of Nigeria
Radio House
Herbert Macaulay Way (South)
Area 10
PMB 247 Garki – Abuja
Nigeria

Your Excellency:

Re: The *Same Sex Marriage (Prohibition) Act* and the Security of Lawyers in Nigeria

I write on behalf of the Law Society of Upper Canada* to voice our grave concern over the threat to the security of lawyers seeking to represent persons charged under the *Same Sex Marriage (Prohibition) Act* enacted in January 2014. When serious issues such as the security of lawyers come to our attention, we speak out.

The *Act*'s provisions prohibit any person or group from providing services to anyone perceived to be homosexual as well as supporting the registration, operation and support of gay clubs, societies, organizations, processions or meetings in Nigeria. From the wording of the *Act* it appears that Nigerian and international human rights lawyers working with Nigeria's lesbian, gay, bisexual, transgender and intersex (LGBTI) community, non-governmental organizations and persons charged under the *Same Sex Marriage (Prohibition) Act* may also be charged and convicted for providing legal services.

The Law Society understands that lawyers working with Nigeria's LGBTI community or representing persons charged under the *Act* are stigmatized and may face harassment and arrest. As a result of the *Same Sex Marriage (Prohibition) Act* there is a chilling effect as lawyers are refusing to represent LGBTI clients because of the fear of persecution. This impacts the ability of Nigeria's LGBTI community to access justice and the functioning of the rule of law. The vague wording of the *Act* regarding what constitutes "providing services" raises serious questions regarding the ability of lawyers working in Nigeria to advocate safely and effectively for their clients.

The Law Society is deeply concerned that lawyers who work for the protection and respect of human rights in Nigeria will themselves be targeted for exercising their freedoms and rights under international law.

International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is

essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Article 18 states "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

The Law Society urges the government of Nigeria to,

a. guarantee all the procedural rights that should be accorded to any lawyers that are arrested and to release them immediately if it appears that no charges should be laid against them;
b. guarantee in all circumstances the physical and psychological integrity of the lawyers;
c. put an end to all acts of harassment and intimidation against lawyers and other human rights defenders in Nigeria;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and
e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

Yours very truly,

Thomas G. Conway
Treasurer

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The Law Society of Upper Canada Expresses Concern that Human Rights Lawyers Representing LGBTI Clients in Nigeria Face Possible Harassment

The Law Society of Upper Canada is concerned that human rights lawyers seeking to represent lesbian, gay, bisexual, transgender and intersex (LGBTI) clients in Nigeria will face harassment.

Nigeria enacted the *Same Sex Marriage (Prohibition) Act* ("SSMPA") on January 7, 2014. The *SSMPA* prohibits not only same sex marriage, but also the witnessing, abetting and aiding in the solemnization of a same sex marriage and public displays of affection. It also prohibits any person or group from providing services to anyone perceived to be homosexual as well as supporting the registration, operation and support of gay clubs, societies, organizations, processions or meetings in Nigeria. Individuals providing services to the LGBTI community upon conviction may receive 10 years in prison. The *Act* does not define what is meant by "providing services". This ambiguity has a chilling effect on Nigerian lawyers and increases the likelihood that Nigeria's LGBTI community will find it difficult to receive legal services.

Lawyers serving LGBTI clients and organizations face stigmatization which is creating a chilling effect as fewer lawyers are willing to represent the LGBTI community. The LGBTI community is often marginalized and impoverished. The *SSMPA* limits the LGBTI community's access to justice as increasingly lawyers are frightened that they will be charged under the SSMPA or found guilty by association. The Law Society is deeply concerned that lawyers who work for the protection and respect of human rights in Nigeria will themselves be targeted for exercising their freedoms and rights under international law.

International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* state that respect for human rights is essential to advancing the rule of law. Article 16 of the *United Nations Basic Principles on the Role of Lawyers* states "governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel and to consult with their clients freely; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." Article 18 states "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

The Law Society urges the government of Nigeria to,

a. guarantee all the procedural rights that should be accorded to any lawyers that are arrested and to release them immediately if it appears that no charges should be laid against them;
b. guarantee in all circumstances the physical and psychological integrity of the lawyers;
c. put an end to all acts of harassment against lawyers and other human rights defenders in Nigeria;
d. ensure that all lawyers can carry out their peaceful and legitimate activities without fear of physical violence or other human rights violations; and

e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.

The Law Society of Upper Canada is the governing body for 46,200 lawyers and 6,000 paralegals in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.

The Law Society urges the legal community to intervene in support of members of the legal profession in their effort to advance the respect of human rights and to promote the rule of law.

[Date]

Law Society of England and Wales
President Nick Fluck
The Law Society's Hall
113 Chancery Lane
London WC2A 1PL

Dear President Fluck,

Re: Enactment of the *Same Sex Marriage (Prohibition)* Act and the Security of Nigerian Lawyers

The Law Society of Upper Canada* Human Rights Monitoring Group has a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Nigeria expressing our deep concerns for the circumstances faced by lawyers serving the lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

We would value the opportunity to collaborate with you to address issues and problems that lawyers in Nigeria may be experiencing in relation to their work with the LGBTI community. We would appreciate speaking with you to hear your views and your assessment of the situation in order to determine how our two Law Societies can work together.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

We look forward to our future work together.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

**The Law Society of Upper Canada is the governing body for more than 46,200 lawyers and 6,000 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar.*

[Date]

Commonwealth Lawyers Association
President Mark Stephens
Institute of Commonwealth Studies
17 Russell Square
London
WC1B 5DR, UK

Dear President Stephens,

Re: The Enactment of the *Same Sex Marriage (Prohibition) Act* in Nigeria and the Security of Lawyers

The Law Society of Upper Canada* Human Rights Monitoring Group has a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required.

I write to inform you that on the advice of the Human Rights Monitoring Group, the Law Society of Upper Canada sent the attached letter to the government of Nigeria expressing our deep concerns for the circumstances faced by lawyers serving the lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

In view of the fact that your organization represents the interests of Commonwealth lawyers working with Nigeria's LGBTI community, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers may be experiencing in Nigeria.

We would also value the opportunity to collaborate with you to address issues and problems that lawyers in Nigeria may be experiencing in relation to their work with the LGBTI community. We would appreciate speaking with you to hear your views and your assessment of the situation in order to determine how our two organizations can work together.

If you are willing and able to do so, we would be very interested in hearing from you concerning the situation noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

We look forward to our future work together.

Sincerely,

Paul Schabas
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TAB 8.1.7

President Lloyd Mhishi
The Law Society of Zimbabwe
5th Floor, Lintas House
46 Kwame Nkrumah Avenue
PO Box 2595
Harare, Zimbabwe

Dear President Mhishi,

Re: Collaboration between the Law Society of Zimbabwe and the Law Society of Upper Canada

I am writing to you in the hopes of renewing collaboration between your organization and ours.

The Law Society of Upper Canada* created the Human Rights Monitoring Group in 2006. The mandate of the Human Rights Monitoring Group is to review information on human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

In 2007, the Board of Directors of the Law Society of Upper Canada approved a recommendation made by the Human Rights Monitoring Group to collaborate with the Law Society of Zimbabwe. Based in part on a request made by Arnold Tsunga during a visit he made to the Law Society of Upper Canada, the proposed collaboration was to focus on strengthening the self-regulation and the independence of the legal profession in Zimbabwe.

Unfortunately, in the intervening years contact with your organization was lost. Despite that, the Human Rights Monitoring Group has been following the situation in Zimbabwe very closely. In June 2008, the Law Society of Upper Canada issued a public statement expressing grave concerns about escalating human rights violations against lawyers in Zimbabwe and the threats to the rule of law. In April 2013, the Law Society issued a public statement and wrote a letter to Zimbabwean authorities opposing the harassment of human rights lawyer Beatrice Mtetwa. We have learned that Beatrice Mtetwa was recently acquitted of all charges. In July 2013, the Law Society issued a public statement and wrote a letter to Zimbabwean authorities condemning the arrest of Arnold Tsunga. We understand that Arnold Tsunga is now the Dangamvura-Chikanga Member of Parliament and is responsible for the Parliamentary Portfolio Committee on Education, Sport, Arts and Culture.

We would value the opportunity to collaborate with you to address issues and problems lawyers and judges may be experiencing in your country. We would appreciate speaking with you to hear your views and your assessment of the situation in order to determine how our two Law Societies can work together.

In the meantime, Josée Bouchard, Equity Advisor to the Law Society of Upper Canada, will contact you in the very near future to follow up and to provide you with further information about our work.

Please feel free to contact her or me at the contacts provided below.

We very much look forward to our future work together.

