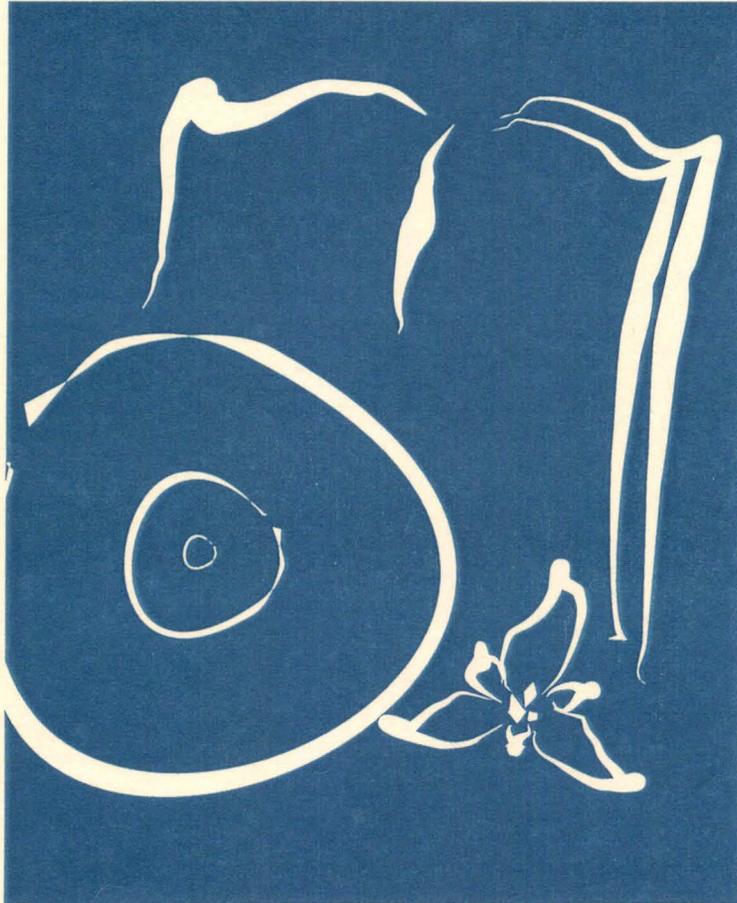




The Law Society of  
Upper Canada

Barreau  
du Haut-Canada



# Beyond 2000:

The Future Delivery of  
County Library Services  
to Ontario Lawyers

Phase III

# **Beyond 2000**

## **A Fresh Start for Ontario County Courthouse Libraries**

**Third Report of the Working Group on  
Long-Term Delivery of County and District Library  
Services – Administrative Working Group  
May, 2000**

# A Fresh Start for a New System

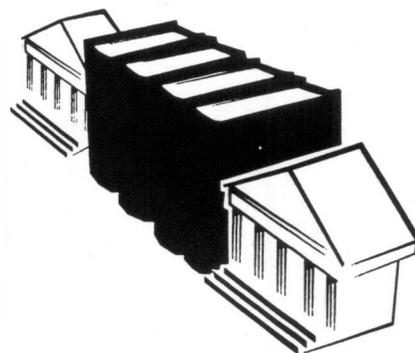
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## Chapter 1: Background & Introduction

### BACKGROUND

1. On January 23, 1998 Convocation adopted recommendations from the Professional Development and Competence Committee calling for the formation of a Working Group on the future delivery of County Law Library services (the Working Group) giving it a three-fold mandate:
  - to establish policy objectives for the libraries
  - to consider broad alternative approaches to delivery of library services in light of stated policy objectives; and
  - to consider the costs of viable alternatives.
2. Convocation has considered two reports from the Working Group: Phase 1 on October 23, 1998 and Phase II on May 28, 1999. The Executive Summaries from these reports are attached as Appendix 4 and Appendix 5.
3. A list of the motions put at Convocation on May 28, 1999 in connection with the Phase II report is attached as Appendix 1. The overall result of the motions was that:
  - i. the Blended System outlined in Phase I and II was accepted and refined;
  - ii. Universal Funding and Universal Access was adopted;
  - iii. Central Management rather than simple coordination was approved for the library system;
  - iv. A committee was to be established to recommend the vehicle for central management;
  - v. A business plan was to be created in conjunction with Law Society staff to address concerns raised by the Chief Executive Officer, John Saso;
  - vi. Funding was allocated to the two committees, loosely referred to as the Administrative Structure group and the Business Plan group
  - vii. The need for a Transitional Board to implement certain aspects of the Phase II report became superfluous.
4. As a result of the overall discussion in Convocation certain questions and issues were raised and were subsequently referred to legal counsel for an opinion by the Administrative Structure group, namely:
  - What administrative structure is most appropriate for the county library system?
  - Whether the creation of a new entity to supervise county libraries is a permissible delegation under *The Law Society Act*.
  - Whether there are any unintended consequences relating to occupancy, income tax, liability or any other issues in the model that is recommended.
  - How to amend Regulation 708 to support the new model.



5. This report is the report of the Administrative Structure Working Group established pursuant to the May 28, 1999 motions: *Beyond 2000 – A Fresh Start for Ontario County Courthouse Libraries*.
6. The Law Society CEO, John Saso, has advised the Working Group that the business plan issues with which he was concerned and upon which Convocation instructed the Working Group to consult with him, were not related to financial matters or financial viability so much as to governance. He raised the following questions as examples of the kinds of business plan questions to be addressed:
  - Who has power to set the fee?
  - Can the fee be capped at a certain level of funding?
  - Who sets the limit?
  - Can libraries operate at a deficit?
  - What happens if they do operate at a deficit?
  - What are the standards?
  - How will they be monitored and reported back to the LSUC?
  - Will there be an annual report?
  - Will there be audited financial statements?
  - Who has dominant control of the Board?
  - Who appoints to the Board?
  - What is the process for appointing and removing directors?
  - What are the limitations of liability?
7. The Administrative Structure group addresses all these questions in this report (not a separate business plan report) as they are all related to either the governance issues arising from an administrative structure or, have been addressed by the legal opinion obtained as part of that analysis.

#### **INTRODUCTION**

8. Moving ahead with the "blended system" that was adopted by Convocation in October, 1998 requires an administrative structure, with a clear decision-making framework. Accordingly, Phase II of Beyond 2000 recommended that a corporate board, independent from the Law Society, (and provisionally known as "LibraryCo") be created to administer and manage the county library system. The board would replace the existing administrative structure comprising a loose partnership of the Law Society and its various committees, the 48 individual county law library associations, and CDLPA and its various committees. Under the current structure any and each of the above-mentioned disparate groups has direct, uncoordinated, and unclear input into the operation of the local library, making accountability for the system both ad hoc as well as diffuse. As a result there is actually no one "in charge" of the county law libraries and there is no defined role for any of these groups, so that everyone *feels* in charge and at the same time each recognizes that no one is running the system overall.
9. A corporate board was determined to be the preferred vehicle for centralized management of the library system for the reason that in addition to providing a fresh start for a new system and connoting a business-like approach to its administration, it has the advantage of:

- providing well-understood institutions for governance with clear accountability for directors and a better focus for interested constituencies;
- being an effective vehicle for organizing ownership and management;
- creating a distinct entity for governance with a clear legal status and the ability to hold assets and employ staff; and
- providing independence from existing, historical relationships as well as funding bodies.

10. The Administrative Structure Group also considered the risks associated with a formal corporate structure. Ultimately it determined that these were not serious enough to warrant abandoning its recommendation given the considerable benefits as noted above. The principal disadvantages of a corporate entity are summarized below, namely:

- **Advocacy and conflict.** There is a risk that Convocation as the virtual sole-source funder of LibraryCo will be under pressure to increase its contribution to the county library system and that LibraryCo may engage in advocacy to encourage the Law Society to loosen its purse strings. In fact, historically this type of pressure has always existed. It is difficult to ascertain how a corporate entity over which the Law Society would exercise significant influence in the selection of its directors could possibly exacerbate a conflict that already exists under the current administrative arrangement wherein the Law Society has no influence whatsoever over the advocates. The Working Group concluded that the risk of conflict has the potential to exist under any administrative model.
- **Loss of control.** As the sole-source funder, the Law Society derives its power over LibraryCo from its control over the purse strings. The Law Society would set the conditions with which LibraryCo must comply in order to qualify for continued funding. Only the Law Society has the power to collect fees for the purpose of maintaining and operating county libraries. Effectively, the Law Society would exercise control through the budget and board selection process.

11. The Administrative Structure Group retained Lorie Waisberg of Goodman, Phillips & Vineberg to provide a legal opinion to address specific issues raised by Convocation in May 1999. These issues are discussed in Chapter 3. In his opinion letter, Mr. Waisberg:

- concurred with the Administrative Structure Working Group's recommendation that a corporate board is the preferred entity for administering the county library system;
- determined that there are no legal barriers to the incorporation of "LibraryCo." as a distinct corporate entity; and
- made several new recommendations to strengthen the governance of "LibraryCo.", all of which were adopted by the Administrative Structure Group and incorporated into the recommended governance structure discussed in Chapter 4.

12. A summary of the major differences between the way county law libraries are currently administered and the proposed method of administration as set out in the Phase I, II and III reports is attached as Appendix 2.

