MINUTES OF CONVOCATION

Thursday, 25th September, 2003
9:00 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Aaron, Alexander, Arnup, Backhouse, Banack, Bobesich, Boyd, Bourque, Campion, Carpenter-Gunn, Cass, Chahbar, Cherniak, Coffey, Copeland, Curtis, Dickson, Doyle, Dray, Ducharme, Eber, Elliott, Feinstein, Filion, Furlong, Gotlib, Gottlieb, Harris, Heintzman, Hunter, Lawrence, Legge, MacKenzie, Martin, Millar, Murphy, Murray, O'Brien, O'Donnell, Pattillo, Pawlitza, Porter, Potter, Robins, Ross, Ruby, St. Lewis, Silverstein, Simpson, Swaye, Symes, Topp (by telephone), Warkentin and Wright.

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The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer outlined the manner in which he wished to proceed in Convocation.

The Treasurer designated Kim Carpenter-Gunn as his representative on the Ontario Bar Association Council.

A painting by The Honourable Chief Justice Roy McMurtry will be sold by silent auction on October 16th, and there will be a concert on November 16th organized by Mr. Martin Teplitsky. All proceeds for both events will be donated to the Feed the Hungry Program.

The Treasurer designated Mr. Patrick Furlong as his representative on the selection committee to hire the complaints resolution commissioner.

MOTION – DRAFT MINUTES OF CONVOCATION

It was moved by Mr. Murray, seconded by Mr. Wright that the Draft Minutes of June 26 and July 31, 2003 be confirmed.

Carried

MOTION – APPOINTMENT TO GOVERNMENT RELATIONS & PUBLIC AFFAIRS COMMITTEE

It was moved by Mr. Murray, seconded by Mr. Wright that Michelle Strom be appointed to the Government Relations & Public Affairs Committee.

Carried

MOTION – APPOINTMENTS TO ONTARIO BAR ASSOCIATION COUNCIL

It was moved by Mr. MacKenzie, seconded by Mr. Wright that Laurie Pattillo and Ross Murray be appointed to the Ontario Bar Association Council for a term of two years, expiring September 2005.

Carried

MOTION – APPOINTMENT TO ONTARIO BAR ASSISTANCE PROGRAM

It was moved by Mr. Murray, seconded by Mr. MacKenzie that Gary Gottlieb be appointed to the Ontario Bar Assistance Program Board of Directors for a term of one year, expiring September 2004.

Carried

MOTION – APPOINTMENT TO CANADIAN NATIONAL EXHIBITION

It was moved by Mr. Murray, seconded by Mr. Wright that Gordon Bobesich be appointed the Law Society's representative on the Canadian National Exhibition Association for a term of one year, expiring September 2004.

Carried

MOTION – APPOINTMENT TO LINK BOARD OF DIRECTORS

It was moved by Mr. Murray, seconded by Mr. Wright that Laurie Pattillo be appointed as the Law Society's representative to the LINK Board of Directors.

Carried

MOTION - AMENDMENTS TO BY-LAWS 13, 16 AND 33 (French Version)

It was moved by Mr. Millar, seconded by Mr. Hunter that:

the By-Laws made by Convocation under subsections 62 (0.1) and (1) of the *Law Society Act* in force on September 25, 2003, be amended as follows:

BY-LAW 13
[MEMBERS]

1. Section 2.2 of By-Law 13 [Members] is amended by adding the following:

Interprétation : « ordonnance »

(0.1) Dans les paragraphes (1) et (2), « ordonnance » s'entend de ce qui suit :

a) une ordonnance rendue en application de la Loi;

b) dans le cas d'une personne qui devient un membre par voie de transfert en provenance d'un ressort autre que l'Ontario en application de l'article 4 ou 4.1 du règlement administratif n° 11, une ordonnance rendue par un tribunal de l'organisme de réglementation de la profession juridique de ce ressort.

2. Subsections 2.2 (1) and (2) of the By-Law are amended by deleting “en application de la Loi”.

BY-LAW 16
[PROFESSIONAL LIABILITY INSURANCE LEVIES]

3. Subparagraph iii of paragraph 2 of subsection 9 (1) of By-Law 16 [Professional Liability Insurance Levies] is amended by deleting “de qualité au moins équivalente à” and substituting “raisonnablement comparable, pour ce qui est de la garantie et des sommes assurées, à celle de l’assurance responsabilité civile professionnelle”.

4. Subsection 9 (1) of the By-Law is amended by adding the following:

2.1 Les membres qui, au cours de l’année où les cotisations sont exigibles :

i. résideront dans un ressort lié par un accord de réciprocité,

ii. font la preuve que la protection offerte pour l’exercice du droit en Ontario, sous le régime d’assurance responsabilité civile professionnelle obligatoire d’un ressort lié par un accord de réciprocité, est raisonnablement comparable, pour ce qui est de la garantie et des sommes assurées, à celle de l’assurance responsabilité civile professionnelle requise sous le régime du Barreau.

5. Subsection 9 (1.1) of the By-Law is amended by adding “2.1” after “ la disposition 1, 2”.

6. Section 9 of the By-Law is amended by adding the following:

Interprétation : « ressort lié par un accord de réciprocité »

(2.1) Dans le paragraphe (1), « ressort lié par un accord de réciprocité » s’entend d’un ressort canadien autre que l’Ontario qui réunit les conditions suivantes :

a) il est signataire de l’entente sur l’exercice interprovincial du droit conclue en décembre 2002 par le Barreau, la Law Society of British Columbia, la Law Society of Alberta, la Law Society of Saskatchewan, la Société du Barreau du Manitoba, le Barreau du Québec, la Nova Scotia Barristers’ Society et la Law Society of Newfoundland;

b) les membres ont le pouvoir d’y exercer le droit;

c) il exonérerait les membres des cotisations de son régime d’assurance responsabilité civile professionnelle s’ils résidaient en Ontario et faisaient la preuve que la protection offerte pour l’exercice du droit dans ce ressort, sous le régime d’assurance du Barreau, est raisonnablement comparable, pour ce qui est de la garantie et des sommes assurées, à celle de l’assurance responsabilité civile professionnelle qu’il requerrait par ailleurs d’eux.

7. Section 9 of the By-Law is further amended by adding the following:

Interprétation : « résider »

(5) Dans le paragraphe (1), « résider » s’entend au sens qui lui est donné pour l’application de la *Loi de l’impôt sur le revenu* (Canada).

BY-LAW 33
[INTER-PROVINCIAL PRACTICE OF LAW]

8. Subsection 4 (1) of By-Law 33 [Inter-Provincial Practice of Law] is amended by adding at the end a comma and the words “à l’exclusion de quiconque le fait en vertu du paragraphe 10 (2.1) ou (4)”.

9. Section 10 of the By-Law is amended by adding the following:

Idem

(2.1) Quiconque n'est pas un membre peut, tant qu'il a le pouvoir d'exercer le droit dans une province ou un territoire du Canada autre que l'Ontario et qu'il n'établit pas de présence économique en Ontario, sans l'autorisation préalable du Barreau, exercer le droit en Ontario à titre occasionnel en qualité :

a) soit d'avocat ou d'avocate dans le cadre d'une instance tenue devant la Cour suprême du Canada, la Cour fédérale du Canada, la Cour canadienne de l'impôt, un tribunal administratif créé en application d'une loi du Parlement, un tribunal militaire au sens de la *Loi sur la défense nationale* (Canada) ou la Cour d'appel de la cour martiale du Canada;

b) soit d'avocat ou d'avocate d'un tribunal judiciaire ou administratif visé à l'alinéa a).