Yours very truly,

Paul Schabas
Chair, Human Rights Monitoring Group

** The Law Society of Upper Canada is the governing body for more than 46,200 lawyers and 6,000 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar.*

[insert contact information for Josée and Paul]

TAB 8.2

FOR INFORMATION

PARENTAL LEAVE ASSISTANCE PROGRAM UPDATE

66. In May 2008, Convocation approved nine recommendations to enhance the retention of women in the private practice of law, including a recommendation to create a three-year pilot Parental Leave Assistance Program (PLAP). PLAP provides benefits to partners in firms of five lawyers or less, including sole practitioners, who have no access to other maternity/parental/adoption financial benefit programs under public or private plans**.** PLAP provides a fixed sum of $750 a week for twelve weeks (maximum $9,000 per leave per family unit) to cover, among other things, expenses associated with maintaining a practice during a maternity, parental or adoption leave.

67. The Law Society launched PLAP on March 12, 2009 to enable more lawyers to stay in practice after the birth or adoption of a child. When PLAP was launched, self-employed lawyers had no access to public funding for maternity or parental leaves. Benefits under the *Employment Insurance Act* were only available to wage-earners and salaried workers. PLAP was adopted to reduce the financial hardship faced by partners in small firms and lawyers in sole practices during maternity or parental leaves. PLAP was also meant to assist them in maintaining their practice, including practices in the non-urban areas, which would contribute to alleviating the shortage of legal services in some regions of the province. In addition, it was believed that the program would encourage practitioners to join small firms or to set up sole practices where they might otherwise be discouraged from doing so because of the financial implications of taking parental leaves.

68. In January 2010, the federal *Employment Insurance Act* was amended to provide self-employed persons special benefits. The benefits are available to sole practitioners and

partners in law firms but they are broader in scope than PLAP benefits. They include not only maternity, parental and adoption leave benefits but also sickness and compassionate care benefits and benefits for parents to care for their critically ill or injured children.

69. The original amendments to the EI Act to provide special benefits to self-employed came into effect on January 1, 2010, and benefits became payable beginning in January 2011. Notwithstanding the federal EI Special Benefits program, the Law Society decided that it would continue to offer PLAP to those who do not take advantage of the EI Special Benefits, until the end of the pilot project on March 12, 2012.

70. On October 27, 2011, Convocation considered a preliminary assessment of PLAP and approved an extension of the program until December 31, 2012 to allow a full assessment of PLAP. Convocation wished to consider whether PLAP should be maintained notwithstanding the availability of EI Special Benefits for most lawyers who are eligible for PLAP. Convocation also decided that it would provide a notice of one year to the profession if it decides to terminate PLAP. The notice would provide an opportunity for lawyers to opt into the EI Special Benefits program and pay the one year mandatory premium for eligibility.

71. In February 2012, Karen Cohl, Crystal Resolution Inc., an experienced consultant was retained to provide advice and expertise on the PLAP assessment process. More specifically, Ms. Cohl helped articulate specific questions to assess how well the PLAP had met its objectives and the impact of the EI Special Benefits program on the continuation of PLAP. Ms. Cohl also provided advice on the nature, content and structure of the assessment report presented to Convocation in November 2012.

72. In November 2012, Convocation considered the assessment of PLAP and a number of models. Convocation approved the following motion:

    a. That the PLAP pilot project be extended to permit consultation with the profession and to further study and evaluate with the stakeholders.

b. That the PLAP eligibility criteria be modified by adopting a means test where the applicant must have a net annual practice income of less than $50,000 to be eligible to receive benefits.

c. That PLAP as currently structured be extended as necessary to permit the Law Society to confirm tax implications of the proposed modification to PLAP for the means test.

d. During the extension of the pilot project, the Equity and Aboriginal Issues Committee will,

i. continue to explore options to meet the objectives of PLAP, to assist in keeping women in practise by reducing the financial hardship faced by lawyers in sole practice and small firms during parental leave;

ii. review the implementation of the means test, make evidence based determinations about the merits of the means test, which ensure that those in need benefit most from this program;

iii. report to Convocation on the matters described in (i) and (ii) above.

73. The Law Society provided a one year notice to the profession as follows: "The new means test will be effective as of January 1, 2014, subject to confirmation of any tax implications of the new model." The Law Society also requested an amended tax ruling from the Canada Revenue Agency (CRA). In December 2013, the Law Society received a positive CRA Ruling and on January 1, 2014, the PLAP means test model was launched.

74. At the October 24, 2013 Convocation, bencher Silverstein made the following comment and brought the following motion, seconded by bencher Evans:

> "I would also like to comment about PLAP. Last November, as you said, Convocation agreed to extend PLAP for a further study, but there was more to the motion than that. During the extension period the work was to be done to explore options to meet the objectives of PLAP, to review the implementation of a means test, and more importantly, most importantly, to report to Convocation. Almost a year has gone by and we have heard nothing, absolutely nothing. I don't know of any other committee, any other working group that is allowed to operate for a year and not provide some sort of report, interim or otherwise, to Convocation. This is a financial drain on this organization. As we heard last year, its usefulness

has become very, very limited, if it still exists. For that reason, I would like to move that PLAP be discontinued at the earliest possible opportunity."

75. Bencher Goldblatt's response to the motion was as follows:

> "I believe that, from our perspective [the Equity and Aboriginal Issues Committee's perspective], we are prepared to report back to Convocation in February, 2014, to the extent that we are able to do so with respect to issues such as the participation, the terms of practice and to the extent, again, we're prepared to do so and able to do so -- not prepared, able to do so, on other options which may be available. We in Equity are prepared to work together with the Retention of Women Committee in order to prepare a report that we hope will be made jointly to Convocation in February."

76. This report presents the following:

a. Statistical information about PLAP;

b. Proposed assessment of the PLAP means test model and timeline;

c. Some options considered by the Retention of Women Working Group and the Equity Committee.

STATISTICAL INFORMATION ABOUT PLAP

77. The following are the overall numbers of PLAP recipients as of December 2013.

Approved and Completed Applications in 2013

All completed applications	54
Male completed applications	6 or 11%
Female completed applications	48 or 89%

Approved and Completed Applications since Program Launch

All completed applications	271
Male completed applications	57 or 21%
Female completed applications	214 or 79%

Approved and Completed Applications since Program Launch per Year

2009	50
2010	68
2011	60
2012	39
2013	54

78. PLAP costs approximately $450,000 per year (the amount per year has ranged between $342,750 and $538,500). The following is the annual cost of PLAP since the inception of the program.

Annual Cost of PLAP since the Inception of the Program

2009	$377,250
2010	$538,500
2011	$495,000
2012	$342,750
2013	$417,750

PROPOSED ASSESSMENT OF THE PLAP MEANS TEST MODEL AND TIMELINE

79. The Retention of Women Working Group and the Equity Committee discussed how it will assess the new PLAP means test model. It was decided that beneficiaries would be surveyed or interviewed immediately following the receipt of PLAP benefits. The survey/interviews would be conducted beginning in March 2014 when it is expected that the first PLAP recipients under the means test will have completed the program.

80. In addition, a consultation document will be prepared, based on the findings of the survey/interviews, and posted online inviting submissions from the profession. It is anticipated that the consultation and survey/interviews process will be completed in March 2015 for a report to Convocation in April of that year.

81. Because the assessment process will largely be conducted in-house with the advice of an expert consultant, it is expected that the cost of the assessment will be under $5,000.

SOME OPTIONS CONSIDERED BY THE RETENTION OF WOMEN WORKING GROUP AND THE EQUITY COMMITTEE

82. There are two PLAP models that have been fully developed and implemented. The original PLAP model has also been fully assessed. The means test model will be assessed over the 2014 year. There are three additional options plus a variation on the original PLAP that are currently being reviewed by the Retention of Women Working Group and Equity and Aboriginal Issues Committee. All five models are described below, in no specific order, with observations.

2009 – 2013 Model

83. This model, launched in March 2009 following a favourable CRA Ruling, provides payments of $750/week for 12 weeks to cover, among other things, expenses associated with maintaining a practice during a maternity, parental or adoption leave. There are no maximum qualifying income and no adjustment for those whose income from practice is less than $750/week.

84. The following are facts and observations that the Retention of Women Working Group and the Equity and Aboriginal Issues Committee discussed:

a. The assessment of this PLAP model, as presented to Convocation in November 2012, indicated that the program benefits sole and small practitioners. It was shown that recipients use the PLAP benefits for the purposes intended by the program, which is to defray some of the overhead costs associated with maintaining a lawyer's practice during the parental leave.

b. As mentioned above, PLAP costs approximately $450,000 per year. Based on the number of completed applications to date, there has been an average of 58 PLAP recipients per year. This is approximately the number of participants that had been estimated when the program was introduced.

c. This model was created largely because there was no EI Program for self-employed individuals. Since the introduction of PLAP, the federal government has launched the EI Program, making benefits available to self-employed lawyers who contribute to the EI Program. Under the 2009-2013 model, the recipients of PLAP do not contribute beyond their annual membership fees. PLAP is paid for by the entire membership, many of whom are already paying EI premiums or funding maternity leaves in other ways.

d. The eligibility criteria did not include a means test or consideration of family income.