## Chapter 2: Policy Issues before Convocation

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13. Convocation is requested to consider this report and, if appropriate,

- a. approve the report, including the recommendations for the governance structure set out in Chapter 4;
- b. authorize the drafting of amendments to Regulation 708 to remove provisions relating to county law libraries;
- c. approve the making of a By-law on county law libraries to include, among other provisions,

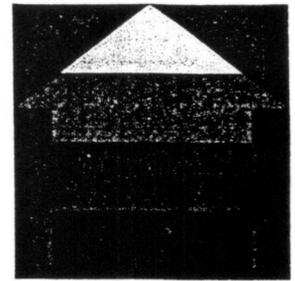


- (i) an obligation on the Society to establish a corporation under the *Ontario Business Corporations Act*, consisting of fifteen directors;
  - (ii) A description of the share structure of the corporation, including the number of classes of shares, the rights, etc. attaching to each class of shares, and the holders of each class of shares;
  - (iii) a list of the objects of the corporation;
  - (iv) a requirement on the corporation to submit to Convocation an annual report, which includes audited financial statements, and an annual budget;
  - (v) a provision that county law libraries shall be operated by their associations in accordance with policies, priorities, guidelines and standards established by the corporation;
  - (vi) a provision, carried over from Regulation 708, dealing with the "ownership" of the library materials of the county law libraries;
  - (vii) a provision dealing with access to county law libraries (the "universal access" provision);
  - (viii) a provision specifying that the money required for the purposes of the corporation shall be paid out of money appropriated therefore by Convocation; and
  - (ix) a provision permitting Convocation to suspend or reduce funding of the corporation in specified circumstances.
- d. authorize the Law Society to enter into a unanimous shareholders agreement with respect to the corporation

## Chapter 3: Key Issues Concerning Governance

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14. The legal opinion of Lorie Waisberg of Goodman, Phillips, Vineberg is attached as Appendix 3. It fully addresses the questions put by Convocation in May, 1999 and outlined in Chapter 1. A summary of the opinion follows.



### Preferred Structure

15. Convocation asked the Working Group to explore with counsel what administrative structure should be employed to accomplish the objective of central management of county libraries.
16. Convocation had already determined that the existing "loose partnership" basis of administration for county libraries, in which over fifty different organizations have a say in the administration, should not continue. Mr. Waisberg considered that the county libraries could be supervised by any of:
- a committee of the Law Society that reports to Convocation
  - a committee composed of benchers and representatives of other constituencies (CDLPA, CBAO, OCLA, MTLA). This committee could report to Convocation and the Boards of the other constituencies.
  - a partnership of the Law Society and the other constituents.
  - a corporation.
17. For reasons cited at pages 2-3 of the legal opinion he concurred that a corporation would more likely assist in achieving the desired results for the blended library system, including providing for:
- clear lines of authority, responsibility and accountability
  - the application of uniform sets of policies, standards and procedures
  - a centralized structure to oversee implementation of policies, standards and procedures
  - the opportunity for various constituents to contribute appropriate input and influence.
18. Mr. Waisberg does however recommend several changes to the Phase II recommendations on administrative structure, resulting in clearer lines of authority and suggesting the corporation be incorporated under the *Ontario Business Corporations Act* rather than the *Corporations Act*. He also recommends the addition of a Nominating Committee to appoint directors to the Board. Chapter 5 outlines in more detail the various administrative options considered by the Working Group and by Mr. Waisberg.

### Delegation of Power

19. Convocation directed the Working Group to obtain a legal opinion on the following: Is the creation of a new entity to manage county libraries a permissible delegation under *The Law Society Act*?

20. According to a review of the common law undertaken by Mr. Waisberg, there are two main factors to consider in determining whether delegation can be implied in cases where the legislation does not permit it:
- The nature of the delegated power; and,
  - The degree of control which the delegating authority retains over the recipient of the delegated power.
21. It is the opinion of Mr. Waisberg that the creation of Library Co. (working name only) on the basis that it will manage county libraries and library expenditures on behalf of the Law Society within the policies articulated in the Phase I and Phase II reports would be permissible because,
- the discretionary power that would be afforded to "LibraryCo." is *administrative* in nature, not legislative, judicial or quasi-judicial; therefore, the power to delegate is implied. "LibraryCo." will manage the county law libraries and library expenditures on behalf of the Law Society within the policies articulated in the Phases I & II reports. Further, this delegation would not be permanent;
  - the Law Society retains a significant degree of control over the recipients through the budget and board selection process. The Law Society ultimately approves "LibraryCo.'s" budget and exercises significant influence in the nomination and selection of directors;
  - while the power of benchers to delegate their authority with respect to county law libraries is not expressly provided for in the *Act*, there is nothing in the relevant sections of the *Act* or Regulation 708 expressly forbidding such delegation.

#### **Unintended Consequences**

22. In May, 1999 Convocation was also concerned to know whether there are any unintended consequences relating to occupancy, income tax, liability or any other issues in the model that is recommended. Accordingly Mr. Waisberg was asked to determine this issue separately from the question of which structure ought to be employed. Then, he was asked to specifically address whether the use of a corporation would create any unintended consequences.
23. He advised that the prospect of unintended consequences would be minimized to the extent that the new structure introduced minimal changes to the current practice. In order to perform its function pursuant to the policies, standards and procedures articulated by the Law Society in Phases I & II, it is not necessary for LibraryCo. to acquire collections, directly employ county library staff or operate any county libraries which would continue to be run by the local association. As such LibraryCo. would not be liable for the obligations and activities of a local association or its library. This structure, according to the opinion provided by Mr. Waisberg, minimizes occupancy, income tax and liability issues.
24. The key element of his opinion, which was not articulated clearly in the Phase II report, is that LibraryCo would not acquire any of the county law library assets, it would merely supervise the management of the system.

**Regulation 708**

25. Currently, regulation 708, passed pursuant to the *Law Society Act*, governs funding for county libraries and matters related to the County and District law Associations. Under the recently amended *Law Society Act* most powers of the Society are exercised through by-laws. Given the decisions made by Convocation to adopt the new blended system and implement Universal Funding and Universal Access for county libraries, Mr. Waisberg was asked to review regulation 708 and recommend how it ought to be amended (or repealed) and how it might work with the Law Society by-laws in order to implement those policy decisions.
  
26. To provide for both universal access and universal fees Mr. Waisberg recommends that the Law Society establish the new county library system under the management of LibraryCo. by by-law passed under the authority of Section 62(.01)27 of the *Act*. Further, Mr. Waisberg recommends that the sections of the regulation that deal with county libraries be repealed. The balance of the regulation, dealing with law associations, would continue in force.

## Chapter 4: Governance Structure

27. **Type of Entity.** The Administrative Structure Group with the concurrence of Mr. Waisberg recommends that an independent corporate entity—provisionally known as LibraryCo—be created to manage the new blended county library system.



28. **Incorporation.** Counsel recommends and the Administrative Structure Group agrees that LibraryCo. be incorporated under the *Ontario Business Corporations Act*. Notwithstanding that its purpose is to govern profit-making corporations, the OBCA was deemed by counsel to be the preferred vehicle for incorporation for the following reasons:

- a. it is a more modern statute with which the participants will be more familiar
- b. it is more flexible.

29. **Ownership.** As the Law Society is providing the funds to be administered by LibraryCo. it is recommended that the Law Society own the common shares of LibraryCo.. CDLPA, its partner in this venture, would be issued a separate class of shares that would permit it to elect one director.

30. **Governance as a system.** LibraryCo is part of an overall governance system in which it shares authority and responsibility with other critical parts of the system and where the relationships with those other parts are often crucial to their effective operation. The components of that system are represented graphically to the right. The five groups that make up the system (Convocation, shareholders, the Board, management and the county libraries) are represented as a series of overlapping spheres, each representing a delegation of power and authority beginning with Convocation and flowing from the owners (the shareholders or the “profession”) down to the county libraries, with accountability flowing back up through LibraryCo management, the board, the owners and eventually to Convocation. The overlapping nature of the components means they are interdependent, and must function together for the same purpose for the system to work well.



31. **Accountability.** In keeping with delegated arrangements of this nature, LibraryCo is set up to be independent of the day-to-day involvement of the Law Society. It is intended to have the flexibility and the freedom to take reasonable risks and adopt innovative ways of delivering the objectives set out for the blended library system. At the same time, LibraryCo must be held accountable by those who have given it power. LibraryCo carries out an

explicit purpose under Convocation's mandate to advance professional competence and Convocation therefore will maintain a strong, ongoing interest. LibraryCo's autonomy and flexibility must be balanced with appropriate and adequate accountability to Convocation. In using delegated arrangements, Convocation must ensure that members' money is being spent for intended purposes, that its authority is being exercised properly and that the objectives of the blended system are being achieved efficiently.