10. Section 10 of the By-Law is further amended by adding the following:

Idem

(4) Quiconque est habilité en vertu du paragraphe (2.1) à exercer le droit en Ontario à titre occasionnel peut le faire plus souvent qu'à ce titre, de la manière dont l'autorise un ou une responsable du Barreau, tant qu'il a le pouvoir d'exercer le droit dans une province ou un territoire du Canada autre que l'Ontario et qu'il n'établit pas de présence économique en Ontario.

11. Section 15 of the By-Law is amended by adding the following:

Idem

(1.1) Quiconque n'est pas un membre peut, tant qu'il a le pouvoir d'exercer le droit dans une province ou un territoire du Canada autre que l'Ontario, sans l'autorisation préalable du Barreau, exercer le droit en Ontario à titre occasionnel en qualité :

a) soit d'avocat ou d'avocate dans le cadre d'une instance tenue devant la Cour suprême du Canada, la Cour fédérale du Canada, la Cour canadienne de l'impôt, un tribunal administratif créé en application d'une loi du Parlement ou de la Législature de l'Ontario;

b) soit d'avocat ou d'avocate d'un tribunal judiciaire ou administratif visé à l'alinéa a).

Carried

LAWPRO REPORT TO CONVOCATION

Ms. Carpenter-Gunn presented the LAWPRO Report to Convocation.

LAWPRO
September 2003

Report to Convocation

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SECTION PAGE

LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO)
REPORT TO CONVOCATION – SEPTEMBER, 2003

INTRODUCTION

1. Each September since 1995, LAWPRO's Board of Directors has reported to Convocation its recommendations for the following calendar year.

The timing of this report is necessitated by the logistics of renewing 19,200 policies effective January 1, and the need to place and negotiate any related or corollary reinsurance treaties.

2. This report is also an opportunity for LAWPRO's Board to review with Convocation issues of importance to its insurance operations and receive policy direction where necessary. Financial information on LAWPRO and the program is provided to Convocation throughout the year.

3. Convocation established LAWPRO's mandate in 1994 with the adoption of the Insurance Committee Task Force Report. The mandate and principles of operation were to be as follows:

- that LAWPRO be operated separate and apart from the Law Society by an independent board of directors;
- that LAWPRO be operated in a commercially reasonable manner;
- that LAWPRO move to a system where the cost of insurance reflects the risk of claims; and
- that claims be resolved fairly and expeditiously; however this was not to be a system of "no-fault" compensation and there would be certain circumstances where coverage was denied.

4. The LAWPRO Board of Directors believes that these recommendations have been achieved in LAWPRO's operations, and the proposed program for the year 2004 continues to operate on these principles.

SUMMARY OF RECOMMENDATIONS

5. The following are the recommendations made by LAWPRO's Board of Directors for the 2004 professional liability insurance program.

Premium pricing for 2004

(i) That the base premium be maintained at $2,500 per lawyer for the 2004 insurance program (paragraph 61).

(ii) That 100 percent of the premiums and losses for the Ontario professional liability program be retained by the company again in 2004 (paragraph 50).

(iii) That revenues from supplemental premium levies (real estate and civil litigation transaction levies, as well as claim history levies) be budgeted at $23.0 million for the purposes of establishing the base premium for 2004 and other budgetary purposes (paragraph 61).

(iv) That $9.7 million be drawn from the Premium Stabilization Fund built up in previous years ($22.5 million at June 2003) and applied to the 2004 insurance premium (paragraph 61).

(v) To the extent that levies (noted in (iii) above) collected in 2004 are different than the budgeted amount, the surplus or shortfall shall flow to/from the Premium Stabilization Fund (paragraph 61).

Proposed changes to the insurance program for 2004

<u>Related claims reported over different policy years</u>

(vi) That the policy be modified to expressly provide that claims (and/or potential claims) reported under different policy years, which arise from a single or related errors, omissions or negligent acts, be treated as a single claim (and/or potential claim) under the earliest policy under which any such related claim (and/or potential claim) was first reported (paragraph 16).

Exclusion for investment advice and services

(vii) That the policy exclude coverage for claims arising out of investment advice and/or services, unless as a direct consequence of the performance of legal services (paragraph 21).

Exclusion for lawyers' personal profit or advantage

(viii) That the policy exclude coverage for claims relating to or arising out of any profit or advantage gained by an insured lawyer, which does not directly relate to the lawyer's practice of law (paragraph 27).

Modifications to Civil Litigation Transaction Levy Surcharge Endorsement

(ix) That the $50 Civil Litigation Transaction Levy Surcharge not apply in the case of divorces or adoption proceedings which are not opposed on any issue, and that institutional references in the Civil Litigation Transaction Levy exclusions be updated as provided for in this report (paragraph 34).

Modifications to the Claims History Levy Surcharge Endorsement

(x) That the Claims History Levy Surcharge Endorsement be modified so that:

(a) for claims reported on or after January 1, 2004, where payment is made in respect of a claim resulting in the full limit of liability per claim under the policy being exhausted, the claim will be deemed to be a claim paid and a surcharge shall apply, unless the insured lawyer can establish that no payment has as yet been made (or remains outstanding other than while under appeal) on the insured's behalf further to a judgment, settlement or repair; and

(b) that the preceding five-year period during which claims are considered instead refer to the last five years during which the lawyer was a practicing member and not claiming exemption under the program (paragraph 42).

CLE Premium Credit

(xi) That the Continuing Legal Education Premium Credit be continued in future years, with a $450 premium credit per course, subject to a $100 per member maximum amount, to be applied for pre-approved legal and other educational courses taken and successfully completed by the member between September 16, 2003, and September 15, 2004 for which the member has successfully completed the online CLE declaration form (paragraph 79).

(xii) That, subject to the recommendations made earlier in this report, the exemption criteria, policy coverage, coverage options, and premium discounts and surcharges in place in 2003 remain unchanged for the 2004 insurance program (paragraph 67).

E & O Fund

(xiii) that the investment income revenues of the Errors & Omissions Fund which are surplus to the obligations of the Fund be made available to the Law Society during 2004 (paragraph 8).

PART 1 – THE ERRORS & OMISSIONS FUND

6. LAWPRO manages the Law Society's Errors & Omissions Fund which is currently in run-off mode. (The Fund was responsible for the insurance program prior to 1990, and for a group deductible of up to $250,000 per claim prior to 1995.)

7. As of June 30, 2003, the Fund had outstanding claims liabilities of $18.7 million. The number of open files for 1994 and prior years stood at 118. Since there are sufficient assets in the Fund to fully meet the outstanding liabilities, the LAWPRO Board is again satisfied that the investment income of the Fund is surplus to the needs of the

Fund and can be used by the Law Society for its general purposes. It is expected that $3.0 million of investment income would be transferred during the 2004 year.

8. LAWPRO's Board recommends to Convocation that the investment income revenues of the Errors & Omissions Fund which are surplus to the obligations of the Fund be made available to the Law Society during 2004.

PART 2 – PROPOSED CHANGES TO THE INSURANCE PROGRAM FOR 2004

9. The current program structure, policy limits, coverage and available options, appear to be generally well suited to meet the practice realities and evolving needs of the profession, as well as planned Law Society initiatives, in 2004.

10. The changing demographics of the profession, the future of sole practitioners and small firms, changing firm structures, the effects of information technology on the profession, diversity within the profession, and the effectiveness of the justice system, are among the aspects considered in relation to the program in 2004.

11. The LAWPRO Board specifically considered and reaffirms its review that the program's policy limits of $1 million per claim/$2 million in the aggregate, remain adequate and appropriate for 2004. A careful review of the program, the policy wording and loss experience, however, was conducted to identify any areas requiring refinement or clarification of specific underwriting intention.