2009 – 2013 Model – Applied to Women Only

85. Based on statistics since launch, 21% of those who apply for PLAP are men (11% in 2013). If we take into account the fact that men tend to take shorter leaves while receiving PLAP benefits, it is estimated that men use approximately 17% of the PLAP funds. One of the options would be to limit PLAP benefits to women only.

86. The following are observations that the Retention of Women Working Group and the Equity and Aboriginal Issues Committee discussed:

a. The goal of the Retention of Women project was to assist women in maintaining their practice. Applying PLAP only to women would be consistent with that goal. On the other hand, providing PLAP benefits to men assists them in taking parental leaves and assuming more family responsibilities. Also, this model is more inclusive as it is accessible to single male parents and men in same sex relationships.

b. Most men who were interviewed for the November 2012 assessment report indicated that their spouse or partner received maternity or parental leave benefits.

c. Based on the current average uptake by men of 21%, the cost of PLAP applied to women only would be reduced from approximately $450,000 to approximately $355,000 per year. If we take into account the shorter leave periods taken by men, the cost of PLAP for women only could be closer to $375,000.

d. It is not discriminatory to apply PLAP only to women, as this is a special program to assist a historically disadvantaged group.

Means Test $50,000 Net Annual Practice Income

87. This model is the same as the 2009-2013 model except that it is only available to those with net practice income at and below $50,000. The model was approved by Convocation and received a favourable CRA Ruling. As a result, it was launched on January 1, 2014 and will need to be in place for a period of time in order to be assessed.

88. The following are observations that the Retention of Women Working Group and the Equity and Aboriginal Issues Committee discussed:

a. Based on PLAP statistics, it is expected that approximately 65% of those eligible for the current PLAP model will also be eligible under the $50,000 net annual practice income means test model.[1] Assuming that the current PLAP model costs approximately $450,000 per year, this would mean that the annual cost of the program would be approximately $292,500, for a difference of $157,500.

b. The means test benefits women with smaller or part-time practices. A higher means test would increase those eligible but would reduce the saving.

c. Applying for PLAP benefits under the means test is more onerous as applicants need to provide financial information related to their practice. As a result, the program will likely be somewhat more administratively onerous to manage.

Top- up for 3 months

89. This model assumes that the Law Society would provide $750 per week for the first two week waiting period of the EI Special Benefits Program for Self-Employed (the "EI Program") and a top-up of $250 per week for the 10 remaining weeks for a total of 12 weeks or 3 months. This model was identified as a potential viable option by the Retention of Women Working Group, but it was not retained as a viable option by the Equity and Aboriginal Issues Committee. Concerns were raised about the obligation, under this model, to opt into the EI Special Benefits program, an obligation that would be

[1] Please note that the 65% is based on a sample of only 6 months of applicants, or 20 applicants, when they had to provide income tax returns with their applications.

difficult to fulfill for those in sole practice and small firms. In exploring this option, it will be important to consider the take-up rate of the EI Program to ensure that the Law Society is not relying on a program that is inaccessible as a prerequisite for eligibility for PLAP benefits.

90. The following are observations that the Retention of Women Working Group and the Equity and Aboriginal Issues Committee discussed:

a. Since the creation of the original PLAP, the federal government has adopted the EI Program which provides an amount that is 55% of the average weekly earnings up to $47,400 in 2013. There is a two week waiting period.

b. The top-up model recognizes that sole practitioners and those in small firms cannot, for the most part, avail themselves of the full year maternity leave available to others that pay into the EI program. Under this model, the Law Society would provide a top-up to assist them to maintain their practices for the 12 week period we understand they can take.

c. Under this model, a parent who takes two maternity leaves and receives the top-up will have benefits that approximate or exceed 20 years of premiums. ($18,000 in EI and top-up vs. $17,820 in premiums for highest wage earner) In addition that parent is entitled to benefits for medical and compassionate care leaves and for leaves as parents of critically ill children.

d. Those receiving PLAP would make a contribution to their own leaves by paying EI premiums. The top-up model recognizes that all employees in Ontario have to pay EI premiums. There is no reason why self-employed individuals should not also pay EI premiums. In Quebec, self-employed individuals must pay the Quebec Parental Insurance Plan premiums.

e. Those who are currently eligible for PLAP may find it unattractive on a cost-benefit basis because most indicate they can only take reduced leaves. The top-up model could address those concerns.

f. If offered for 3 months, the cost of the top-up PLAP model to the Law Society would be $4,000 per applicant compared to $9,000 for the current PLAP model. Assuming there are 58 recipients per year, the cost to the profession, if fully

subscribed, would be approximately $232,000 for the top-up compared to $450,000 for the current PLAP model.

g. This model would require a new CRA Ruling.

Eliminate PLAP

91. This proposal would see the elimination of PLAP in its entirety. Practitioners would be responsible for covering the cost of their maternity leaves, through the EI plan or otherwise. The Law Society would continue to offer supports for women taking maternity leave through the other programs it funds (contract registry, coaching) but would not contribute directly.

92. The following are observations that the Retention of Women Working Group and the Equity and Aboriginal Issues Committee discussed:

a. Eliminating PLAP would represent an annual $450,000 saving[2] (under the 2009 – 2013 model) and the elimination of resources to manage the program.

b. The EI Program is in place and available to sole practitioners and partners in law firms.

c. Although PLAP has assisted small numbers of lawyers per year, the November 2012 survey indicates that most women recipients say PLAP has been important in maintaining their practices.

d. Sole practitioners and partners in small firms argue that PLAP is preferable to EI on a cost-benefit basis.

CONCLUSION

93. The original PLAP model and the means test model have been fully developed and implemented. The original PLAP has been assessed; the current means test model is in the process of being assessed. The Retention of Women Working Group and the Equity

[2] Because the Law Society had a fund balance (money left over) from prior years, the amount budgeted in 2014 is $400,000. From a budget perspective, the savings would be $400,000.

and Aboriginal Issues Committee welcome further suggestions as to additional options that the groups might consider and/or considerations to be taken into account for the two developed plans and/or the three potential options that have been identified. Benchers should contact Josée Bouchard, Equity Advisor at jbouchar@lsuc.on.ca should they wish to propose further options or considerations.

TAB 8.3

REPORT OF THE ACTIVITIES OF THE DISCRIMINATION AND HARASSMENT COUNSEL JULY 1, 2013 – DECEMBER 31, 2013

BACKGROUND

94. Subsection 20 (1) (a) of By-Law 11, *Regulation of Conduct, Capacity and Professional Competence* provides that, unless the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the Equity Committee) directs otherwise, the Discrimination and Harassment Counsel (the DHC) shall make a report to the Committee no 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.

95. Subsection 20(2) of By-Law 11 provides "The Committee shall submit each report received from the Counsel to Convocation on the day following the deadline for the receipt of the report by the Committee on which Convocation holds a regular meeting".

96. On February 13, 2014, the Equity Committee considered the *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada* for the period of July 1 to December 31, 2013, and it presents the report to Convocation pursuant to Subsection 20(2) of By-Law 11 (**TAB 8.3.1**).

TAB 8.3.1

REPORT OF THE ACTIVITIES OF THE DISCRIMINATION AND HARASSMENT COUNSEL FOR THE LAW SOCIETY OF UPPER CANADA

For the period from July 1, 2013 to December 31, 2013

Prepared By Cynthia Petersen
Discrimination and Harassment Counsel

TABLE OF CONTENTS

A. INTRODUCTION

1. The DHC provides a wide range of services to individuals who make discrimination or harassment complaints about lawyers, articling students or paralegals. Complaints are received from both members of the public and members of the legal profession.

2. The complaints arise in a variety of contexts, such as clients who report that they have been subjected to sexual harassment and/or sexual assault by their lawyer or paralegal, lawyers who are experiencing workplace discrimination relating to a maternity leave, law firm employees with disabilities who confront discriminatory barriers to employment or challenges in obtaining appropriate workplace accommodation, and paralegals, articling students and lawyers who are experiencing discriminatory (eg. racist, sexist, homophobic) treatment by opposing counsel in their cases.

3. The DHC provides complainants with safe counsel, coaching, information, referrals to other agencies and resources, informal mentoring, and general (non-legal) advice – some on an ongoing basis. The DHC also provides mediation services, described below.