32. **Governing framework.** In order for Convocation to ensure that the flexibility LibraryCo needs to work efficiently is balanced with the requirements of good governance and accountability its governing framework must provide for,
- clarity of roles and responsibilities of LibraryCo and the Law Society;
  - appropriate reporting to Convocation and the membership on the extent to which LibraryCo. has achieved its policy purpose and on the expenditure and investment of Law Society monies and the stewardship of members' assets;
  - mechanisms to measure performance of LibraryCo;
  - adequate transparency of important decisions on the management and operations of LibraryCo;
  - formal mechanisms and guidance to resolve disputes; and
  - means to deal with non-performance and termination of the delegated arrangement.
33. **Role of LibraryCo. and the Law Society.** LibraryCo is a delegated arrangement whereby a non-LSUC entity exercises discretionary authority in the administration of library programs and services within the broad policy framework known as the "blended system", developed by a committee of the Law Society in partnership with CDLPA and approved by Convocation in May 1999. Only the Law Society, in consultation with CDLPA, has the authority to establish or change the policy framework under which LibraryCo operates.
34. **Responsibility of LibraryCo and the Law Society.** The legal duty of LibraryCo is to manage the county library system in accordance with the objectives, policies and principles of the blended system. LibraryCo cannot alter the system's objectives, policies or principles without express permission from both Convocation and CDLPA. Convocation's responsibility is to ensure that LibraryCo achieves its policy purpose.
35. **Reporting to Convocation.** The Law Society approves LibraryCo's budget and has the authority to review and approve corporate plans including business plans, management financial reports, financial statements and budget requests. In addition, the Chief Financial Officer of the Law Society may, from time to time, request on Convocation's behalf access to corporate information that is relevant to ensuring that LibraryCo's resources are being allocated judiciously and appropriately.
36. **Transparency and Reports.** Delegated arrangements distance the delivery of programs from direct control of Convocation. Without direct control, provisions need

to be made for enhanced transparency, including access to corporate information that is relevant to the delivery of library services. LibraryCo. must make an annual report to its funding bodies and to the users of the system. The annual report must provide full financial and budget information — including audited statements — and detail the major activities of the previous year. It must also outline long range planning activities for the system. In addition to annual reports, LibraryCo. shall make such periodic and special reports as may be necessary to properly inform all relevant constituencies of key activities and significant developments affecting the library system, its viability and its ability to delivery library services as required by the policies.

37. **Performance.** LibraryCo shall establish key measures to assess its overall performance in achieving the policy objectives of the blended library system. Key performance measures will be established in the following areas:

- Compliance with standards in the areas of information, reference and research services, staffing collections, physical facilities, operations, budgeting, technology and equipment;
- Service quality in county libraries;
- The extent to which accessibility and distribution of legal information throughout the province is enhanced;
- Client satisfaction: library user information on satisfaction levels; and
- Efficiency of program delivery.

Reporting of corporate performance measures to the Law Society on an annual basis as part of the budget approval process shall be a requirement of funding for LibraryCo.

38. **Provision for non-performance and adjustment by Convocation.** The Law Society must be able to take corrective action if and when the arrangements with LibraryCo stray from their intended purpose or when circumstances alter or invalidate their purpose. Each year, once the guidelines for the membership fee have been established, the Law Society shall communicate these guidelines to LibraryCo in writing—clearly setting out both the financial parameters and any adjustments to the broad policy framework under which LibraryCo is to prepare its corporate plan and budget for approval by Convocation. In the event of non-performance, the Law Society's main instruments of influence are the position of its appointees on the board of LibraryCo and the allocation of its operating budget. Ultimately, the priorities and direction of delegated arrangements can be adjusted by withholding payments or attaching new conditions.

39. **Size of the Board.** The optimum size of a board depends upon the circumstances of the organization. It is recommended that LibraryCo. comprise an uneven number of 15 voting directors in order to,

- provide sufficient breadth to accommodate the interests of various legitimate constituents;
- facilitate majority voting; and
- provide sufficient people to staff board committees.

40. **LSUC Director of Libraries.** The Working Group agreed that the Law Society's Director of Libraries should be an appointee to the board of LibraryCo. by virtue of office. All but one member agreed that the appointment ought to be a voting position, recognizing that on occasion the Director of Libraries might need to declare a conflict of interest and not vote on that occasion. One member of the Working Group was of the view that the appointment ought not to be a voting position as it would put the Director of Libraries in the position of having to vote in the best interest of LibraryCo. even if that interest conflicted with the best interest of the Law Society, an untenable position in which to put a Law Society employee. While the majority of the Working Group felt such conflict would be minimal and could be resolved by declaring a conflict of interest.
41. **Method of and Criteria for Appointment.** Directors would be appointed in the manner set out below which has been amended in accordance with the recommendations of Mr. Waisberg.

| Appointing Entity   | No. of Directors | Criteria for Appointment   | Procedural Matters  |
|---|------------------|--|---|
| LSUC  | 1                | Affiliation  | Direct appointment  |
| CDLPA*  | 1                | Affiliation  | Direct appointment  |
| MTLA  | 1                | Affiliation  | Direct appointment  |
| OCLA  | 1                | Affiliation  | Direct appointment  |
| LSUC-Director of Libraries  | 1                | Affiliation  | Ex officio  |
| LibraryCo. Nominating Committee (comprising LSUC & CDLPA directors only)<br><br>* If CBAO and CDLPA merge then there is 1 director appointed by the merged organization and therefore 10 remain for the nominating committee. If there is no merger then each of CDLPA and CBAO appoint 1 director, leaving 9 positions to be filled by the nominating committee. | 9 or 10*         | Must meet standards for directors as set out in Phase II and paragraph 44. | Joint appointments made by consensus and based on recommendations received from LSUC and CDLPA. |

42. **Role and Composition of Nominating Committee.** Mr. Waisberg recommends the appointment of a nominating committee to see to appointment to the Board. The nominating committee of LibraryCo. will comprise two directors: one a direct appointee of the Law Society and the other a direct appointee of CDLPA. The nominating committee's role is to;

- select 9 or 10 suitable board candidates based on the criteria set out in paragraph 44;
- ensure balance and representation of constituencies among directors;
- ensure appropriate expertise and experience is represented on the board by considering a wide array of candidates including those outside of the legal profession;
- advertise for board candidates;
- give fair consideration to all who express an interest in or commitment to serving on the board; and
- evaluate the contribution of each board member.

43. ***Term of Appointment.*** Appointments to LibraryCo. should be for staggered terms of three years to preserve experience while introducing new energies and ideas on a regular basis. Initial appointments will need to be for various terms (1,2 and 3 years) to begin the process.

44. ***Qualities and Competencies of Directors.*** The standard for appointment to the board is to be related to library knowledge and interest. In order to provide informed guidance and support, the 10 directors not appointed on the basis of affiliation must have the following qualifications in order to be considered for appointment by LibraryCo.'s nominating committee:

- Knowledge of and interest in county law libraries;
- Knowledge of the community being served and its changing needs;
- Awareness of changing delivery methods (technology);
- Willingness to acquire familiarity with Phase I & II reports and decisions made by Convocation;
- Time to devote to meetings of the board in person;
- Geographic representation; and
- Ability to make decisions independently of any particular organization.

45. ***Role and Reporting of Managing Officer.*** The key to success of the blended system and of LibraryCo. is the newly created position of the Managing Officer of County Libraries who will report to the board of LibraryCo.. The Managing Officer's duties will include;

- planning and development for ongoing growth and operation of the library system;
- gathering and coordinating system-wide statistics;
- system budget preparation/assisting local associations as requested with local budgets;
- ensuring that standards for each category of library are met and maintained and assisting with attainment of standards where requested to do so by local associations;
- communication of policies and procedures;
- hiring other administrative office and clerical staff;
- providing local associations with assistance as requested in hiring/managing staff;

- personnel administration as determined in conjunction with local associations;
- seeking/monitoring sources of funding;
- financial reporting, accounting, budgeting and administration;
- liaising with the board and preparing agendas for board meetings;
- public relations/communication of information for system;
- ensure cooperation/smooth exchange of materials/reference services between libraries;
- ensuring continuing education opportunities for all staff in the system;
- monitoring/overseeing collections of materials (all formats) within the system;
- leading in the advancement of the distribution of legal information to all users, wherever they may be located in the province; and
- involvement with professional associations.

46. **Qualifications of Managing Officer.** The Managing Officer will become an expert on county law libraries and the blended system. S/he will advise the board of LibraryCo. on issues emerging in the system and will help lead the libraries into the next century. Strong administrative and management skills will be required. In addition to the above qualifications, the Managing Officer will possess,

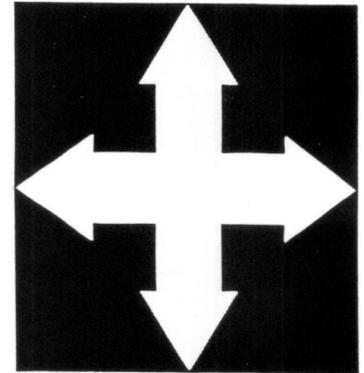
- an MLS or MLIS;
- law library experience an asset;
- broad knowledge and experience of library procedures;
- knowledge and experience of law library related technology and electronic information sources;
- knowledge of legislation affecting law libraries;
- supervisory/administrative experience;
- budgeting/financial planning experience; and
- management of multi-branch organization at a senior level is desirable.

47. **Board Meetings.** Initially, LibraryCo. will meet at least monthly to establish the organization. It is expected it will meet at a minimum on a quarterly basis once the system is fully established.

48. **Board Committees.** It is expected that LibraryCo. will establish small, specialized committees on audit, standards, collections and technology that will meet 4-6 times per year as required. Outside expertise will be added to these committees (e.g. accountant).