12. The result is that 2004 is seen as an important year for policy refinements, to ensure that newly reported claims are dealt with in a fashion consistent with program principles. The following changes are proposed for the Law Society program in 2004.

Related claims reported over different policy years

13. It is not uncommon for one or more lawyers to report related claims under the program. This may be, for example, because more than one lawyer in the firm was involved in providing the legal services giving rise to the claim, or more than one client relied on the same legal advice or service, or varying allegations are made or proceedings commenced at different points in time.

14. To address this, the policy provides that all claims and potential claims which arise from a single or related error, omission or negligent act shall be considered a single claim, regardless of the number of insureds or number of persons or organizations making a claim, or the time or times that the error, omission or negligent act took place.[1]

15. On some occasions though, the related claims and/or potential claims have been reported over the course of more than one policy year. Claimants' counsel sometimes then argue that the policy definition of "claim" is not broad enough to encompass related claims reported under other polices, so that separate limits should apply to each related claim reported under different policy years.

16. So that there is no doubt as to interpretation, the LAWPRO Board of Directors recommends that the policy be modified to expressly provide that claims (and/or potential claims) reported under different policy years, which arise from a single or related errors, omissions or negligent acts, be treated as a single claim (and/or potential claim) under the earliest policy under which any such related claim (and/or potential claim) was first reported.

Exclusion for investment advice and services

17. It is clear that the practice of law may involve some incidental investment advice or ancillary financial service. This is particularly clear for those lawyers involved in establishing trusts for clients and in estate law, where counsel may have some limited investment or banking authority concerning trust or estate funds which is incidental and related to his or her legal services mandate.

[1] See "CLAIM", as defined under Part V, Definition (b) of LAWPRO policy no. 2003-001.

18. On these occasions, coverage is provided under the program for the lawyer's legal services, including for the incidental investment advice or financial service which he or she is expected to provide.

19. However, some lawyers have chosen to provide investment advice or service which is not accompanied by any legal services, or where the legal services are clearly incidental to the investment advice or service. Although claims arising out of this type of investment activity have been occasional, they have resulted in substantial claims being reported under the program.

20. The type of investment advice and service contemplated in these examples is not incidental to the lawyer's law practice, and requires a different type and level of investment expertise which most lawyers are not trained or educated in, nor are they in a position to readily provide. Activities like this represent an inordinate exposure to the program when compared to the exposure associated with incidental investment advice provided by lawyers in their ordinary practice, or compared to the exposure associated with most lawyers' law practices generally.

21. Accordingly, the LAWPRO Board recommends that the policy exclude coverage for claims arising out of investment advice and/or services, unless as a direct consequence of the performance of legal services.

Exclusion for lawyers' personal profit or advantage

22. Another area of concern involves claims concerning lawyers' business ventures or investments outside of their law practice that do not involve investment advice.

23. These claims tend to occur when the business venture or investment fails to meet participants' expectations, or when the participants become unhappy with the business arrangements, prompting the lawyer's co-venturers, co-investors or others to sue. Appreciating that their co-venturer or co-investor happens to be a lawyer, they argue in part that they relied on this fact, and allege that he or she was acting as a lawyer and fiduciary, regardless of whether any legal services were ever provided.

24. The result is that allegations are made against the lawyer that trigger the lawyer's policy coverage, and the program is obligated to respond as the lawyer and other parties dispute their various business or investment dealings.

25. To limit the program's involvement in these types of claims, it is proposed that the exclusion for claims arising out of legal fees, accounts or fee arrangements involving the insured lawyers[2], be expanded to also exclude claims relating to or arising out of any profit or advantage gained by the lawyer which does not directly relate to his or her law practice.

26. This seems appropriate given that these business or investment activities are outside of the lawyer's law practice and the mandate of the insurance program. The risks associated with this type of activity are generally very different from those associated with the practice of law.

27. Accordingly, the LAWPRO Board recommends that the policy be modified to exclude coverage for claims relating to or arising out of any profit or advantage gained by an insured lawyer, which does not directly relate to the lawyer's practice of law.

Modifications to Civil Litigation Transaction Levy Surcharge Endorsement

28. Beyond establishing a definition for "civil litigation transaction" and requiring that Law Society members (who are not exempt under the program) pay a $50 levy surcharge for each civil litigation transaction, Endorsement no. 3 to the policy establishes exclusions whereby certain types of transactions are exempt from the levy surcharge.

29. In particular, the endorsement provides that no levy surcharge is payable by a member in respect of a civil litigation transaction if the proceedings are commenced in Small Claims Court, or pursuant to residential landlord and tenant matters, or if the proceedings are funded by the Legal Aid Plan, Office of the Children's Lawyer/Office of the Official Guardian, the Public Trustee or the Family Support Plan.

[2] See exclusion (h) under Part III of LAWPRO policy no. 2003-001.

30. Beyond updating these institutional references, it is proposed that further exclusion be made so that no $50 civil litigation transaction levy surcharge would apply in the case of uncontested divorces or uncontested adoption proceedings.

31. This is based on the fact that the risk associated with these two types of transactions is very slight when compared to other types of civil litigation transactions. This conclusion is based on review of the program loss experience, where claims arising out of these types of proceedings were found to be rare.

32. Knowing this, as an administrative matter, LAWPRO has not insisted that members pay the $50 transaction levy for uncontested divorces in recent years. No substantial impact on transaction levy revenues is anticipated as a result of the recommended changes.

33. Institutional references in the transaction levy exclusions would be updated to reflect: Legal Aid Ontario, Office of the Children's Lawyer, Office of the Public Guardian and Trustee, and the Family Responsibility Office.

34. Accordingly, the LAWPRO Board recommends that the $50 Civil Litigation Transaction Levy Surcharge not apply in the case of divorces or adoption proceedings which are not opposed on any issue, and that institutional references in the Civil Litigation Transaction Levy Exclusions be updated as provided for in this report.

Modifications to the Claims History Levy Surcharge Endorsement

35. The Claims History Levy Surcharge represents an additional premium charged to Law Society members based on their past loss experience under the program. It is a key part of risk-rating under the program, and reflects the fact that lawyers with past claims are more likely than others to report future claims under the program.

36. In this regard, policy Endorsement no. 4 requires that a member pay a Claims History Levy Surcharge in addition to his or her base levy and other applicable charges, where the member has had one or more claims in which an indemnity payment has been made pursuant to a judgment, or by way of repair or settlement of a claim, in the last five years. The amount of the surcharge is $2,500 per year for one claim with an indemnity payment made within the last five years, and increases with each such additional claim during that five-year period.[3]

37. Appreciating the risk-based nature of the program, it is proposed that this criterion be expanded to apply to two other situations. The first is where no indemnity payment is made in connection with the particular claim, but the whole of the $1 million per claim policy limit has been consumed by costs and expenses incurred in the investigation and defence of the claim.

38. In that circumstance, it seems reasonable for the program to apply a surcharge in respect of the claim, on the premise that a judgment has been rendered or a settlement or repair made on behalf of the member in regard to the claim in excess of the program limits. However, the surcharge applicable to the claim would be removed, if the member shows that in fact no such judgment, settlement or repair outside of the policy limits was ever made.

39. The second proposed change is that the last five-year period during which claims are considered should instead refer to the last five years during which the member maintained the practice coverage under the program.

40. The fact that a lawyer has claimed exemption during the five-year period following an indemnity payment on a claim should not mean that no surcharge is payable when the member returns to practice after the five-year period. This is because the lawyer's past practice is considered to carry an inordinate claim exposure, and the program is obligated to respond to these claims which are later reported, regardless of the lawyer's subsequent practice status.