B. SERVICES PROVIDED TO COMPLAINANTS

4. Complainants who contact the DHC are advised of various avenues of recourse open to them, including (where applicable):

- confronting the respondent lawyer or paralegal directly with their concerns;
- speaking to their union representative (if they are unionized and their complaint relates to their employment by a lawyer or paralegal);

- filing an internal discrimination or harassment complaint within their workplace;
- making a complaint to the law firm that employs the respondent lawyer;
- filing an Application with the Human Rights Tribunal of Ontario;
- filing a complaint about professional misconduct with the Law Society;
- reporting to the police (where criminal conduct is alleged); and
- consulting a lawyer for legal advice regarding possible claims and causes of action.

5. Complainants are provided with information about each of these options, including:

- what (if any) costs might be involved in pursuing an option;
- whether legal representation is required in order to pursue an option;
- referral to resources on how to obtain legal representation (actual referrals to lawyers are not made by the DHC);
- how to file a complaint, Application or report (eg. whether it can be done electronically, whether particular forms are required, etc.)
- the processes involved in each option (eg. investigation, conciliation, mediation, hearing, etc.)
- the general types of remedies that may be available in different *fora* (eg. compensatory remedies in contrast to disciplinary penalties, reinstatement to employment versus monetary damages, public interest remedies); and
- the existence of time limits for each avenue of redress (complainants are advised to seek legal advice with respect to precise limitation periods).

6. Complainants are told that the options available to them are not mutually exclusive.

7. In some cases, upon request, strategic tips and/or coaching are provided to complainants about how to handle a situation without resort to a formal complaints process (eg. confronting the offender, documenting incidents, speaking to a mentor).

8. Student complainants whose articles are terminated or who decide to withdraw from their articles before completion also receive counselling and advice from the DHC about transferring their articles, as well as support in their job search for a new articling position. They are also referred to appropriate resources within the Law Society.

9. Some complainants are referred to other agencies/organizations (such as the Law Society's Member Assistance Program and the Human Rights Legal Support Centre) or are directed to relevant resource materials available from the Law Society, the Ontario Human Rights Commission, or other organizations.

C. MEDIATION / CONCILIATION

10. In addition to being advised about the above-noted options, where appropriate, complainants are offered the mediation or conciliation/intervention services of the DHC Program.

11. Whenever formal mediation is offered, the nature and purpose of mediation is explained, including that it is a confidential and voluntary process, that it does not involve any investigation or fact finding, and that the DHC acts as a neutral facilitator to attempt to assist the parties in negotiating the terms of a mutually satisfactory resolution of the complaint.

12. When a complainant opts for mediation, s/he is given the choice of contacting the respondent to propose the mediation or having the DHC contact the respondent to canvass his/her willingness to participate. If the complainant elects to have the DHC contact the respondent, written instructions must be provided. If both parties are willing to participate, they are required to sign a mediation agreement prior to entering into mediated discussions with the DHC.

13. Where informal conciliation/intervention services are offered, the complainant is advised that the DHC could contact the respondent confidentially and discuss the complainant's concerns, in the hope of achieving a resolution to the complaint. Where such an intervention occurs, both the complainant and respondent are advised that the DHC is not acting as the complainant's counsel or representative, but rather as a go-between to facilitate constructive dialogue between the parties. When a complainant requests such an intervention, written consent must be provided before the DHC contacts the respondent.

14. Some complainants decline the offer of the DHC's mediation and conciliation services, notwithstanding that the services are free, confidential, and in the case of formal mediation, subject to a mutual "without prejudice" undertaking by both parties. The reasons why complainants decline mediation are varied and include: complainants desiring to have a fact-finding investigation, complainants believing that the respondent will not participate in good faith, and complainants wanting to create a formal record of the respondent's misconduct through an adjudicative process.

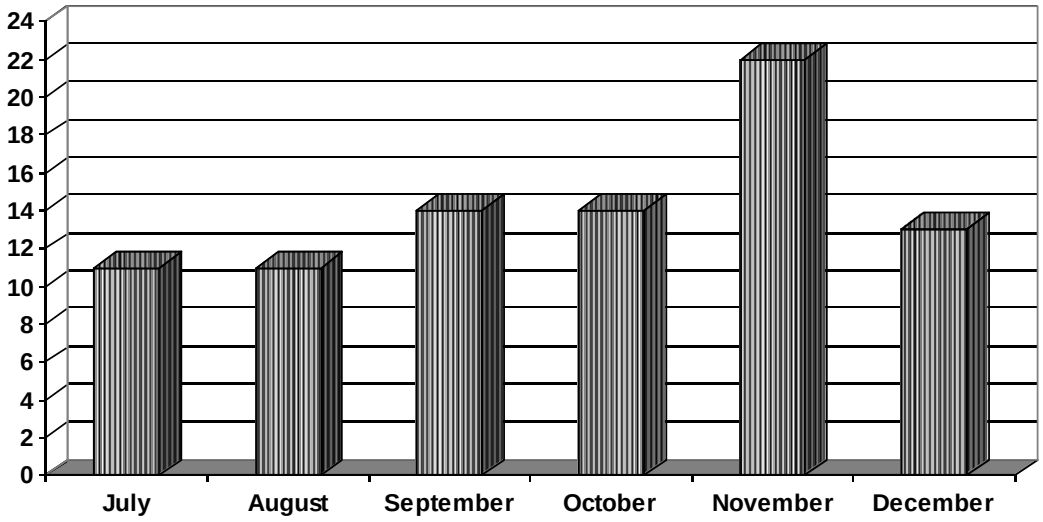
15. During this reporting period, there were no formal in-person mediation sessions conducted by the DHC. Formal mediation was not requested by any complainants.

16. There were, however, a number of informal interventions made at complainants' request. The DHC spoke with the respondent lawyers in several cases and was thereby able to achieve resolutions to complaints.

D. OVERVIEW OF NEW CONTACTS WITH THE DHC PROGRAM

17. During this six month reporting period, 85 individuals contacted the DHC Program with a new matter.[1] This represents average of 14 new contacts per month.

18. The volume of new contacts with the Program was distributed as follows:



19. Of the 85 individuals who contacted the DHC, 48 (56%) used the telephone to make their initial contact and 37 (44%) used email.

[1] Individuals who had previously contacted the Program and who communicated with the DHC during this reporting period with respect to the same ongoing matter are not counted in this number.

20. During this reporting period, 5 individuals were provided services in French. The remaining clients of the Program were provided services in English.

E. SUMMARY OF DISCRIMINATION AND HARASSMENT COMPLAINTS

21. Of the 85 new contacts with the Program, 27 individuals reported specific complaints of discrimination or harassment by a lawyer or paralegal in Ontario.[2]

22. In this reporting period, 3 complaints were made against paralegals. The remaining 24 complaints were made against lawyers. There were no complaints about articling students.

23. The 3 complaints against paralegals were made by members of the public. Of the 24 complaints against lawyers, 10 (42%) were made by members of the public and 14 (58%) were made by members (including student members) of the Law Society.

24. During this reporting period, all complainants were provided services in English.[3]

F. COMPLAINTS AGAINST LAWYERS BY MEMBERS OF THE BAR

25. In this reporting period, there were 14 complaints against lawyers by members of the Law Society. Seven (7) of these complaints were made by lawyers and 7 (50%) were made by articling students or law students. There were no complaints about lawyers made by paralegals.

[2] The other new contacts with the program either involved general inquiries or complaints about licensees that did not include allegations of discrimination or harassment and were therefore outside the mandate of the DHC program. These contacts are summarized below.

[3] A number of francophones contacted the DHC during this reporting period and were provided services in French, but they did not raise specific complaints about discrimination or harassment by a lawyer, articling student or paralegal.

26. Of the 14 complaints by members of the legal profession, 8 (57%) were made by women and 6 (43%) were made by men. Four (4) of the 7 student complainants (57%) were female and 4 of the 7 lawyer complainants (57%) were female.

27. Of the 7 complaints made by lawyers, 4 (57%) arose in the context of the complainant's employment. Of the remaining 3 complaints, one complaint was made against a lawyer who was providing a public service to the complainant, one was made about opposing counsel involved in litigation, and one was made about a former colleague with whom the complainant no longer worked.

28. Four (4) of the 7 student complaints (57%) arose in the context of the complainants' employment or a job interview for an articling position. The remaining 3 student complaints arose in the context of the complainants' education and involved complaints about the conduct of law professors who are licensees.

29. There were 7 complaints against lawyers based (in whole or in part) on sex. Of these,

- Three (3) involved allegations of sexual harassment. One involved a law student complaining about her professor, one involved a government lawyer complaining about her supervisor, and one involved a lawyer complaining about her former colleague with whom she no longer worked.

- Two (2) involved complaints by articling students about sexist remarks made by a senior partner in their firm (one of the student complainants was female and the other was male).