## Chapter 5: Summary of Governance Options Considered

49. Adopting the approach of many governments and governing-bodies in a large number of jurisdictions, the Administrative Structure Group examined and inquired into a wide variety of approaches to program and service delivery for the country library system. In reviewing the options available, and in departing from traditional models of delivery, the Working Group sought to balance the potential for greater efficiency, accountability, flexibility, participation and representation, member satisfaction and the protection of shareholder interest.



50. The options considered by the Working Group and evaluated by Mr. Waisberg in his legal opinion are summarized below.

| Type of Arrangement  | System Results  |
|--|---|
| <p><b>Corporation</b> - e.g. independent board (LibraryCo) incorporated under the OBCA. This is a delegated governance arrangement. The Law Society, within the policy framework it has set out under the blended system, delegates key planning and operational decisions to the discretion of an independent board, LibraryCo.</p> | <ul style="list-style-type: none"> <li>▪ provides for a balance of power among shareholders, management, county libraries, LSUC</li> <li>▪ corporate structure provides for strong accountability inside the corporation</li> <li>▪ legal base provides for well recognized roles, accountabilities and institutions for governance</li> <li>▪ board will attract better directors than committee structures contemplated under the traditional or collaborative models</li> <li>▪ a board of LSUC and CDLPA representatives stands a better chance of enforcing county library compliance with uniform set of policies, standards and procedures than a committee of Convocation or a collaborative body</li> <li>▪ arms length arrangement means LSUC has less direct control-- delegated arrangements distance the delivery of LSUC policy from direct control and accountability to Convocation so more financial controls are required</li> <li>▪ transparency to LSUC is not assured</li> <li>▪ may create an advocate for increasing spending for library services that may place LibraryCo in conflict with Convocation as the holder of the purse strings</li> </ul> |
| <p><b>Traditional LSUC</b> - e.g. Committee or sub-committee of Convocation that reports directly to Convocation through a bencher-chair. Composition could include benchers and representatives of other</p>  | <ul style="list-style-type: none"> <li>▪ contrary to policy adopted in Phase I and confirmed in Phase II</li> <li>▪ creates a new committee</li> <li>▪ will perpetuate multiple systems as local libraries and associations need inputs too – a vote in committee will not be seen as participation</li> </ul>  |

| Type of Arrangement  | System Results   |
|--|--|
| <p>constituents (CDLPA, CBAO, OCLA, MTLA) or, could be solely a committee of benchers. Library programs and services from the Great Library have traditionally been delivered to counties by the LSUC by departments that report through the CEO directly to Convocation.</p>  | <ul style="list-style-type: none"> <li>▪ CDLPA input is sought and used at the LSUC's discretion—CDLPA have no official standing before Convocation so local library issues will be presented indirectly</li> <li>▪ full control by Law Society—maximum accountability to LSUC</li> <li>▪ full access to information by LSUC but not others necessarily</li> <li>▪ transparency of the management and operations of the county libraries is at risk</li> <li>▪ sole discretion in making policies and decisions rests with LSUC</li> </ul>   |
| <p><b>Enhanced Partnership or Enhanced Status Quo</b> - e.g. an association between the LSUC, CDLPA, OCLA and MTLA. This could be achieved through a committee reporting to Convocation and the boards of the other constituencies. Under this arrangement, the LSUC shares policy formulation, risk and operational planning, design and management with other parties.</p> | <ul style="list-style-type: none"> <li>▪ recognizes the interdependence between the LSUC and the counties in the successful delivery of library services</li> <li>▪ provides constituents with opportunity for input and influence</li> <li>▪ greater participation from all partners enhances quality of decision-making and buy-in</li> <li>▪ perpetuates loose partnership arrangement that currently exists (described in both the Phase I and Phase II reports) wherein lines of accountability, authority and responsibility are unclear</li> <li>▪ risk of power vacuum—reporting to dual boards could slow down decision-making, creating bottlenecks and paralyzing the business of county libraries</li> <li>▪ no mechanism for resolving impasses or disputes between entities</li> <li>▪ diffuse accountability</li> </ul> |
| <p><b>Traditional Partnership</b> – create a formal partnership between CDLPA, LSUC and others to eliminate the current loose arrangement but without adding a full corporate model</p>  | <ul style="list-style-type: none"> <li>▪ outmoded form of organization prevalent in only a few industries such as farming, fishing, professional services and investments</li> <li>▪ confers primarily tax advantages</li> <li>▪ requires fresh start in discussions with possible partners to determine terms of arrangement, who partners are to be and rights of partners</li> <li>▪ may not provide adequate central management</li> <li>▪ is not well understood as a business model for complex business with multiple locations</li> </ul>  |
| <p><b>Status Quo</b> - any, all and each of the following have direct, uncoordinated and unclear input to the operation of the local library and the distribution of the central funds collected by the Law Society</p>  | <ul style="list-style-type: none"> <li>▪ Convocation has already rejected this model when it twice endorsed the Blended system model as a replacement</li> <li>▪ Reasons for rejecting the Status Quo then and now include:</li> </ul>   |

| Type of Arrangement  | System Results  |
|--|---|
| <ul style="list-style-type: none"> <li>• 48 local association library committees with local lawyers</li> <li>• each of the local county law librarians</li> <li>• a CDLPA library funding committee</li> <li>• a full CDLPA library committee of over 25 members</li> <li>• executive members of the library committee (who meet together and with the Law Society's Director of Libraries)</li> <li>• the benchers on Professional Development and Competence Committee</li> <li>• various library working groups of PD &amp; C</li> <li>• Convocation</li> <li>• CDLPA sitting in Plenary session twice a year</li> <li>• The Ontario Courthouse Librarians Association</li> </ul> <p>This list does not include other groups that influence or directly affect the county libraries such as the Law Foundation of Ontario, QL Systems, the major legal publishers, staff of the Law Society, the Canadian Bar Association - Ontario, the Ministry of the Attorney General, Ontario Realty Corporation, library users and other library communities.</p> | <ul style="list-style-type: none"> <li>• there is no systematic approach to the provision of library services across the province, even though some individual county libraries provide excellent service to members</li> <li>• There is actually no one "in charge" of the county law libraries</li> <li>• there is no defined role for any of the groups outlined above, so that everyone feels they are in charge and at the same time recognize that no one is running the overall libraries</li> <li>• lack of clarity and precision in responsibility and accountability cannot continue given the commitment to a system of libraries</li> <li>• a single group has to be accountable to the profession and to Convocation for the success or failure of the Blended System. This is particularly so if there is a decision to adopt universal funding for libraries.</li> <li>• a \$6 million budget cannot be successfully administered and governed by the loose structure of disparate groups currently operating</li> </ul> |

## Chapter 6: Conclusion

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51. The governance arrangement Convocation is being asked to enter into with LibraryCo is expected to be in operation for a number of years and as such its provisions and practices for accountability and good governance will continue to evolve. New and unique approaches to delivering services require Convocation to be vigilant about how and to what extent it wishes to scrutinize the way in which delegated authorities are delivering programs funded by the profession's fees.
- 
52. The concerns expressed by Convocation in May, 1999 have been fully investigated and resolved through the advice of legal counsel. There are no legal impediments to creating LibraryCo. and, in fact, it is the model recommended by counsel, with some important adjustments from the Phase II proposal such as incorporating under the OBCA, using a Nominating Committee and having two classes of shares. The most significant clarification the Working Group can make for members of the profession and for Convocation is that the administrative arm of county law libraries, LibraryCo., will be a supervisory/management vehicle and will not receive a transfer of assets or of any liabilities. Local autonomy is very much preserved while creating a means for central accountability. It is simply a more efficient way of administering the complex, \$6 million system of county law libraries.
53. Attached as Appendix 2 is an overview of the most significant administrative and governance differences between the current method of operation for county law libraries and the proposed method outlined in Phases I, II and III. To avoid repetition it does not contain all the many recommendations of the Phase I and II reports but only the significant administrative highlights. The Executive Summaries from the Phase I and II reports are set out in Appendices 4 and 5.
54. The Administrative Structure Working Group has made a conscious effort to systematically consider the essential elements of reporting, accountability mechanisms, transparency and protection of members' interest when designing LibraryCo. The Working Group believes that the use of a structured approach, based on the governance framework we have suggested will guide the Law Society in addressing the needs of Convocation and the membership and still allow for the creation of an innovative, flexible arrangement for the provision of library services.
55. Convocation is requested to consider this report and, if appropriate,
- a. approve the report, including the recommendations for the governance structure set out in Chapter 4;
  - b. authorize the drafting of amendments to Regulation 708 to remove provisions relating to county law libraries;
  - c. approve the making of a By-law on county law libraries to include, among other provisions,

- (i) an obligation on the Society to establish a corporation under the *Ontario Business Corporations Act*, consisting of fifteen directors;
  - (ii) A description of the share structure of the corporation, including the number of classes of shares, the rights, etc. attaching to each class of shares, and the holders of each class of shares;
  - (iii) a list of the objects of the corporation;
  - (iv) a requirement on the corporation to submit to Convocation an annual report, which includes audited financial statements, and an annual budget;
  - (v) a provision that county law libraries shall be operated by their associations in accordance with policies, priorities, guidelines and standards established by the corporation;
  - (vi) a provision, carried over from Regulation 708, dealing with the "ownership" of the library materials of the county law libraries;
  - (vii) a provision dealing with access to county law libraries (the "universal access" provision);
  - (viii) a provision specifying that the money required for the purposes of the corporation shall be paid out of money appropriated therefore by Convocation; and
  - (ix) a provision permitting Convocation to suspend or reduce funding of the corporation in specified circumstances.
- d. authorize the Law Society to enter into a unanimous shareholders agreement with respect to the corporation.