[3] Those who have two claims with an indemnity payment made within the last five years are surcharged $5,000 per year, those with three claims are surcharged $10,000, those with four claims are surcharged $15,000, and those with any additional such claims are charged a further $10,000 per claim each year.

41. Although the savings to the program for these two suggested changes is limited, the changes do ensure a greater degree of fairness for those members who do not bring this added exposure to the program, and do ensure that the program better meets its risk-rating objective.

42. Accordingly, the LAWPRO Board of Directors recommends that the Claims History Levy Surcharge Endorsement be modified so that:

(a) for claims reported on or after January 1, 2004, where payment is made in respect of a claim resulting in the full limit of liability per claim under the policy being exhausted, the claim will be deemed to be a claim paid and a surcharge shall apply, unless the insured lawyer can establish that no payment has as yet been made (or remains outstanding other than while under appeal) on the insured's behalf further to a judgment, settlement or repair; and

(b) that the preceding five-year period during which claims are considered instead refer to the last five years during which the lawyer was a practising member and not claiming exemption under the program.

PART 3 – THE PROFESSIONAL LIABILITY INSURANCE PROGRAM

43. The program appears to be on track for 2003, with LAWPRO currently performing at budget. LAWPRO is forecasting a profit of $4.2 million for 2003. An important measure of the current program's success is the consistent A (Excellent) rating LAWPRO has received from A.M. Best Co. for each of the last three years.

44. While the number of claims has been fairly consistent in recent years, higher legal defence expenses are expected to create inflationary pressures for the program. Interest rates are at near-record lows. A one percent drop in the average investment yield costs the insurance program $2.5 million. Despite these factors, given the company's financial strength and the continuing stability in claims experience, the LAWPRO Board proposes that the structure and pricing of the insurance program be continued in its current form for 2004. The LAWPRO Board proposes that:

(a) the base insurance premium for the program be maintained at $2,500 per lawyer; and

(b) LAWPRO again retain 100 percent of the premiums and losses for the core professional liability insurance program, consistent with the approach taken in 2003, rather than reinsure a portion of the program in what continues to be a costly reinsurance marketplace.

Reinsurance

45. Based on industry forecasts and discussions LAWPRO has had with reinsurance brokers and various reinsurers, it is expected that reinsurers will continue to dictate reinsurance pricing and terms in 2004. Consolidation of companies and declining financial ratings in the reinsurance market continues, and reinsurance pricing is likely to be as high or higher than that seen in the market for 2003.

46. Indeed, it is anticipated that the cost of reinsurance in the current marketplace would easily add $5 million or more to the costs of the program, without significantly reducing the risks to the program. This would add approximately $270 per lawyer to the base premium.

47. LAWPRO, however, annually assesses its need for reinsurance based on its capital position, its claims results and volatility. As noted in the graph on page 18, claims results have been relatively stable. Furthermore, LAWPRO's capital position has continued to improve beyond that seen a year ago, when it was first decided to assume 100 percent of the risk of the program. Beyond LAWPRO's own resources, additional reserves are being carried in the Errors & Omissions Fund.

48. Accordingly, we propose that the program not pursue the expensive course of purchasing reinsurance. Instead, as in 2003, it is proposed that the retroactive premium endorsement effectively be used to backstop the

capital held in LAWPRO with the Premium Stabilization Fund/E&O Surplus, to a maximum of $15 million in the event that claims experience is outside of the expected range of outcomes.

49. LAWPRO purchased reinsurance on a quota share basis for the program for each year from 1995 to 2002. With this reinsurance arrangement, LAWPRO was effectively "borrowing" the resources of more strongly capitalized companies to insure the program when it did not have sufficient capital in these early years to do so on its own. At the time reinsurers' participation also provided credibility to the fact that the program was competitively priced and that best practices would be adopted by LAWPRO in managing the program. As LAWPRO's solvency improved, the percentage of the program ceded or share with reinsurers decreased from 57 percent in 1995 to 35 percent in 2002.

50. The LAWPRO Board of Directors therefore recommends that 100 percent of the premiums and losses for the Ontario professional liability program be retained by the company again in 2004.

Premiums – Costs, revenues and pricing

51. LAWPRO's revenue requirements for the 2004 insurance program are based on the anticipated cost of claims for the year, as well as the cost of applicable taxes and program administration. With some measure of conservatism, we estimate total funds required in 2004 at $77.7 million, consistent with forecasted and actual premiums for the mandatory program for each of the last four years. As the graph below illustrates, claims numbers and costs for the coming year also are expected to be slightly greater than in previous years. This is due to increased defence costs under the program. Approximately 1,900 new claims and $68 million in loss costs are anticipated for 2004.

GRAPH – Claims Cost of Ontario Program, by Fund Year ($000's)

(see graph in Convocation file)

52. As in past years, premium revenues to meet our fiscal requirements for 2004 will as in past years, come from three principal sources: the base premiums, levy surcharges and premium stabilization fund. The projected insurance revenues from these three sources are as follows (see graph on following page).

GRAPH – Projected Insurance Revenues, by Source

(see graph in Convocation file)

a) Levy surcharges:

53. Lawyers currently pay a transaction levy of $50 per file for real estate and civil litigation transactions, as well as a Claims History Levy Surcharge that ranges from $2, 500 for a lawyer with one claim paid in the last five years to $25,000 for a lawyer with five claims paid in the last five years (an additional $10,000 is levied for each additional claim paid in excess of five). Revenues from these levy surcharges are applied as premiums, to supplement the base levy.

54. This approach ensures an element of risk rating in the insurance program, as both real estate and civil litigation continue to represent a disproportionate risk when compared to other areas of legal practice. It also avoids the substantial dislocation which would likely occur if the base premiums were increased to reflect the risk, and was agreed to by the affected sectors of the bar as the most equitable way to achieve risk rating when introduced in 2000. (Risk rating is discussed in more detail in paragraphs 68 to 95 of this Report.)

55. In 2004, LAWPRO estimates transaction and claims history levy surcharge revenues at $23.0 million, compared to $25.4 million in 2002. Vagaries in the economy, particularly in the real estate market, make it difficult to predict transaction levy revenues with certainty. Real estate levy revenues also are affected by the increased use of title insurance, since the levy is waived for many title-insured real estate transactions.

GRAPH – Transaction Levies: Residential R/E Sales – Rolling 4 Quarter Basis

(see graph in Convocation file)

b) Premium Stabilization Fund:

56. Since the introduction of the 1999 program, any excess receipts from the transaction levies and claims history surcharges collected in the year have been held and managed on a revolving account basis and applied to the insurance program. These funds are used to guard against any future shortfall in levy receipts in a given year, appreciating the difficulties in forecasting transaction levy revenues in a changing economic climate, and to act as a buffer against the need for sudden increases in base premium revenues.

57. As well, through the use of a refund of premium provision in the policy, any surplus in funds resulting from claims costs being lower than budgeted, are similarly transferred to the premium stabilization fund for future insurance purposes. This return of premium provision, which has been in place since the 2000 policy period and considers premiums and claims costs under the program since the 1995 policy year, has generated $21.7 million in return premiums in total to date.

58. For 2003, an anticipated $7.3 million will be drawn from the revolving fund. LAWPRO proposes that, for 2004, $9.7 million be drawn from the surplus. This would still allow for sufficient surplus in this Premium Stabilization Fund to deal with adverse future claims experience.

c) Base premiums

GRAPH – Base Premium, by Fund Year

(see graph in Convocation file)

59. For 2004, the LAWPRO Board proposes that the base premium be maintained at $2,500 per lawyer. The base premium has declined steadily over the years from a high of $5,600 in 1995 (see chart on previous page). The proposed based premium is based on the following assumptions:

- 19,200 practising insured lawyers (full-time equivalents);
- $68 million in anticipated total loss costs;
- $23.0 million in budgeted transaction and claims history levy revenues;
- $9.7 million drawn from Premium Stabilization Fund; and
- 3.5 percent investment income.