- One involved allegations by a lawyer of discrimination based on pregnancy in the context of her employment; and

- One law student complained about sexist remarks made by her professor.

30. All but one[4] of the complainants who reported sex-based discrimination or harassment were female and all of the respondent lawyers were male.

31. There were 4 complaints against lawyers based (in whole or in part) on religion. All of these complaints arose in the context of the complainants' employment:

    - A Jewish student complained about inappropriate questions regarding his religion during a job interview for an articling position at a law firm.

    - Two articling students (one male and one female) complained about anti-Muslim remarks made by a senior partner in their firm.

    - A Muslim lawyer complained about hostile anti-Muslim comments made to him by a senior partner in his firm.

32. There were 3 complaints based on disability. Two of these complaints (one by a male lawyer and one by a female articling student) arose in the context of the complainants' employment and involved allegations of a failure to provide appropriate workplace accommodation. The third complaint was made by a male law student who reported harassment by a law professor, including derogatory comments about his disability.

33. There were 2 complaints based on sexual orientation. Two articling students (one male and one female) complained about homophobic remarks made by a senior male partner in their firm.

[4] A male articling student complained about sexist comments made by a senior male partner in his firm. That student also reported that the same partner made homophobic and anti-Muslim remarks. A female articling student in the same firm made similar complaints about the same partner.

34. There was one complaint based on family status. A female lawyer reported that opposing counsel made offensive remarks about her family status.

35. There was one complaint based on marital status. A male law student complained about inappropriate questions raised during a job interview for an articling position with a law firm.

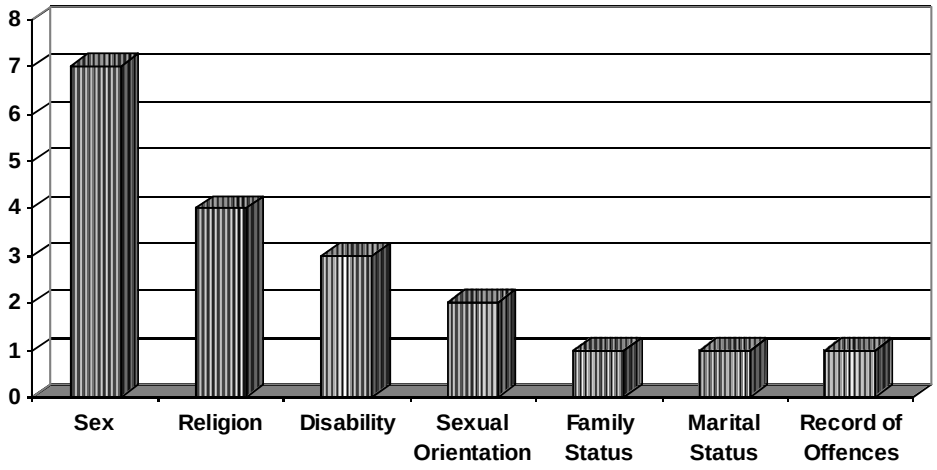
36. There was one complaint based on record of offences. A lawyer reported that he was denied a service by another lawyer based on a conviction for which he had received a pardon.

37. In summary, the number of complaints[5] by lawyers and articling students in which each of the following prohibited grounds of discrimination was raised are:

- sex 7 (3 sexual harassment; 1 pregnancy)
- religion 4
- disability 3
- sexual orientation 2
- family status 1
- marital status 1
- record of offences 1

[5] The total number exceeds 14 because a number of complaints involved multiple grounds of discrimination.

Grounds Raised in Complaints against Lawyers by Members of the Bar



G. COMPLAINTS AGAINST LAWYERS BY THE PUBLIC

38. During this reporting period, there were 10 complaints against lawyers made by members of the public.

39. Half (50%) of the public complaints were made by women and half were made by men.

40. Of the 10 public complaints:

- Five (5) involved litigants complaining about the conduct of opposing counsel in their cases;
- Three (3) involved clients complaining about their own lawyers; and
- Two (2) involved employment-related complaints by individuals working in law firms.

41. There were 5 public complaints based (in whole or in part) on disability:

- Three (3) litigants with disabilities complained about the discriminatory conduct and/or derogatory comments of opposing counsel in their cases.

- Two (2) clients complained about discriminatory remarks made by their own lawyers, their lawyers' failure to accommodate their medical needs, and (in one case) their lawyer's breach of confidentiality regarding their medical information.

42. There were 3 public complaints based (in whole or in part) on sex.

43. Two (2) of the sex-based complaints were made by men. Both were litigants who complained about remarks made by opposing counsel (one alleged anti-male sexist comments and the other alleged misogynist comments). In both cases, the respondent lawyer was male. The third sex-based complaint was made by a woman who reported employment discrimination by a lawyer based on both her sex and marital status.

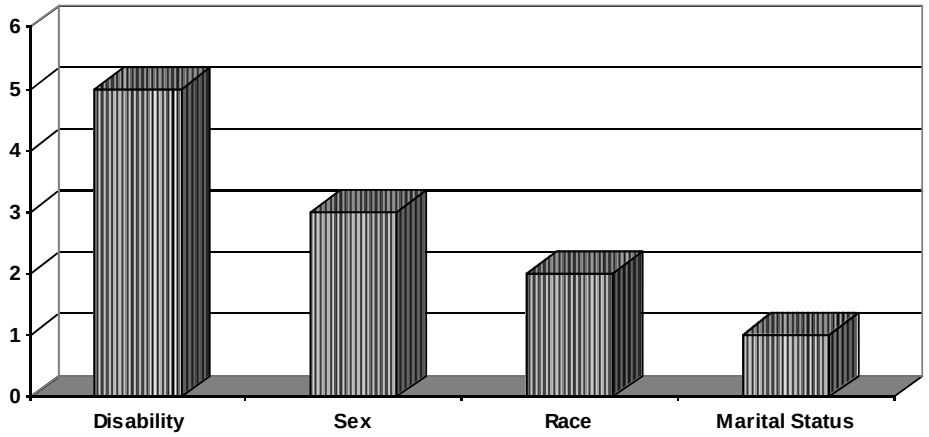
44. There were 2 public complaints based on race. A Black female litigant complained about a racially derogatory comment made to her by opposing counsel. An Asian man complained about racial discrimination by a lawyer who was representing him.

45. In summary, the number of public complaints[6] in which each of the following grounds of discrimination was raised are as follows:

- disability 5
- sex 3
- race 2
- marital status 1

[6] The total of these numbers exceeds 10 because some of the complaints involved multiple intersecting grounds of discrimination.

Grounds Raised in Public Complaints



H. COMPLAINTS AGAINST LAWYERS BY PARALEGALS

46. During this reporting period, there were no complaints about lawyers by paralegals.

I. COMPLAINTS AGAINST PARALEGALS

47. During this reporting period, there were 3 complaints against paralegals.[7] All were made by members of the public and all involved allegations of sexual harassment:

- A male student complained that his male paralegal instructor made unwelcome sexually suggestive remarks to him;

[7] There were two additional complaints about the conduct of paralegals, but neither raised issues of discrimination or harassment based on human rights grounds. The data regarding these complaints are therefore captured later in this report, in the section about contacts "outside the mandate" of the DHC program.

- A woman complained about the conduct of a male paralegal who was her ex-boyfriend and who was stalking her and harassing her after the breakdown of their relationship, including harassment in her workplace; and

- A man called on behalf of his fiancée, who was experiencing sexual harassment by a male paralegal whom she had retained to represent her.

G. GENERAL INQUIRIES

48. Of the 85 new contacts with the DHC during this reporting period, 18 involved general inquiries about matters within the mandate of the DHC program and did not involve reports of misconduct by licensees.

H. MATTERS OUTSIDE THE DHC MANDATE

49. During this reporting period, the DHC received 40 calls and emails relating to matters outside the Program's mandate.

50. These contacts included complaints about paralegals and lawyers that did not involve allegations of discrimination or harassment based on human rights grounds (such as allegations of unethical behaviour, confidentiality breaches, or bullying and incivility). They also included complaints about the conduct of judges, landlords and employers, none of whom were licensees.

51. Several individuals contacted the DHC to obtain a referral to a lawyer to deal with a harassment or discrimination case. They were referred to the Law Society's Lawyer Referral Service.

52. An explanation of the DHC's mandate, role and duties was provided to each person who called with a matter outside the Program's mandate. Some of these individuals were referred to other agencies.

53. Although there are a number of these "outside mandate" contacts during every reporting period, they typically do not consume much of the DHC's time or resources, since we do not assist these individuals beyond their first contact with the Program.

J. PROMOTIONAL ACTIVITIES

54. The LSUC maintains a bilingual website for the DHC Program.

55. Throughout this reporting period, periodic advertisements were placed (in English and French) in the *Ontario Reports* to promote the DHC Program.