# APPENDICES

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# APPENDIX 1

## Motions in Convocation May 28, 1999 Phase II County Libraries Report

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1. Should Convocation approve the further description of the blended system and the description of the operation as referred to on page 62 and referred to throughout the report?

Carried unanimously.

2. Should there be universal funding and universal access?

Carried unanimously.

3. Should there be central management of the library system or simply coordination?

Central Management - carried

4. Should there be a committee established, staffed by persons selected by the Treasurer in consultation with Ms. Elliott, to recommend to Convocation the vehicle for central management?

Carried. One abstention.

5. Should there be a business plan developed by Law Society staff in conjunction with the committee that created the report?

Carried

6. Should a transition group be established today?

Defeated.

7. If yes, what should the powers be of the transition group?

No vote taken as a result of the vote in motion 6.

8. Should \$368,000 be allocated today to the transition group?

No vote taken as a result of the vote in motion 6.

9. That the business plan committee have a budget of \$150,000 and the committee looking into the structure have a budget of \$75,000, each to be paid from the library funds.

Carried.

## APPENDIX 2

| Current Administration<br>of County Courthouse Law Libraries   | New Model of Administration<br>of County Courthouse Law Libraries  |
|--|--|
| <ul style="list-style-type: none"> <li>• Ad hoc loose association between libraries</li> <li>• No Standards</li> <li>• No accountability to LSUC, only local</li> <li>• Muddled unclear accounting</li> <li>• All decisions made at local level</li> <br/> <li>• Difficult decisions are not being made</li> <br/> <li>• Independent County Law Associations</li> <li>• Inconsistencies between libraries of similar size</li> <br/> <li>• Reg. 708 alone, out of date with policies</li> <br/> <li>• Partnership - loose arrangement</li> <br/> <li>• Performance issues reviewed, if at all, at local level</li> <br/> <li>• Staff hired without qualifications being specified, many have no job descriptions, resulting in a huge discrepancy in standards of service</li> <br/> <li>• Salaries for similar responsibilities vary widely</li> <br/> <li>• Libraries inadequately staffed to suit needs</li> <br/> <li>• Some training for lawyers</li> </ul> | <ul style="list-style-type: none"> <li>• Managed system of libraries</li> <li>• Standards</li> <li>• Accountability to Convocation</li> <li>• Financial transparency</li> <li>• System requirements made by a Board representative of all shareholders overseeing total needs</li> <br/> <li>• Library Co. will make the difficult decisions and bear the consequences for these</li> <br/> <li>• Independent County Law Associations</li> <li>• Benefits of having a system and providing access to materials and services to all members</li> <br/> <li>• Reg. 708 amended by Law Society by-law, only clauses relating to Associations retained</li> <br/> <li>• Corporation under OBCA with LSUC owning common shares and CDLPA preferred shares</li> <br/> <li>• Performance requirements part of mandate</li> <br/> <li>• Clear job descriptions for staff in different sizes of libraries. Requirements for staffing in various libraries stated, expectations of performance articulated to staff and staff performance evaluations done</li> <br/> <li>• Salaries will be standardized at appropriate levels and staff will be remunerated fairly</li> <br/> <li>• Libraries appropriately staffed</li> <br/> <li>• All lawyers receive necessary training</li> </ul> |

## APPENDIX 3

# GOODMAN PHILLIPS & VINEBERG

BARRISTERS & SOLICITORS

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May 3, 2000

Our File No.: 99-4088

Law Society of Upper Canada  
Osgoode Hall  
130 Queen Street West  
Toronto, ON  
M5H 2N6

Attention: Mr. Richard Tinslev, Secretary

Dear Sirs:

Re: County Library System

On May 28, 1999, Convocation considered the Phase II Report on Libraries and approved the principle of central management of the county library system. Some issues have arisen with regard to the structure and governance of the vehicle for central management and you have asked for my opinion on some of these matters.

### 1. PREFERRED STRUCTURE

You have asked for my views on the preferred structure for the central management of the county library system. Structural and governance issues are dealt with at Paragraphs 171 through 198 of the Phase II Report.

#### Preferred Entity

The county libraries could be supervised by:

- a committee of the Law Society which reports to Convocation;
- a committee composed of Benchers and representatives of other constituents (County and District Law Presidents' Association ("CDLPA"), Canadian Bar Association, Ontario ("CBAO"), Metropolitan Toronto Law Association ("MTLA") and Ontario County Librarians Association). This committee could report to Convocation and the Boards of the other constituents;
- a partnership of the Law Society and the other constituents;
- a corporation. The corporation could be a non-profit corporation without share capital incorporated under *The Corporations Act* (Ontario) (the "Corporations Act")

or a corporation with share capital incorporated under *The Business Corporations Act* (Ontario) (the "OBCA").

One of the principal problems addressed by the Phase I and Phase II Reports was that the county libraries were being governed by a loose partnership of the Law Society, the individual County Law Associations and the CDLPA. Lines of authority, responsibility and accountability were not clear. The county libraries needed a uniform set of policies, standards and procedures. It was felt that uniform policies, standards and procedures could best be implemented through some entity that would permit centralized supervision while at the same time giving the various constituents appropriate opportunity for input and influence. While each of the options identified above could be fashioned to achieve the objectives, the use of a corporation seems more likely to assist in achieving the desired results.

One hundred fifty years ago most enterprises were organized as proprietorships or partnerships. Over the last 150 years, the corporation has become the predominant entity for organizing enterprises. Today, very few enterprises employ a non-corporate entity. Examples of the use of a non-corporate form may be found in a few industries such as farming, fishing, professional service and investments. For farmers and fisherman, size and tax considerations usually dictate the proprietorship form. If it is a one-person business, simplicity usually dictates a sole proprietorship. Professional service organizations tend to be organized as corporations if there are more than a few professionals associated unless regulatory requirements otherwise dictate (as they do for lawyers and accountants in Ontario). Certain investment vehicles are organized as trusts or partnerships usually so that investors can receive conduit tax treatment. The fact is that today very few organizations of any size, complexity or capital are organized in any form other than the corporate form. This is not an accident. There are a number of reasons why the corporate form is generally preferred. Some of the reasons that may be relevant in this case are:

- A corporation has well understood institutions for governance: the shareholders elect directors, receive stipulated information (including audited financial statements) and approve fundamental changes; the board of directors supervises management; and management runs the day-to-day affairs of the corporation subject to board supervision.
- The corporation has proven to be an effective vehicle for organizing ownership and management. Most sophisticated organizations operate in the corporate form. By institutionalizing the separation of i) ownership, ii) direction and control and iii) management and implementation, the corporation provides useful machinery for organizing and co-ordinating activities. The predominant use of the corporate vehicle for owning and managing large businesses has encouraged the development of clear lines of power, authority, responsibility and accountability.
- The corporation creates a distinct entity for the activity. This gives the corporation a degree of permanence and stability not enjoyed by other forms of entity.

- Modern corporation statutes provide the flexibility to achieve different governance objectives (e.g., class votes for directors and unanimous shareholder agreements). Moreover, corporations can be transformed to respond to changed circumstances.

For the foregoing reasons, I concur with the recommendations at Paragraph 171 that the best vehicle for overseeing the county library system is a corporation. In the balance of this opinion, I have assumed that this recommendation will be accepted and refer to the entity that will manage the county library system as "Libraryco".

Focusing the responsibility for managing the county library system on Libraryco may create an advocate for spending more money to maintain and improve library services to Law Society members. This may place Libraryco in conflict with Convocation as the holder of the Law Society purse strings. I suspect that any entity which effectively manages the county libraries would play this role.

If a corporation is to be utilized, should it be a corporation incorporated under the Corporations Act or the OBCA? Paragraphs 187 through 191 express a bias for a corporation without share capital. The OBCA was enacted to govern corporations incorporated for profit-making activities. Typically, not-for-profit corporations are incorporated under the *Corporations Act*. Notwithstanding, I suggest that Libraryco be incorporated under the OBCA. The *Corporations Act* has not been substantively reviewed or amended for several decades whereas the OBCA is a modern corporate statute. I recommend that Libraryco be incorporated under the OBCA because it is a more modern statute with which the participants will be more familiar. As well, the OBCA is somewhat more flexible (e.g., unanimous shareholder agreements and action by instrument in writing).

#### Board of Directors

Under Section 115 of the OBCA, "the directors shall manage or supervise the management of the business and affairs of a corporation". In discharging duties, a director is obliged to exercise "the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (OBCA, Section 134(1)(b)). Even if a director is nominated or appointed by a particular group or constituency, a director may not prefer the interests of one shareholder or constituency over another. As Farley, J. put it in *820099 Ontario v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 at p. 171:

The directors owe the duties of a fiduciary to the corporation. This duty is not owed to shareholders, even to a majority shareholder who is responsible for a directors' appointment to the board. It is true that the interests of the shareholders as a whole are usually synonymous with the interests of the corporation. . . . It is inappropriate, however, for directors to advance particular interests at the expense of the corporation. It may also be inappropriate for a director to advance the interests of one group at the expense of another, such as favouring a particular class of shareholders.

