20th October, 2005

MINUTES OF CONVOCATION

Thursday, 20th October, 2005
8:30 a.m.

PRESENT:

The Treasurer (George D. Hunter), Aaron, Alexander, Backhouse, Banack, Bobesich, Bourque, Campion, Carpenter-Gunn, Chahbar, Cherniak, Coffey, Copeland, Crowe, Curtis, Dickson, Dray, Eber, Feinstein, Filion, Finkelstein, Finlayson, Gold, Gotlib, Gottlieb, Harris, Heintzman, Krishna, Lawrence, Legge, MacKenzie, Martin (by telephone), Murphy, Murray, O'Donnell, Pattillo, Pawlitza, Potter, Ruby, St. Lewis, Sandler, Silverstein, Swaye, Symes, Warkentin and Wright.

…….

Secretary: Katherine Corrick

The Reporter was sworn.

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IN PUBLIC

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HISTORICAL MOMENT

The Treasurer delivered the Historical Moment marking the passing of The Honourable John Arnup on October 5, 2005.

TREASURER'S REMARKS

The Treasurer noted the passing of Professor James McLeod on October 4, 2005 at the age of 57 and extended Convocation's deepest sympathy to his wife Margaret McSorley and his children James, Kathleen, Michael, Erin and Ian.

On October 5th, the Treasurer met with the Chairs and Vice-Chairs for the purpose of assessing and developing a strategic plan to assist with the creation of the agenda for each Convocation.

Two task forces will be established. The first, to be chaired by Gavin MacKenzie, will study the population of disciplinary panels. The second task force will study the independence of the profession and will be chaired by Earl Cherniak and Neil Finkelstein.

The Treasurer advised that beginning next year a meeting of Convocation will be held prior to the budget planning process to establish priorities.

Following the Throne Speech in the legislature and the government's commitment to ensure fair and timely access for new Canadians to professions for qualified professionals outside of Canada, the Treasurer has asked those responsible in the various areas including the National Accreditation Committee of the Federation to assist in meeting this standard.

It is anticipated that a motion will be brought before the November Convocation with respect to the Law Society's support of the Civil Justice Conference to be held next year.

The Treasurer announced his intention, with the support of Convocation, to accept the presidency of the Federation of Law Societies of Canada at its meeting in November.

The Treasurer has reconvened the Treasurer's liaison group.

The Treasurer made a submission on behalf of the Federation of Law Societies of Canada before the Senate Committee studying the anti-terrorism legislation. The submission was well received and the Secretary, Katherine Corrick was commended for her assistance.

The Treasurer noted that once again the Law Society is included in the top 100 places to work in Canada and commended the Chief Executive Officer, Malcolm Heins, Senior Management and staff on this achievement.

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of September 22 and 23, 2005 were confirmed.

MOTION – Lawyers Fund for Client Compensation Committee Appointment

It was moved by Mr. Pattillo, seconded by Mr. Crowe, that Andrew Coffey no longer be a member of the Lawyers Fund for Client Compensation Committee and further that Allan Gotlib be appointed Vice-Chair of the Lawyers Fund for Client Compensation Committee.

Carried

Mr. Bourque rose to thank Mr. Coffey for the work he did on the Committee and Review Subcommittee and in his role as Vice-Chair.

MOTION – Appeal Panel Appointments

It was moved by Mr. Murray, seconded by Ms. Alexander, that Paul Dray and Bradley Wright be appointed to the Law Society Appeal Panel for a term of two years pursuant to section 49.29 of the *Law Society Act* to replace Holly Harris and Andrew Coffey whose terms have expired.

Carried

REPORT OF THE TASK FORCE ON EMPLOYMENT OPPORTUNITIES FOR ARTICLING STUDENTS

Ms. Carpenter-Gunn presented the Report of the Task Force on Employment Opportunities for Articling Students.

Report to Convocation
October 20, 2005

Task Force on Employment Opportunities for Articling Students

Task Force Members:
Kim Carpenter-Gunn, Chair
Andrea Alexander
Connie Backhouse
Paul Copeland
Laurie Pawlitza
Joanne St Lewis

Purpose of Report: Decision

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

MOTION

1. That Convocation approve the following recommendations of the Task Force:

RECOMMENDATION #1

The Task Force recommends that the Law Society seek Law Foundation funding for a web-enabled database of articling positions.

RECOMMENDATION #2

The Task Force recommends that the Equity and Aboriginal Issues Committee consider conducting a study to gather information about the students in the unplaced group.

RECOMMENDATION #3

The Task Force recommends that the Professional Development, Competence and Admissions Committee continue to examine methods of promoting the creation of

additional articling positions, including the possibility of seeking additional funding for articling positions with non-profit organizations. To this end, the Task Force recommends that the Professional Development, Competence and Admissions Committee should develop a proposal for Convocation's consideration.

RECOMMENDATION #4

The Task Force recommends that the Professional Development, Competence and Admissions Committee continue to explore methods of improving supports to articling students seeking positions.

Background

2. The Task Force was established by Convocation on September 23, 2004. Task Force members are: Kim Carpenter-Gunn (Chair), Andrea Alexander, Connie Backhouse, Paul Copeland, Laurie Pawlitza and Joanne St Lewis. (Prior to his election as Treasurer, George Hunter was also a member).

3. The mandate of the Task Force was adopted by Convocation on February 24, 2005. A copy of the mandate is attached at Appendix 1.

4. The Task Force met on:

   a. November 25th, 2004;

   b. January 27th, 2005;

   c. May 26th , 2005;

   d. June 9th, 2005, and

   e. September 22nd, 2005.

5. The Task Force was mandated to report to Convocation by October 2005.

6. In accordance with its mandate, the Task Force,

   a. Reviewed the statistical trends in student placement rates and the Law Society's statistical tracking of this information;

   b. Considered the role of the Law Society in encouraging the creation of further articling positions and the provision of information to law schools;

   c. Reviewed the current supports that the Law Society provides to students, and

   d. Considered whether the Law Society should provide additional supports to equity seeking students.

Review of Statistics on Placement Rates

7. The Task Force reviewed the available statistics on the placement rates for articling students over the last few years. A chart setting out the latest statistics is attached at Appendix 2. It was noted that the percentage of unplaced students does not show any year over year increase. For the most recent year (the 47th Bar Admission Course), only 3% of students were unplaced at the end of the articling term. This is in spite of an increase in enrolment, owing to larger class sizes in Ontario law schools.

8. It was also noted that the Law Society maintains a listing of unfilled articling positions, displayed on the website for students to access. There are generally a variety of attractive positions available. In the first half of 2005 there were 63 positions listed as vacant.

9. While the Task Force believes all efforts should be made to assist unplaced students, there does not appear to be evidence of a growing problem.

10. It was noted that the information concerning the remaining unplaced students is incomplete. This is mainly due to the difficulty of contacting some of the students. The Task Force also noted that comparable statistics are difficult to obtain because of changes to the format and timing of the licensing process, the recent increase in the number of law school places and possible changes to the employment preferences of students arising from the increases in law school tuition fees.

11. To improve the quality of the statistics available and improve service to students and law schools, the Task Force endorsed the proposal of the Professional Development and Competence Department to seek Law Foundation funding for a web-enabled database of articling positions. When complete, this will permit students and other interested stakeholders, such as career development officers at law schools, to search through available positions on-line and will make the comparison of year-to-year changes in the supply and demand for articling positions easier. (This project is contingent on Law Foundation funding).

RECOMMENDATION #1

12. The Task Force recommends that the Law Society seek Law Foundation funding for a web-enabled database of articling positions.

Further information on Unplaced Students

13. Task Force members expressed the concern that unplaced students may be disproportionately from equity-seeking groups and that it would be appropriate to commission a study of the students in the unplaced group. However, since the principal concern is the possible over-representation of equity-seeking groups, the Task Force is of the view that it would be appropriate for the conduct of such a study to be referred to the Equity and Aboriginal Issues Committee for consideration. The Chair and Vice Chair of the Equity and Aboriginal Issues Committee were both members of the Task Force and concur with this view.

RECOMMENDATION #2

14. The Task Force recommends that the Equity and Aboriginal Issues Committee consider conducting a study to gather further information about the students in the unplaced group.

Review of initiatives to increase the number of positions

15. The Task Force reviewed a submission from Legal Aid Ontario to the Ontario government, requesting that articling positions be considered for a tax credit similar to the apprenticeship tax credit currently available. On March 8th, 2005 Treasurer Frank Marrocco wrote to the Ontario government in support of this proposal (and two other initiatives proposed by Legal Aid Ontario). This letter is attached at Appendix 3.

16. Legal Aid Ontario has submitted a further proposal to the government, entitled "Funding Partner Projects for Internationally Trained Individuals". This proposes, among other measures, the creation of additional articling positions for foreign-trained lawyers as a means of assisting in their integration into the Ontario work force. Further information about this initiative is provided at Appendix 4.

17. The Task Force also noted that the Law Foundation has approved funding for six new articling positions to be placed with non-profit organizations under the auspices of *Pro Bono Students Canada*. Further information about this initiative is provided at Appendix 5.

18. The Task Force regards the increase in articles with non-profit organizations as a particularly valuable development. These positions are highly attractive to students and constitute a powerful, cost-effective method of assisting non-profits and charities with their work. The Task Force is of the view that the Law Society should explore options and alternative sources of funding to permit the creation of further articling positions.

19. The Task Force noted that there is evidence that the availability of articling positions in certain geographic areas of the province and in certain areas of practice is changing as available positions become more concentrated in large urban areas. For the most recent year, over 65% of available articling positions were in the greater Toronto area. Members believe this is a result of the decline in the number of smaller practices in smaller centres of the province noted by the Task Force on Sole Practitioners and Small Firms. The Task Force is of the view that this problem is not specifically related to articling but is part of the more general question of the viability of smaller firms.

20. The Task Force took note of Recommendation 3 of the Sole Practitioner and Small Firm Task Force, that the Law Society facilitate the sharing of information about possible shared articling positions.

21. The Task Force believes that there is potential for further work by the Law Society on promoting the creation of articling employment. However, the Task Force is of the view that this work would best be carried out by a permanent committee rather than a temporary Task Force.

RECOMMENDATION #3

22. The Task Force recommends that the Professional Development, Competence and Admissions Committee continue to examine methods of promoting the creation of additional articling positions, including the possibility of seeking additional funding for articling positions with non-profit organizations. To this end, the Task Force recommends that the Professional Development, Competence and Admissions Committee should develop a proposal for Convocation's consideration.

Review of the Law Society's Existing Supports to Students

23. The Task Force reviewed the current range of supports provided to students by the Professional Development and Competence department. These include:

    a. *Online articling position postings:* Education Support Services posts articling vacancies on the Law Society's web pages. The job posting web page has been very active since its creation in December 2002, with 260 positions posted, including positions with offices such as: the Financial Services Commission of Ontario, the Canada Industrial Relations Board, Toronto Community Housing Corporation, Environmental Review Tribunal, Office of the Public Guardian and Trustee, Ontario Securities Commission, Regional Municipality of Peel and the Clinique Juridique Francophone (Ottawa) etc.

    b. *Biographical Summaries*: Students who have not yet secured an articling placement are provided with information about the Biographical Summaries initiative. This program asks students to write and submit a short biography that succinctly describes their experience, interests and qualifications. Education Support Services provides this list, in whole or in part, to potential employers. This has assisted employers in contacting prospective students-at-law and arranging for interviews at convenient times. It helps students by marketing their interest in seeking articles to a wide audience. The feedback from both students and employers continues to be positive.

    c. *Mentor program:* The Articling Mentor Program pairs students seeking articles with a member of the profession, for the purpose of receiving advice, support and encouragement in the search for an articling position. Mentors connect with their assigned student periodically to discuss the student's concerns and to provide advice or strategies that the student might employ in their job search. The mentor's role is to encourage the student to maintain a positive, constructive attitude and approach to securing an articling position. Feedback suggests this program has been very helpful to students.

    d. *Job search skills workshop and counselling*: An external professional career-planning consultant conducts two workshops in job-search skills for students seeking articles. These workshops are designed to be interactive and assist students with market research, cover letter and resume writing, networking and interviewing skills. Materials were created to accompany the workshop and are posted on the website. Students who attended the workshops were eligible for individual follow-up sessions with the counsellor to discuss their job search skills and strategies and have their resume reviewed. Some students were counselled in person and other meetings were conducted over the phone.

e. *Outreach:*

i. *Law School Visits*: Every spring, the Registrar and Associate Registrar visit all six Ontario law faculties to speak with students. The Aboriginal Issues Equity Co-ordinator accompanies them on their visits. Students are told about the licensing process, articling and all of the articling placement initiatives offered by the Educational Support Services branch of the Law Society. In addition, after the presentation, the Associate Registrar meets one-on-one with third year students seeking articles.

ii. *Telephone Survey*: In November, February and June of the academic year, Society staff conduct a telephone survey of students who have not commenced articles. Once it is determined that a student is actively seeking articles, staff explain, in detail, all of the placement initiatives currently available.

iii. *Other Support:* 'Office hours' are set aside during which students may book appointments with the Associate Registrar to review their resume and cover letter and to discuss articling and job search strategies.

24. The Task Force has noted that there is potential for further work by the Law Society on providing supports to articling students. However, the Task Force is of the view that this work would best be carried out by a permanent committee rather than a temporary Task Force.

RECOMMENDATION #4

25. The Task Force recommends that the Professional Development, Competence and Admissions Committee continue to explore methods of improving supports to articling students.

CONCLUSIONS

26. The Task Force is of the view that the statistics do not reveal an increase in the proportion of unplaced students, but that

a. the statistical work of the Law Society could be enhanced by technological improvements such as a web-enabled database and,

b. further research is appropriate to obtain further information about the students who remain unplaced.

27. The Task Force is impressed with the range of supports the Law Society currently provides to students seeking articling positions and notes that work to improve these supports is continuing.

28. The Task Force is of the view that there is a role for the Law Society in encouraging the creation of articling positions, and that this logically falls within the mandate of the Professional Development, Competence and Admissions Committee.

Appendix 1

TASK FORCE ON EMPLOYMENT OPPORTUNITIES FOR ARTICLING STUDENTS

TERMS OF REFERENCE AS ADOPTED BY CONVOCATION, FEBRUARY 24, 2005

Whereas articling remains a fundamental component of the licensing process for lawyers, the Task Force proposes to examine and, if appropriate, make recommendations to Convocation on the following:

1. The trends in student placement rates over the last few years and whether the Law Society's current statistical tracking of the situation is sufficient to identify and assist students who may be disadvantaged by the current system;

2. Whether there is a role for the Law Society in,

    a. encouraging the creation of new articling placements by means of partnerships with,

        i) other legal organizations to encourage the creation of placements addressing student interest in social justice and access to justice issues;

        ii) law firms outside major metropolitan areas to support the development of new/joint/alternative articling placements in a wider geographic area,

    b. Working with the law schools to assist students in the early stages of law school with information, precedents and training on how to establish oneself in the market, how to develop and present a CV, how to have a successful interview, etc.,

3. The current supports provided by the Law Society to students seeking placements and whether these supports could be improved, including the Law Society's current communication activities directed at students, and whether further steps are appropriate to improve the information available to students about the articling job market.

4. Whether the Law Society should provide further specific supports to students from equity–seeking groups to assist them in obtaining their preferred articling positions.

Articling Student Update: 2004 vs 2005

Academic Year-to-Year Comparison

Date	Class Size	Unplaced Students	Actively Looking	Percentage of total class actively looking
June 2004 46th BAC	1219	57	39[1]	3.2%
June 2005 47th BAC	1255	66	40[2]	3.2%

Update on Placements for Academic Year to Date: last reported to Task Force in May 2005

Date	Class Size	Unplaced Students	Actively Looking	Percentage of total class actively looking
January 2005 47th BAC	1313	117	66	5%
March 2005 47th BAC	1278	89	44	3.4%
April 2005 47th BAC	1259	80	38	3%
May 2005 47th BAC	1255	76	38	3%
June 2005 47th BAC	1256	66	40	3.2%

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

(1) Copy of a letter from Frank N. Marrocco, Q.C., Treasurer to The Honourable Rich Bartolucci, Minister of Northern Development and Mines dated March 8, 2005.
(Appendix 3, page 13)

[1] Telephone contact was made in January of 2004. Using the information gathered at that time and tracking these students: of the 57 unplaced students, 39 students were actively seeking articles, 8 students were not actively seeking articles (were pursuing further studies, employment in a related field or residing abroad) and 10 were status unknown (did not respond to communications)

[2] Telephone contact was made in January of 2005 and followed up in May/June 2005. Using the information gathered at that time and ongoing tracking of these students: of the 66 unplaced students, 40 students are actively seeking articles, 16 are not actively seeking articles and 10 are status unknown. It is also important to note that the size of the 2004/05 class as at June of each year shows an increase in registered students of 3%. Overall, placement rates for this academic period are much better based on actual placement rates as well as number of placements required for the class size. Anecdotally, this may be a result of positive economic conditions allowing more firms to take on placements.

(2) Copy of a letter from David McKillop, Director, Policy, Planning and External Relations, Legal Aid Ontario to Sophia Sperdakos, Policy Counsel dated July 21, 2005.
Copy of a letter from Patti Redmond, Director, Ministry of Training, Colleges and Universities to Jawad A. Kassab, Legal Aid Ontario dated July 15, 2005 re: Integration of Internationally Trained Legal Professionals into Legal Aid.
(Appendix 4, pages 14 – 17)

(3) Copy of an e-mail from Diana Miles, Director, Professional Development & Competence dated March 30, 2005. Copy of a memorandum to the Task Force on Employment Opportunities for Articling Students from Diana Miles dated January 26, 2005 re: Law Foundation of Ontario Support of Alternative Articling Placements.
(Appendix 5, pages 18 – 20)

It was moved by Ms. Carpenter-Gunn, seconded by Ms. St. Lewis, that Convocation approve the following recommendations of the Task Force:

RECOMMENDATION #1

That the Law Society seek Law Foundation funding for a web-enabled database of articling positions.

RECOMMENDATION #2

That the Equity and Aboriginal Issues Committee consider conducting a study to gather information about the students in the unplaced group.

RECOMMENDATION #3

That the Professional Development, Competence and Admissions Committee continue to examine methods of promoting the creation of additional articling positions, including the possibility of seeking additional funding for articling positions with non-profit organizations. To this end, the Task Force recommends that the Professional Development, Competence and Admissions Committee should develop a proposal for Convocation's consideration.

RECOMMENDATION #4

That the Professional Development, Competence and Admissions Committee continue to explore methods of improving supports to articling students seeking positions.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence reports:

B.

ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, October 20th, 2005:

Sheri Anderson Munro	Bar Admission Course
Kristyn Sarah Annis	Bar Admission Course
Shelley Balshine	Bar Admission Course
Priya Natasha Bharratt Bukhari	Bar Admission Course
Usman Asghar Bhatti	Bar Admission Course
Douglas Paterson Bryce	Bar Admission Course
Eva Wai Cheung Chow	Bar Admission Course
Justin Dugald Clark	Bar Admission Course
Lee Philip Clark	Bar Admission Course
SandraCzarny	Bar Admission Course
Brian Richard Danson	Bar Admission Course
Vittorio De Luca	Bar Admission Course
Terence Warren Doherty	Bar Admission Course
Tammara Diana Giardino Pabon	Bar Admission Course
Jeffrey Lorne Gic Perry	Bar Admission Course
Xuemei Jiang	Bar Admission Course
Manjeet Kaur	Bar Admission Course
Jennifer Lynne Lennon	Bar Admission Course
Joelle Liliane Malette	Bar Admission Course
Aliya Mawani	Bar Admission Course
Jeremy William David Mills	Bar Admission Course
Michele Marie Mulgrave	Bar Admission Course
Cameron Fredrick Paulikot	Bar Admission Course
Evangelos Petropoulos	Bar Admission Course
Ricard Farhad Pochkhanawala	Bar Admission Course
Aneel Kaur Rangi	Bar Admission Course
Nika Jean Robinson	Bar Admission Course
Shirin Rustomji	Bar Admission Course
Jordan David Sobel	Bar Admission Course
Jessi Lee Nicholas Stanfield	Bar Admission Course
Rudi Alia Taylor	Bar Admission Course
Robbie Wi-Pun Tsang	Bar Admission Course
Alexis Rebecca Wiseman	Bar Admission Course
Stuart Alexander Zacharias	Bar Admission Course

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

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, April 28th, 2005:

Orin Antonio Del Vecchio	Province of British Columbia
Sari Lynn Diamond	Province of Alberta
Catherine McGhie	Province of British Columbia
Jennifer Louise Wilson	Province of British Columbia

B.1.5. (c) Full-time Member of Faculty of Approved Ontario Law School

B.1.6. The following member of an approved law faculty, who has filed the necessary documents and complied with the requirements of the Law Society, asks to be Called to the Bar and admitted as a solicitor without examination, under sec. 5 of By-Law 11 made under the *Law Society Act:*

Jean François Gaudreault-DesBiens	University of Toronto, Faculty of Law

ALL OF WHICH is respectfully submitted

DATED this the 20th day of October, 2005

It was moved by Mr. MacKenzie, seconded by Ms. Warkentin, that the Report of the Director of Professional Development and Competence setting out the names of the candidates for Call to the Bar be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar. Ms. Pawlitza then presented the candidates to Mr. Justice Donald R. Cameron to sign the rolls and take the necessary oaths.

Sheri Anderson Munro	Bar Admission Course
Kristyn Sarah Annis	Bar Admission Course
Shelley Balshine	Bar Admission Course
Priya Natasha Bharratt Bukhari	Bar Admission Course
Usman Asghar Bhatti	Bar Admission Course
Douglas Paterson Bryce	Bar Admission Course
Eva Wai Cheung Chow	Bar Admission Course
Justin Dugald Clark	Bar Admission Course
Lee Philip Clark	Bar Admission Course
Sandra Czarny	Bar Admission Course
Brian Richard Danson	Bar Admission Course

Vittorio De Luca	Bar Admission Course
Terence Warren Doherty	Bar Admission Course
Tammara Diana Giardino Pabon	Bar Admission Course
Jeffrey Lorne Gic Perry	Bar Admission Course
Xuemei Jiang	Bar Admission Course
Manjeet Kaur	Bar Admission Course
Jennifer Lynne Lennon	Bar Admission Course
Joelle Liliane Malette	Bar Admission Course
Aliya Mawani	Bar Admission Course
Jeremy William David Mills	Bar Admission Course
Michele Marie Mulgrave	Bar Admission Course
Cameron Fredrick Paulikot	Bar Admission Course
Evangelos Petropoulos	Bar Admission Course
Ricard Farhad Pochkhanawala	Bar Admission Course
Aneel Kaur Rangi	Bar Admission Course
Nika Jean Robinson	Bar Admission Course
Shirin Rustomji	Bar Admission Course
Jordan David Sobel	Bar Admission Course
Jessi Lee Nicholas Stanfield	Bar Admission Course
Rudi Alia Taylor	Bar Admission Course
Robbie Wi-Pun Tsang	Bar Admission Course
Alexis Rebecca Wiseman	Bar Admission Course
Stuart Alexander Zacharias	Bar Admission Course
Orin Antonio Del Vecchio	Transfer, Province of British Columbia
Sari Lynn Diamond	Transfer, Province of Alberta
Catherine McGhie	Transfer, Province of British Columbia
Jennifer Louise Wilson	Transfer, Province of British Columbia
Jean François Graudreault-DesBiens	University of Toronto, Faculty of Law

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CIVIL RULES COMMITTEE APPOINTMENTS

The Treasurer announced that the Law Society has reappointed Robert Harrison, Don Jack, Kristopher H. Knutsen and Ron Slaght to the Civil Rules Committee.

REPORT OF THE FINANCE & AUDIT COMMITTEE

Law Society's Budget for 2006

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

Report to Convocation
October 20, 2005

Finance and Audit Committee

Committee Members:
Clayton Ruby, Chair
Abdul Chahbar, Vice-Chair
John Campion
Marshall Crowe
Mary Louise Dickson
Allan Gotlib
Holly Harris
Ross Murray
Alan Silverstein
Gerald Swaye
Beth Symes
Robert Topp

Purpose of Report: Decision

Prepared by the Finance Department

COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on October 6, 2005. Committee members in attendance were: Clayton Ruby (c.), Abdul Chahbar (vc.), John Campion, Marshall Crowe, Mary Louise Dickson, Allan Gotlib, Holly Harris, Alan Silverstein, Gerald Swaye, Beth Symes.

Staff present were Malcolm Heins, Wendy Tysall, John Matos, Fred Grady and Andrew Cawse.

FOR DECISION

LAW SOCIETY 2006 DRAFT BUDGET

MOTIONS

A. That Convocation approves the Law Society budget for 2006.

B. That Convocation approves the LibraryCo Inc. budget for 2006 maintaining the Law Society levy of $206 per member and utilizing $415,231 of the LibraryCo Inc. reserve.

2. The draft Law Society budget for 2006 is submitted under separate cover in three books. The Summary book is a public document providing an overview of the Society's budget in its major functional categories with summarized staffing, revenue and expense information. The Detail book (in camera) provides a detailed, divisional breakdown of staffing numbers, revenue analysis and expense breakdown, comparing 2005 budgeted and projected numbers with the draft 2006 budget. Departmental narratives are also included describing operations and performance. LibraryCo's 2006 budget is the third book (in camera).

Summary

3. The budget proposes an increase in the annual membership levy of $55 from $1,441 to $1,496. This is the first proposed increase in the membership fee since 2001. The general membership fee is increased $55 to $1,015; the LibraryCo levy remains at $206; the Lawyers Fund for Client Compensation remains at $200 and the Capital Fund stays at $75.

4. There are three primary factors driving the proposed fee increase:

(i) the Regulatory Division's continued need for additional resources,

(ii) the demands placed upon the Society's information systems resulting in additional resources being devoted to the Information Systems department,

(iii) security and facilities costs, including lease payments and higher building maintenance and utility costs.

5. The growth in annual membership, estimated at 1,000 will increase the total full fee paying equivalent membership to approximately 31,000. The membership has increased almost 32% in the last 10 years from 23,500 in 1997.

6. The Bar Admission Course (BAC) will be replaced in 2006 with the new Licensing Process. The Licensing Process has reduced direct costs by approximately $1.7 million from the former BAC. These reduced costs have been passed on to students in the

form of lower tuition fees. Tuition for 2006 is set at $2,600, down from $4,400 for the BAC, a savings of $1,800. The member subsidy of $34 has been maintained in 2006.

Revenues

7. The Errors and Omissions Insurance Fund investment income is projected to increase by $500,000 to $3.0 million in 2006.

8. The reduction in Licensing Process tuition fees, noted in paragraph 6 above reduces total tuition fees by $2.6 million to $3.6 million in 2006. Funding from the Law Foundation of Ontario for the Licensing Process decreases to $1.0 million, down from the grant in 2005 of $1.5 million for the BAC. This reduction is in line with decreasing operating expenses.

Expenses

9. An allowance for merit increases to staff salaries has been included in operational expenses throughout the budget. The total provided is $900,000 based on 3.5% of total compensation and discounted for anticipated staff turn over.

10. A provision for bencher remuneration has been included in the amount of $300,000 based on estimates previously reported to Convocation.

11. To continue to meet the needs of the Society in its role as regulator, a case management system was implemented for the effective management of the complaints process in 2005. This budget dedicates funds for the development and expansion of this system to aid in the complaints intake function. The Society has been faced with escalating costs of investigating mortgage frauds for the past several years. In 2005, an additional $1.0 million was added to the Professional Regulation budget and an incremental $300,000 has been added in 2006.

12. Funding for the Great Library at $2.8 million is essentially unchanged from 2005 and funding for CanLII is unchanged at $610,000. Total library spending, including CanLII and LibraryCo, amounts to $9.8 million in 2006 ($9.6 million in 2005).

13. Corporate expenses are significantly unchanged. The Society's general contingency account of $1.2 million, unchanged since 2002, is available for the funding of projects or programs that come before Convocation after the approval of the current year budget. In the past this has been used to fund such activities as task forces and space requirements. This contingency is vital to allow Convocation the flexibility to act on issues of importance that arise between annual budget processes.

14. No allowance has been made for the funding of paralegals.

Unrestricted Fund Surplus

15. The 2006 budget proposes that $1.0 million of the Unrestricted Fund surplus accumulated in prior years be applied to reduce the annual membership levy. The utilization of this surplus results in a $32 reduction in the member fee.

16. The Working Capital Reserve remains at $7.95 million. The reserve was established in 2002 to provide working capital to ensure the ability of the Society to meets its current financial obligations. The reserve policy provides for the maintenance of a balance of up to two months of operating expenses. The current balance is slightly less than two months expenses but is adequate to support the operations of the Society.

Capital

17. The capital levy of $75 per member has been unchanged for five years. The levy is tracked in the Capital Allocation Fund and is intended to ensure adequate funding is available to meet the capital requirements of the Law Society.

18. In 2004, Convocation approved the renovation of the north wing. Construction began in 2004 and will be completed in 2006. No additional funding is budgeted for this project. It is expected that the work will be completed on time, within the approved budget of $9.8 million.

19. Funding in the amount of $1.1 million, primarily for work in the historic south wing and funding in the amount of $1.4 million for information systems projects, is included in this budget.

Lawyers Fund for Client Compensation

20. The member levy for 2006 of $200 is unchanged from 2005. The budget for 2006 proposes to retain the allowance for claims at $2.7 million. This level of claims experience is consistent with average claims levels over the past ten years. The Compensation Fund Committee supports maintaining the levy at $200.

LibraryCo Inc.

21. LibraryCo Inc has submitted its budget for 2006 (see separate attachment in camera). The Finance & Audit Committee reviewed the budget and recommends its approval by Convocation with changes to funding by the Law Society. The Committee recommends that LibraryCo uses $415,231 of its projected $970,000 reserve to maintain the Law Society levy at $206 per member.

22. LibraryCo's budget proposal for 2006 asks for funding from the Law Society in the amount of $6,801,231 compared to $6,240,000 for 2005. For the first time, the 2006 LibraryCo budget proposes not using the reserve.

23. LibraryCo maintains a reserve that, prior to the establishment of LibraryCo, was included in the Law Society's county library fund. The reserve has been used by LibraryCo to reduce the impact of county library operations on the annual levy.

24. The reserve began 2005 with a balance of $1.392 million, with a forecast of approximately $420,000 being utilized to support operations in 2005. This will leave a projected reserve balance of $970,000 at the end of 2005.

25. The 2006 LibraryCo budget proposed to "safeguard" the reserve for operational cash flow requirements and potential liabilities.

26. The LibraryCo budget materials make reference to the Law Society's reserve and indicate that the proposed LibraryCo reserve of 13% of total spending is described as "not out of line with the standard applied at the Law Society". The Society's Working Capital Reserve of $7.9 million represents 14.5% of 2005 unrestricted fund expenses. Although this comparison of the two reserves is accurate on a percentage basis, it does not provide the full context of the need for such a reserve.

27. LibraryCo's liabilities are relatively predictable and all of LibraryCo's cash flow needs can be accommodated by ensuring that the transfer of funds from the Law Society are sent in advance of payments to county law libraries and for the payment of electronic products. For 2006, payments to county law libraries and purchases of electronic products represent $6.6 million of the $7.7 million proposed budget. Applying the Law Society's reserve allocation benchmark of 14.5% to the remaining administrative expenses, LibraryCo's reserve requirement would be approximately $160,000.

28. Using $415,231 in 2006 to maintain the levy at $206, would leave a reserve balance of approximately $555,000, an amount that is more than adequate for LibraryCo's needs.

29. During the 2006 budget review, the Committee assessed how closely LibraryCo has adhered to the Business Plan submitted by LibraryCo and approved by Convocation in 2002. The foundation for the Business Plan was implementing the recommendations of *Beyond 2000: The Future Delivery of County Library Services to Ontario Lawyers* or the "Elliott Report". The LibraryCo business plan envisaged a system that would allocate financial resources in a manner that was consistent with the objectives of the "Elliott Report."

30. The "Elliott Report"was first presented to Convocation in October 1998. The principles of the report were adopted and LibraryCo was formed to implement the report's recommendations. The report recommended and adopted a delivery method that has come to be known as the blended system. Relevant features of the blended system included:

    a. Three separate library types: Regional, Area and Local.

    b. Operate with universal access and a universal library fee.

    c. All libraries will contain electronic products, Internet access and some books, with smaller ones (local libraries) handling only a core collection of texts and print materials with extensive CD-ROM and online access.

    d. The libraries are to be distinguished by differences in their funding and budget estimates, staffing levels and expertise, size and extent of on-site collections, level of services provided on-site and nature of services provided to those outside of the county, if any.

    e. Local library collections will be organized, developed and superior to the existing collection and services of small libraries, but not necessarily in print.

31. County Law Libraries under the administration of LibraryCo have clearly achieved points (a) and (b) above.

32. LibraryCo has deviated from the original Business Plan in one particular respect. The intent of the original Business Plan was to allocate resources in a manner consistent with the Elliott Report. Extracting from the Elliott Report:

> "Professional staff will be concentrated in the Regional Libraries….Area and Regional libraries should be open and staffed at least during normal business hours….Local Libraries must have regular staffed hours of opening (10 to 12 hours per week)…" and
> "The Working Group recognizes the historic importance of the local librarian to the operation and maintenance of local associations. This connection should be preserved and fostered where appropriate but only to the extent that it does not interfere with the operation and maintenance of the library to the standards for that level of library…….It may be that local associations will wish to retain the services of the librarian….for other association purposes…if so there should be a separate arrangement and payment…"

33. In 2003, Convocation approved an amendment to the Business Plan, increasing resources to assist practitioners in the transition from paper based to electronic products. The Finance & Audit Committee initiated this amendment as a temporary measure. However, the budgets submitted by LibraryCo from 2003 to 2006 have continued to maintain staffing at Local Libraries at levels significantly higher than the original Business Plan.

34. In comparing the 2006 budget to the Business Plan, potential savings would approximate $665,000 if the LibraryCo budget for 2006 was consistent with the Business Plan.

35. The Committee considers that 2006 can be used to transition back to the original Business Plan, particularly as LibraryCo's Integration Task Force will be presenting its findings during this period. The transition can be carried out in an orderly way over this extended period so that the 2007 budget presented by LibraryCo can reflect the objectives envisaged in the Elliott Report and adopted in LibraryCo's original Business Plan. The Committee is sympathetic to local associations and users of the libraries and will ensure that the transition plan be properly resourced and implemented with vigor and sensitivity to local needs.

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

(1) Copy of the bound Law Society of Upper Canada 2006 Draft Budget Summary (in camera).

(2) Copy of the bound Law Society of Upper Canada 2006 Draft Budget Detail (in camera).

(3) Copy of the bound Overview of 2006 Proposed Budget for LibraryCo Inc. (in camera).

(4) Copy of a paper entitled "LibraryCo Budget Comparison with Original Business Plan" which was distributed at Convocation.

It was moved by Mr. Ruby, seconded by Mr. Chahbar,

A. that Convocation approves the Law Society budget for 2006.

Carried

ROLL-CALL VOTE

Aaron	For	Legge	For
Alexander	For	MacKenzie	For
Backhouse	For	Martin	For
Banack	Against	Murray	For
Bobesich	Against	Pawlitza	For
Bourque	Against	Potter	Against
Campion	For	Ruby	For
Carpenter-Gunn	For	St. Lewis	For
Chahbar	For	Sandler	For
Coffey	For	Silverstein	Against
Crowe	For	Swaye	For
Copeland	For	Symes	For
Curtis	Against	Warkentin	For
Dickson	For	Wright	Against
Dray	For		
Eber	For		
Feinstein	Against		
Filion	For		
Gold	For		
Gotlib	For		
Gottlieb	Against		
Heintzman	Against		
Krishna	For		

Vote: 27 For; 10 Against

B. that Convocation approves the LibraryCo Inc. budget for 2006 maintaining the Law Society levy of $206 per member and utilizing $415,231 of the LibraryCo Inc. reserve.

It was moved by Mr. MacKenzie, seconded by Mr. Swaye, that Motion B be amended as follows:

B. that Convocation approves the LibraryCo Inc. budget for 2006.

Carried

ROLL-CALL VOTE

Aaron	For	Legge	For
Alexander	For	MacKenzie	For
Backhouse	Against	Martin	For

Banack	Against	Murray	For
Bobesich	Against	O'Donnell	For
Bourque	For	Pattillo	For
Campion	Against	Pawlitza	For
Carpenter-Gunn	For	Potter	For
Chahbar	Against	Ruby	Against
Coffey	Against	St. Lewis	For
Crowe	Against	Sandler	Against
Copeland	Against	Silverstein	Against
Curtis	For	Swaye	For
Dickson	Against	Symes	Against
Dray	Against	Warkentin	For
Eber	For	Wright	For
Feinstein	For		
Filion	For		
Finlayson	Against		
Gold	Against		
Gotlib	For		
Gottlieb	Against		
Heintzman	For		
Krishna	Against		

Vote: 22 For; 18 Against

It was moved by Mr. Wright, seconded by Ms. Potter, that the working capital reserve be reduced by $1 million and that the reduction be used to reduce the annual fee.

Lost

ROLL-CALL VOTE

Aaron	Against	Legge	Against
Alexander	Against	MacKenzie	Against
Backhouse	Against	Martin	Against
Banack	Against	Murray	Against
Bobesich	For	Pawlitza	Against
Bourque	For	Potter	For
Campion	Against	Ruby	Against
Carpenter-Gunn	Against	St. Lewis	Against
Chahbar	Against	Sandler	Against
Coffey	Against	Silverstein	For
Crowe	Against	Swaye	Against
Copeland	Against	Symes	Against
Curtis	Against	Warkentin	Against
Dickson	Against	Wright	For
Dray	Against		
Eber	Against		
Feinstein	Against		
Filion	Against		
Gold	Against		
Gotlib	For		
Gottlieb	Against		

Heintzman	Against
Krishna	Against

Vote: 31 Against; 6 For

The Treasurer thanked Mr. Ruby and the Finance Committee and staff for their work on the budget.

REPORT ON FEDERATION OF LAW SOCIETIES OF CANADA

Professor Krishna provided an information report on the activities of the Federation.

REPORT OF THE ACCESS TO JUSTICE COMMITTEE

Conference on Civil Justice Reform

Ms. Pawlitza presented the Report of the Access to Justice Committee.