60. Although the number of lawyers in practice year over year has grown steadily by about 1.5 per cent, there has not been a corresponding increase in claims costs. For example, between 1995 and 2002, claims costs stood at about $65 million annually, even though an additional 1,900 lawyers came into practice over this time. In fact, the number of claims has decreased from 129 per thousand in 1995 to 105 per thousand in 2002. This factor has contributed to stable claims costs, and has enabled LAWPRO to gradually reduce premiums over the course of the last eight-year period. With the proposed base premium, Ontario lawyers would continue to pay insurance premiums from as low as $l,113 for restricted area of practice, new calls and part-time practitioners, up to $2,500 for the mandatory insurance program (depending on the options chosen).

61. The LAWPRO Board of Directors recommends that:

a) The base premium be maintained at $2,500 per lawyer for the 2004 insurance program.

b) Revenues from supplemental premium levies (real estate and civil litigation transaction levies, as well as claim history levies) be budgeted at $23.0 million for the purposes of establishing the base premium for 2004 and other budgetary purposes.

c) $9.7 million be drawn from the Premium Stabilization Fund built up in previous years ($22.5 million at June 2003) and applied to the 2004 insurance premium.

d) To the extent that levies (noted in [b] above) collected in 2004 are different than the budgeted amount, the surplus or shortfall shall flow to/from the Premium Stabilization Fund.

The 2004 program

62. With the exception of the proposed policy changes (including the refinements in policy coverage, as well as civil litigation transaction and claims history levy surcharges) as detailed earlier in this Report, all aspects of the insurance program for 2004 will remain unchanged from those now in place.

63. As detailed in Appendix A, the current insurance program encompasses the following:

- exemption criteria;
- standard practice coverage, including Mandatory Innocent Party Coverage;
- policy options, including Innocent Party Buy-Up, Part-Time Practice, and Restricted Area of Practice; and
- Run-Off Coverage for lawyers eligible for exemption from paying the insurance premium.

64. The current program also provides for premium discounts and surcharges. Discounts and surcharges expressed as a percentage of premium include:

- New practitioner discount;
- Part-Time Practice discount; Restricted Area of Practice Option discount;
- Adjustments for deductible options and minimum premiums; and
- A “no application form” surcharge.

65. Discounts and surcharges expressed as a stated dollar amount include:

- the Mandatory Innocent Party premium;
- optional Innocent Party Buy-Up premium;
- premium discount for early lump sum payment;
- e-filing discount; and
- Continuing Legal Education discount.

66. With regard to the renewal process for 2004, important improvements are being made to make better use of the technology available to most lawyers and law firms. In particular, lawyers and law firms this fall will have the choice of receiving either electronic or hardcopy delivery of their policy materials and invoicing. As well, the e-filing of lawyers’ applications has been substantially streamlined for those choosing to file on a firm-wide basis. These improvements will further minimize administration and costs for lawyers and law firms, as well as for LAWPRO.

67. The LAWPRO Board recommends that, subject to the recommendations made earlier in this report, the exemption criteria, policy coverage, coverage options, and premium discounts and surcharges in place in 2003 remain unchanged for the 2004 insurance program.

Risk Rating

a) *Background*

68. As already discussed in this report, the Task Force Report concluded that the cost of insurance under the program should generally reflect the risks.

69. Specifically the Report indicated that "…as a fundamental, shaping principle the cost of insurance should generally reflect the differences in risk history, differing risks associated with different areas of practice, and differing volumes of practice. But no insurance program can be solely risk-reflective and there must be some sharing and spreading of risk."[4]

70. In keeping with this, detailed analyses of the risks associated with the program have been undertaken by LAWPRO. The earlier results of these analyses are summarized in previous Reports to Convocation. Notably, these analyses concluded that the practice of real estate and civil litigation represented a disproportionate risk when compared to other areas of practice, and that lawyers with a prior history of claims have a greater propensity for future claims than do other lawyers.

71. The objective of risk-rating was finally achieved in 1999 by applying various discounts and the real estate and civil litigation transaction levies and claims history levy revenues to the insurance program.

72. Risk rating, however, is not static. The relationship between the cost of claims and different areas of practice may change, and it is important that LAWPRO continue to monitor the program to ensure that risk rating continues to be achieved. Accordingly, the results of these earlier risk analyses are re-evaluated each year, and are addressed in this report at paragraphs 80 to 95.

b) Practice trends

73. LAWPRO's present risk analysis reaffirms the results of its last report indicating that the practice of real estate and civil litigation represent a disproportionate risk when compared to other areas of practice, with civil litigation equaling or leading the practice of real estate as the area of practice with the greatest relative exposure for losses. In particular, the analysis indicates that:

- Overall, the practice of real estate and civil litigation represent a disproportionate risk when compared to other areas of practice, with these two areas of practice representing 60.2 percent of the claims reported and 53.6 percent of the claims costs under the program in 2002;

However:

a) in 2002, the relative exposure relating to the practice of real estate law has again been substantially less than that traditionally seen, with this practice area accounting for 25.5 percent of the claims reported and 26.4 percent of the claims costs under the program (well below the levels of 48.1 percent and 58.3 percent seen in the 1989-94 period); and

b) in 2002, the relative exposure relating to the practice of civil litigation has again been substantially less than that traditionally seen, with civil litigation accounting for 34.7 percent of the claims reported and 27.2 percent of the claims costs under the program (well above the traditional levels of 27.4 percent and 17.9 percent seen in the 1989-94 period);

c) in 2002, the nature of claims against civil litigators was also reaffirmed, with claims involving the general conduct or handling of the matter at 70.9 percent compared to purely missed limitation period claims at 29.1 percent; and

[4] 1994 Task Force Report, at page 17.

d) lawyers with a prior claims history continue to have a considerably greater propensity for claims than other practicing lawyers, with 13.6 percent of lawyers with claims in the prior nine years, compared to 4.1 percent of lawyers with no claims in the prior nine years, reporting one or more claims during the last 12-month period.

74. The results of this analysis are summarized in the graphs contained in Appendix B of this report.

c) Risk management initiatives

75. A principal mandate of LAWPRO is to help the legal profession manage the risk associated with practice, by providing lawyers with tools and resources that help them manage risk and practice in a more risk-averse fashion. Among LAWPRO's major risk management initiatives are:

- *TitlePLUS*: Now in its sixth year, LAWPRO's successful title insurance program has had a significant impact on both real estate practice and real estate claims. Real estate claims today cost the program about $10.2 million less than they did seven years ago – a decline that can be attributed to changes in the lawyers' practice environment and the insurance program, and to widespread acceptance of title insurance. It is, however, not possible to isolate the impact of this latter factor from others affecting real estate claims under the program. As well, given the time it takes for claims to arise after the transaction and legal services are provided, the full impact of title insurance on the program may not be known for some time.

- *Special Reports on Fraud and Civil Litigation:* Two trends were noted in previous reports to Convocation: (1) new sophisticated fraud schemes, and (2) changes in the number and nature of civil litigation claims. Through in-depth reports, LAWPRO has alerted the profession to these trends and provided risk management guidance. These two subjects are expected to remain a matter of on-going focus in communications with the profession in the coming years.