This is not to suggest that regional or occupational representation, for instance, is impermissible. Each director brings particular knowledge and skills to the boardroom. In exercising duties, each director is quite properly informed by her own knowledge and experience.

Paragraph 177 recommended a board of fifteen members with a staggered term of three years. The Toronto Stock Exchange Committee on Corporate Governance noted in 1994 that large boards are often ineffective.

If the board is too big, the individual director risks losing a sense of responsibility, may feel constrained about actively participating in board deliberations and may have little sense of personal accountability for board decisions. . . . As the number of directors on a board increases beyond a particular threshold (approximately 20), the effectiveness of the board decreases.

Some might prefer a somewhat smaller board to focus responsibility more sharply and encourage more active involvement by Board members. On the other hand, it is hard to criticize a board of 15 given the various interests that legitimately should be represented on the Libraryco board.

The idea of a staggered board for Libraryco seems warranted. It is a good way of ensuring that there is some reservoir of expertise but an opportunity to refresh the board with new appointees annually.

Paragraph 179 outlines the suggested composition of the board and a number of procedural matters. Three organizations (MTLA, OCLA and CBAO) would be entitled to appoint one director and the Director of Libraries would also be appointed as a director. The remaining 11 directors would be appointed by the Law Society and CDLPA in accordance with the criteria set out in Paragraphs 181, 185 and 198 of the Phase II Report. The Director of Libraries is the senior professional librarian employed by the Law Society. It might be argued that appointing a manager to the board of Libraryco could dilute the objectivity of the board. On the other hand, the Director of Libraries will have no operational responsibilities to Libraryco or any of the county libraries. The Director is appointed, it would seem, to recognize the importance of having available to the board of Libraryco the knowledge and expertise of the senior professional law librarian in the province.

For the appointment of the remaining 11 directors, I suggest a refinement to the recommendation put forth in Section 182. I suggest that each of the Law Society and CDLPA be entitled to appoint one director. Those two appointees would constitute the Nominating Committee of the board of Libraryco. The Nominating Committee would be authorized to choose the remaining nine directors based on the criteria set out in Sections 181 and 185. The procedure might work as follows: 60 days prior to the end of each year, the Law Society and CDLPA would, if necessary, choose their appointees. If their appointee were continuing in office, that appointee would remain a member of the Nominating Committee. The appointees would meet as a Nominating Committee to select individuals who would replace the directors whose term was scheduled to expire. The Nominating Committee might seek recommendations

from the Law Society and CDLPA and might find it advisable to advertise for candidates. The mandate of the Nominating Committee would be to identify suitable board candidates in light of the criteria suggested in Paragraphs 181, 185 and 198 of the Phase II Report. The Nominating Committee would also evaluate the contribution of each member of the board.

I recommend that the procedures for appointing the Nominating Committee and the mandate of the Nominating Committee be articulated in a unanimous shareholder agreement. The procedures and mandate should also be set out in the by-laws of Libraryco.

#### Shareholders

The Law Society is providing the bulk of the funds to be administered by Libraryco. For that reason, I recommend that the Law Society own the common shares of Libraryco. CDLPA, its "partner" in this venture, would be issued a separate class of shares which would permit it to elect one director. The mechanism for electing the board including the nominees from MTLA, OCLA and CBAO would be spelled out in a unanimous shareholder agreement between the Law Society and CDLPA.

#### 2. WOULD THE CREATION OF A NEW ENTITY TO SUPERVISE COUNTY LIBRARIES BE PERMITTED DELEGATION UNDER THE LAW SOCIETY ACT?

The general principle is that, in the absence of an express authorization to do so, the recipient of a discretionary power may not subdelegate that power to another: *delegatus non potest delegare*. However, as explained in the following excerpt from the judgment of MacKinnon, A.C.J.O. in *Peralta v. Ontario* ((1985), 7 O.A.C. 283 (Ont. C.A.), aff'd [1988] 2 S.C.R. 1045, at 292-293), this principle is simply a presumption of statutory interpretation which can be rebutted:

As Professor Willis pointed out, the maxim "delegatus non potest delegare" does not state a rule of law; it is "at most a rule of construction" and in applying it to a statute "there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects".

Where the legislation does not expressly permit delegation, a functional analysis is undertaken to determine whether delegation can be implied from the legislation. In his seminal article on the subject ("Delegatus Non Potest Delegare" (1943), 21 Can. Bar. Rev. 257), Professor John Willis posed the question as follows (at 261):

Is there anything in the nature of the authority to which the discretion is entrusted, in the situation in which the discretion is to be exercised, in the object which its exercise is expected to achieve to suggest that the legislature did not intend to confine the authority to the personal exercise of its discretion?

The two main factors in determining whether delegation can be implied are the nature of the delegated power and the degree of control which the delegating authority retains over the recipient of the delegated power.

Generally, the more significant the power, the less likely the ability to delegate such power can be implied. A significant power, for instance, would be the right to discipline a professional or make a decision that would impact property rights or values. A power to delegate will usually be found to exist by implication if the nature of the discretionary power can be characterized as "administrative". A power to delegate will usually not be found to exist where the nature of the discretionary power is characterized as "legislative," "judicial" or "quasi-judicial". The delegated discretionary power will usually be characterized as "administrative" if it involves the exercise of little or no significant discretion (*Forget v. Quebec (P.G.)*, [1988] 2 S.C.R. 90).

If the authority delegating the discretionary power retains a significant degree of control over the recipient, the delegation is more likely to be upheld (*Clark v. Canada (Attorney General)* (1977), 17 O.R. (2d) 593 (Ont. H.C.J.) at 608).

Under Section 10 of the Law Society Act (the "Act") the benchers are to govern the affairs of the Society. The phrase "affairs of the Society" has been interpreted to mean the professional or public business of the Society (*Re Law Society of Upper Canada and Attorney General of Ontario* (1995), 21 O.R. (3d) 666 (Ont. Gen. Div.) at 676-677).

The only provision of the Act which deals specifically with libraries is Paragraph 27 of Subsection 62 (0.1) which provides that Convocation may make by-laws providing for and governing libraries. The only provision of the by-laws which currently mentions libraries is Subsection 14(3) of By-Law 9 which states that the Professional Development and Competence Committee shall perform the functions assigned to the Libraries and Reporting Committee under Regulation 708. Paragraph 8 of Section 63 of the Act provides that Convocation, with the approval of the Lieutenant Governor in Council, may make regulations providing for the establishment, operation and dissolution of county and district law associations and respecting grants and loans to such associations. Regulation 708 was enacted pursuant to a predecessor of this provision. In addition to outlining the requirements for the formation and funding of county and district law associations, Regulation 708 also deals with the financing and maintenance of each association's county law library.

The majority of funds required to maintain and operate county law libraries will be provided by the Law Society. Libraryco will supervise the county law libraries and library expenditures on behalf of the Law Society within the policies articulated in the Phase I and Phase II Reports. It would appear that the powers to be exercised by Libraryco would likely be characterized as "administrative" as opposed to "legislative" or "quasi-judicial".

While the power of the Benchers to delegate their authority with respect to county law libraries is not expressly provided for in the Act or the regulations enacted pursuant to the Act, the wording used in the relevant sections of the Act and Regulation 708 do not appear to prohibit

the Law Society from delegating such authority. As I understand the plans for Libraryco, an annual (and perhaps multi-year) budget would be generated by Libraryco for approval by its board of directors and the Law Society. The Law Society will always maintain control over the funding of Libraryco. As well, the Law Society will have significant influence in the selection of the board of directors of Libraryco. Finally, Libraryco will be governed in accordance with the policies articulated in the Phase I and Phase II Reports. The use of Libraryco to supervise the management of the county law libraries subject to the foregoing constraints and controls would not be a permanent delegation of authority. Rather, through the budget and board selection process, Convocation will have the opportunity to monitor on a continuing basis the operations of Libraryco and the county law libraries. In my opinion, the creation of Libraryco for the foregoing purposes and subject to the foregoing constraints and controls would not be an impermissible delegation.

3. UNINTENDED CONSEQUENCES

You have asked me whether the creation of Libraryco to supervise the county library system might attract unintended adverse consequences such as occupancy, income tax and/or liability issues. While I am unable to speak with any professional authority on what the future may hold, it strikes me that if the new structure minimizes changes, the prospect of unintended consequences would be minimized. At the present time, the Law Society provides the bulk of the funds required to maintain and operate county law libraries. Some portion of the operating costs of each library is contributed by the local county law association. It is proposed that the Law Society assume financial responsibility for Libraryco and, through its representative on the Nominating Committee, participate in the selection of the Board of Directors of Libraryco. The board of Libraryco would set its policies, standards and procedures and supervise the management of the county law libraries. It is not necessary that Libraryco acquire the collections or become the direct employer of all of the staff who will operate the county law libraries. Rather, it would be sufficient if Libraryco derived its power over the county law libraries from its control over the purse strings. In other words, Libraryco would articulate appropriate policies, standards and procedures; a condition of a county library obtaining continuing funding would be compliance with those policies, standards and procedures. Each county library would continue to be run by the local association. Libraryco would not be liable for the obligations and activities of any local association unless by its conduct it became liable for the obligations and activities of a local association or its library. Libraryco will be the manager and administrator of the county library system; it will not operate any county libraries. I believe that this structure will minimize occupancy, income tax and liability issues.