Report to Convocation
October 20, 2005

Access to Justice Committee

Committee Members
Marion Boyd, Co-Chair
Laurie Pawlitza, Co-Chair
Bonnie Warkentin, Vice-Chair
Andrea Alexander
Paul Copeland
Mary Louise Dickson
Richard Filion

Purposes of Report: Decision & Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

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Pro Bono Law Ontario Retreat on Access to Justice

COMMITTEE PROCESS

1. The Committee met on October 5th, 2005. Members in attendance were Marion Boyd (Co-Chair), Laurie Pawlitza (Co-Chair), Bonnie Warkentin (Vice-Chair), Andrea Alexander, Paul Copeland, Mary Louise Dickson and Richard Filion. Staff in attendance were Malcolm Heins (CEO), Terry Knott, Josée Bouchard and Julia Bass.

FOR DECISION

CONFERENCE ON CIVIL JUSTICE REFORM

MOTION

2. That the Law Society of Upper Canada sponsor the conference on civil justice reform by providing publicity and promotional assistance and a financial contribution, not to exceed $ 25,000, to be determined by the Chairs of the Access to Justice Committee, the Treasurer and the Chief Executive Officer of the Law Society.

Introduction and Background

3. A conference on civil justice reform is being organized by the Canadian Forum on Civil Justice, a national organization based in Alberta, with the support of a number of other organizations including the Canadian Bar Association and the Canadian Institute for the Administration of Justice. Background information on the conference is attached at Appendix 1.

4. The Canadian Forum on Civil Justice (CFCJ) was founded as a result of the Canadian Bar Association *Task Force on the Systems of Civil Justice* formed in 1995, chaired by Eleanore Cronk. One of the needs identified in the Task Force report was better gathering and sharing of information nationally. Information on the CFCJ is attached at Appendix 2. The Executive Summary of the Task Force Report is attached at Appendix 3.

5. Debra Paulseth, Assistant Deputy Attorney General and Mohan Sharma, Counsel, both of the Ontario ministry of the attorney general, joined the meeting to provide further information about the conference. Ms Paulseth is a representative of the Association of Canadian Court Administrators, one of the sponsors of the conference.

6. The conference will be in two parts, the first being a public session in Montreal in May 2006, while the second invitation-only session is to take place in Toronto the following November. The Law Society has been invited to be a sponsor of the conference by making a financial contribution and by helping to publicize it and promote attendance.

7. The Canadian Bar Association has committed to providing $15,000 support. The Barreau du Québec has also been approached and is still considering the extent of their support.

8. There is some urgency to the decision as to whether to be a sponsor, as the promotional materials for the conference are to be prepared by the end of November. It is therefore

considered appropriate to ask for Convocation's approval in principle for support for this initiative.

The Committee's Deliberations

9. The Committee agrees that problems in the civil justice system are of serious concern and that proposals for reform merit urgent examination. One of the objectives of the conference is to review the recommendations of the CBA Task Force report, to determine the extent to which they have been implemented and to identify barriers to reform.

10. The Committee is of the view that it is important that the conference lead to practical improvements that will make a real difference to the operation of the justice system and that the Law Society should work with the conference organizers to ensure that is the case.

11. Since the conference is a national initiative, it is appropriate to consider the matter in consultation with other Law Societies. The Committee was of the view that support from the Law Society of Upper Canada should be proportional to support provided by other law societies across the country. The conference will be discussed at the Federation of Law Societies meeting in early November.

12. The Law Society of Upper Canada is being asked to provide both financial and promotional support. Promotional support would take the form of publicity in the Ontario Reports and the Ontario Lawyers' Gazette.

13. Financial support from the Law Society could take a number of forms, including,

    a. Sponsoring of a specific lunch, dinner or conference session;

    b. Sponsoring stakeholders to attend the Montreal session;

    c. General financial support.

14. Since there is some urgency to the decision as to whether to be a sponsor, it is appropriate to ask for Convocation's approval in principle for support for this initiative, up to a specified maximum.

FOR INFORMATION

PRO BONO LAW ONTARIO RETREAT ON ACCESS TO JUSTICE

15. The meeting was joined by representatives of *Pro Bono Law Ontario*, Chair of the Board, Paul Schabas and Executive Director Lynn Burns, who provided a briefing on the recent activities of PBLO and described the upcoming retreat on access to justice. Information on this event is attached at Appendix 4.

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

(1) Copy of background information on the Civil Justice Reform Conference.
(Appendix 1, pages 7 – 18)

(2) Copy of information on the Canadian Forum on Civil Justice.
(Appendix 2, pages 19 – 22)

(3) Copy of the Executive Summary of the Task Force on the Systems of Civil Justice.
(Appendix 3, pages 23 – 31)

(4) Copy of the information on the Pro Bono Law Ontario at the Access to Justice Visionary Retreat.
(Appendix 4, pages 34 – 36)

It was moved by Ms. Pawlitza, seconded by Ms. Warkentin, that the Law Society of Upper Canada sponsor the conference on civil justice reform by providing publicity and promotional assistance and a financial contribution, not to exceed $25,000, to be determined by the Chairs of the Access to Justice Committee, the Treasurer and the Chief Executive Officer of the Law Society.

Carried

Item for Information

Pro Bono Law Ontario Retreat on Access to Justice

REPORT OF THE TRIBUNALS COMMITTEE

Committee Mandate

Mr. Banack presented the Report of the Tribunals Committee.

Report to Convocation
October 20, 2005

Tribunals Committee

Committee Members
Larry Banack (Chair)
Mark Sandler (Vice-Chair)
Peter Bourque
Paul Copeland
Sy Eber
Derry Millar
Bonnie Warkentin

Purpose of Report: Decision

Policy Secretariat
(Sophia Sperdakos 416-947-5209)

COMMITTEE PROCESS

1. The Committee met on September 8, 2005. Committee members Larry Banack (Chair), Mark Sandler (Vice-Chair), Peter Bourque, Paul Copeland, Sy Eber, Derry Millar and Bonnie Warkentin attended. Staff members Katherine Corrick, Grace Knakowski and Sophia Sperdakos also attended.

FOR DECISION

TRIBUNALS COMMITTEE MANDATE

MOTION

2. That Convocation approves the following as the mandate for the Tribunals Committee:

Mandate

(1) The mandate of the Tribunals Committee is to develop for Convocation's approval policy options on all matters relating to the operation and administration of the Hearing Panel and the Appeal Panel, including the development or preparation of,

i. practice directions

ii. an adjudicator code of conduct

iii. publication protocols for tribunal decisions

iv. adjudicator professional development

Rules of practice and procedure

(2) Subject to the approval of Convocation, the Tribunals Committee may prepare rules of practice and procedure.

Introduction and Background

3. All standing committees have a mandate that governs their activities and is included in By-law 9. The Committee has developed a proposed mandate for Convocation's approval and inclusion in the By-law.

4. As with all standing committees the Tribunals Committee's role will be to develop policy options for Convocation's consideration. The Tribunals Task Force recommended the

creation of a Tribunals Standing Committee to address those issues related to the operation and administration of Law Society tribunals. The Task Force noted:

The majority of the Task Force recommends that Convocation establish a Tribunals standing committee. Its mandate would be to provide Convocation with policy options respecting tribunals-related policy and rules. Its membership should include the Chairs of the Hearing and Appeal panels, as well as other benchers….

The adjudicative process must be perceived to be as separate from the investigative/prosecutorial arm as possible. The rule and policy making function, as it relates to adjudicative matters, must be as neutral as possible.…

The Task Force recommends that Convocation establish a standing committee to be known as the Tribunals Committee, whose membership should include the Chairs of the Hearing and Appeal Panels.

5. The Tribunals Task Force Report addressed the main policy areas that are relevant to a Tribunals Committee, including the rules of practice and procedure, a code of conduct for adjudicators, practice directions for the operation of tribunals, and adjudicator professional development.

6. Keeping in mind the Task Force's analysis of the role of a Tribunals Committee, which was approved by Convocation, it is proposed that the Committee's mandate should be as set out in the motion at paragraph 2 above.

7. Subsection (2) of the mandate places the preparation of the rules of practice and procedure within the responsibility of the Committee.

8. In addition, other standing committees will continue to initiate policies that the Tribunals Committee will develop into appropriate rules of practice and procedure for Convocation's approval to implement those policies.

9. This approach is in keeping with the policy decision Convocation made to keep the adjudicative arm of the Law Society as separate as possible from the investigative/prosecutorial branch.

It was moved by Mr. Banack, seconded by Mr. Sandler, that Convocation approves the following mandate for the Tribunals Committee:

(1) The mandate of the Tribunals Committee is to develop for Convocation's approval, policy options on all matters relating to the operation and administration of the Hearing Panel and the Appeal Panel, including the development or preparation of,

i. practice directions

ii. an adjudicator code of conduct

iii. publication protocols for tribunal decisions

iv. adjudicator professional development

Rules of practice and procedure

(2) Subject to the approval of Convocation, the Tribunals Committee may prepare rules of practice and procedure.

Carried

Wright Statement

Mr. Wright rose to praise the courage and contribution of Andrea Alexander's son, Christopher, who served as ambassador for Canada in Afghanistan and to Paul Copeland's son, Jeremy, who served in Iraq in the green zone to help ensure that the elections were fair. Also noted were the Treasurer's remarks about The Honourable John Arnup.

Convocation gave a sustained round of applause to Christopher Alexander, Jeremy Copeland and John Arnup.

REPORT NOT REACHED

Governance Task Force Report

Final Report to Convocation
October 20, 2005

Governance Task Force

NOTE:
DEFERRED (WITH REVISIONS)
FROM JUNE 22, 2005 CONVOCATION

Task Force Members
Clay Ruby, Chair
Andrew Coffey
Sy Eber
Abe Feinstein
Richard Filion
George Hunter
Vern Krishna
Laura Legge
Harvey Strosberg

Purpose of Report: Decision

Prepared by the Policy Secretariat

(Jim Varro – 416-947-3434)

FOR DECISION

GOVERNANCE TASK FORCE RECOMMENDATIONS

MOTION

That Convocation approve the following recommendations to improve the governance of the Law Society by Convocation:

1. RECOMMENDATION 1 - The *method by which members become benchers*

    a. That enhancements be made to the existing communications strategy for the bencher election, through appropriate Law Society and other media, to encourage more members to vote in the bencher election;
    b. That Law Society members who are candidates in the bencher election be educated through material produced by the Law Society to be sent to all candidates and published in the bencher election voters' guide on the subject of the Society's public interest mandate, the importance of a self-regulating legal profession and the role of a bencher, with a focus on the bencher's obligations as a fiduciary and as a representative of the public's, as opposed to the profession's, interests;

2. RECOMMENDATION 2 - *Electronic voting for bencher elections*

    a. That the Law Society begin the process to institute electronic voting for the next bencher election and future bencher elections, and

    b. That the Society pursue other improvements to the bencher election process that might reasonably be expected to increase voter participation.

3. RECOMMENDATION 3 - *The size of Convocation as a board*

    That rules of procedure for Convocation be adopted to assist the Treasurer and benchers in fulfilling the policy decision-making function of Convocation;

4. RECOMMENDATION 4 - *Benchers in the dual role of directors of a corporation and representatives in a forum similar to a legislature*

    a. That Convocation affirm the bencher's role as a fiduciary to the Law Society as an organization, whose mandate benchers must reflect in their discussions and decision-making;

    b. That Convocation affirm that a bencher in his or her role as a bencher cannot advocate a position in Convocation or elsewhere that places the profession's interest ahead of the public interest, and

c. That Convocation affirm that when a bencher is appointed as a Law Society representative to the board of another organization, insofar as the issues the bencher addresses affect the Law Society's mandate, the bencher must strike a balance between duties as a Society representative and duties owed to the board by virtue of the appointment, and, on occasion, may have to refrain from offering views or opinions if doing so places the bencher in a conflict with respect to those duties.

5. RECOMMENDATION 5 – *Increase efforts to encourage potential bencher candidates from all communities*

That the Society increase its efforts to encourage members from all communities within Ontario's legal profession to run for bencher, as the public whose interests the Society represents in its governance of the profession should be reflected in those who serve as governors.

Introduction and Terms of Reference

6. On September 23, 2004, Convocation established the Governance Task Force as part of an ongoing commitment to ensure that the Law Society's self-governance of the legal profession is sound and continues to focus on the public interest. The terms of reference for the Task Force approved by Convocation appear at Appendix 1.

7. The Law Society's effectiveness as a regulator is linked to its effectiveness at the board (Convocation) level. The Task Force focused on whether changes to improve the Society's corporate governance are needed, and if so, what those changes should entail. The Task Force recognized that the Law Society's governance structure is a functional response to its legislative mandate, and that any changes to the structure must be informed by and consistent with this mandate.

8. The Task Force also recognized that improvements in governance, if warranted, must be made in ways that acknowledge the value of the Law Society's unique history, culture and traditions, which have influenced its governance structure.

9. As reflected in its terms of reference, the Task Force took advantage of significant work that had previously been done by the Society on the subject of governance. The Task Force declined to explore governance theory and focused on practical considerations affecting governance.

10. The Task Force, which met on six occasions beginning in the fall of 2004, considered the following issues:

a. The method by which members become benchers and the size of Convocation as a board;

b. The role of the Treasurer as chair of the board (Convocation), the notion of an executive committee, priority planning, and the frequency and the procedural and substantive efficacy of Convocation;

c. Benchers in the dual roles of directors of a corporation and representatives in a forum similar to a legislature;

d. Benchers in the dual roles of policy makers and adjudicators; and

e. Electronic voting for bencher elections.

11. The Task Force received written submissions on governance issues from benchers Bradley Wright and Joanne St. Lewis, in her role as chair of the Equity and Aboriginal Issues Committee/Comité Sur L'Équité Et Les Affaires Autochtones.

12. This report discusses the above-noted issues and the Task Force's conclusions, which led to a series of recommendations that, in the Task Force's view, will enhance Convocation's ability to fulfill its obligations to govern the legal profession in the public interest.

The Starting Point: Governance and the Public Interest

13. In the Task Force's view, the historical basis for the Society's public interest mandate, how the public interest has been interpreted judicially and how that interpretation has informed the Society's governance of the profession is important to an understanding of the Law Society's purpose and, in relation to governance, the benchers' roles as directors and fiduciaries of the organization.

The Law Society's Role Statement

14. The Law Society's Role Statement, which was adopted by Convocation on October 27, 1994, reads as follows:

> The Law Society of Upper Canada exists to govern the legal profession in the public interest by:
>
> · ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and
>
> · upholding the independence, integrity and honour of the legal profession,
>
> for the purpose of advancing the cause of justice and the rule of law.

15. Through this language, the "public interest" informs the Law Society's governance obligations for the purpose of advancing the cause of justice and the rule of law.

The 1797 Statute

16. The creation of the Society presupposed a public interest foundation. The principles found in the Role Statement were embodied in the 1797 legislation that established the Law Society. It read as follows:

> "it shall and may be lawful for the persons now admitted to practise in the law, and practicing at the bar of any of his Majesty's courts of this province, to form themselves into a Society, to be called the *Law Society of Upper Canada*, as well for the establishing of order amongst themselves as for the purpose of securing

> to the Province and the profession a learned and honorable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province."

Judicial Consideration of the Public Interest Mandate

17. In *Attorney General of Canada v. Law Society of British Columbia*,[1] the Supreme Court of Canada explained the rationale for a self-governing body serving the public interest:

> The general public is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the *Legal Professions Act.*

18. The Court goes on to explain why regulation of the profession independent from government is necessary for the protection of the public:

> The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

19. Callahan, J. (as he then was) writing on behalf of the Ontario Divisional Court in *Re Klein and the Law Society of Upper Canada*[2] stated:

> The Law Society's mandate under the *Law Society Act* R.S.O. 1980, c. 233, is to regulate the affairs of the legal profession and the public interest… The Law Society is a statutory authority exercising its jurisdiction in the public interest…

20. This view was reiterated in the February 2000 decision of *Wilder v. Ontario Securities Commission*[3] , in which the Ontario Divisional Court stated:

> The Law Society and the Ontario Securities Commission both exercise public interest functions, but the public interests which they seek to protect are not the same. The Law Society has an important role to govern the legal profession in the public interest, and to ensure that members of the profession do not engage in professional misconduct or conduct unbecoming a barrister and solicitor.

21. On appeal (February 2001), the Ontario Court of Appeal agreed with the Divisional Court's analysis.

22. In June 2001, the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada*[4] , referring to the mandate of the Law Society, said "The Law Society Act is geared for the protection of clients and thereby the public as a whole;"

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[1] [1982] 2 S.C.R. 307
[2] (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.)
[3] (2000) 47 O.R. (3d) 361 (Ont. Div. Ct).
[4] [2001] 3 S.C.R. 562.

Applying the Public Interest Mandate in the Profession's Governance

23. The law is clear that self-regulatory organizations such as the Law Society are required to fulfill their mandates in the public interest. The competence, professional conduct, integrity and independence of the bar in the Ontario, as the Role Statement emphasizes, is fundamental to the public interest mandate of the Law Society.

24. It is against this background that the Task Force examined the Law Society's own governance through the benchers in Convocation.

The Issues

I. The Bencher Qualification Process and the Size Of Convocation as a Board

The Election Process

25. The Task Force considered whether the method by which members of the Law Society become benchers affects the effectiveness of Convocation as a board and thus the Society's effectiveness as a governing body.

Some "Pros and Cons" of the Election Process

A Democratic Process

26. Forty benchers are elected by the legal profession in Ontario every four years. The eligible voters are the 37,000 members of the Law Society. The bencher election provides lawyers in the province with a transparent, democratic process for electing their governors from the profession, who are required to govern the profession in the public interest.

Voter Participation - Does Convocation Reflect the Legal Profession in Ontario?

27. Despite increased efforts by the Society to encourage members to vote, a significant portion of the Society's membership does not vote in the bencher election. In recent bencher elections, the benchers have been elected by less than 50% of the eligible voters.[5] How this number might be improved is discussed later in this report.

28. The question for the Task Force, in light of this statistic, was whether the election results in a board of governors that sufficiently captures the choices of and reflects Ontario's legal profession.

The "Constituency" Issue

29. The bencher election prompts most candidates to mount some type of campaign. Campaigns are directed to the Society's membership as voters, and in some cases, judging from candidates' election statements, focus more on member's interests than the public interest. While this may be peculiar to this election process, the Task Force is discomforted by the notion that some bencher candidates do not appear to understand

[5] See the chart on page 13 for data on past bencher elections.

that the bencher's role, as a fiduciary of the organization, is that of a governor of lawyers in the public interest.

30. The election process in fact leads some bencher candidates to portray themselves as constituency representatives rather than representatives of the public constituency for the profession's governance. The issue of benchers as legislative representatives *versus* fiduciaries on a board is discussed in detail later in this report, but the question is whether a bencher who participates more as a constituency representative negatively impacts on Convocation's ability to fulfill the Society's public interest mandate. From time to time, some benchers have confused their role in this way.

The Value of An Election Process

31. Notwithstanding the above, the Task Force believes that the election of the governors by the profession's membership is a key aspect of self-governance of the profession in Ontario.

32. In the Law Society's process, the entire membership is able - and invited - to vote for the governors without restriction.[6] Through the vote, the members determine who governs the profession in Convocation, and to that extent, have the opportunity to influence the profession's governance. In the absence of an election process, the Society might well be criticized for failing to provide such an opportunity.