The *Report on Litigation* specifically noted that the general breakdown in the lawyer/client relationship is now a leading cause of claims. Traditional causes of claims such as poor calendaring, procrastination, and failure to know and/or apply the law or meet a deadline have declined; the leading causes of litigation-related claims are now: failure to follow instructions, poor communication with the client, and overall dissatisfaction on the part of the client with the relationship.

GRAPH – Types of Errors that Result in Litigation Claims, 1989 – 2003

(see graph in Convocation file)

- *Practice finances:* Sound financial practice and management has been a key focus for communication with Ontario lawyers this year, appreciating that poor financial management can and does lead to: an inability to focus on the job at hand; negligence; and even misconduct. This subject was the focus of the March 2003 issue of the LAWPRO Magazine, with a new practicePRO '*managing'* booklet enclosed dedicated to helping lawyers manage the financial challenges associated with starting up a law practice, dealing with an established law practice, and planning for retirement and winding down the law practice.

- *Firm structure:* With lawyers now able to practice through professional corporations, limited liability partnerships, and multi-discipline partnerships, lawyers and law firms are provided with new risk management as well as tax saving opportunities. Helping lawyers recognize these opportunities is the focus of this summer's issue of the LAWPRO Magazine.

- *Promoting mentoring:* Concern with the apparent increase in incivility in the profession raised interest in promoting mentoring within the profession. Last year, LAWPRO actively promoted mentoring within the profession, dedicating a full issue of LAWPRO Magazine to the subject and producing a new practicePRO '*managing'* booklet dedicated to managing a mentoring relationship. It was also the first year in which program

changes applied that waived a mentoring lawyer's deductible or claims history levy surcharge for claims subsequently arising out of the mentoring relationship, where procedures and guidelines are followed.

- *Disaster recovery:* The events of September 11, 2001, drove home the need for all professionals to prepare for the unpredictable. Last year, through a full discussion in our LAWPRO Magazine and a new practicePRO *'managing'* booklet dedicated to guiding lawyers through the steps needed to prepare for practice interruptions, LAWPRO provided the profession with access to hands-on advice on how to manage this risk. The value of this type of planning was again brought home during the week following the August 14th blackout.

76. The Continuing Legal Education ("CLE") Premium Credit offered under the program, has also been another significant LAWPRO risk-management initiative. In 2001, a premium credit of $50 was first offered to lawyers using the practicePRO On-line Coaching Center, an internet-based, self-coaching tool that helps lawyers to enhance their business and people skills.

77. In the following year, the premium credit was renamed and broadened to provide a $50 premium credit (to a maximum of $100 per lawyer in a year) for designated law-related courses and programs completed by the lawyer. These courses are offered by the Law Society, Ontario Bar Association and other organizations, and must include a substantial risk-management component. Much of the risk management content deals with the "soft" skills of lawyers-communication, documentation, and time management rather than substantive law, in keeping with the most frequent causes of loss.

78. As an early indication of the success of this program, the loss experience of the 2,400 lawyers who have taken advantage of this initiative has been compared to those who have not, both in very recent years and for the period from 1995 to 1999. Even at this early measurement point, while the early loss experience of this group was entirely comparable to those who did not take advantage this initiative, the recent loss experience of this group is much better than those who did not participate. The results are set out below and give credence to the view that focused CLE can favourably influence claims frequency.

GRAPH – Average Annual Claim Frequency of Lawyers with and without CLE Credit by year of Claim

(see graph in Convocation file)

79. Accordingly, the LAWPRO Board of Directors recommends that the Continuing Legal Education Premium Credit be continued in future years, with a $50 premium credit per course, subject to a $100 per member maximum amount, to be applied for preapproved legal and other educational courses taken and successfully completed by the member between September 16, 2003, and September 15, 2004, for which the member has successfully completed the online CLE declaration form.

e) Revalidating risk rating

80. It is important to periodically re-evaluate the program by area of practice to ensure that it continues to be effective in its risk rating. The following chart shows the distribution of claims costs and expenses by detailed area of practice over the last decade. A similar chart is enclosed as part of Appendix B, providing a distribution by the number of claims.

GRAPH – Distribution of Claim Cost and Program Expenses, by Area of Practice

(see graph in Convocation file)

81. Apparent from the chart on the previous page are the significant but declining claims costs associated with real estate claims; the significant and growing claims costs associated with civil litigation; and the variability associated with most other areas of practice. This variability associated with most other areas of practice, to large measure, is a reflection of the unpredictability associated with smaller group sizes.

82. The fact that few lawyers practice exclusively in one area, provides a compelling reason to group together common or related areas of practice. Grouping the areas of practice, we get the following chart which complements the first.

GRAPH – Distribution of Claim Cost and Program Expenses, by Grouped Area of Practice

(see graph in Convocation file)

83. However, to ensure that risk-rating is being achieved, the program's anticipated losses must be compared to the premiums. Based on the most recent loss experience under the program (including that seen under the program in 2002 and the first six months of 2003), the following chart compares the anticipated losses distributed by area of law, to the proposed base levy premiums by the lawyer's primary area of practice. The premiums in this chart include only the proposed base levy premiums (together with discounts), and no amounts applied as transaction levies and claims history surcharges.

GRAPH – Comparison of Projected 2004 Premium by Lawyer's Primary Area of Practice to Claims and Expenses by Claim's Area of Law

(see graph in Convocation file)

84. The shortfall between the anticipated claims costs and expenses to base levy premiums, both for both real estate and the litigation grouping, is clearly significant. As already noted, it is proposed that $23.0 million be provided through the transaction levies and claims history levy surcharges. Although clearly benefiting those whose primary area of practice is real estate or who are in the litigation grouping, these additional revenues also benefit those who secondary and other areas of practice include payment of these levies.

85. The latest program statistics indicate that without the benefit of the transaction and claims history levy revenues, base premium levies of about $7,500 and $4,800 would be required of members whose primary area of practice is real estate or civil litigation, respectively.

86. Past reports have discussed the importance of using the transaction and claims history surcharge levies as premium, avoiding any substantial dislocation among the bar in the higher risk areas of practice which would otherwise occur with risk rating.[5]

87. By including the transaction and claims history surcharge levies as proposed, the shortfall between anticipated claims costs and expenses to total insurance levies is almost entirely overcome in these higher risk and other areas of practice.

88. To compare the actual claims experience of lawyers to revenues received from those lawyers, the chart below compares the anticipated premiums (with the transaction and claims history levies) sorted by the lawyer's primary area of practice, and compares this to the anticipated claims costs and expenses of these lawyers.

GRAPH – Comparison of Projected 2004 Premium + Levies by Lawyer's Primary Area of Practice to Claims and Expenses by Lawyer's Primary Area of Practice

(see graph in Convocation file)

89. This comparison indicates that with the benefit of the transaction and claims history surcharge levies, there is a close correlation between revenues and claims.

[5] 1999 LAWPRO Report to Convocation, pp. 18-22; 1998 LAWPRO Report to Convocation, pp. 35-37; and 1996 LAWPRO Report to Convocation, pp. 32-36.

90. However, the chart does indicate some subsidy by area of practice. Those lawyers whose primary area of practice is classified as "All Other" are expected to have their premiums somewhat exceed losses. This affects less than 15 per cent of the practicing bar.