4. REGULATION 708

Section 63(8) of the Act permits Convocation, with the approval of the Lieutenant Governor in Council, to make regulations providing for the establishment, operation and dissolution of county and district law associations. Regulation 708 was passed under the authority of this Section. Section 62(.01) 27 of the Act permits Convocation to make by-laws providing for and governing libraries. County law libraries can be regulated *by-law* while

county and district law associations can only be regulated *by regulation*. Currently, the only by-law or regulation dealing with either subject is Regulation 708 which deals with both subjects.

If no by-law is passed under the power to regulate county law libraries, all elements of Regulation 708 are probably valid.

What if the Law Society passes a by-law governing county law libraries? Such a by-law would almost certainly provide for universal access contrary to Section 34 of Regulation 708. Such a by-law might also deal with fees differently than contemplated by Section 28 of Regulation 708.

Section 62(2) of the Act provides:

The by-laws made under this section shall be interpreted as if they formed part of this Act.

This seems to mean that by-laws should be *treated* as though they were part of the Act. In other words, the by-laws would be enforced, applied and construed as operative provisions of the Act, as if they were amendments to the Act itself (rather than mere subordinate legislation). If Section 62(2) is so interpreted, conflicts between a newly enacted by-law concerning libraries and Regulation 708 (to the extent that it deals with libraries) are easily resolved. The new by-law will prevail since the new by-law must be construed and applied as if it amounted to an amendment to the Act. As a (new) amendment to an Act clearly takes precedence over an (old) Regulation, the by-law would prevail, and the old Regulation would be rendered inoperative to the extent of any inconsistency with the newly enacted by-law.

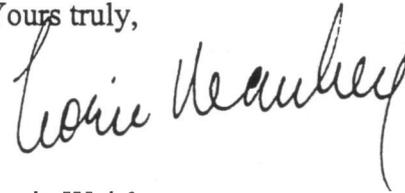
The issue then is whether the substance of the matter is libraries or county law associations. Universal access would seem to be principally related to libraries. Consequently a by-law providing for universal access would prevail over Section 34 of Regulation 708. On the other hand, fees would seem to be principally related to county law associations with the result that Section 28 of Regulation 708 would prevail.

GOODMAN PHILLIPS & VINEBERG

-9-

I recommend that the Law Society establish a new county library system under the management of Libraryco by by-law passed under the authority of Section 62(.01)27 of the Act. To avoid uncertainty, Sections 26-35 of Regulation 708 inclusive should be repealed effective on the coming into force of the new by-law.

Yours truly,

A handwritten signature in cursive script, appearing to read "Lorie Waisberg".

Lorie Waisberg

LW/mc

## Chapter 2

### EXECUTIVE SUMMARY - PHASE I

#### Format of Report

24. This report is the product of Phase I of the work of the Working Group. The work was divided into two phases, so that decisions can be obtained from Convocation on Phase I issues before Phase II begins.
25. Two distinct policy areas need to be developed by Convocation and, the order in which they should be addressed are:

#### **Phase I - Library Design**

- i. The kind of province-wide delivery of library services which should exist. This includes the structure (type and number of libraries, delivery methods for services) and the type of services (research, CLE, publications).

#### **Phase II - Funding Methods**

- ii The funding options or funding methods for such services.
26. Two major decisions are required of Convocation as part of Phase I:
  - i) **Policy Decision - System or No System:** Whether the County Libraries should become a system of libraries, rather than continue as a loose, ad hoc arrangement of libraries;
  - ii) **Design Model Decision - How to Deliver Services:** Which of the possible model or models should be further developed, in detail, as a delivery model for county library services?

#### Libraries: Competence. Research and Supporting Users

27. Possessing legal research skills and being able to adapt to changing realities of practice are part of being a competent lawyer. Law libraries provide resources and tools to develop and maintain these skills.
28. Lawyers need to be better trained and educated in the use of libraries and in how to perform legal research, including appropriately using library staff and using electronic products.
29. There are many different kinds of research. Some research is best suited to hard copy while other research is best suited to electronic products. Knowing when to use which kind of medium is something in which librarians are proficient. There are categories of reference questions which librarians can answer and

there are more complex questions for which librarians can only provide guidance to lawyers.

30. By cataloguing information and organizing collections, libraries help users access legal information. A possible emerging field for libraries is to become more active in the actual creation and dissemination of legal information, rather than simply the passive distribution of it. Continuing legal education is an area where libraries are already active and, could expand their participation as publishers or distributors, as well as facilitating users' efforts to create legal information.

#### Organization of Libraries

31. County Libraries are not presently organized as a system of libraries and do not operate in a systematic way. There is no common, co-ordinated approach to the delivery of services nor a planned organization of resources. They have been described as a "hodge podge" loose association of individual libraries run by local committees with minimal Law Society oversight.
32. The benefits of a system approach need to be counterbalanced against the loss of local autonomy. An appropriate administrative model can alleviate some of the loss of local autonomy but cannot eliminate it.

#### Industry Trends and Issues

33. All libraries are faced with the problem that the publication and cost of information is expanding faster than the ability to acquire it and the funds to pay for it. The challenges libraries have include keeping up with technology changes, dealing with a proliferation of materials, using shrinking budgets to acquire more expensive materials and adapting to information demands driven by new technologies and expectations of users.
34. These challenges are coupled with a user population which also has limited financial resources and is not equipped with the research skills required in an electronic environment.
35. Librarians are constantly acquiring new skills for retrieving information. Today, librarians need to market those skills and transfer some level of skill to users through education and training.

#### County Libraries

36. County libraries were first recognized by the Law Society in 1879 in response to complaints from outside Toronto that the facility at Osgoode Hall did not serve the "country lawyer" and, local libraries were needed. There are now 47 county libraries, funded through a mixture of money raised locally by each association and those levied by the Law Society through the annual levy or received from the Law Foundation.

37. All County Libraries are located in County Courthouses, in county towns. The courthouse space is provided rent-free by the province, through the Attorney-General. Every library has some level of staffing, ranging from part time staff with no specific library training in the small libraries to several full time professional librarians with clerical and technical staff, in the large libraries.
38. Annually, about \$6 million is spent on County Libraries. Roughly one-half of the funds are raised through levies on the whole profession and the other one-half is raised through fees paid by local members of associations.
39. There are five sources of funds for County Libraries: LSUC annual levy, LSUC grant, LFO grant, local association fees, local association other revenue.
40. There are three main categories of library expenses: staff, books and office/other expenses. Some libraries have significant CLE programs, the revenues and expenses of which are shown under the category "other". A change in the bookkeeping records for County Libraries is required to provide better management information.
41. Long-term funding issues facing County Libraries, part of Phase II, are:
- ◆ should all members of the Law Society pay for the County Libraries?
  - ◆ how much, if anything, should local associations contribute to funding?
  - ◆ what other sources of revenue can be generated?
  - ◆ does the public have any responsibility for funding the County Libraries?
42. Increased materials costs over the past several years have forced libraries to cut subscriptions and not acquire new publications. This has resulted in some cases in greatly diminished quality with a lack of current materials, leading to a negative image of the library and affecting the ability of local associations to attract members.

#### Technology

43. Two kinds of technology are used in County Libraries - online services such as QL or the Internet and CD-ROM products from legal publishers. In a comparison of the currency of QL, CD-ROM and hard copy materials, CD-ROM was found to be the least current while QL was more current in 5 of 7 reports than either CD-ROM or paper.
44. There are many advantages and disadvantages to each of the three media (online, CD-ROM and paper). The electronic products take up far less physical space and do not require manual updating; they also can be searched by "key word" which is faster than manual searching. However, they can't be browsed as easily as paper and access is not reliable as hardware and software are not dependable. There is expensive, ongoing financial upkeep with electronic

products, particularly with changing hardware and, in the case of CD-ROM, access may be cut-off if the license expires; in effect, the product is rented.

45. Paper products are not going to disappear in the near future and a good library will support the best of both electronic and paper. Many resources, especially older ones, will never be digitized and will only be available in paper.
46. The profession is currently in a transitional stage, entering the electronic world gradually and not necessarily voluntarily. One county library has been temporarily displaced from its library and has substituted a wide-range of electronic products and computer terminals for its collection of materials, retaining only a core collection of reports in hard copy. While members initially expressed interest in the electronic option, use has been "woefully inadequate" with members instead travelling to a neighbouring county to access library materials.

#### Closing Libraries

47. If libraries are closed, for any reason, physical assets such as books, shelving, furniture and equipment will need to be disposed of; subscriptions cancelled and arrangements made with staff for appropriate termination payments. Depending on the number of libraries closed, this process could engage one full-time person for one year.
48. There would also be a tremendous effect on local associations, as the library facility is used for a variety of purposes. Given space problems in most courthouses, closing the library would probably mean permanently losing the physical space and displacing the association.