33. The election process is also free of any limitations on who may run as a candidate, including limitations that might be viewed as discriminatory or arbitrary. The election provides a level playing field in which any member who meets the requirements in the by-laws can choose to become a candidate.[7]

34. The Task Force considered whether the lack of specific qualifications for a bencher leaves the Society open to criticism about the quality of the elected bench or whether the "right" candidates are elected. The Task Force rejected this notion. There is no evidence to suggest any correlation between the quality of the benchers and the fact that they are elected, as opposed to qualifying through other methods.

35. As an option to an elected board, the only other process noted by the Task Force by which a board could be constituted was an appointment process.[8] In this process, board

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[6] All members of the Society whose rights and privileges have not been suspended are entitled to vote (By-Law 5, s. 18)

[7] Section 15 of the *Law Society Act* provides that benchers are elected in accordance with the by-laws. By-Law 5 (Election of Benchers) provides as follows:

> 9. Every member, other than a temporary member, is qualified to be a candidate in an election of benchers if, at the time of signing a nomination form containing his or her nomination as a candidate, the member resides in Ontario and the member's rights and privileges are not suspended.
>
> 10(2). A candidate shall be nominated by at least ten members who are not temporary members and whose rights and privileges are not suspended at the time of signing the nomination form.

[8] This is distinguished from the current process for appointing lay benchers to Convocation under the *Law Society Act.*

members are selected typically on the basis of certain criteria and qualifications. John Carver said the following about recruiting board members:

> If a board is able to select its own members, it should start with a well-deliberated set of qualifications. If the members are selected by others, the board should enroll appointing authorities in using the board's desired qualifications whenever possible.
> …
> What qualifications are important?… For the degree of strategic leadership championed in these pages, five qualifications, among other, are necessary.
>
> 1. Commitment to the ownership and to the specific mission area:…
> 2. Propensity to think in terms of systems and context:…
> 3. Ability and eagerness to deal with values, vision, and the long term
> 4. Ability to participate assertively in deliberation:…
> 5. Willingness to delegate, to allow others to make decisions:… [9]

36. The Task Force did not consider the appointment process as a viable option for the Society. First, the process would be complex, with intricate considerations around the criteria and qualifications for appointment, who sets these standards, who should make the appointments and the term of the appointments. Second, the Task Force was not convinced that an appointment process or any process other than an election would ensure, or at a minimum enhance the ability to show, that the Society's governors represent the profession's choices. Third, an appointment process may give rise to claims of elitism or claims that the ability to govern in the public interest is compromised if there is a concern that those who appoint, and those who are appointed, have other agendas that are not centered on the public interest.

37. In short, the Task Force concluded that an appointment process would create more problems than it would solve. In comparison, the election process is a transparent and democratic method of populating Convocation that avoids the concerns of unfairness, favouritism or selectivity. The Society's history affirms this conclusion.

Lay Benchers

38. The Task Force considers the appointment process for lay benchers a separate issue, and is making no recommendations for changes or enhancements to that procedure. Lay benchers are appointed under s. 23 of the *Law Society Act*. Under this process, the Lieutenant Governor in Council may appoint eight lay benchers whose terms expire immediately before the first regular Convocation following the first election of benchers that takes place after the effective date of the appointment. Lay benchers are eligible for reappointment.

Conclusions on the Bencher Qualification Process

39. The Task Force is recommending no change to the process by which members become benchers. However, the Task Force believes the public interest mandate of the Law Society, the role of the bencher within that mandate, with a focus on the bencher's obligations as a fiduciary and as a representative of the public's, as opposed to the

[9] John Carver, *Boards That Make A Difference* (Jossey-Bass Inc.: 1990 pp. 201-203)

profession's, interests, and the importance of an independent self-regulating profession should be emphasized within the profession. More specifically, it should be emphasized among those who choose to run as candidates in a bencher election. To this end, the Task Force proposes that material produced by the Society on these subjects should be sent to each bencher candidate upon acceptance of the candidacy under By-Law 5.[10] This material should also be published in the voters' guide for the election to create awareness among the profession about these issues and to indicate that all bencher candidates have received the material.

40. The Task Force also believes that the bencher election process will be enhanced and the results more meaningful if a larger number of members vote in the election. The Task Force suggests that two matters be pursued.

41. The first matter relates to the profession's awareness of the bencher election. The Law Society already engages in extensive communications in advance of a bencher election[11] , and the Task Force acknowledges the significant and worthwhile effort that is made through the Society's Communications Department to notify the membership of an upcoming election. The Task Force proposes that enhancements be made to this communications strategy, in the months prior to the bencher election, using available Law Society and other media, that would have the effect of focusing the profession's attention on the vote.

42. The second matter relates to the voting process. The Task Force believes that improvements to the election process, including the ease with which members may cast their votes, may have the effect of increasing voter participation. Such improvements should be pursued. The Task Force focused on electronic voting for the bencher election as one such improvement, discussed in the next section of this report.

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[10] By-Law 5, s. 11 requires the Elections Officer to do the following:
Results of examination of nomination form
(3) The Elections officer shall communicate the results of his or her examination of a nomination form to the candidate whose nomination is contained therein and,

- (a) if the Elections Officer has accepted the nomination, he or she shall communicate to the candidate,
  - (i) the manner in which the candidate's name will appear on the election ballot; and
  - (ii) the electoral regions from which the candidate is eligible to be elected as bencher; or
- (b) if the Elections Officer has rejected the nomination, he or she shall communicate to the candidate,
  - (i) the reasons why the nomination was rejected; and
  - (ii) the time by which the candidate, if he or she wishes to be a candidate in the election of benchers, must submit to the Elections Officer a valid nomination.

[11] An elaborate communications plan entitled "Get the Vote Out" was instituted for the 2003 bencher election. It included notices in the *Ontario Reports* and local community newspapers, notices and articles in the *Ontario Lawyers Gazette*, posters distributed to county law libraries and legal organizations, a letter from the Treasurer sent separately to every member about the election and a link on the Society's website to a stand-alone site that included all election material and information.

Electronic Voting For Bencher Elections

43. As noted above, the Task Force concluded that no change to the method by which members become benchers is required. However, an ongoing concern has been the level of voter participation in bencher elections. Voter turnout has been steadily declining over the last 40 years. In 1961, voter participation was 76% compared to 37% in 2003.[12]

44. The Task Force believes that an increase in voter participation is desirable primarily because Convocation will more solidly reflect the profession's choices for its governors.

45. To this end, the Task Force supports methods to streamline the election process that may also have the effect of increasing voter participation.

The Current Election Process and the Benefits of Electronic Voting

46. By-Law 5 (Election of Benchers) requires that the ballot and voting guide be mailed to members and that members return the ballot to the Law Society in Toronto by mail, courier or hand delivery. Apart from cost [13], the following systemic issues with the current process could be resolved by electronic or on-line voting:

a. Mail delivery to members in the regions outside of Toronto, particularly the northern regions, usually takes longer than delivery in Toronto. Members outside of Toronto must also allow more time for return of their ballots to the Law Society. Some of these members will courier their ballots to ensure delivery, incurring charges that some Toronto members can avoid, for example, by hand delivering their ballots to the Law Society on the day voting closes.

b. A significant number of ballots are received by mail after voting has closed. In 1995, 1,332 ballots were received late, in 1999, 1,102 ballots were received late

[12] Law Society Voter Turnout

Year	Total Eligible Votes	Total Ballots Cast	% Turnout	Trend
1961*	5,061	3846	76%	
1966*	5,655	4193	74%	-2%
1971*	6,905	5051	73%	-1%
1975*	9,007	6146	68%	-5%
1979*	12,296	8,237	71%	+3%
1983*	14,367	9,341	63%	-8%
1987	18,369	10,506	54%	-9%
1991	23,391	12,399	53%	-1%
1995	27,175	11,880	44%	-9%
1999	29,718	11,351	42%	-2%
2003	33,667	12,363	37%	-5%

*Source: Law Society Archives.

[13] Elections conducted by mail have very high administrative costs. The budget for the election in 2003 was $250,000. Of that, more than $180,000 was spent on printing and distribution of the election package. An additional $15,000 was spent on postage for return ballots. These costs will continue to increase with future elections. In 2007, the size of the membership will be almost 40,000 members.

and in 2003, 508 ballots were received late. Electronic voting would eliminate the need for members to estimate the time for delivery of a paper ballot to the Law Society.

c. A paper system can result in invalid or spoiled ballots. When a mark on a paper ballot is unclear, scrutineers must determine whether the vote is valid. The number of spoiled ballots can be significant. In the 1995 bencher election, there were 462 spoiled ballots, in 1999 there were 40 spoiled ballots and in 2003 there were 159. Members cannot spoil a ballot when voting electronically.

47. On-line voting would provide equal access for members in all locations, provided that the member has access to the Internet. Election results would be generated almost instantaneously with on-line voting. Members who misplaced their ballot packages could vote on-line. An email could be sent to members to remind them to vote with a link to the log-in screen. They will no longer have to search for their ballot package or call the Law Society to request another ballot.

48. Electronic voting may also encourage younger members to vote, a group that statistically is underrepresented among members who vote. Many members who were born after 1970 are accustomed to using the Internet as a daily tool. Electronic voting may engage younger members of the Law Society in the governance of the profession by providing an easy and convenient voting method.

49. Currently, the Society can communicate with more than 70% of members by email. Law Society members are becoming more accustomed to conduct business with the Society electronically. More than 15,000 members e-filed the Member's Annual Report in 2004, compared to 10,754 in 2003, and 2,343 in 2002. LawPRO reports that of the 19,800 members who pay insurance, 16,200 or 80% file electronically.

50. The Law Society has already used electronic voting. The recent referendum on bencher remuneration was conducted by an electronic vote.[14]

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[14] The following excerpt from the March 24, 2005 report on the referendum provides a summary of the experience with electronic voting:

Conduct of the Referendum

1. In October 2004 Convocation approved electronic voting as the means by which the referendum would be conducted. No paper ballots were accepted during the referendum. All voting was done over the telephone or the Internet.
2. The Law Society contracted with Computershare, a company in the business of conducting corporate shareholder voting processes. Computershare already had the electronic voting systems in place to conduct the referendum. Computershare manages shareholder voting for over 7,000 corporations with more than 60 million shareholders worldwide.
3. Computershare printed and distributed the referendum packages; conducted the electronic voting process; and generated the statistical reports following the referendum.
4. Voting closed at 7:00 p.m. EST on February 28, 2005. Computershare advised the Law Society of the results at 9:00 a.m. on March 1, 2005. The results were posted on the Law Society's web site after benchers were advised of them.
5. The referendum was conducted between February 4, 2005 and February 28, 2005. A notice to the profession first appeared in the January 7, 2005 edition of the *Ontario*

Conclusions on Electronic Voting for Bencher Elections

51. The Task Force recommends that electronic voting be instituted for the 2007 bencher election. While the hope is that such a method will improve voter participation, based on research completed after the last bencher election, there is no evidence to suggest that electronic voting increases voter participation. Reforms in other jurisdictions designed to make voting more convenient in broad based elections have had very little effect on voter participation. The studies that resulted in these conclusions suggest that information, motivation and mobilization are more powerful tools of influence than convenience.

52. The Task Force is hopeful that, within the smaller context of the bencher election, electronic voting as a means to increase the ease with which members may vote will translate into increased participation. However, the Task Force believes that even if electronic voting does not ultimately enhance voter participation, for the reasons outlined above, this method is a logical evolution of the election process, is reasonable as an application to facilitate the vote and will be an effective way to run the election.

53. The Task Force understands that initial costs for electronic voting would likely be high in the short term, until the infrastructure for on-line voting is in place. The Task Force also learned that overall costs may not decrease until there is a way to distribute the election material, including the lengthy voter's guide, by a means other than mail. The Law Society would also have to accommodate members who do not use the Internet. Eventually, the Society could move to electronic voting only. Determining the costs of a move to and maintaining an electronic election process will be part of the work to be done if Convocation agrees to pursue this proposal.

54. Apart from electronic voting, the Task Force has no other specific recommendations on improving the election process, but requests that Convocation encourage the Society's staff to pursue other improvements that might reasonably be expected to increase voter participation.

Reports. Six notices in total were published in the *Ontario Reports* between January 7 and February 18, 2005.

6. In addition to notifying the profession through the *Ontario Reports*, notices appeared on the Law Society's web site, in an e-bulletin distributed by the Professional Development & Competence Department to 24,942 members, and in the *Ontario Lawyers Gazette.*
7. One week prior to the close of voting, a reminder e-mail was sent to every member for whom the Law Society has an e-mail address (27,239 members).
8. Referendum packages were mailed to all eligible voters on February 4, 2005. The packages consisted of the referendum question and background information, as well as a Voting Instruction Form....
9. All referendum material and notices to the profession were distributed in French and English.
10. Three members who have visual impairments have asked the Law Society to distribute all information to them electronically. The Elections Officer communicated directly with these members, and they received the referendum package from Computershare in a format that was accessible to them.

Size of Convocation as a Board

55. As noted above, there are 40 elected benchers in Convocation. The total number of benchers who make up Convocation, however, is greater. Currently, in addition to the elected benchers, there are eight lay benchers and 29 *ex officio* benchers, who include former Treasurers, current and former Attorneys-General and life benchers, for a total of 77. The *Law Society Act* determines the composition of Convocation.

56. For the size of the organization, the board of directors (Convocation) is large. The Task Force considered whether there was some relationship between the size, the ability to set priorities and timely and effective decision-making.

57. As a subject for review, the size of Convocation is not a new issue. It was discussed in the Strategic Plan of 2000, which proposed that the size and composition of Convocation be reviewed to determine whether it could be structured to be more effective in its policy decision-making. The Strategic Planning Committee's report of January 2001 included the following:

> A. Size of Convocation
>
> The Committee considered reducing the size of Convocation as a means of making the decision-making process more efficient. Several members of the Committee were of the view that the size of Convocation should be reduced, and that the reduction should be substantial. At the same time, the Committee recognized that any reduction in the size of Convocation would have to take into account the effect of such a measure on diversity and regional representation.
>
> A reduction in the size of Convocation would require legislative amendment. Given how lengthy and resource intensive a process legislative change is, the Committee recommends the implementation of a number of other measures to improve Convocation's efficiency prior to embarking on a course of legislative amendment.
>
> The measures being suggested for immediate implementation to improve the efficiency of Convocation include,
>
> (a) the development and enforcement of rules of procedure for Convocation, and
>
> (b) the establishment of the Treasurer's Advisory Committee.

58. With respect to (a) above, the Task Force agrees that there is merit to examining procedures that govern Convocation. The Task Force is aware that the Professional Regulation Committee has completed a review of proposed rules of procedure for Convocation that were before Convocation in June 2004, and that the Treasurer has reviewed the report and the proposals. The Treasurer indicated his intention to conduct the affairs of Convocation in accordance with the proposed rules for a period of six months, beginning in September 2005, during which Convocation may assess their appropriateness. The Treasurer has proposed that toward the end of that period, he will seek Convocation's disposition regarding the adoption of these rules.

59. With respect to (b) above, the matter of an Executive Committee or Treasurer's Advisory Committee is discussed later in this report.

60. Beyond these two issues, the Task Force concluded that the large size of Convocation does not translate into an unwieldy forum for decision-making. While a smaller board may be more efficient in moving through the business of Convocation, the current size is not an impediment to accomplishing the Society's business. Many factors affect whether efficient decisions can be made at Convocation, but the size of the board has never determined whether a required decision was made or not made.

61. Further, reducing the size of Convocation may lessen the ability of Convocation to reflect the diversity of Ontario's legal profession. As noted above, the Task Force determined that continuing with an election process and increasing efforts to encourage the vote should help to enhance this aspect of Convocation. Given that conclusion, it would be inappropriate to suggest that Convocation's size be reduced.

62. If improvements can be made in Convocation's governing procedures through rules of procedure, this should assuage any current concerns about inefficiency.

Conclusions on the Size of Convocation as a Board

63. The Task Force makes no recommendation to reduce the size of Convocation.

64. With respect to ways to improve the effectiveness and efficiency of decision-making in Convocation, the Task Force proposes that rules of procedure for Convocation be adopted to assist the Treasurer and benchers in fulfilling the policy decision-making function of Convocation.

II. Role Of The Treasurer as the Chair of the Board, the Notion of an Executive Committee, Priority Setting, and the Frequency and Procedural and Substantive Efficacy of Convocation

65. As the Task Force began review of the issues noted in the above title, the link between them became apparent. They all focus on Convocation's agenda and in a broader sense, how governance priorities are set and how planning for Convocation's agenda unfolds.

The Treasurer

66. The Treasurer is "the president and head of the Law Society". [15], and as the chair of Convocation, is responsible for running Convocation. The Task Force's interest in the Treasurer's role was the extent of the Treasurer's authority and, in relation to the governance process, whether its scope should be reconsidered.

Overview of the Treasurer's Duties

67. The Task Force could not improve on the following narrative description provided by bencher Ron Manes, transcribed from Convocation's discussion of the Strategic Planning Report on January 25, 2001:

[15] *Law Society Act*, s. 7.

> …when it comes to defining what the Treasurer does, it's important we understand the scope of the Treasurer's job and how it has evolved from what historically may be termed a largely ceremonial position to what is now a real integral function to the internal operations of the Law Society and to Convocation.
>
> The Treasurer, it is true, presides over Convocation, presides over our agenda to ensure that what comes before us is properly before us, and, of course, regulates the debate. The Treasurer oversees all committees, all task forces, and all working groups to ensure that they all achieve their objective.
>
> The Treasurer is responsible for coordinating. The Treasurer is an ex officio member of all of those committees, task forces, and working groups, and in our experience with our present Treasurer, attends many of these committee meetings, task force meetings, et cetera.
>
> The Treasurer, in addition to that, monitors the CEO. We have decided that now. It is clear to us that the Treasurer is going to be accountable to us to monitor the performance of the CEO. Now, this entails, just so we understand, not only defining for the CEO or translating what we have defined for the CEO what the CEO's objectives are, but also measuring the CEO against those objectives.
>
> Now, anyone who knows that responsibility knows how onerous it is, and it is not a responsibility that in our view the Treasurer can possibly discharge on his own. And then he comes to recommend to us, in a formal way, what we or how we assess the performance of the CEO.
>
> The Treasurer, in addition to that oversight and in addition to his responsibilities here at Convocation, must liaise with the public, must liaise with the profession, must liaise with the bench, liaise with the press, deal with interest groups and constantly write letters to the Globe and Mail.
> …
> The Treasurer is the face of Convocation. Yes, it is a ceremonial job. It is a huge job. He represents us at a substantial number of functions, more functions than we can possibly count or comprehend."

68. The Treasurer's formal authority is found in the *Law Society Act*, the regulations and the by-laws. Policies have also developed around the role of the Treasurer. Certain practices connected with the office of the Treasurer are also followed. The following discusses the provisions that relate to governance.

Law Society Act

69. The Treasurer is part of the corporation of the Society. Section s. 2(2) says that the Society "is a corporation without share capital composed of the Treasurer, the benchers and the other members from time to time." The Treasurer is the president and head of the Society (s. 7). Benchers, not the membership, elect the Treasurer annually, who ceases to be an elected bencher (s. 25).