56. The Program's French and English brochures were updated, revised and reprinted in December 2013. The new brochures should be in circulation early in 2014 (to legal clinics, law firms, community centres, libraries, government agencies, faculties of law, etc.).

57. The DHC continues to work closely with the Law Society's Equity Advisor (Josée Bouchard) to design and deliver *Discrimination and Harassment Prevention* and *Violence Prevention* workshops to law firms in Ontario. In addition to delivering important educational content, these workshops also serve as a useful opportunity to promote awareness of the DHC Program's services.

TAB 8.4

FOR INFORMATION

TRANSLATION OF CONSULTATION DOCUMENTS

BACKGROUND

97. The Law Society of Upper Canada has committed itself to providing services in French to its members and the public. To pursue its commitment, the Law Society works closely with the Association des juristes d'expression française de l'Ontario ("AJEFO") and other organizations dedicated to promoting access to justice in French. For an overview of other Law Society initiatives, please see **TAB 8.4.1**.

98. The Equity and Aboriginal Issues Committee approved a new initiative that consultation reports on policy initiatives on which the Law Society wishes to consult with the profession as a whole would be produced in French and English.

99. Some consultation reports have been produced in French and English (e.g. the Pathways Report), and were extremely well received by members of the profession. It is anticipated that this new initiative will be positively received and may lead to more engagement from the Francophone legal community.

100. The translation of consultation reports responds to requests received from members about the availability of those reports in French. It is also consistent with the *Access to Justice in French* report in that it provides enhanced opportunities for members of the profession who speak French to influence policy development that could have a positive impact on the public.

101. Based on the number and length of consultation reports produced between 2008 and 2014, the estimated annual cost of producing the reports without the appendices is $3,500 and with the appendices is $6,400. The cost of translation will be covered by using already existing budget money from Policy, Equity, Communications and Public Affairs.

A fund of $12,000 will be created for the translation of such documents in 2014. The Equity Initiatives Department and Policy will monitor the ongoing costs.

TAB 8.4.1

LAW SOCIETY FRENCH LANGUAGE SERVICES

BACKGROUND

1. The percentage of lawyers who can provide legal services to their clients in French is higher than the Francophone community in Ontario. Four point eight percent (4.8%) of the Ontario population self-identifies as Francophone while 12% of lawyers indicate that they can provide legal services in French and three percent (3%) of paralegals indicate that they can provide legal services in French.

2. As the province's regulatory body for the profession, the Law Society has committed itself to providing services in French to its members and the public. This report provides an update of the Law Society's services in the French language.

ACCESS TO JUSTICE IN FRENCH – BENCH AND BAR COMMITTEE

3. In June 2012, the Bench and Bar Committee released its *Access to Justice in French* report. Justice Paul Rouleau, Court of Appeal for Ontario, and Paul LeVay, Stockwoods LLP, co-chaired the Bench and Bar Committee. The Law Society was a member of the Bench and Bar Committee. Other members of the Committee included judges of the Superior Court of Justice and the Ontario Court of Justice, representatives of the Ontario government, the National Judicial Institute and the Association des juristes d'expression française de l'Ontario ("AJEFO").

4. Two recommendations focus on the Law Society and indicate that the Attorney General, in cooperation with the Law Society and law faculties, should explore measures to support language rights education. In addition, it is recommended that the Law Society consider assessing language rights knowledge in the Licensing Process, develop strategies to enhance the knowledge of French language rights and services before the court system and promote language rights and access to legal services in French with the public. As described below, the Law Society is in the process of implementing those recommendations.

5. In November 2012, the Ministry of the Attorney General announced the creation of a steering committee with representatives from the justice sector and other organizations to review and develop an implementation plan that responds to the recommendations outlined in *Access to Justice in French* report. The Law Society accepted the Ministry's invitation to participate on the steering committee.

RECENT DEVELOPMENTS

6. The Law Society makes ongoing efforts to enhance access to justice in French, including a bilingual Licensing Process, core regulatory information, forms, website information, numerous publications and various other communications materials in French. The Law Society also collaborates with many partners in the legal system to strengthen French language services within the justice system.

For the Profession

7. The following is a snapshot of services and activities for the profession:
    a. Licensing Process: Lawyer and paralegal licensing examinations, along with associated reference materials and other resources, are offered in

French. The Law Society also assesses language rights knowledge in the Licensing Process, as recommended by the *Access to Justice in French* report.

b. Rules of Conduct: In 2001, the *Rules of Professional Conduct* were amended to include a commentary to Rule 1.03 (Interpretation – Standards of the Legal Profession) that discusses the obligation of lawyers to inform their clients of their linguistic rights when applicable. The *Paralegal Rules of Conduct* also include a Rule to that effect.

c. Advising the Profession about the Rules: The guides *Advising Clients of their French Language Rights – Lawyers' Responsibilities* and *Advising Clients of their French Language Rights – Paralegals' Responsibilities* have recently been updated and are available online. This is the first step in the implementation of the *Access to Justice in French* recommendation to collaborate with associations of lawyers and paralegals where possible to develop strategies to enhance the knowledge of lawyers and paralegals of French language rights and services before the court system.

d. Lawyer and Paralegal Annual Report: The Lawyer Annual Report was modified to include the following voluntary questions (the Paralegal Annual Report also includes similar questions):

   i. Can you communicate with your clients and provide legal advice to them in the French language?

   ii. Can you communicate with your clients, provide legal advice to them and represent them in the French language?

e. Continuing Professional Development: In November 2012, the Law Society, in partnership with AJEFO, the Advocates' Society and the Official Languages Committee of the Ontario Bar Association ("OBA"), organized a very successful CPD Program accredited for professionalism

hours– *Plaider une action civile en français*. Approximately 60 lawyers and paralegals attended the program in person while 210 participated by webcast. A second accredited CPD was held on June 21, 2013 entitled *Droit au but- parlons grammaire*. The session was a success with about 165 members registered. The Law Society, in partnership with AJEFO and the Advocates' Society, has held another very successful CPD program accredited for professionalism hours on January 20, 2014 entitled *Plaider une cause pénale en français.* Approximately 20 lawyers and paralegals attended in person and 70 online. In addition, the Law Society participates in the organizing committee of the annual AJEFO conference.

f. Internal Capacity: The Law Society offers services in French, including through the Call Centre, the Practice Management Helpline, the Law Society Referral service, the Registrar's Office and the Policy, Tribunals (bilingual clerks and a number of adjudicators), Equity and Communications Departments. The Senior Management Team also has bilingual capacity.

g. Communications in French: The Law Society Portal enables all licensees to choose whether they would prefer to receive Law Society communications in French or English.

h. Law Society Programs: Numerous programs offer services in French. For example, the Discrimination and Harassment Counsel Program, the Member Assistance Program and the Career Coaching Program have offered services in French and English since their inception.

i. Regulatory Forms: The Law Society has translated most forms mandated under the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct*, laws, regulations and by-laws, into French. The website has been updated to significantly increase the number of forms in French.

j. Collaboration with Associations: The Equity and Aboriginal Issues Committee is the committee responsible for French language services. AJEFO participates in committee meetings and provides input in policy development. AJEFO is also a member of the Law Society's Equity Advisory Group. The Law Society also participates in meetings of the AJEFO board and the Official Languages Committee of the Ontario Bar Association.

For the Public

8. The following is a snapshot of services and activities for members of the public:

a. Law Society Referral Service: The Law Society Referral Service operates bilingually and provides the public with access to bilingual lawyers and paralegals.

b. Call Centre: Call Centre staff field public calls in both English and French, with equal response times. From January to June 2013, the average time in minutes to respond to call was as follows:

	French	English
Practice Management Helpline*	n/a	0.08
Resource Centre	0.20	0.20
Complaints Reception	0.19	0.12
Reception	0.24	0.21

c. Directory of Lawyers and Paralegals: The online directory of lawyers and paralegals is bilingual and indicates whether a lawyer or paralegal is able to offer services in French.

d. Commenting about the Law Society Services: Contact information is available on the Law Society website for anyone who wishes to comment about Law Society services in French.

e. Public Legal Education: The Law Society offers at least two public legal education programs in French annually. On September 25, 2013 the Law Society, in partnership with AJEFO and the OBA, celebrated the Jour des Franco-Ontariens et des Franco-Ontariennes by hosting an event with Pascale Daigneault, President of the OBA. The event was attended by at least 85 lawyers, paralegals and members of the public. On March 28, 2013, the Law Society, with the AJEFO and the OBA, celebrated the Journée internationale de la francophonie by hosting an event with Françoise Boivin, the Deputy for Gatineau for the New Democratic Party. On June 19, 2013, the Law Society offered a public education program entitled *Legal Information for Everyone* in French. The program was organized in partnership with Community Legal Education Ontario, the Ontario Justice Education Network and AJEFO and was a success.