#### Delivery Models

49. Certain design principles have been applied to a review of a number of possible ways to deliver library services. Some of these principles establish that libraries promote and facilitate competence, provide a basic level of access to current and historic legal information and facilitate the flow of research in the profession.
50. Selecting any one service delivery model involves accepting a certain trade-off between cost, quality and convenience as it is unlikely that all three can be achieved at once.
51. The eight delivery models outlined fall generally into those which employ a system approach and those which do not. Ranging from a privatized model, with no Law Society funding or input to a fully integrated, blended system of tiers of libraries, to a model where there is only one, electronic library, the advantages and disadvantages of each model are set out.
52. Convocation is asked to answer the main policy question of whether County Libraries should operate as a system or not, and then to provide guidance as to the kinds of services which ought to be delivered such as CLE or reference

services, Convocation is then asked to select a model for the Working Group to develop in detail. The Phase II report will provide such detail.

53. Convocation will also be asked in Phase II to address the long-term funding issues of who should pay and for what should they pay?
54. A possible Phase III topic is to address the question of duplicate library resources by meeting with representatives from the Crown Attorneys and the judges.

# 2 EXECUTIVE SUMMARY - PHASE II

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## CONTENTS OF THIS REPORT

12. Unlike the Phase I report, which presented various policy options to Convocation, the main thrust of this report is to present implementation proposals. This report sets out in more detail how the Blended System will work, what the design principles are for it and suggests an administrative structure within which it ought to operate. There is also a recommendation that the detailed implementation of the Blended System be turned over to a Transition Board and that the new system be up and running as of January 1, 2000.
13. There are five major recommendations in this report, for approval of Convocation. None of the recommendations appear to the Working Group to be controversial and, given the resolution of the CDLPA Library Committee, it appears the profession is in agreement with the recommendations. All recommendations and tasks are shown in boldfaced type in the report.
14. The five implementation decisions which Convocation is asked to support are:
  1. Approval of the further description of the Blended System and how it will operate. (Paragraph 62)
  2. Creation of a corporation, which will be in place by January 1, 2000, to manage the Blended System (Library Co.) (Paragraph 171)
  3. Creation of a Transition Board to continue the implementation decisions in the period between approval of the Phase II report and Library Co. becoming fully functional. (Paragraph 239)
  4. Approval of the concept of a Universal Library Fee, subject to future approval of the amount of the fee, within general guidelines. (Paragraph 233)
  5. Approval of a starting date of January 1, 2000 for the Blended System and its multi-year funding. (Paragraph 259)

## THE BLENDED SYSTEM

15. The design principles and objectives for a new system of county law libraries adopted by Convocation on the basis of the Phase I report are designed to replace the existing *ad hoc* state of county law libraries with an organized system of libraries, building on the existing categories of large, medium and small libraries.
16. In the Blended system, libraries are either Regional, Area or Local and Phase I included a number of principles for deciding upon the categorization of the libraries.. This report adds the further design principle that categorization of a library is based primarily on usage and

no categorization is to be static. The Blended System will remain flexible and responsive to changing circumstances.

17. Within categories of libraries, there may well be different budgets. A large Area library could receive more funding than a small Regional library, given usage patterns and demands on the library. The categorization is important to establish initial staffing and service levels but usage determines budget.
18. Prior to final categorization of libraries, a comprehensive analysis of the existing on-site services and expected demands on the library should be undertaken by a consultant and the Transition Board should then make the final decision as to whether a library is Regional, Area or Local.

#### **SERVICES PROVIDED LOCALLY OR BY SYSTEM**

19. Whether a particular library service is provided by the system administration or the local library committee is an ongoing issue that requires balancing the benefits of a system with the need for local input. The Transition Board will make decisions of how services are provided to strike this balance.

#### **ROLE OF THE GREAT LIBRARY**

20. The Great Library at Osgoode Hall is not part of the county law library system nor will it become a part of it.
21. The Great Library's collection is unique and comprehensive, serving a broad provincial market with an experienced staff. The Great Library is the custodian of rare legal materials that other libraries do not have and could not justify acquiring.
22. The Great Library will continue to be part of the Law Society, accountable through the CEO to Convocation, pursuing matters of broad provincial interest that do not fall under the county law library system and pursuing those library matters that best fit into the mandate of the Great Library.
23. It will be important for the Director of Libraries and the Executive Director of the county law libraries to delineate those tasks that will remain with the Great Library and, if they cannot agree, then a separate report will be made to Convocation to resolve the issue.

#### **PUBLISHING LEGAL INFORMATION**

24. One objective of the Blended System is to make legal information accessible to all members of the legal profession. While traditionally libraries simply distribute information, exploring the feasibility of publishing more legal information and disseminating it more broadly was a Phase I recommendation that is a joint responsibility of the county law libraries, the Great Library and the Law Society to implement. The Working Group foresees a significant role for the Great Library in accomplishing this objective.

## FEARS ABOUT THE BLENDED SYSTEM

25. Local law associations are primarily concerned that the move to a system of libraries will be the end of their association and that local decisions will not be allowed.
26. The Blended System anticipates the existence of local library committees and the continued existence of local associations. If local associations do not want to run the local library, they can turn it over to the system administration. Otherwise, they will work with system administration to ensure standards are met and local input exists through a pool of discretionary funding they will control.
27. Through the establishment of "Library Co." the profession as represented by CDLPA and CBAO will be jointly managing the county law libraries with the Law Society. Stable, multi-year funding and a single accountable entity will ensure the local interests and system interests are both managed.

## STANDARDS

28. Librarians are used to operating with standards that represent the "best practices" for the system. Standards enable a co-ordinated approach to utilization of resources and let each system component know their responsibilities. They help achieve the design principles and objectives for the system.
29. The standards suggested for the Blended System are largely based upon the *Canadian Courthouse and Law Society Library Standards* and have been modified to reflect the unique characteristics of the county law libraries.
30. Standards will continue to develop and evolve with the system. It will be the task of Library Co.'s board to make sure system standards change with the times to reflect advances in technology and increased demands for information.

## GOVERNANCE STRUCTURE

31. At least 10 different groups and hundreds of individuals are currently involved in making key decisions for county law libraries. No single group is accountable for the approximately \$6 million budget and there is no systematic approach to the provision of library services across the province.
32. Just as the administrative structure requires standards, so too the governance structure should adhere to standards. Governors should be appointed based upon criteria including an interest in and knowledge of county law libraries.
33. Proper operating by-laws, policies and procedures must be instituted. An annual report and a long range plan must be produced.

## "LIBRARY CO."

34. A new corporation, yet to be named, should be established to operate the Blended System. A board of 15 people should be appointed with 3 or 4 appointees based upon affiliation with

a group and the balance appointed jointly by the Law Society and the profession, represented by CDLPA or, if merged, CDLPA/CBAO.

35. The Transition Board should return to Convocation with a report as to whether the new corporation ought to be non-profit, without share capital or a business corporation.
36. An Executive Director is to be hired by Library Co., to oversee the implementation and operation of the Blended System.

### **UNIVERSAL ACCESS**

37. The Blended System envisions legal information being available to all members of the Law Society, throughout the province. This in turn requires what is called "Universal Access" to the libraries, permitting any member of the Law Society to obtain the information.
38. Over the years, members of the Law Society have paid an increasing levy to support county law libraries so that the amount of the current levy approaches an amount sufficient to fully fund the system. With Universal Access, Convocation should adopt a principle that a Universal Library Fee be instituted.

### **TRANSITION/IMPLEMENTATION BOARD**

39. The Working Group has, in Phase I and II, set out the design principles, objectives, standards and policies governing the Blended System. The remaining detailed implementation decisions should be made by a separate group whose sole function is to see to the realization of the Blended System - a Transition/Implementation Board.
40. This board should contain 11 members,. Five members will be appointed by 1 each from CBAO, MTLA, LSUC, OCLA and CDLPA. Also, the Director of Libraries for the Law Society, 2 other members of the Working Group and a chair jointly appointed by LSUC and CDLPA. The term of appointment is to December 31, 1999. The Chair will be paid and honourarium and members will receive a meeting fee.
41. The Transition Board will work closely with the Executive Director and will be responsible for establishing Library Co. A budget of \$368,000 for operating the Transition Board, paying the Executive Director and legal and accounting fees is recommended as well as a discretionary budget of \$150,000 to allow upgrading libraries to minimum standards this year.
42. The Transition Board will produce a three-year budget so that stable funding can be granted to county libraries. To the extent possible, the budget shall reflect existing funding of approximately \$6 million however the board of Library Co. will assess this once the standards have been fully designed, the Executive director hired and the Blended system implemented.
43. The annual general administrative costs of operating Library co. are anticipated to be approximately \$220,000. The board of Library Co. should endeavor to bring forward an operating budget that achieves the objectives of the Blended System, including Universal Access, for a per member Law Society levy that is within 10% of the current \$200 per

member being levied. As a guideline, the existing level of funding should be used in planning the budgets.

#### **WHEN AND HOW SHOULD THE BLENDED SYSTEM BEGIN?**

44. A number of factors were taken into account in recommending a start date of January 1, 2000 for the Blended System. By this date the Transition Board should be finished its work and Library Co. should be incorporated, with a new board in place.
45. The report sets out various tasks, primarily legal and accounting/financial, that need to be accomplished each month to meet this date. It is expected that the Transition Board may have to turn over some unfinished tasks to the board of Library Co.
46. The general approach to the implementation of the new system ought to be to implement it as quickly as possible but not in a way which disrupts local associations. The long range needs of the new system must be considered as well as the transition to the new system. If there are areas of deficiency capable of immediate rectification, that should be done. A thoughtful, planned implementation with maximum benefit in return for minimum disruption is to be sought.