91. Appreciating the foregoing variables and possibilities of comparison, by area of practice, it appears that the program does substantially meet its objective of risk rating, and that the proposed program will continue to do so in the coming year. Although a small amount of subsidy may exist for some areas of practice, taking into account the commercial realities and the relatively small amount of the subsidy, the cost of insurance under the program is considered to generally reflect the risk. Notably, the Task Force Report acknowledged that "…no insurance program can be solely risk-reflective and there must be some sharing and spreading of risk."[6]

92. Other aspects reviewed in the analysis included the exposure based on the size of firm, year of call, geographic location and prior claims history. The results of this analysis reaffirm the premium discounts already in place, including the discounts for new and for part-time practitioners and the surcharge applied to those practitioners with a prior claims history. The results of this analysis support the conclusions of previous reports, and are summarized in the graphs in Appendix B.

93. Although the volume (size) of practice may not be wholly determinative of risk, the transaction levies do reflect the volume of business transacted in a practice as well as the higher risk associated with real estate conveyancing and civil litigation.

94. Accordingly, the LAWPRO Board is satisfied with the continued use of the transaction and claims history levy revenues as premium, with the result that the cost of insurance under the program continues to generally reflect the risk.

95. Various examples of premiums which would be charged to members depending upon the nature of their practice are summarized in Appendix C of this Report.

CONCLUSION

96. The LAWPRO Board considers the proposed program changes to be appropriate and consistent with its mandate as set out in the 1994 Insurance Task Force Report. The LAWPRO Board invites Convocation's consideration of this Report and recommendations for approval by Convocation in September, so that the 2004 insurance program can be implemented by January 1, 2004.

ALL OF WHICH LAWPRO'S BOARD OF DIRECTORS RESPECTFULLY SUBMITS TO CONVOCATION.

September, 2003

Kim A. Carpenter-Gunn
Chairman, LAWPRO's Board of Directors

APPENDIX A

APPENDIX B

[6] 1994 Task Force Report, at page 17.

- The 80-20 Rule (graph) 46

APPENDIX C

- Premium Rating Example 49

It was moved by Ms. Carpenter-Gunn, seconded by Mr. Chahbar that the insurance program for 2004 be approved.

A debate followed.

An amendment was moved by Ms. Curtis and seconded by Mr. Aaron that paragraphs 21 and 27 be removed from the Report.

Withdrawn

The main motion was amended by the mover and seconder to be that Convocation approve the recommendations set out in paragraph 5 of the LAWPRO Report.

An amendment was moved by Mr. MacKenzie, seconded by Mr. Wright that paragraph 5(viii) be amended to read:

> "that the policy exclude coverage for claims relating to or arising out of any business ventures or investments which do not directly relate to the lawyers' practice of law".

The MacKenzie/Wright amendment was accepted by the mover and seconder.

It was moved by Mr. Heintzman but failed for want of a seconder that in paragraph 16 on page 7 the words "by the same law firm or lawyer or firm " be inserted after the word "reported" and the words "by that lawyer or firm" before the words "under the earliest policy" so that the paragraph then reads:

> "So that there is no doubt as to interpretation, the LAWPRO Board of Directors recommends that the policy be modified to expressly provide that claims (and/or potential claims) reported by the same law firm or lawyer or firm under different policy years, which arise from a single or related errors, omissions or negligent acts, be treated as a single claim (and/or potential claim) by that lawyer or firm under the earliest policy under which any such related claim (and/or potential claim) was first reported."

The main motion to approve the recommendation set out in paragraph 5 on pages 2, 3 and 4 of the LAWPRO Report as amended was voted on and approved.

Mr. Heintzman abstained.

MOTION – ESTABLISHMENT OF A TASK FORCE

It was moved by Mr. Millar, seconded by Mr. Wright that the following people be appointed to a Task Force to review the Discussion Paper prepared on behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council on Open Courts, Electronic Access to Court Records, and Privacy and prepare submissions on behalf of the Law Society of Upper Canada for Convocation's consideration:

Gavin MacKenzie (Chair)
Carole Curtis
Alan Gold

Dr. Allan Gotlib
Robert Martin

Carried

PROFESSIONAL REGULATION COMMITTEE REPORT

Mr. Ducharme presented the Report of the Professional Regulation Committee to Convocation.

Professional Regulation Committee
September 25, 2003

Report to Convocation

Purposes of Report: Decision and Information

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

OVERVIEW OF POLICY ISSUE

AMENDMENTS TO BY-LAW 17 WITH RESPECT TO THE MEMBER'S ANNUAL REPORT

Request to Convocation

1. Convocation is requested to amend By-Law 17 – Filing Requirements by approving amendments to the current version of the Member's Annual Report (MAR) for the filing year 2003, pursuant to the motion on page 5.

Summary of the Issue

2. The Committee is proposing a number of changes to the MAR. The MAR is prescribed as Form 17A under By-Law 17 – Filing Requirements and any changes to the form require Convocation's approval. To implement the proposed changes, Convocation must revoke current Form 17A and substitute it with the amended form.

3. The proposed changes are explained at pages 18 and 19. The 2003 MAR, which includes the changes and date-specific references for the 2003 filing year, follows the explanatory material. The prescribed form, which for the purposes of the By-Law is not date specific with respect to the filing year, appears in the motion to make the amendments at page 5.

THE REPORT

Terms of Reference/Committee Process

4. The Committee met on September 11, 2003. Committee members in attendance were Todd Ducharme (Chair), Carole Curtis (Vice-Chair), Mary Louise Dickson, Sy Eber, Patrick Furlong, Allan Lawrence, Tracey O'Donnell and Laurie Pattillo. Allan Lawrence and Judith Potter also attended. Staff in attendance

were Dan Abrahams, Bruce Arnott, Julia Bass, Deena Baltman, Naomi Bussin, Lesley Cameron, Margaret Froh, Terry Knott, Zeynep Onen, Jim Varro, and Sheena Weir.

5. The Committee is reporting on the following matters:

For Decision

- Amendments to By-Law 17 – Filing Requirements, with respect to the Member's Annual Report (MAR)

Information

- Aboriginal Residential School Litigation Guidelines
- Policies On Staff Resolution And Disposition Of Sexual Harassment/Discrimination Complaints
- Report from the Professional Regulation Division

AMENDMENTS TO BY-LAW 17 WITH RESPECT TO THE MEMBER'S ANNUAL REPORT

A. BACKGROUND

6. By-Law 17 governs the filing of the annual information report by members with respect to their practices and related activities, including trust account holdings.

7. Section 2 of the By-Law reads:

> 2. (1) Every member shall submit a report to the Society, by March 31 of each year, in respect of the member's practice of law and other related activities during the preceding year.
>
> (2) The report required under subsection (1) shall be in Form 17A [Member's Annual Report].

8. In an effort to improve the integrity of the information obtained through the Member's Annual Report (MAR) and the "user-friendly" component of the form, staff in the Administrative Compliance Processes department, under the direction of Terry Knott, in consultation with other relevant staff review the MAR annually and, if warranted, suggest changes to the MAR.

9. The Committee reviewed and approved the changes suggested by staff for the filing year 2003. The changes are described in the material at pages 18 and 19. The MAR that includes these changes with date-specific references for the 2003 filing year follows the explanatory material.

10. Convocation is required to approve the changes to the MAR, as the form is prescribed under By-Law 17. To implement the proposed changes, Convocation must revoke current Form 17A and substitute it with the amended form, which for the purposes of the By-Law is not date-specific with respect to the filing year. The Committee is requesting that Convocation approve the changes through an amendment to the By-Law (i.e. amending the MAR) as outlined in the following motion.