70. The Act includes by-law-making authority for matters related to the office of the Treasurer. Section 62 (1) 7. says that by-laws may be made " governing the election of

and removal from office of the Treasurer, the filling of a vacancy in the office of Treasurer, the appointment of an acting Treasurer to act in the Treasurer's absence or inability to act, and prescribing the Treasurer's duties".

The By-Laws

71. The By-Laws include the following:

a. By-Law 1 (By-laws): the Treasurer has the authority to call a special meeting of Convocation to vote on making, amending or revoking a by-law when that vote has been deferred (s. 1(3)).

b. By-Law 5 (Election of Benchers): Generally, the Treasurer presides over the election of benchers.[16] The Treasurer can intervene to fill certain positions (e.g. assistant or scrutineer) related to the election (s. 7).

c. By-Law 6 (Treasurer): Most of this by-law focuses on the election of the Treasurer. The last part of the by-law deals such things as term of office, vacancy and who acts when the Treasurer is unable to act (s. 16 and 17). For example:

i. Subject to removal of a Treasurer from office, he or she remains in office until his or her successor takes office;

ii. If a Treasurer resigns, is removed from office or cannot continue to act, Convocation must elect an elected bencher to fill the office of Treasurer until the next Treasurer election;

iii. If a Treasurer is temporarily unable to act, or if there is a vacancy in the office, the chair of the standing committee of Convocation responsible for financial matters, or if he or she cannot act, the chair of the standing committee of Convocation responsible for admissions matters, acts as Treasurer until the Treasurer is able to act or another election is held.

d. By-Law 8 (Convocation) details the Treasurer's authority and responsibility in Convocation. This is the by-law which is the subject of the motion (June 2004) to adopt rules of procedure for Convocation. In particular,

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[16] 4. (1) Subject to subsection (4), an election of benchers shall be presided over by the Treasurer.

(2) The Treasurer may appoint a member who is not a candidate in an election of benchers to assist the Treasurer in exercising the powers and performing the duties of the Treasurer under this By-Law.

(3) The Treasurer shall appoint a member who is not a candidate in an election of benchers to exercise the powers and perform the duties of the Treasurer under this By-Law whenever the Treasurer is unable to act.

(4) If the Treasurer is a candidate in an election of benchers, Convocation shall, as soon as practicable after the Treasurer's nomination as a candidate is accepted, appoint a member to preside over the election and to exercise the powers and perform the duties of the Treasurer under this By-Law.

i. The Treasurer may vary the dates of regular Convocation (s. 1);

ii. The Treasurer may call a special Convocation (s. 2(1)) at any place (s. 3(2)) but must do so on the written request of 10 benchers (s. 2(2));

iii. The Treasurer presides over all Convocations (s. 4);

iv. In addition to Convocation's decision to meet in camera according to the criteria in By-Law 8, Convocation will meet in camera to consider "any matter at the instance of the Treasurer" (s. 5(3)5);

v. The Treasurer can vary the usual order of business at Convocation (s. 6(1)).

Policy

72. Convocation has adopted Governance Policies that also define to the Treasurer's role. Reproduced below is Section D of the Governance Policies (amended to April 30, 1999), which provides the Treasurer's "job description". This description repeats some of the Treasurer's duties described in the Act and by-laws.

D. Treasurer's Job Description

1. The Treasurer is the president and head of the Law Society.

2. The Treasurer shall adhere to the Policy Governance Model.

3. The responsibilities of the Treasurer shall be,

a) to be the public and ceremonial representative of the Law Society of Upper Canada and the only person authorized to speak for Convocation;

b) to chair meetings of Convocation in accordance with the Policy Governance Model;

c) to prepare Convocation's agenda on the advice of Convocation;

d) to develop for Convocation's approval, priorities for the Law Society for the upcoming year in consultation with benchers and senior staff;

e) to coordinate, in consultation with staff and committee chairs, the work and responsibility of committees and to ensure policy issues are assigned to appropriate committees;

f) to appoint chairs and vice-chairs and members of committees subject to ratification by Convocation;

g) to be an *ex officio* member of all committees and task forces; and

h) to provide such reports and evaluations as Convocation may request, including an evaluation of the performance of the Chief Executive Officer.

The Treasurer's Role in Setting Convocation's Agenda and Priority Planning

73. The Treasurer's responsibility for Convocation's agenda has developed as a matter of practice, but to the extent that it has been codified, Governance Policies D.3.c) through f) above generally reflect the process.[17] Simply put, the Treasurer controls Convocation's agenda, and no item will appear on the agenda unless the Treasurer has approved it for the agenda.

74. That said, an informal consultation between the Treasurer and other key individuals, including the Chief Executive Officer (CEO) and committee or task force chairs, occurs prior to Convocation. As noted above, these chairs are the appointees of the Treasurer and Convocation, and in a practical sense, their input has a significant impact on the business of Convocation.

75. This consultation is required because the Treasurer must ensure that items that appear on the agenda have been fully developed, consulted upon and properly presented in writing. Beyond the CEO and committee chairs, the Treasurer will also consult with the Director of Policy and Tribunals with respect to Convocation's agenda.

76. At another level, the Treasurer will respond to the initiatives of benchers, external bodies and other stakeholders to have matters considered by Convocation. These "ad hoc" initiatives will generally be accommodated to the extent that they relate to the governance of the profession. The Treasurer's accommodation also helps him or her to manage the political aspects of Convocation, which are a function of its structure, size and the relationships that arise within it.

77. The above process relates to the whether an executive committee would be a useful addition to the Society's governance processes.

The Notion of an Executive Committee

78. The suggestion that the Society explore establishing an executive committee has arisen from time to time in discussions about priorities and planning for Convocation. In particular, the executive or advisory committee has been characterized as a way to assist Convocation in effectively and efficiently sorting out priorities and planning Convocation's policy agenda.

79. The issue dates back to at least the early 1990s. A 1991 Research and Planning Committee report referenced a subcommittee report's findings on the idea of an executive committee:

> When agreement has been reached on the limits of the proper role of the Law Society, a further study should be undertaken into the respective roles of benchers and staff to determine whether there are ways in which bencher workload might be reduced, …

[17] In the Task Force's view, the Treasurer's receipt of the "advice of Convocation" described in Governance Policy D. 3. c), operates primarily as a "reverse" consultation in practice, in that benchers will raise issues with the Treasurer they feel should appear on the agenda. Under By-Law 8, 10 benchers also have the right to require a special Convocation to deal with an issue.

> …Consideration should be given as to whether the problem might be alleviated by the establishment of an Executive Committee of Convocation.
> The proposal that the establishment of an Executive Committee should be studied coincides with your Committee's earlier thinking in response to the request from the Finance and Administration Committee to consider how the Society should respond to proposals for new programmes in times of fiscal restraint.
> The further consideration of these matters will be recommended to the Research and Planning Committee which takes office after the 1991 bencher election.

80. A subsequent report from this Committee to July 10, 1992 Convocation included the following:

> The following questions were posed for consideration [by the Committee]:
>
> Should the Research and Planning Committee develop a statement for Convocation, defining the limits of the proper role of the Law Society, the statement to serve as a standard against which all activities of the Law Society, and all proposals for new activities, can be measured to determine their respective priorities?
>
> Should the Research and Planning Committee recommend to Convocation that the Rules of the Law Society be amended to provide for an Executive Committee which will be responsible for determining the political and financial priorities of the Law Society?
>
> Should the Research and Planning Committee prepare a proposal for Convocation setting out the respective responsibilities of the Treasurer, Convocation, the Executive Committee, Standing Committees, benchers and staff?
>
> At its meeting on May 15, your Committee debated the first two questions at length and decided to consider, at its June meeting, proposals
>
> - for developing a statement on the role of the Law Society and,
> - for studying an appropriate structure for the determination of Law Society priorities.

81. The first question noted above lead to the adoption of the Society's Role Statement in 1994. In its report to September 24, 1992 Convocation, the Committee indicated the following with respect to the second question:

> DETERMINATION OF LAW SOCIETY PRIORITIES
>
> A further consequence of the discussions last year concerning the responsibilities of benchers, staff and committees was a decision to appoint a subcommittee to recommend a structure for the determination of Law Society priorities. The project is dependent upon the definition of the role of the Law Society, mentioned in the previous paragraph; it also overlaps with steps that are

being undertaken by the Finance and Administration Committee. The Research and Planning Committee will therefore proceed only when it seems appropriate to do so in light of these other initiatives.

82. In the fall of 1992, the Committee formed a sub-committee to deal with this issue and its February 26, 1993 report to Convocation indicated that this matter would "wait until after the 1993-1994 budget process has been completed". There is no record of further reports from the Committee to Convocation with respect to this matter or recommendations for an executive committee.

83. The most recent comprehensive treatment given to the issue was in the 2000 Strategic Plan, which recommended that an executive committee be formed "for managing and streamlining Convocation's agenda and advising the Treasurer". The Strategic Planning Committee's January 2001 report to Convocation included the following section on the establishment of a Treasurer's Advisory Committee.

C. Treasurer's Advisory Committee

29. There is currently no formal mechanism in place to plan Convocation's agenda; to determine when issues are ready for Convocation's consideration; to advise the Treasurer between meetings of Convocation; to ensure that the Chairs of the major policy-making committees are apprised of the issues being dealt within each committee; to consistently and effectively monitor the implementation of Convocation's policies; to review the Law Society's governance policies to ensure they meet the Law Society's current needs; and to generally assist the Treasurer in the exercise of the Treasurer's duties.

30. The Committee is of the view that a formal process must be developed to accomplish these objectives if Convocation is to become more efficient. Too often, matters are before Convocation prematurely, the consequences of a course of action have not been fully examined, financial ramifications are not detailed, or further consultation with other committees, staff, or external organizations is required. Bringing such matters before Convocation results in time wasted on debate when the matter is eventually sent back to committee for further study, or decisions are made by Convocation on the basis of inadequate information.

31. Convocation has not always effectively monitored the implementation of the policies it sets. Once the policy is passed by Convocation, there is no formal mechanism for monitoring its implementation or its achievement of Convocation's goals.

32. In addition, the Committee is of the view that our governance policies, including the executive limitations, must be reviewed to ensure they are appropriate for the current circumstances of the Law Society. There is no formal mechanism to accomplish this.

33. The Committee recommends that a Treasurer's Advisory Committee be established to oversee the work of committees, task forces and working groups, to ensure that issues are channelled to the appropriate committee, that the work of the committees is progressing and finding appropriate space on Convocation's

agenda, that the work of the committees is co-ordinated to avoid duplication of effort, that Convocation's policies are implemented by maintaining close liaison with the Chief Executive Officer, and that appropriate monitoring mechanisms are developed. The Treasurer's Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

34. The Treasurer's Advisory Committee would not acquire any of the decision-making powers vested in Convocation by section 10 of the *Law Society Act*, which reads as follows:

The benchers shall govern the affairs of the Society, including the call of persons to practise at the bar of the courts of Ontario and their admission and enrolment to practise as solicitors in Ontario.

35. As always, all policy decisions would be made in Convocation. The Treasurer should be responsible for keeping Convocation apprised of the committee's activities, for example, by circulating agendas and minutes of the committee's meetings.

36. For maximum efficiency, the Treasurer's Advisory Committee should be small. The committee would be composed of the Treasurer and the chairs of those committees responsible for developing policy on matters related to the core mandate of the Law Society - bar admissions, professional regulation, professional development and competence - as well as the chair of the Finance and Audit Committee and the Chief Executive Officer. In addition, the Treasurer should have the option of adding two further benchers to the Treasurer's Advisory Committee. Other benchers may be invited to attend committee meetings for specific purposes.

Recommendation to Convocation

37. That a Treasurer's Advisory Committee be established with the mandate to ensure that,

(a) the work of committees, task forces and working groups is overseen;
(b) issues are channelled to the appropriate committee;
(c) the work of the committees is progressing and finding appropriate space on Convocation's agenda;
(d) the work of the committees is co-ordinated to avoid duplication of effort;
(e) Convocation's policies are implemented by maintaining close liaison with the Law Society's Chief Executive Officer;
(f) appropriate monitoring mechanisms are established; and
(g) the Law Society's governance policies meet the current needs of the Law Society.

The Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

38. The Treasurer's Advisory Committee is to be composed of the Treasurer, the Chairs of the Admissions, Professional Regulation, Professional Development and Competence, and Finance and Audit Committees, the Chief Executive Officer and up to two other benchers to be appointed at the option of the Treasurer.

39. The Treasurer shall keep Convocation apprised of the Committee's activities.

84. The above recommendation was defeated in Convocation by a vote of 20 to 12.

85. As noted above, in the absence of an executive or advisory committee, the priorities and planning functions for Convocation do not devolve to Convocation as a whole. Consultations occur among the chairs of committees and senior staff, who bring issues forward as required to the Treasurer and the CEO. The Treasurer then sets Convocation's agenda.

86. As boards usually set the policy agenda for an organization, one argument in favour of an executive committee is that a large board could benefit from the work of a smaller group of its members who can focus on the groundwork for a policy agenda. The authority given to an executive committee, however, may be broader. Task Force reviewed the mandates of the executive committees of a diverse group of organizations and found the following common particulars:

a. To perform the duties and exercise the powers delegated to it by the board;

b. To expedite the administration and affairs of the organization between board meetings on important matters arising between board meetings that cannot be postponed until the next scheduled meeting of the board;

c. To exercise all the powers delegated to it by the board when the board is not in session and, in the judgment of the committee, calling an in-person or telephonic special board meeting is impractical or unnecessary;

d. To act as a sounding board for general management issues and/or matters that affect the organization as a whole;

e. To conduct an annual performance evaluation of the committee;
f. To report to the board on a regular basis so that the board can monitor the committee's performance and take any corrective action.

87. There are critics of the executive committee, but the criticism is linked to the larger issue of whether or not a board is exercising good governance. John Carver, in a 1994 article on board leadership, discussed how many boards, as noted above, give their executive committees the power to make board decisions between board meetings. He then says that the only excuse for a board to authorize an executive committee to make such decisions is if the board is too awkward to do its own job. Ultimately, he concludes that executive committees are entirely optional, and that giving such a committee the authority commonly given either to the board or the CEO reflects important flaws in the existing governance.

88. The theory of Carver's policy governance model is that if a board is properly constituted, knows its role, and governs effectively, an executive committee is likely superfluous.

Conclusions on the Treasurer's Role and an Executive Committee

89. The Task Force saw no reason to disturb the process by which the Treasurer controls Convocation's agenda by suggesting any limitation on his or her role or institutionalizing the Treasurer's current and effective consultative process.

90. In the Task Force's view, the Treasurer should be free to seek and receive advice from those from whom he or she wishes to hear. He or she should be able to seek that advice, in confidence if necessary, outside of a formal process, such as an executive committee, that would require structure, agendas and minutes. An executive or advisory committee would impose another layer of bureaucracy, and may politicize the Treasurer's consultations, for no great benefit.

91. With respect to some of the findings documented in the Strategic Planning Committee's report, the Task Force notes that since 2001, improvements in planning Convocation's policy agenda have been made, including the following:

a. Committees and task forces are better at preparing the necessary information for Convocation's decision-making function, including the financial impact, the impact on stakeholders and how the decisions are to be implemented operationally;

b. Through the budget planning process, a systematic review of operations includes information on the implementation status of Convocation's policies, which will also inform the need for new initiatives that Convocation should consider[18] ;

c. The work of the committees is co-ordinated to a large extent through the Policy Secretariat within which regular briefings are held on committee activities; efforts are made to avoid duplicated work;

d. In consultation with the Policy Secretariat, the CEO informally monitors the progress and completion of policy issues before the standing committees and task forces.

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[18] The following is from the Finance Committee's report to May 2005 Convocation on the budget planning process for the 2006 budget:

> Convocation, in the course of its regular business, receives regular program reports from the Society's various standing committees as well as periodic updates from the CEO on how the policy objectives of Convocation are being implemented and the relative merits and progress of the various initiatives and programs undertaken during the course of the year.
>
> A comprehensive system of program review linked to the budget is also in place. It was approved by Convocation in January 2002 and has been carried out for the last three years (the 2003, 2004 and 2005 budgets). With Convocation's concurrence, it is staff's intention to continue the review program for the 2006 budget.

92. As a final matter, the process of electing the Treasurer is in one respect part of the long-range planning for Convocation's agenda. Each candidate for Treasurer espouses priorities that he or she would pursue upon election as Treasurer. This informal advice to benchers is in reality an institutionalized method of informing benchers about proposed priorities, broadly speaking, for the next two years. The benchers' vote for their candidate of choice is effectively an endorsement of a broad-based policy agenda for that period.

93. The Task Force concludes that the decision in 2001 to reject establishing the Treasurer's advisory committee was the right one. The Task Force does not propose that an executive committee or advisory committee be established, nor does it propose any changes to limit the role of the Treasurer.

Frequency and Substantive and Procedural Efficacy of Convocation Meetings

Frequency of Convocation

94. The Task Force determined that an in-depth examination of Convocation's meeting schedule was not warranted. The Task Force could not see how the integrity of Convocation's governance functions is negatively affected because of the frequency of Convocation's meetings, which generally occur once a month. Typically, at each meeting, there is important business to conduct and decisions to be made.

Procedure for and Efficacy of Convocation's Decision-Making

95. The Task Force concluded earlier in this report that there is merit to adopting appropriate rules of procedure for Convocation, and noted that the Treasurer has indicated his intention to apply proposed rules of procedure prepared through the Professional Regulation Committee for a period of six months beginning in September 2005. The Task Force will await Convocation's disposition after the six-month period regarding the adoption of these rules.

96. The Task Force repeats its recommendation above with respect to the use of rules of procedure for Convocation as a way to increase the effectiveness of its decision-making.

III. Benchers in the Dual Roles of Directors of a Corporation and Representatives in a Forum Similar to a Legislature

97. As members of a board of an organization, benchers have fiduciary duties as directors to the Law Society. However, benchers become directors through an election process in which they seek the vote of the membership. This dynamic creates what the Task Force calls the dual nature of benchers' participation in Convocation, that is, benchers as fiduciaries and benchers as participants in a forum similar to a legislature.

98. The dual nature is a function of structure, tradition and culture. It is influenced by factors such as:

a. Regional participation as part of the design of the bencher election process, including the designation of a regional bencher,

b. Benchers choosing to identify themselves as representatives of particular constituencies within the profession, and

c. Convocation's "debates" unfolding more like proceedings in a legislature than at a board meeting.

99. A key question for the Task Force was whether benchers' fidelity to the organization as board members can co-exist with the historical expectation that benchers will speak freely on a particular issue affecting the profession. Convocation is mandated to oversee the governance of the legal profession in the public interest. If a bencher approaches his or her participation in Convocation as a representative of a particular legal constituency, does that negatively impact on the ability of Convocation to make a decision consistent with the public interest?