TAB 8.5

PUBLIC EDUCATION EQUALITY AND RULE OF LAW SERIES CALENDAR 2014

For a list of upcoming events, please consult http://www.lawsocietygazette.ca/events/

INTERNATIONAL WOMEN'S DAY
Date : March 6, 2014
Time and location: Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 7:00 p.m.)

The impact of new immigration law on gender rights
Panel Discussion:
Moderator: Deepa Matoo - South Asian Legal Clinic of Ontario (SALCO)
Sayran Sulevani - Barbara Schlifer Clinic
Gloria Nafziger - Amnesty International
Mary Jo Leddy - Romero House
Idil Atak - Assistant Prof. Ryerson
Loly Ricco – President of the Canadian Council of Refugees

LA JOURNÉE DE LA FRANCOPHONIE
Date : March 25, 2014
Upper Barristers' Lounge (6:00 p.m. – 8:00 p.m.)

Conférencier: Maître Roger Billodeau, Registraire, Cour Suprême du Canada

HOLOCAUST REMEMBRANCE DAY
Date : April 28, 2014
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

Keynote: The Honourable Justice Rosalie Abella – Supreme Court Justice

ASIAN AND SOUTH ASIAN HERITAGE MONTH
Date : May 22, 2014
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

ACCESS AWARENESS FORUM
Date: June 4, 2014
Donald Lamont Learning Centre (4:00 p.m. – 8:00 p.m.)

PRIDE WEEK - June 17, 2013
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

NATIONAL ABORIGINAL HISTORY MONTH - June 19, 2014
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 9

Report to Convocation
February 27, 2014

Audit & Finance Committee

Committee Members
Christopher Bredt (Co-Chair)
Carol Hartman (Co-Chair)
John Callaghan (Vice-Chair)
Adriana Doyle
Paul Dray
Susan Elliott
Seymour Epstein
Janet Leiper
James Scarfone
Alan Silverstein
Catherine Strosberg
Robert Wadden
Peter Wardle

Purpose of Report: Decision and Information

Prepared by the Finance Department
Wendy Tysall, Chief Financial Officer, 416-947-3322 or wtysall@lsuc.on.ca

TABLE OF CONTENTS

For Decision

COMMITTEE PROCESS

1. The Audit & Finance Committee ("the Committee") met on February 12, 2014. Committee members in attendance were Chris Bredt (co-chair), Carol Hartman, John Callaghan (vice chair), Paul Dray, Adriana Doyle, Susan Elliott (phone), Seymour Epstein, Janet Leiper, Jim Scarfone (phone), Alan Silverstein, Catherine Strosberg (phone), and Peter Wardle.

2. Law Society staff in attendance: Robert Lapper, Wendy Tysall, Terry Knott, Elliot Spears, Fred Grady, Brenda Albuquerque-Boutilier and Andrew Cawse.

3. Also in attendance were Kathleen Waters (CEO) and Steve Jorgensen (CFO) from LAWPRO.

TAB 9.1

FOR DECISION

INFORMATION SYSTEMS THREE YEAR CAPITAL BUDGET PLAN

Motion

4. **That Convocation approve the medium-term capital expenditure plan for Information Systems.**

5. For many years, the Law Society has incorporated a capital levy in its annual fee to provide a source of funds to maintain and upgrade its facilities at Osgoode Hall and to acquire, maintain and upgrade information technology in support of operations. The levy had ranged from $65 to $85 from 2010 through 2013. Management had attempted to restrain capital spending to the amount raised by the annual levy without a detailed assessment of capital needs extending out over a number of years. This is particularly true in regard to information systems. For 2014, the levy was set at $50, intended to fund facilities projects in 2014.

6. The three-year budget scenario approved by Convocation in October along with the 2014 budget, included a provision of $8.0 million, comprised of $6.0 million transferred from the General Fund balance to the Capital Fund and $2.0 million from the existing Capital Fund balance, dedicated to the revitalization of the Law Society's information systems over the next three years. The approved budget noted that a detailed plan for information systems capital spending would be presented to the Audit and Finance Committee for recommendation to Convocation.

7. The Law Society has recently undertaken a review of its information systems governance procedures, management, skill requirements and physical assets. The Law Society will require a significant investment in information technology over the next several years in order to achieve efficiencies in its operations and to meet the expectations of members and the public in terms of accessing information and interacting with the Law Society. Increasingly, these expectations include the use of electronic communications, electronic

data collection and dissemination and the transition of processes that have been traditionally paper based to electronic formats. Meeting these expectations will require significant financial resources and effort.

8. The details of proposed capital spending for 2014-2016 are attached for Convocation's approval.

CONFIDENTIAL

THREE YEAR TECHNOLOGY PLAN

TERRY KNOTT, EXECUTIVE DIRECTOR
CORPORATE SERVICES

FEBRUARY 2014

Contents

Overview

In mid 2013, Corporate Services, the division responsible for technology initiatives, along with the other Law Society divisions, embarked on a long term planning exercise, the goal of which was to clearly define and set the Law Society's operational priorities going forward. As a result of this exercise, we, the Senior Management Team, mapped out the priorities for our work over the next three years.

Most all of the priorities that were identified require technology-based solution(s). Many of these initiatives are large and solutions will need to be delivered in phases over multiple years. Recognizing this, Convocation determined that a technology capital budget of $8 million should be set for three years (2014-2016) to cover all technology initiatives.

An IS Executive Committee was established in 2013 to review the technology requirements of the organization. The Committee is comprised of the CEO; CFO; Executive Director, Corporate Services; Executive Director, Professional Regulation; and, Executive Director, Professional Development and Competence.

Recommendations were made to the Committee by the Project Management Office and IS Shared Services regarding the viability of the proposed technology projects. These recommendations were based on the following three factors:

1. Is the initiative aligned with the organization's strategic direction?
2. Does the initiative automate a process? Create efficiencies?
3. Does the initiative reduce costs?

As a result of those recommendations, and in consultation with the IS Executive Committee, the three year technology plan (2014-2016) was established.

Three Year Technology Plan

The technology plan sets out the specific projects and initiatives that the Project Management Office (PMO) and IS Shared Services (IS) will be leading over the next three years (2014-2016). The plan identifies not only projects with a capital impact but also those projects that, while no capital dollars are assigned, have an impact on our internal resources.

For the purpose of the Audit & Finance Committee, the attached plan has been formatted to identify only those projects that have capital dollars allocated to them.

Non-Capital Projects

There are many technology initiatives that will be completed over the next three years utilizing only internal resources. Many of these are small to medium sized projects that include upgrades and enhancements. One project, in particular, stands out as significant in both its size and in its benefits to the organization and the membership – the Licensee Self Serve Program.

Licensee Self Serve Program

The Licensee Self Serve Program automates and consolidates many of our processes through the LSUC Portal. It is a two year project that will see, at its completion, annual fee invoicing (including adjusted billings) and credit card payment; archiving previously submitted lawyer and paralegal annual reports (LAR/PAR); automating the change of information process; automating the Professional Corporation application and renewal processes; and, establishing pre-authorized payment for annual fees.
This project will see the LSUC Portal as a single point of entry for many licensee activities. It will also automate a significant number of manual processes that will realize efficiencies and, as a result, cost savings from a resource perspective.

Capital Projects

The detailed plan, outlining projects with a capital impact, can be found at Appendix 1. Some of the more significant expenditures include:

Enterprise Content Management (ECM) (Project #1)

The implementation of the SharePoint 2013 platform includes a centralized document management system; automated workflow; and electronic access to licensee files. Phase 1 will focus on establishing the foundational capabilities such as the environment installation and set-up. Phase 2 will focus on the roll-out to the organization.

Phase 3 of this initiative, Project #2, includes the replacement of ELF and rebranding of SharePoint to be consistent with our corporate image. Because there are a number of web-based initiatives that we will be embarking on this year, all requiring a common approach, we feel it wise to amalgamate these into one, multi-phased project. Originally, $100,000 was allocated to our corporate website redesign initiative; however, given that this project will also incorporate revamping our intranet (ELF) and SharePoint rebranding, all of which must also conform to AODA/WCAG 2.0 requirements, $325,000 in capital costs for 2014 is more realistic.

E-Tribunals (Project #3)

This is a significant project that will take approximately two years to complete. Because processes in the Tribunals Department are being re-engineered, it is difficult to determine accurate costing for this project. We have earmarked what we anticipate the costs will be.

LSRS Development (Project #4)

Two complementary services will be added to the current LSRS solution. The complementary services involve enhancements to the Lawyer & Paralegal Directory as well as an external facing directory of social service resources (CSC411). This initiative, once completed, will increase efficiencies for this programme and provide the public with better information.