Benchers as Fiduciaries

100. As Treasurer, Vern Krishna discussed with Convocation its function as a board of directors, and highlighted the fiduciary duties of benchers to the organization. The following excerpts from Convocation proceedings illustrate his thinking on the issue:

> We are here as fiduciaries to Convocation and we run and want to run a democratic Convocation, but a democratic and efficient Convocation. This is a decision-making body, it is not a debating society, and I want the focus of Convocation to be on decisions.
>
> July 26, 2001

> Section 2 of the Law Society Act says we are a corporation, and every bencher sitting around this room is a director of that corporation and a fiduciary of that corporation. … This is not a legislative assembly or a parliamentary body.
>
> February 13, 2003

> …you are fiduciaries to the corporation not to the shareholders and not the members. … And that fiduciary obligation that is on us requires us to govern in the best interest of this Society in the public interest. And sometimes we have to pull ourselves up and say, is what I am doing in the best interest of the society? Is the speech that I am making in the best interest of the society? Or is it in some other interest?
>
> May 22, 2003

101. The question of in whose interests the Society governs (public *versus* profession) is not a new issue for the Society and has spawned a number of debates about whether the interests of the profession can be considered - and if so, to what extent - when the Society governs in the public interest. The debates have generally been resolved by concluding that often the interests of the public and the profession meet, but when a conflict between the two interests arises, the interests of the public must take precedence.[19]

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[19] This is articulated in Commentary 3 to the Law Society's Role Statement as follows:

> It is sometimes assumed that the public interest must necessarily be opposed to the interest of the profession and that, in fulfilment of its duty to govern in the public interest,

102. Legal regulators in jurisdictions in which this line is blurred have suffered the consequences. Recent developments in England and Wales and some Australian states illustrate how entities that included both a regulatory and representative function fell into disrepute with the government because of the perception, in some cases supported by fact, that the regulatory function in the public interest was not being pursued as robustly as required. The result led to reforms in New South Wales, Australia to create an entity separate from the Law Society to control the investigation of complaints about solicitors.[20] In England and Wales, a proposal currently before the government will create a Legal Services Board to oversee the legal services sector, will remove complaints investigation authority from the Law Society of England and Wales, and will empower an independent entity created by the government to oversee these functions.[21]

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the Law Society can give no consideration to the interest of the profession. This is not so. Ideally, what is in the public interest will also be in the interest of the profession. It is only when the two interests conflict that the Law Society must subordinate the interest of the profession to that of the public.

[20] In 1994, the New South Wales government established an independent statutory office called the Legal Services Commissioner, pursuant to sections 134 and 135 of the *Legal Services Act 1987,* responsible for receiving all complaints and monitoring investigations conducted by the Law Society and Bar Council, and established a Legal Services Tribunal, responsible for hearing misconduct complaints. The Commissioner reports to Parliament through the Attorney General, and co-regulates legal practitioners and licensed conveyancers with the Law Society, the Bar Association and the Office of Fair Trading.

[21] The proposal is to create a single independent complaints organization, covering all the "front-line" regulatory bodies, under the general supervision of the Legal Services Board (LSB). The LSB, as a legislatively created body, would be granted regulatory powers and would have the authority to delegate day-to-day regulatory operations to the recognized front-line bodies, like the Law Society of England and Wales, where such bodies satisfy the LSB that they are competent to handle the regulatory functions and have appropriate governance arrangements to deal with such functions without conflict. The model from which the LSB came would require the separation of the Law Society's regulatory and representative functions.

In his March 21, 2005 speech to the Legal Services Reform Conference, Lord Falconer, Constitutional Affairs Secretary and Lord Chancellor said: "...I will create an Office for Legal Complaints. I reject the view that centralisation will lead to a slower service for consumers...A single complaints body means consistent, fair and professional handling of cases for all complainants. As with the Legal Services Board, the Office for Legal Complaints will be led by a board with a lay Chair and lay majority, and appointments will be made on merit, by the Legal Services Board. The different responsibilities of the Legal Services Board, the Office for Legal Complaints and the various professional bodies will be clearly defined...Removing complaints handling from the professional bodies will in no way reduce their responsibility to ensure that their members operate to the highest professional and ethical standards at all times. I acknowledge the serious and constant efforts the professional bodies make in this regard. The Office for Legal Complaints will help, not hinder....

A Bencher's Duty as a Fiduciary

103. As neither the *Law Society Act* nor the *Corporations Act*, which applies to the Law Society as a corporation without share capital, describe the fiduciary duty of a director, reliance is placed on the common law to determine the nature of a bencher's fiduciary duty. In general terms, a director's common law fiduciary duty requires the director to act honestly, in good faith and with a view to the best interests of the corporation.[22]

The Notion of the Bencher as Constituency Representative

104. In discussing benchers' fiduciary duties, Vern Krishna as Treasurer said the following:

> We…are elected by various constituencies and by various regions. But when we arrive here, we are not here as spokespeople for those constituencies. We are not here to serve regional interest. We are here to serve the common interest of the entire profession of which you can take into account those regional constituencies. But you are not here to serve on one constituency. You are here to serve all…. We formally adhere to the rules of the legislative assembly, but we are not a legislature. We adhere to some rules of the corporate governance, and we are not completely a corporation in the sense of a traditional, private corporation.
>
> Convocation, May 22, 2003

105. This quote captures the dichotomy of the dual nature of Convocation, which ultimately affects the bencher's approach to his or her role in Convocation.

106. In Task Force's view, benchers must understand that they are not constituency representatives or parliamentarians. It may be that the role of bencher as a fiduciary does not come intuitively. In such an environment, the education discussed earlier in this report is important.

107. Directors' duties to an organization are informed by the organization's mandate. For the Law Society, this means that the benchers' decision-making function and activities related to it must be based on the public interest, as the Society governs the legal profession in the public interest. Decisions cannot be based on the interests of shareholders (i.e. the members of the Society) or a particular legal constituency.

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[22] In remarks he prepared for bencher orientation, Vern Krishna, after a review of the applicable law, provided the following summary of the bencher's fiduciary responsibility:

> The Law Society is a corporation without share capital and the Benchers are its directors. As directors, Benchers are responsible for "govern[ing] the affairs of the Society". Since Benchers act as agents for the Law Society, they are not separate from the Law Society, but effectively *are* the Law Society. Thus, in all matters related to their agency, the interests of the Law Society must be the very interests of the Benchers.
>
> Benchers have a fiduciary responsibility to act faithfully and loyally in the best interests of the Law Society. This fiduciary duty is owed directly to the Law Society rather than to its members who are merely "shareholders" of the corporation. Thus, in all matters relating to their undertaking of trust and confidence as directors of the Law Society, Benchers must act solely in the best interests of the Law Society.

108. Benchers' actions in addressing a particular constituency or advocating a position for the profession instead or at the expense of the public interest may effectively operate as a challenge to the mandate. Ultimately, this may amount to a conflict for the bencher.

109. The Bencher Code of Conduct includes a brief statement on conflicts of interest. The entire code reads:

> 1.0 The benchers commit themselves to ethical conduct.
> 1.1 Benchers must declare conflicts of interest and act in accordance with Convocation's policy on conflicts of interest.
> 1.2 Benchers must not use their positions to obtain employment or preferential treatment for themselves, family members, friends or associates.
> 1.3 No bencher shall purport to speak for Convocation or the Law Society unless designated by the Treasurer.
> 1.4 When exercising adjudicative powers, benchers shall behave in a judicial manner.
> 1.5 Benchers shall observe Convocation's policy regarding confidentiality.
> 1.6 Benchers sitting as members of the hearing panel must adhere to the provisions set out in the guidelines for applications to proceed in camera and must strictly maintain the confidentiality of all matters subsequently heard in camera.

110. The Bencher Code of Conduct is part of the Law Society's Governance Policies, and to the extent that it addresses conflicts issues, the Code should continue to be observed.[23] Initially, the Task Force identified the Bencher Code of Conduct as a topic for review. However, after considering the Code in the context of specific bencher behaviour, as noted above, the Task Force determined that a separate examination of the Code was not warranted, and that the current environment in which the Code is observed does not call for additional instruments for regulation of bencher conduct.[24]

Conclusions on the Bencher's Role

111. The Task Force concluded that consistent with the Society's current policy on conflicts of interest[25] , a bencher as a fiduciary cannot act against the interests of the Society as an

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[23] With respect to compliance with the Governance Policies, the Law Society's *Rules of Professional Conduct* impose certain duties on lawyers, in whatever capacity they serve. It is possible that a serious breach by a bencher of his or her duties *qua* bencher may amount to professional misconduct or conduct unbecoming a lawyer deserving of sanction.

[24] Other reasons for foregoing a detailed review of the Code include the following:

- Egregious misconduct of an elected bencher would likely amount to a breach of the *Rules of Professional Conduct* and would be dealt with through the investigations stream at the instance of the Treasurer through provisions in the *Law Society Act*, and
- If the issue about the bencher's conduct relates to procedural matters in Convocation, the proposed rules of procedure for Convocation, discussed earlier in this report, should address those concerns.

[25] In March 1995, Convocation adopted the final report of the Special Committee on Conflicts of Interest, which provides the current policy on bencher conflicts in a number of areas (see

organization. This means that actions of the benchers as directors must be and must be seen to be consistent with the purposes of the Society and not in derogation of its mandate to govern in the public interest.

112. The Task Force also believes that when a bencher is appointed as a Law Society representative to the board of another organization, insofar as the issues the bencher addresses affect the Law Society's mandate, a balance must be struck between the bencher's duties as a Society representative and the duties the bencher owes to the board by virtue of the appointment. On occasion, a bencher may have to refrain from offering views or opinions if doing so places the bencher in a conflict with respect to those duties.

113. With respect to the bencher's role as a fiduciary, the Task Force believes, similar to an earlier recommendation in this report, that Convocation should affirm the bencher's role as a fiduciary to the Law Society as an organization, whose mandate benchers must reflect in their discussions and decision-making. In particular, Convocation should affirm that benchers in the role of benchers cannot advocate a position in Convocation or elsewhere that places the profession's interest ahead of the public interest.

IV. Benchers in the Dual Role of Policy Makers and Adjudicators

114. The Task Force considered whether the benchers' role in setting both policy and adjudicating matters on the basis of that policy affects their governance responsibilities.

115. According to section 49.21(2) of the *Law Society Act*, all benchers except for members of the Proceedings Authorization Committee and ex officio benchers who are the Minister of Justice and Attorney General for Canada, the Solicitor General for Canada and current and former Attorneys General of Ontario are members of the Hearing Panel. The Hearing Panel adjudicates applications with respect to the conduct, competence and capacity of members of the Law Society and hears readmission and student member good character applications.

116. The Task Force is aware that other tribunal models exist. One is that of the chartered accountants in Ontario, through their regulator, the Institute of Chartered Accountants of Ontario (ICAO). The ICAO discipline committee's members are appointed by the 20-member Council (16 elected members, four lay appointees) and consist of Institute members and public representatives.

117. The Law Society in the past considered non-bencher involvement on Law Society committees, including the discipline function. In 1989, Convocation adopted the report of the Special Committee on Voting and Non-Bencher Appointments that recommended the appointment of non-benchers (both lawyers and lay persons) to standing committees. A 1990 Special Committee on Bencher Elections report included this comment as a related matter:

Appendix 2). It would appear that this is the policy to which paragraph 1.1 of the Bencher Code of Conduct refers.

NON-BENCHER INVOLVEMENT

Whether or not the number of benchers is to be increased, your Committee is persuaded that a greater reliance on non-bencher members would be of considerable assistance to benchers in the discharge of their responsibilities. In particular, your Committee favours a greater involvement of non-bencher lawyers in the discipline process: it notes, however, that this is a matter falling within the mandate of the Special Committee on Discipline Procedures.

Non-bencher involvement was favoured by 72% of the respondents.

It was suggested by a number of respondents that the benchers restrict themselves to policy matters and place greater reliance on Law Society staff in administration.

Your Committee recommends that:
Rather than increasing the number of benchers, the Society should look to its membership for assistance in committee work of all kinds.

118. According to a 1991 Research and Planning Committee report, Convocation approved the following:

a. That greater numbers of persons who are not benchers (both lawyers and lay persons) should be appointed to committees of the Law Society; and
b. That members who run for election as benchers but who are not elected should be considered for membership of committees.

119. In the early to mid-1990s, non-bencher lawyers participated on standing committees. This practice was discontinued, largely it is thought because the non-benchers, for undetermined reasons, felt constrained to fully participate with the benchers on the committees.

120. Discipline has always been a key responsibility of the benchers and is taken seriously. The Tribunals Task Force noted the importance of the Society's adjudicative responsibilities in its report to May 26, 2005 Convocation. In Part II of its report, the Task Force discussed its examination of alternatives to the current adjudicative structure and the composition of the Hearing Panel. The Task Force began by noting the following factors or concerns that are relevant to the consideration of which model to adopt:

a. Whether there is an inherent conflict of interest where the regulatory adjudicators are also the regulatory policy makers. This concern may be countered by the view that in a self-regulatory system, those most able to render relevant and meaningful decisions are the governors who understand the intricacies of that system;

b. Whether there are increasing perceptions of systemic bias in a tribunals structure, even where there is no evidence of actual bias, which may be a drawback to the effectiveness of the process[26] ; and

c. Possible limitations of a large volunteer adjudicative body whose members have different levels of adjudicative knowledge, skill, experience, writing ability and availability to sit on panel hearings and appeals.

121. The Tribunals Task Force identified five models (and in its report comprehensively explained the issues with respect to each model), as follows:

a. the continuation of the current Law Society model …Within this model, the decision could be made to make no changes to the process and procedures (the status quo) or to enhance them to make the tribunals composition more effective…;

b. a tribunal model made up of elected benchers, lay benchers and non-bencher lawyers, the latter either for general participation on panels or for selected cases;

c. a tribunal model with a permanent Chair and one or two permanent Vice-Chairs who occupy one seat on every panel; the remaining members of each panel to be either elected lawyer benchers and/or lawyer members, and lay benchers;

d. a model that establishes a tribunals unit within the Law Society made up entirely of non-bencher lawyers and lay people; and

e. a model that establishes a tribunal that is completely independent of the Law Society.

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[26] This was an issue for the Ontario Securities Commission, as discussed in the *Report of The Fairness Committee To David A. Brown, Q.C. Chair Of The Ontario Securities Commission*, March 5, 2004, by The Honourable Coulter A. Osborne, Q.C., Professor David J. Mullan and Bryan Finlay, Q.C. (The Osborne Report). The report notes that as the Commission engages in policy-setting, rulemaking, investigation, prosecution and adjudication under one corporate, statutorily established, umbrella, this arguably creates a perception of bias at the level of the Commission's adjudicative function, even though a Commissioner involved in an investigation of a matter cannot act as an adjudicator in the same matter without written consent. The report says that critics of the structure contend that the perception of bias erodes the credibility of the Commission. The report concluded that:

> ...the case has been made for the separation of the Commission's adjudicative function from its other functions, as related only to proceedings in which sanctions against respondents are sought. In our view, this separation will resolve the perception problem to which we have referred in this report and will thus end what we view as an erosion of the Commission's institutional credibility. Hiving off the Commission's adjudicative function will also permit the Commissioners to take a more proactive role in the oversight of Enforcement. The Commissioners' monitoring of enforcement matters will also enhance the Commission's credibility.

122. The Tribunals Task Force recommended that "Convocation undertake an examination of the different models for the composition of the Law Society tribunals, as described in Part II of this report." Convocation approved this recommendation.

123. As the Tribunals Task Force carefully considered these issues and Convocation approved the above recommendation, the Task Force makes no recommendations on this subject.

V. Other Governance Issues Raised By Members Of Convocation

Equity And Diversity Issues

124. Joanne St. Lewis, chair of the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones, referred the following three issues to the Task Force.

Representation of Francophones at Convocation

125. Section 49.24 (1) of the *Law Society Act* provides that "A person who speaks French who is a party to a proceeding before the Hearing Panel may require that any hearing in the proceeding be heard by panelists who speak French". In order to satisfy section 49.24(1), the Law Society must provide panelists who speak French.

126. Ms. St. Lewis's view is that the Law Society should ensure that Francophone or bilingual (French/English) elected benchers with knowledge of the Law Society's processes are available to sit on the Hearing Panel for a bilingual proceeding.

127. The *Law Society Act* provides a mechanism for the appointment of Francophone members of the Law Society for bilingual proceedings in cases where it is not practical to assign benchers. Section 49.24 (2) provides that "If a hearing before the Hearing Panel is required to be heard by panelists who speak French and, in the opinion of the chair of the Panel, it is not practical to assign the required number of French-speaking benchers to the hearing, he or she may appoint one or more French-speaking members as temporary panelists for the purposes of that hearing".

128. Ms. St. Lewis believes that the Law Society should ensure that at least one elected bencher is Francophone. Under this proposal, members of the Society who satisfy bilingualism criteria established by AJEFO[27] should be encouraged to run in the bencher election. The bencher candidate who satisfies the bilingualism criteria and has the most votes would be elected as a bencher regardless of his or her ranking in the election. Ms. St. Lewis suggests that this bencher seat be designated in the pool of candidates who run for election outside of Toronto.

129. Ms. St. Lewis's view is that this procedure would ensure that the Law Society always has French language capability for hearings. She does not see this as the "thin edge of a wedge" to have designated bencher seats for other equality-seeking communities, as the *Law Society Act* already allows for bilingual French/English hearings, which must be held when requested.

[27] l'Association des juristes d'expression française de l'Ontario

The Task Force's Views

130. The Task Force recognizes the importance of ensuring French-language capability for Law Society hearings. However, the Task Force does not agree with guaranteeing a seat for a Francophone bencher, for the following reasons.

131. First, one guaranteed seat for a Francophone bencher will not resolve the issue of sufficient numbers of Francophone benchers for hearings. A larger pool is required. The current system, which draws on benchers who are capable of conducting a hearing in French and permits the selection of qualified non-bencher Hearing Panel members, is successful in filling necessary positions on the Hearing Panel. Enhancements should be made if necessary, and the Task Force understands that the Society has consulted with AJEFO as required when a Francophone hearing panel member is required. This consultation should be encouraged.

132. Second, fixing a seat for a particular group may set a precedent that could have serious consequences for the Society. In the current environment, although certain constituencies in the profession may consider that they are "represented" by a bencher (as discussed earlier in this report), generally, candidates do not run and are not encouraged to run for election on a specific platform for an identifiable group of members. A guaranteed Francophone bencher seat could affect this dynamic, and increase the politicization of the election process at a time when it is important to emphasize that benchers represent the public interest, not the interests of the profession, or groups within the profession. The perception associated with a guaranteed seat, in spite of what may be valid reasons for it, could have the effect of undermining the Society's mandate.

133. Third, the fact is that the membership usually elects at least one Francophone bencher, or a bencher who is capable of conducting a hearing in French.

134. In the past, the Society has encouraged members of the Francophone community to run for bencher, and this will continue.[28] The Society should not only devote more effort to encouraging candidates from the Francophone community to run in the election, but expand this initiative to other communities. The diversity of communities represented in Convocation in recent years has increased substantially, and Convocation is better for it.

135. While the Task Force does not recommend a guaranteed Francophone bencher seat, it proposes that the Society increase its efforts to encourage members from all communities represented in Ontario's legal profession to run for bencher, as the public

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[28] Bicentennial Report Working Group in its 2004 report *Bicentennial Implementation Status Report and Strategy* noted this type of effort during the 2003 bencher election:

> In 2003, the Law Society encouraged members from equality-seeking communities, Francophone and Aboriginal members to run for election. During the 2003 Bencher Election process, an information session for members of equality-seeking, Francophone and Aboriginal communities was held. There was wide publication of the election process including the development of a web site solely for the bencher election. Every member of the profession was encouraged to run through a letter written by the Treasurer.

whose interests the Society represents in its governance of the profession should be reflected in those who serve as governors.

Equality Template

136. Ms. St. Lewis requested that the Governance Task Force support the use of the equality template and the definitions of equality and diversity as approved on March 10, 2005 by the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones ("the Committee"). The template was reported to March 24, 2005 Convocation for information. Law Society staff, including the Senior Management Team and the policy advisors, will use the equality template in their work. The relevant excerpt from the March 24 report and a copy of the template appear at Appendix 3.

137. Ms. St. Lewis has asked that the Governance Task Force consider requesting that Convocation and all bencher committees apply the template and definitions to Law Society related work.

The Task Force's Views

138. As the Committee's report indicates, the equality template will be used in decision-making processes, policy development activities, implementing policies, development of programs and initiatives and in consultations undertaken by the Society. This broad application, which the Task Force endorses, means that all policy matters that eventually reach Convocation's agenda will have been informed by use of the template. As such, the Task Force's view is that Ms. St. Lewis's suggestion will have been effectively implemented once the template is applied.

The Equity Advisory Group's Membership on the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones

139. The Bicentennial Report Working Group suggested in its 2004 report *Bicentennial Implementation Status Report and Strategy* that the Equity Advisory Group (EAG) be permanently represented as a voting member on the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones ("the Committee"). Ms. St. Lewis requested that the Task Force consider this issue.

140. The mandate of the EAG is to assist the Committee in the development of policy options for the promotion of equality and diversity in the legal profession by:

a. identifying and advising the Committee on issues affecting equality communities, both within the legal profession and relevant to those seeking access to the profession;

b. providing input to the Committee on the planning and development of policies and practices related to equality, both within the Law Society and the profession; and

c. commenting to the Committee on Law Society reports and studies relating to equality issues within the profession.

141. The EAG is composed of up to 22 members of the legal profession (including organizational members) who have direct experience with or commitment to access and equality for Aboriginal, Francophone and/or equality seeking communities, including but not limited to communities of ethno racial people, people of colour, immigrants and refugees, people with disabilities, gays, lesbians, bisexuals, transgender persons, Francophones, Aboriginal people and women. Such experience is in areas of employment equity, access to the legal system and to justice, human rights, anti racism and anti oppression, equity and diversity training or social justice issues. The membership reflects gender parity and balance among the various equity seeking communities.

142. Given the EAG's mandate as a Law Society advisory group to the Committee and the fact that the EAG is composed of a diversity of experts in the area of equality and diversity, Ms. St. Lewis requested that the Task Force consider recommending that the EAG become a permanent and voting member of the Committee.

The Task Force's Views

143. The Task Force supports the role fulfilled by the EAG as described above, but does not agree that it should become a permanent and voting member of the Committee, for the following reasons.

144. The EAG is structured as an advisory group, and its input is valued. The EAG need not be a member of the Committee to fulfil this advisory function.

145. The risk in extending membership on the Committee to advisory groups like the EAG is that other groups may make requests to join the Committee once the precedent is set. Input from various communities helps to inform the work of the Committee, but membership of such representative groups on the Committee could be counter-productive to its decision-making on policy issues. Managing expectations and requests of the various groups and arriving at consensus on issues could be a difficult and delicate task. The Committee's current practice of receiving advice from and consulting with these groups provides the necessary input on the issues and concerns of the representatives, but permits the Committee to make recommendations, including those that relate to the profession's governance, that collectively account for equity and diversity issues of the broad range of communities, in keeping with the Committee's mandate.[29]

146. The Committee, as a standing committee of Convocation, is composed of elected and lay benchers who are required to make policy recommendations in the public interest for Convocation's consideration and who have fiduciary responsibilities to the Law Society

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[29] By-Law 9, s. 16.1 reads:
The mandate of the Equity and Aboriginal Issues Committee is,

(a) to develop for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession and for addressing all matters related to Aboriginal peoples and French-speaking peoples; and

(b) to consult with the Treasurer's Equity Advisory Group, Roti io' ta'-kier, AJEFO, women and equity-seeking groups in the development of such policy options.

as an organization. A group like the EAG is not bound by these obligations, and indeed, should not be. But because of that, it would be inappropriate to make it a voting member of the Committee.[30]

147. For these reasons, the Task Force does not recommend that the EAG be made a permanent and voting member of the Committee.

Entrenchment of the Independence of the Chief Financial Officer

148. Bradley Wright requested that the Task Force consider entrenching the independence of the Law Society's Chief Financial Officer (CFO) in the by-laws.

149. The Task Force acknowledged that ensuring the independence of the CFO is an important aspect of corporate governance. However, the Task Force did not see the need to codify various aspects of and protections for the CFO's office in the by-laws, for the following reasons.

150. First, the CFO's employment contract covers all necessary aspects of her role within the Society's management, including protections for her independence.

151. Second, the Task Force was of the view that the general issues of independence and the ability to address compliance issues are not unique to the CFO position, but extend to all senior managers, and perhaps even middle managers. The Task Force concluded that it is not necessary and may be undesirable to include in a by-law obligations of managers that are more appropriately the subject of an employment contract.

152. Third, the Law Society has adopted a Business Conduct Policy (November 2004, superseding an initial 1997 policy) to which all staff must adhere that addresses a variety of circumstances relating to employment, including corporate compliance.

153. The section of the Policy entitled "Compliance With Laws" states that honesty and fairness must characterize the Society's activities with the public and the profession, and that the Society strives to comply with applicable laws, regulations and internal policies. The section provides that if any Society employee is concerned that the Society is not operating in compliance with applicable laws, regulations or established policies, the employee should immediately report the concern to a superior or, if necessary, to the Chief Executive Officer. The section also provides that the reporting employee is fully protected against recrimination.

154. Another section entitled "Reporting To Management And Auditors" requires a Law Society employee who has knowledge of a matter which he or she believes might adversely affect the Law Society's reputation or operations to bring such knowledge promptly to the attention of senior management. Similarly, an employee must not conceal such information from the Society's auditors.

155. For these reasons, the Task Force does not recommend by-law amendments with respect to the office of the CFO.

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[30] There may also be a legal impediment – *quaere* whether the fiduciary obligation of a bencher can be delegated to a non-fiduciary.

APPENDIX 1

TERMS OF REFERENCE

(approved by Convocation November 25, 2004)

a. The Task Force will study specific issues related to governance, including the following:

i. The bencher qualification process and how Convocation is constituted;
ii. The size of Convocation as a board;
iii. The role of the Treasurer as chair of the board (Convocation);
iv. The notion of an executive committee;
v. The frequency and the procedural and substantive efficacy of Convocation, including the process of setting priorities for Convocation;
vi. Benchers in the dual roles of directors of a corporation and representatives in what has been characterized as a parliamentary assembly;
vii. Benchers in the dual roles of policy makers and adjudicators;
viii. A bencher code of conduct.

The Chair invites benchers to advise him within the next month of any other discrete issues that should be included in the Task Force's study.

b. As the Society has received a number of reports on governance based on previous studies and reviews, the Task Force will use these existing reports in its study and does not propose to commission further reports for its use on the subject of Law Society governance.

c. If necessary, the Task Force will conduct additional research and consultation on the issues it has identified for study. This may include consultation with other benchers and non-benchers, as appropriate, to obtain the views of those who have an interest in and are able to contribute to the Task Force's study.

d. The Task Force anticipates that its expenses for research or consultation will be such that funds allocated for such purposes within the budget of Policy and Tribunals ($100,000 annually) will be sufficient.

e. The Task Force will provide interim reports to Convocation as needed.

f. The Task Force will aim to conclude its work and prepare a final report to Convocation by June 2005.

APPENDIX 2

REPORT OF THE SPECIAL COMMITTEE ON CONFLICTS OF INTEREST
MARCH 24, 1995

AS AMENDED BY CONVOCATION ON FEBRUARY 24TH, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The SPECIAL COMMITTEE ON CONFLICTS OF INTEREST begs leave to report:

The Special Committee on Conflicts of Interest was struck on March 25, 1994 to consider the issue of conflicts of interest with respect to benchers and bencher firms; its members being Arthur Scace (Chair), Lloyd Brennan, Kevin Carroll, Maurice Cullity, Carole Curtis, Susan Elliott, Marie Moliner, Ross Murray and Hope Sealy.

Your Committee has met on April 21st, August 10th, September 7th, November 9th and November 25th, 1994 and January 26th and February 10th, 1995.

I Background

This Committee was created as a result of the debate in Convocation concerning the report of the Special Committee on Lawyers' Fees. That Special Committee was charged with recommending guidelines for the selection and compensation of counsel to represent the Law Society in a variety of matters. When its report came before Convocation, a lively debate ensued in which the need for a comprehensive policy for benchers and their firms on conflicts of interest vis a vis the Law Society was identified. Convocation voted to establish this special committee for that purpose.

Your Committee has explored various approaches to the problem of conflicts of interest which arise by virtue of the bencher's role.

In so doing your Committee has examined in some detail the different functions that benchers perform and the nature and context of the problems that arise in each of those roles.

At the outset your Committee recognized that there is an enormous variety and number of conflicts arising out of the bencher role. It is acknowledged that it is not practical to attempt to deal with every such conflict. Accordingly your Committee has limited its consideration to those conflicts which are significant.

II Discussion

As a general principle, it is acknowledged that benchers are elected precisely because of the combination of interests, talents and experience which they as individuals can bring to the work of Convocation. Furthermore, your Committee feels that benchers have an obligation to carry those attributes into Convocation.

In addition, your Committee recognizes that there are certain conflicts of interest which are inherent in any self-governing body. Every elected bencher is by definition also a member of the Law Society and therefore has a self-interest in the matters coming before Convocation. That self-interest is, however, essential to the effective governance of the profession. The question your Committee has focused on is, "At what point does an individual bencher's self-interest become so significant that a conflict of interest arises which interferes with that bencher's ability to make a decision in the best interest of the Law Society and the public?".

There is a clear distinction between voting on issues which affect the profession as a whole and necessarily affect benchers as members and voting on issues where the bencher is in a position

to benefit, either financially or otherwise, in a fairly specific and direct way from a particular decision of Convocation.

Further, there may well be instances where a bencher not only ought not to vote on an issue but ought not to speak or even attend in Convocation while certain issues are considered.

The Committee has attempted to formulate a general statement of principle by which individual benchers may govern themselves. As well, it has tried, where possible, to enumerate specific rules and guidelines for particular situations. The Committee recognizes that the problem is complex and does not lend itself to a simple straightforward solution. In any solution proposed, there will be areas of disagreement. That this is necessarily so was evident from the discussion in the Committee. There are some situations which will be resolved ultimately by the exercise of the personal judgment of the bencher involved.

III Sample Issues

In order to provide Convocation with a sense of the scope of the issues that the Committee identified, a sampling of some of the questions posed during the course of the Committee's deliberations is included here:

1. May a bencher whose firm acts for LPIC in insurance defense matters participate in debate or decisions concerning such matters as

(a) an increase or decrease in the schedule of rates for counsel to LPIC;
(b) changes to the amount and structure of the member's deductible; or
(c) changes to the coverage provided by LPIC.

2. May a bencher whose practice includes a substantial proportion of legally aided clients participate in debate or decisions involving such matters as:
(a) Legal Aid service cuts in the area of law in which the bencher primarily practises;
(b) changes to the Legal Aid Tariff which would affect the bencher's practice;
(c) funding of disbursements by Legal Aid where the bencher's practice would be affected; or
(d) the introduction of a staff delivery model for services in the bencher's area of practice.

3. To what extent may a bencher who is employed by the provincial government participate in debate or decisions involving:
(a) any matters concerning the Legal Aid Plan;
(b) negotiations with the government; or
(c) proposals for amendments to the Law Society Act which would materially affect the relationship between the Law Society and the government.

These examples serve to illustrate the kinds of issues that were considered by the Committee which went beyond the conflicts usually identified in relation to benchers, such as, direct retainer by the Society or involvement in the discipline process.

Your Committee struggled to answer these and other questions and could not in every case provide a complete response that was acceptable to all Committee members. In some instances, however, the Committee, after a thorough analysis of the issue, reached a consensus on the response. It is important to state, however, that even in those cases where the Committee reached agreement that in the particular circumstances a bencher ought not to

be prohibited from participating, it at the same time recognized that individual benchers might well, in the exercise of their personal judgment, decide they ought not to participate. In other words, the fact that there is no absolute prohibition does not necessarily settle the matter. Benchers must be aware of and alert to situations which require them to exercise independent judgment.

For example, as to the matters outlined in question #2, the Committee initially felt that there are special considerations surrounding Legal Aid which bear on the issue of who may vote. Perhaps the most significant of these is that Convocation's authority with respect to the Legal Aid Plan differs somewhat from its authority over many of the other programs administered by the Law Society. This difference arises by virtue of the fact that funding for the Ontario Legal Aid Plan is provided primarily by the government of Ontario. Thus the conflicts may not be as direct and immediate as they might seem to be at first. Taking this into account, your Committee concluded that there should be no absolute prohibition against any bencher voting on all the issues outlined in question #2. Each bencher must assess their own personal situation and decide whether or not to participate. After exploring the Legal Aid issues further, however, the Committee concluded that while there are some special considerations surrounding Legal Aid, on balance, there should not be a different standard applied to conflicts arising in a Legal Aid context than would be applied in any other context.

IV Types of Conflicts

The Committee identified a number of different situations in which conflicts or potential conflicts needed to be addressed. To the extent possible, this report will describe each of them and suggest an approach for dealing with them.

A. Proceedings involving an individual member's rights and privileges - benchers acting in a quasi-judicial capacity

This category includes:

Discipline, incapacity, admission, readmission and competency proceedings and any other proceeding involving an individual member's rights and privileges.
The Committee is of the view that even the slightest perception of a conflict of interest in these proceedings must be scrupulously avoided at every stage in the proceeding.

Accordingly, your Committee suggests the following specific rules:

1. Bencher prohibited from appearing as counsel

A bencher may not appear as counsel before a Committee of benchers or Convocation in a discipline, incapacity, admission, readmission, or competency hearing or any other matter involving an individual member's rights and privileges.

2. Member of bencher firm appearing as counsel

A member of a bencher firm may appear as counsel before a Committee of benchers or Convocation in a discipline, incapacity, admission, readmission, or competency hearing or any other matter involving an individual member's rights and privileges, provided the bencher in question does not in any way participate in the matter.

3. Member of bencher firm providing evidence

Where a member of a bencher firm provides evidence (other than a written testimonial) in any hearing or other matter before a Committee of benchers or Convocation involving an individual member's rights and privileges, the bencher in question will be excluded from all deliberations.

4. Bencher participating who knows member

It is a matter of individual judgment whether a bencher who knows a member either personally or professionally should participate as a bencher in any stage (e.g. investigation, authorization, pre-hearing, hearing) of the process in respect of a discipline, incapacity, admission, readmission or competency hearing or any other matter involving that member's rights and privileges, subject to the usual considerations governing bias or reasonable apprehension of bias in proceedings before an administrative tribunal.

In this context your Committee considered one example of a fairly common situation ie: where the bencher is on a discipline panel and a member is before the panel who is known to the bencher. In this particular instance the following steps are suggested, assuming that the bencher concludes that he or she can continue to participate:
The bencher should:

(l) state on the record that the bencher knows the member and provide particulars of the circumstances;
(2) indicate on the record that the bencher does not feel that he or she is unable to continue to participate by virtue of the knowledge or relationship;
(3) invite the member to take a few moments to consider whether he or she wishes to raise any objection to the bencher's continued involvement.

The advantage of this approach is that the panel is then able to deal with the issue at the outset and where the member raises no objection, he or she will, in most cases, be precluded from raising it at some later date, as, for example, a ground for appeal.

5. Bencher as witness

It is a matter of individual judgment whether a bencher who knows a member either personally or professionally should participate as a witness or in some other capacity in support of the member in respect of a discipline, incapacity, admission, readmission or competency hearing or any other matter involving that member's rights and privileges.

Your Committee in formulating these rules suggests that benchers should be alert to the consequences both for them as individuals and for Convocation and the Society's admissions and discipline process, should they or members of their firm provide character evidence on behalf of an individual member in a proceeding before Convocation or a hearing panel. Your Committee urges benchers to weigh carefully any request for their participation on behalf of an individual member, bearing in mind the need to ensure that a sufficiently large and diverse pool of benchers is maintained for hearings in Committee and Convocation.

B. Direct Retainer by the Law Society or the Lawyers' Professional Indemnity Company of a bencher or a bencher firm

In considering the elements which should be included in this policy, your Committee, after some discussion, concluded that it was not in the best interests of the Law Society or LPIC to exclude benchers and bencher firms from the pool of counsel eligible for selection. The Committee felt that some of these individuals and firms possess substantial expertise in the area of solicitor's negligence, which expertise the LSUC and LPIC have made a significant investment in developing. To exclude them would, in effect, be throwing away that investment as well as denying LPIC access to experienced counsel. Accordingly, your Committee does not recommend that Convocation adopt a policy under which the Society or LPIC would be prohibited from directly retaining benchers or members of bencher firms.

Instead, the following guidelines are proposed for the retaining of counsel generally by the Society or LPIC. The Committee made the observation that in the vast majority of instances, counsel will be selected and retained by senior Law Society or LPIC staff and not by Convocation. The guidelines have been prepared with this in mind.

1. The Law Society or LPIC should establish criteria for the selection of counsel having regard to the following goals:

(a) To ensure that the Society or LPIC is represented by counsel who will provide competent and cost effective legal services and, in particular, to ensure that the services are provided by individuals whose skills, training and experience are most appropriate to the task.
(b) To ensure that the Society's or LPIC's work is distributed as equitably as possible having regard to considerations of specific expertise, geographic location, gender, equity and resources.

2. In each instance where the Society or LPIC retains counsel, there should be a written notation confirming that the selection criteria have been applied and setting out in brief terms the justification for the particular choice.

3. There should also be an independent review of the selection process on a periodic basis.

4. There should be a semi-annual report to Convocation of all law firms retained during the preceding six months, specifying the amounts billed for fees and disbursements by firm.

It is also suggested that LPIC avoid, wherever possible, retaining a bencher to represent LPIC and a member in an insurance matter where that matter is also the subject of a Law Society complaints investigation.

C. Policy Issues Considered by Committees or Convocation

For the balance of matters considered in Committee or Convocation, it is suggested that it is up to the individual bencher to decide whether or not to participate in the decision.

On a very simplistic basis, it is recognized that each bencher brings to their work at the Society a unique combination of personal and professional experience which will affect their approach to and ultimately their decisions upon the matters before Convocation. It is both understood and expected that this is the case. To require individual benchers to declare a conflict of interest by virtue of the fact that some aspect of their personal or professional experience impinges upon or in some way relates to the issue before Convocation, would significantly impair not only the individual bencher's freedom to participate but also Convocation's ability to deal with business.

The Committee wrestled with how to offer useful guidance to benchers in reaching a decision. Two situations were raised by way of example to illustrate instances where, in the Committee's view, benchers ought to refrain from participating.

1. Solicitor-Client Relationship
A bencher ought not to participate in a matter where:

1. the bencher or the bencher's firm acts for a client whose interests will be significantly affected by Convocation's decision, or
2. the bencher or the bencher's firm is, by virtue of a solicitor-client relationship, in possession of confidential information pertaining to the issue under consideration which may tend to influence the bencher's decision on the matter.