Microsoft Office Upgrade (Project #5)

This project upgrades the current version of MS Office 2007 to MS Office 2013, a necessary requirement to ensure compatibility with SharePoint 2013 (see ECM).

Lawyer/Paralegal Database Redevelopment (Project #6)

This is a complete overhaul to the licensee database and access to licensee information on the AS/400. The focus will be on web-based solutions, eliminating the use of "green-screens" for our internal users. It is important to note that the AS/400 has morphed into an extremely large, complex database and therefore a significant portion of this initiative is to map all of the information that the database currently houses.

E-Commerce (Project #7)

The current platform needs to be replaced as it will provide the foundation to address future needs related to the Licensee Self-Serve Program. Additionally, there is concern with respect to the longevity of the existing vendor, essentially a "one-person" organization.

Technology Upgrades (Project #8)

This includes ongoing upgrades to our network and data management tools. Also included within this cost is our annual Evergreen initiative, a replacement of older, outdated computers and monitors.

Middleware Vendor Replacement (Project #26)

We were recently notified that our middleware vendor will no longer provide support, with the exception of bug fixes up to 2017. This means that all applications that reside on Linux, virtually everything, will need to be migrated over to another middleware. This project will need to commence in 2015 and be completed by the end of 2016. We have earmarked $500,000 for this project which is a high estimate based on one of the more expensive solutions. Until we have determined which vendor will be used, we feel it prudent to budget costs at the higher end of the spectrum.

Summary

The plan clearly identifies the technology initiatives for the organization over the next three years and associated capital costs. We have a small reserve of just under $900,000 to cover off any unforeseen initiatives that may crop up in the future. The IS Executive Committee will also consider deferring projects to reallocate resources - money and people – as necessary.

Appendix 1

#	Year	Multi Year	Project Name	High Level Description	2014 Total Project Cost	2015 Total Project Cost	2016 Total Project Cost
1	2014	Yes	Enterprise Content Management Program (ECM) - Multiple Phases	This program focuses on implementing the SharePoint 2013 platform, centralized document management, automated workflow, and electronic access to member files. Phase 1 focuses on establishing the foundational capabilities such as the environment installation and setup as well as developing the three core workflows for Membership Services.	$675,000.00	$400,000.00	$150,000.00
2	2014	Yes	Enterprise Content Management Program (ECM) - Phase 3/Web Redesign	This project amalgamates several initiatives - redesigning the corporate website; replacing the organization's intranet (ELF); and rebranding SharePoint. All of these initiatives that AODA/WCAG 2.0 management tools are integrated into solutions.	$325,000.00	$200,000.00	$50,000.00

#	Year	Multi Year	Project Name	High Level Description	2014 Total Project Cost	2015 Total Project Cost	2016 Total Project Cost
3	2014	Yes	E-Tribunals - Phase 1	Tribunals will reengineer all their processes during 2014 and determine their business requirements.	$350,000.00	$357,000.00	$0.00
4	2014	Yes	LSRS - System Development	This project allows for the creation of an external facing CSC 411 and will make enhancements to the Lawyer & Paralegal Directory.	$300,000.00	$20,000.00	$20,000.00
5	2014	No	Microsoft Office Upgrade	This project upgrades the current version of MS Office 2007 to MS Office 2013 to ensure compatibility with SharePoint 2013.	$350,000.00	$0.00	$0.00
6	2014	Yes	Lawyer/Paralegal Database Redevelopment	This project will completely redesign the member database and access to member information on the AS/400 to reduce the usage of green screens. The focus will be on web based access.	$300,000.00	$300,000.00	$150,000.00

#	Year	Multi Year	Project Name	High Level Description	2014 Total Project Cost	2015 Total Project Cost	2016 Total Project Cost
7	2014	Yes	E-commerce Replacement Project	Project to replace our E-commerce system	$300,000.00	$100,000.00	$60,000.00
8	2014	Yes	Technology upgrades	This includes our annual Evergreen/Refresh program - upgrading out of date PCs & laptops; upgrades to our network switches; as well as the purchase of management tools for data and VMware.	$265,000.00	$265,000.00	$265,000.00
9	2014	No	E-mail Replacement of Lotus Notes with MS Exchange	This project will see Lotus Notes replaced with MS Exchange.	$100,000.00	$0.00	$0.00
10	2014	Yes	Asset, Contract and License Management System	Part of this project includes replacing the Helpdesk reporting tool.	$75,000.00	$75,000.00	$0.00

#	Year	Multi Year	Project Name	High Level Description	2014 Total Project Cost	2015 Total Project Cost	2016 Total Project Cost
11	2014	No	Data Centre Upgrades	Miscellaneous upgrades associated with the infrastructure.	$60,000.00	$0.00	$0.00
12	2014	No	Application Virtualization	Continuation of the virtualization of our environment to consolidate servers.	$50,000.00	$0.00	$0.00
13	2014	No	Security/Threat Protection	Yearly review and testing of our IS security system.	$50,000.00	$0.00	$0.00
14	2014	Yes	IS Application Development Tools	**$115,000 carried over from 2013** Software licensing tools to facilitate moving code changes from one environment to another. Change management and software source code management. Project Web Server to track programs, projects, resources, budgets and timesheets in the IS.	$115,000.00	$60,000.00	$50,000.00
15	2015	Yes	Automated expense management	Self service for employee, bencher and adjudicator expense processing including the generating of any relevant T-slips (e.g. 'Work at Home' employees requiring T2200s).	$0.00	$50,000.00	$100,000.00
16	2016	No	Implementation of Paperless Accounts Payable	Facilitate automated workflow related to the review & approval of invoices by departments.	$0.00	$0.00	$150,000.00

#	Year	Multi Year	Project Name	High Level Description	2014 Total Project Cost	2015 Total Project Cost	2016 Total Project Cost
17	2014	No	AODA Changes and Maintenance		$50,000.00	$0.00	$0.00
18	2014	No	CASL	Changes required to comply with the anti-spam legislation	$75,000.00	$0.00	$0.00
19	2015	No	Convocation and Organization IPad refresh	Project to replace out-dated IPad technology used by the Benchers and LSUC staff.	$0.00	$150,000.00	$0.00
20	2014	No	Tribunals Website	Creation of a new Tribunals website	$30,000.00	$0.00	$0.00
21	2015	No	Consolidation of Lockbox Accounts (and other modifications)	Modifications to the existing interface programs; updating templates Consolidation from two lockboxes to one lockbox	$0.00	$15,000.00	$0.00
22	2014	No	Cash Receipts Upload Program changes	Modifications to field length; error message; file extension	$15,000.00	$0.00	$0.00
23	2015	No	Electronic Distribution of Employee Paystubs	Electronic distribution of employee paystubs by either secure employee portal or implementation of ePost.	$0.00	$25,000.00	$0.00
24	2015	No	Licensing Process/Finance System Interface	Modify the interface between the Licensing Process system and the financial system.	$0.00	$100,000.00	$0.00

#	Year	Multi Year	Project Name	High Level Description	2014 Total Project Cost	2015 Total Project Cost	2016 Total Project Cost
25	2014	No	Corrections & Enhancements to Synchronization Program	Corrections and enhancements to the synchronization program that pushes information from Infinium AR to the Member database related to fee classes, billings, etc.	$80,000.00	$0.00	$0.00
26	2015	No	Middleware Vendor Replacement	We were notified at the end of January 2014 that our middleware vendor, will no longer provide support other than bug fixes until 2017. As a result, all applications residing on Linux (virtually everything) will need to be migrated over to another middleware.	$0.00	$500,000.00	$0.00
	Totals				**$3,565,000.00**	**$2,617,000.00**	**$995,000.00**
						Total	**$7,177,000**
						Less 2013 Carry-Over	**$115,000.00**
						Total Project Costs (2014 - 2016)	**$7,062,000.00**

THIS SECTION CONTAINS

IN CAMERA MATERIAL

TAB 9.3

FOR INFORMATION

TAB 9.3.1

FOR INFORMATION

OTHER COMMITTEE WORK

16. In conjunction with the Compensation Fund Committee, the Committee agreed that the model for calculating the Compensation Fund component of the annual fee and the allocation of revenues and expenses between the General and Compensation Funds should be reassessed. New cost allocation models will be prepared and presented to both the Audit & Finance and Compensation Fund Committees. Amended fee calculations, if approved, would be presented in the 2015 budget.

17. The Committee received a report on a proposed automated time and attendance solution for bencher and adjudicator remuneration. The web-based time and attendance solution will automate the current remuneration activity sheet with little change to what benchers and adjudicators are familiar with, other than the method of submission.

18. The Committee received updates to the factors used to draft the Law Society's medium-term financial plan.