2. Employment Relationship
Where a bencher is an employee, the bencher ought not to participate in a matter where:

1. the bencher's employer has a significant interest, which is distinct from the interest of the profession at large, in a matter before Convocation, or
2. the bencher, by virtue of his or her employment, is in possession of confidential information pertaining to the issue under consideration which may tend to influence the bencher's decision on the matter.

V Rulings by Convocation

Lastly, your Committee considered whether there should be some procedures introduced to assist benchers in recognizing and dealing appropriately with conflicts of interest. There was unanimous support for this proposal. Accordingly, your Committee recommends as follows:

1. Benchers are invited to consult informally with the Treasurer to seek guidance in situations involving the appearance of, or a potential or actual conflict of interest relating to their responsibilities as benchers.

2. Benchers may also seek a ruling by Convocation on any situation involving the appearance of, or a potential or actual conflict of interest relating to their own or any other person's responsibilities as bencher.

3. Where a ruling is sought, Convocation may rule that the bencher or benchers who are the subject of the ruling:

(a) be required to withdraw from Convocation while the matter in question is under consideration;
(b) may remain in Convocation and be available to inform Convocation but may not otherwise participate in the debate or decision on the matter in question;
(c) may remain in Convocation and participate in the debate but may not vote on the matter in question; or
(d) may participate fully in the debate and decision on the matter in question.

4. Convocation shall maintain a record of such rulings as are made and where appropriate, such advice as is given, so that it is available for reference as required.

All of which is respectfully submitted
Arthur Scace, Chair

It was moved by Mr. Scace, seconded by Ms. Sealy that the amended Report of the Special Committee on Conflicts of Interest be adopted.
Carried

THE REPORT WAS ADOPTED

APPENDIX 3

EXCERPT FROM MARCH 24, 2005 REPORT TO CONVOCATION FROM THE EQUITY AND ABORIGINAL ISSUES COMMITTEE/
COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES

INFORMATION
EQUALITY TEMPLATE, DEFINITIONS OF EQUALITY AND DIVERSITY AND RECOGNITION OF ABORIGINAL AND FRANCOPHONE COMMUNITIES

1. In 1997 the Law Society adopted the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession (the Bicentennial Report)*, which made sixteen recommendations seeking to provide a coherent approach to advancing new policies and enhancing the implementation of existing policies directed at advancing the goals of equality and diversity within the legal profession.

2. The recommendations were grouped under the following categories: policy development, advancement of equality and diversity policies, governance, education, regulation and employment/contracting for legal services.

3. In 2003 Convocation established the Bicentennial Report Working Group to review and report on the implementation status of the recommendations contained in the *Bicentennial Report.* The Bicentennial Report Working Group noted in its 2004 *Bicentennial Implementation Report* that,

> Advancing equality requires effective tools of measurement and analysis. The Law Society has an impressive array of initiatives but no coherent standards by which to measure their effectiveness and mark their progress. It is for this reason the Working Group has highlighted the need for an equity template that would include definitions of the terms "equity" and "diversity". Staff, bencher committees and Convocation would use the template to analyze the impact of policies on persons from equality-seeking, Aboriginal and Francophone communities.

4. The Bicentennial Report Working Group proposed that a definition of "equality" and "diversity" be developed and an equality decision-making template be formulated to guide the Law Society in its policy development activities.

Definitions of "Equality" and "Diversity" and Recognition of Aboriginal and Francophone Communities

5. In 1997 the Law Society confirmed its commitment to the promotion of "equity" or "equality" and "diversity" in the legal profession without providing a definition of those terms. The Bicentennial Report Working Group proposed that a definition of "equity" or "equality" and "diversity" be developed to provide consistency and to guide the Law Society in its policy and program development activities.

6. There has been much debate over the preference between "equity" and "equality" to characterize initiatives aimed at promoting diverse community representation and access to various spheres of the legal profession. The term "equity" focuses on treating people fairly by recognizing that different individuals and groups require different measures to ensure fair and comparable results.

7. "Equality" advocates on the other hand, focus on equality of result, access and opportunity – all of which translate to substantive equality. Equality does not mean sameness. The attainment of equality demands that equal consideration, deference and respect ought to be given to diverse perspectives, experiences and positions. In order to assess whether equality is reflected in the decision-making and policy-making activities of the Law Society, one must be concerned not only with equality of the end result (in that the final decision or policy can be fairly applied to all), but also with equality in the process. At all stages, there should be, and should be seen to be diversity in the consultation, access and end result.

8. Diversity by definition takes into account the different perspectives and positions that individuals occupy in society. However, this difference should not be interpreted as inequality – for each perspective is given equal acknowledgement and consideration. Diversity does not mean that all identifiable groups must directly participate, but rather that the development of the policy or the decision reflects a consideration of all identifiable groups and their possible intersections.

9. A comprehensive definition of "equality" and "diversity" must take intersectionality into account. Intersectionality has been defined as "intersectional oppression that arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone".[31] Intersectionality recognizes the unique experience of an individual based on the simultaneous membership in more than one group. For example, a Black woman who has been the victim of harassment by colleagues will experience the harassment in a completely different way than Black men or White women. This is because groups often experience distinctive forms of stereotyping or barriers based on a combination of race and gender, and not on race or gender separately. Another example would be the experience of a Muslim woman who is the victim of discrimination. Her experience would likely be different than the experience of a Muslim man victim of discrimination, and it is unlikely that the Muslim woman could categorize the discrimination as based on gender only, separately from race or religion. An intersectional analysis uses a contextual approach by taking into account the simultaneous membership in more than one group, instead of categorizing each ground separately.[32]

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[31] See Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims, Discussion Paper* (Toronto: Ontario Human Rights Commission, October 2001) at 3

[32] *Ibid.*

10. Aboriginal communities hold a unique and distinct position within society and the legal profession. The *Charter of Rights and Freedoms* entrenches Aboriginal and treaty rights as distinct from equality rights recognized in the *Charter*. The Law Society recognizes and respects that Aboriginal communities are distinct from equality-seeking communities.

11. The *Canadian Charter of Rights and Freedoms*[33] also recognizes the unique position of Francophone communities within Canada. The Charter provides that English and French are the official languages of Canada. Both languages have equal status, rights and privileges as to their use in all institutions of the federal and New Brunswick governments. In Ontario, the *French Language Services Act*[34] guarantees each individual the right to receive provincial government services in French in the designated areas of the province. Also, the *Court of Justice Act*[35] provides that the official languages of the courts of Ontario are English and French. The Law Society recognizes and respects that Francophone communities are distinct from equality-seeking communities.

12. On March 10, 2005, the Committee adopted the following definitions of "equality" and "diversity" to be applied by the Law Society. The Committee also recognized the unique position of Aboriginal and Francophone communities.

> "Diversity": Diversity recognizes, respects and values individual differences to enable each person to maximize his or her own potential. The Law Society acknowledges the diversity of the community of Ontario, respects the dignity and worth of all persons and promotes the right of all persons and communities to be treated equally without discrimination.
>
> "Equality": Equality means equality of substantive access, opportunity and result without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.
>
> The Law Society recognizes and respects the uniqueness of the Aboriginal and Francophone communities and is committed to the promotion of rights for Aboriginal and Francophone communities.
>
> The Law Society recognizes that individuals may experience discrimination due to their membership in one or more of the identified grounds, groups or communities.

Application of template

13. A general Equality Template has been developed and is presented at Appendix 2. The questions included in the Equality Template have also been integrated within the Senior Management Team Initiative Proposal Form and the Policy Secretariat Policy

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[33] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (the *Canadian Charter)*.
[34] R.S.O. 1990, c. F. 32.
[35] R.S.O. 1990, c. C.43.

Development Template. This ensures that equality considerations will be given to projects and initiatives considered for approval by the Senior Management Team and in policy development activities undertaken by the Law Society.

14. The Equality Template does not attempt to determine whether an initiative, project or policy should proceed. It assists in identifying the potential impact, positive or negative, of policies and initiatives on Aboriginal, Francophone and equality-seeking communities. The instrument is also useful to determine whether there are alternative ways to proceed that would alleviate negative impacts on Aboriginal, Francophone and equality-seeking communities and promote equality.

15. The Equality Template will be used in decision-making processes, policy development activities, implementation of policies, development of programs and initiatives, and in consultations undertaken by the Law Society. For example, the template may be used in:

    a. Senior Management Team's decision making processes;
    b. Policy development activities;
    c. Implementation of programs;
    d. Development and management of projects;
    e. Development of resources and tools; and
    f. Training and education programs.

16. The questions outlined in the general Equality Template may be integrated within already existing processes, or may be used as an Equality Template to be applied on its own.

17. The Senior Management Team will be responsible for the implementation of this initiative and the application of the template. The Senior Management Team has approved the proposed template.

18. A glossary of terms has also been developed for the Law Society and is presented at Appendix 3.

Appendix 2
Equality Template

The Equality Template does not attempt to determine whether an initiative, project or policy should proceed. It assists in identifying the potential impact, positive or negative, of initiatives, projects and policies on Aboriginal, Francophone and equality-seeking communities. The instrument is also useful to determine whether there are alternative ways to proceed that would alleviate negative impacts or that would accentuate the positive impacts on Aboriginal, Francophone and equality-seeking communities and promote equality.

The Law Society recognizes and respects the uniqueness of the Aboriginal and Francophone communities and is committed to the promotion of rights for Aboriginal and Francophone communities. In addition, the Law Society is committed to the promotion of rights of members of equality-seeking communities. The Law Society defines members of "equality-seeking communities" as people who consider themselves a member of such a community by virtue of, but not limited to, ethnicity, ancestry, place of origin, colour, citizenship, race, religion or creed,

disability, sexual orientation, marital status, same-sex partnership status, age, family status and/or gender. The Law Society also recognizes that people may be more vulnerable due to their membership in more than one of the identified groups or communities.

Managers and project leads should apply the instrument to initiatives, projects or policy development such as the development of internal policies and guidelines and significant projects and initiatives.

The questions outlined below may be integrated within already existing processes, or may be used as an equality template to be applied on its own.

1. What are the potential benefits for Aboriginal, Francophone and equality-seeking communities?

_____
_____
_____

2. What are the potential risks that may affect members of Aboriginal, Francophone or equality-seeking communities?

_____
_____

3. What are potential hurdles/barriers that may affect members of Aboriginal, Francophone and equality-seeking communities?

_____

_____

4. What is the foreseeable impact on members of Aboriginal, Francophone and equality-seeking communities?

_____
_____
_____

5. If foreseeable impact on members of Aboriginal, Francophone and equality-seeking communities, how could the initiative, project or policy be modified to eliminate or reduce negative impact, or create or accentuate positive impact?

_____
_____
_____

6. What, if any, additional research or consultation is desirable or essential to better appreciate the impact of the initiative, project or policy on diverse groups?

_____
_____
_____

7. Have issues of accessibility for persons with disabilities been considered?

_____
_____
_____

8. What, if any, aspects of the initiative, project or policy should be undertaken in both official languages?

_____
_____

_____

9. What benchmarks and measures can be used to assess the success and impact of the initiative, project or policy on members of Aboriginal, Francophone and equality-seeking communities?

_____
_____
_____

10. Is there an intended or unintended impact with respect to equality or diversity?

Yes □ No □

Appendix 3
Glossary of Terms

· *Aboriginal Peoples of Canada* – is defined in the *Constitution Act, 1982*[36] as including the Indian, Inuit and Métis peoples of Canada. The use of the term Indian is preferably restricted to the *Indian Act* and is usually viewed as inappropriate. The names of Aboriginal organizations and associations in Canada are often a reflection of the period of incorporation. We find names such as the Indigenous Bar Association, the Assembly of First Nations and the Native Women's Association of Canada. The reader is encouraged to seek to determine the preferred terminology used by the community or organization as a fundamental component of the dignity and respect that is encompassed in an equality commitment.

  o *Aboriginal Rights* - The *R. v. Van der Peet* case[37] is the leading case in establishing the test that must be satisfied to successfully prove the existence of an Aboriginal right. The Aboriginal claimant must prove that an activity, custom or tradition was integral to the distinctive culture of the Aboriginal community prior to European contact.

[36] Section 35 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11.
[37] [1996] 2 S.C.R. 507.

- *Métis Peoples* – has been defined by the Supreme Court of Canada as not encompassing all individuals with mixed Indian and European heritage. Rather it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.

· Age – is defined in the Ontario *Human Rights Code* to mean an age that is eighteen years or more, except in the context of employment where age means an age that is eighteen years or more and less than sixty-five years. Until the Ontario *Human Rights Code* is amended, it is not contrary for employers to require employees to retire at age 65 or older. Similarly, workers who remain employed past age 65 cannot complain if their employer treats them differently (for example in terms of remuneration, benefits, hours, vacation) because of their age.

· *Creed or Religion* – means a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single Supreme Being or deity is not a requisite. The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed. The Supreme Court of Canada defined "freedom of religion" in *Syndicat Northcrest v. Amselem*[38] as "the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter.* It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection"

· *Discrimination* - occurs when a law, program or policy – expressly or by effect – creates a distinction between groups of individuals which disadvantages one group based on shared personal characteristics of members of that group in a manner inconsistent with human dignity.

- *Direct Discrimination* – involves a law, rule or practice which on its face creates harmful differential treatment on the basis of particular group characteristics.
- *Adverse Effect Discrimination* – occurs when the application of an apparently neutral law or policy has a disproportionate and harmful impact on individuals on the basis of particular group characteristics. It is also referred to as "indirect" discrimination or "disparate impact" discrimination
- *Systemic Discrimination* – occurs when problems of discrimination are embedded in institutional policies and practices. Although the institution's

[38] [2004] S.C.J. No. 46.

policies or practices might apply to everyone, they create a distinction between groups of individuals, which disadvantage one group based on shared personal characteristics of members of that group in a manner inconsistent with human dignity. Systemic discrimination is caused by policies and practices that are built into systems and that have the effect of excluding women and other groups and/or assigning them to subordinate roles and positions in society or organizations. Although discrimination may not exclude all members of a group, it will have a more serious effect on one group than on others.

- *Disability* – The definition of disability is not fixed, static or universal. Disability is a multi-dimensional concept with both objective and subjective characteristics. When it is interpreted as an illness or impairment, disability is seen to be located in an individual's mind or body. When it is interpreted as a social construct, disability is seen in terms of the socio-economic, cultural and political disadvantages resulting from an individual's exclusion.[39] Disability is a functional limitation that is experienced by individuals because of the economic and social environment (or because of society's reaction to the limitation)

- *Diversity*: The presence of members from Ontario's communities at all levels of the social, economic and political structures which includes their meaningful participation at the decision and policy making levels.[40]

- *Equality* – is difficult to define because it represents a continuum of concepts. In various contexts it can mean equality of opportunity, freedom from discrimination, equal treatment, equal benefit, equal status and equality of results

    - *Formal Equality* – prescribes identical treatment of all individuals regardless of their actual circumstances
    - *Substantive Equality* – requires that differences among social groups be acknowledged and accommodated in laws, policies and practices to avoid adverse impacts on individual members of the group. A substantive approach to equality evaluates the fairness of apparently neutral laws, policies and programs in light of the larger social context in equality, and emphasizes the importance of equal outcomes which sometimes require equal treatment and sometimes different treatment.

- *Equity* – focuses on treating people fairly by recognizing that different individuals and groups require different measures to ensure fair and comparable results.

- *Equity Programs* – are proactive, planned programs designed to remedy group-based problems of systemic discrimination. They are premised on the recognition of the need to take positive steps to redress institutionalized discrimination and persistent social inequalities. Equity initiatives are also referred to in the United States as "affirmative action" programs.

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[39] Government of Canada, Defining Disability as a Complex Issue (Gatineau: Office for Disability Issues, Human Resources Development Canada, 2003)

[40] Adapted from Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Profession* (Ottawa: Canadian Bar Association, February 1999).

- *Gender* - is the culturally specific set of characteristics that identify the social behaviour of women and men, the relationship between them and the way it is socially constructed. Gender is an analytical tool for understanding social processes. Gender may refer to male or female.

    - *Gender Equity* – is the process of being fair to women and men. To ensure fairness, measures must often be available to compensate for historical and social disadvantages disproportionately experienced by women. Equity leads to equality.
    - *Gender Equality* – will be achieved when women and men contribute equally to – and benefit equally from – political, economic, social and cultural development; and society equally values the different contributions they make.
    - *Gender Equality Analysis* – is a process to help identify and remedy problems of gender inequality that may arise in policy, programs and legislation. It is premised on an understanding of the continuing reality of women's inequality in Canadian society; and a recognition that our legal rules have historically been founded on explicit or implicit assumptions about appropriate gender roles that restrict women's choices and actions. The object of gender equality analysis is to replace those assumptions with a consideration of the specific situations of women in the labour market, in the household and in the community, and thus shape laws, policies and programs that reflect and respond to women's needs and priorities.

- *Gender Identity* – refers to those characteristics that are linked to an individual's intrinsic sense of self that is based on attributes reflected in the person's psychological, behavioural, and/or cognitive state. Gender identity may also refer to one's intrinsic sense of being male or female. It is fundamentally different from and not determinative of, sexual orientation.[41]

- *Racialized* – refers to persons whose social experiences may be determined by their presumed membership in a race. It identifies their vulnerability to different treatment or the denial of rights or privileges by individuals and institutions who believe that race should factor into their decisions-making.[42]

    - *Race* – is the idea of observable physical differences as the basis for categorizing people. This idea has been around for some time though it has lost its scientific validity. The selection of characteristics that define people into racial groups has been arbitrary. Skin colour has been seen as very significant where ear shape of the length of arms and legs have not. Once the person has these characteristics they are assumed to share certain cultural attributes.
    - *Systemic Racism* – Systemic or institutional discrimination consists of patterns of behaviour that are part of the social and administrative

[41] This definition is a modification of that found in the Ontario Human Rights Commission *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

[42] Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Profession* (Ottawa; Canadian Bar Association, February 1999).

structures of the workplace, and that create or perpetuate a position of relative disadvantage for some groups and privilege for other groups, or for individuals on account of their group identity. This definition focuses attention on patterns of behaviour, not attitudes, on the assumption that ridding the workplace of racism begins (though does not end) with changing discriminatory behaviours.[43]

- *Sexual Orientation* – is more than simply a status that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity, including innate sexual attraction. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations.[44]

- *Special Programs* - a right to equality without discrimination is not infringed by the implementation of special programs designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of discrimination.[45] Such affirmative action programs have sometimes been referred to as "reverse discrimination". However, the Ontario *Human Rights Code* and relevant case law clearly indicate that those programs are not discriminatory, but are established to provide substantive equality for disadvantaged groups. Section 15(2) of the *Canadian Charter of Rights and Freedoms*[46] also states that the right to equality "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

CONVOCATION ROSE AT 1:00 P.M.

Confirmed in Convocation this 24th day of November, 2005.

Treasurer

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[43] Carol Agocs, *Surfacing Racism in the Workplace: Qualitative and Quantitative Approaches to Identifying Systemic Discrimination,* September 2004, Prepared for The Race Policy Dialogue, Association for Canadian Studies and Ontario Human Rights Commission.

[44] This definition combines elements of that used by the Ontario Human Rights Commission and that used by the National Lesbian and Gay Journalists Association.

[45] Section 14 of the Ontario *Human Rights Code*, R.S.O. 1990, chap. H.19.

[46] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.