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 17
[FILING REQUIREMENTS]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON SEPTEMBER 25, 2003

MOVED BY

SECONDED BY

THAT By-Law 17 [Filing Requirements] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, May 28, 1999, October 29, 1999, January 27, 2000, June 22, 2000, October 19, 2000, April 26, 2001, October 25, 2001 and October 31, 2002 be further amended by revoking Form 17A and substituting the following:

CHANGES TO THE MAR FOR
THE FILING YEAR 2003

Structural/Layout Changes

Three attachments previously accompanying the MAR have now been incorporated in the MAR. These attachments are:

- Schedule to Section G #1
- Schedule to Section G #3
- Specifics Page

The MAR now consists of a cover page, a blank inside cover page that may be used for information about the MAR, and 10 pages of filing-specific questions.

This new structure improves the MAR in the following ways:

- A significantly more user-friendly form for members, i.e. members will save time by not having to look for an attachment or determine if an attachment is applicable.
- Fewer staff hours for sorting and follow-up with members who do not include a required attachment. Administrative Compliance Processes staff can concentrate on reviewing the report for completeness and expediting scanning of reports.
- Fewer ancillary filings which will reduce the costs of maintaining and storing files and reduce staff time in creating, filing, boxing and maintaining file records.
- A single "package" from receipt of report to verification to scanning, avoiding the need to retrieve separate attachments.
- Reduced costs for printing and paper for enclosures to the report (105,000 sheets of paper annually).

The information from the incorporated attachments will be captured via image filing, which is used to capture extensive free-hand text. Scanning is used to capture numbers (i.e. trust dollar figures in section G and number of hours in section E). "Comb" fields are created in the report which allows the member to enter the numbers. The scanner will read the numbers inserted in the comb fields and transfer them to the Law Society's AS/400 system along with the other information.

Incorporating the above pages allowed for improvements in the structure and layout of the MAR. It is expected that the 2003 e-file will mimic the paper copy in that the incorporated attachments can be completed and submitted online. Based on the answer a member provides, an attachment may "pop-up" or a reminder would appear asking the member to complete the required attachment. This improved functionality means truly paperless e-filing for members.

Section Changes

SECTION	CHANGES
B – Status	The following categories have been added to improve the accuracy of information about a member's status: *1. Added "in Ontario" to employee/associate in a law firm category.* *2. Added "in Ontario" to employed in education, employed in government, and employed other categories.* *3. Added "a lawyer practising law outside of Ontario".* *4. Added "Employed other outside of Ontario".*
E – Professional Development	This area was redesigned to be more user-friendly. Instead of filling in the bubbles for "Approx. Total Number of Self-Study/CLE Hours", a member will simply indicate the number of hours in figures. The report will also ask the member if he or she has completed any Professional

	Development, "Yes or No". The member will have the option of leaving that section blank by answering "No." These changes will reduce follow-up for incomplete answers and increase the accuracy of reported hours. The number of hours will still be captured during the scanning process as the scanner can read numerals.
F – Individual Member Questions	In the heading of this section, members are asked to complete ALL questions (if the section is applicable). The information in Question #3 – Estates is only required to be recorded in the reconciliation in section G if it is part of the firm's financial information.
G – Financial Reporting Part I – Joint Filing Option	This section has been re-arranged to accommodate the signature of the firms' Joint Filing Member. This clarifies the requirement in section H that only the member completing the report signs the back page.
Part II – Firm Records #1	The attachment for question #1 has been incorporated in the report. This eliminates the need for follow-up when the member does not submit it. The incorporated attachment (now referred to as "Schedule") clearly identifies the information sought through the question.
#2	More space has been provided for "Name and Address of bank…" The trust figure area is modified by adding a line below the last figure to be added in each column of figures. This mirrors generally accepted accounting principals (GAAP)).
#3	As in question #1, the attachment has been incorporated in the report.
H – Certification	This section is now signed only by the member responsible for completing the report.

INFORMATION

GUIDELINES FOR LAWYERS ACTING IN CASES INVOLVING CLAIMS OF ABORIGINAL RESIDENTIAL SCHOOL ABUSE

11. The Committee and the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("EAIC") unanimously approved the content and publication/distribution of Guidelines for lawyers acting in cases involving claims of Aboriginal residential school abuse, which follow paragraph 23.

12. The Guidelines are intended to be an educational tool to assist lawyers acting in these cases. The Guidelines highlight a number of issues specific to representation of these claimants and the professional conduct expectations for lawyers acting in these cases, with appropriate references to the Rules of Professional Conduct.

A. BACKGROUND TO THE DRAFTING OF THE GUIDELINES

Genesis of the Issue

13. In September 2001, a joint working group of the EAIC and the Committee[1] was struck to consider a number of issues identified in connection with Aboriginal Residential School and Childhood Institutional Abuse discussed in a report to Convocation in June 2001. One issue related to the manner in which lawyers seek to represent and represent individuals who are pursuing claims arising from Aboriginal residential school abuse.

14. The impetus for the Law Society's review of issues related to litigation involving these claimants came from a number of sources, including

- an October 1998 letter from the National Chief of the Assembly of First Nations to the Society raising concerns about the alleged exploitation of residential school claimants by lawyers in

[1] The members of the working group were Judith Potter (chair), Stephen Bindman, Tom Carey and Avvy Go.

Canada;

- a March 2000 report "Restoring Dignity: Responding to Child Abuse in Canadian Institutions", from the Law Commission of Canada, which made several recommendations specific to law societies in regard to providing safeguards for survivors of childhood institutional abuse, as well as guidance and training for lawyers acting in Aboriginal residential school and childhood institutional abuse cases;
- Canadian Bar Association Resolution 00-04-A ("Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools") adopted at the August 2000 Annual General Meeting of the CBA, which called upon all law societies in Canada to adopt the Guidelines as recommended conduct for lawyers acting or seeking to act for claimants in Aboriginal residential school abuse cases.

15. In late 2000 and into mid-2001, EAIC received reports, largely through Rotiio> taties Aboriginal Advisory Group, concerning Aboriginal residential school issues. While to date, the Law Society has not received any formal complaints about lawyers from Aboriginal residential school claimants, unsubstantiated third party allegations of misconduct by lawyers in other Canadian jurisdictions in these types of cases have been brought to the Society's attention. They include reports of:

- Lawyers sending unsolicited letters to potential claimants which may include detailed and lengthy questionnaires requesting explicit information about experiences in residential school, including accounts of physical and sexual abuse from the survivor
- Lawyers requiring claimants to sign retainer agreements which do not set out a defined fee, but rather indicate that the fees will be determined by an hourly rate, the complexity of the case, the results obtained in the case, with allowances for the delay in payment for the lawyer's fees.
- Lawyers coming into communities and setting up in a local community centres, putting up posters about the lawyer's ability to sign up clients in residential school cases and actively recruiting clients, without any concern whether that claimant is already represented by counsel.
- Lawyers offering to pay claimants $50 cash if they agree to sign a retainer agreement with the lawyer.
- Lawyers signing on clients in bulk fashion but not delivering on legal services, lawyers not doing the work required on the case, and lawyers not being knowledgeable about the work required in residential school claims.
- Lawyers not keeping clients informed on the status of their case or the legal process, lawyers not returning phone calls from clients, lawyers sending clients detailed opinion letters with complicated instructions requiring clients to opt in or out of certain processes, etc. without making themselves available to the client to discuss and explain the opinion, lawyers refusing to accept collect phone calls from indigent clients and thereby denying communication with the client altogether.
- Lawyers requiring aging claimants to amend their wills naming the lawyer as Executor of their estates prior to agreeing to proceed with their cases.

16. While there was consensus that the *Rules of Professional Conduct* generally deal with many of the above issues, in light of the developments described above, EAIC considered whether further work could be done to educate the profession. This led to discussions between the Committee and EAIC.

17. Gavin Mackenzie, then the Committee's chair, and George Hunter, then Vice-Chair of EAIC requested that staff from the Equity Initiatives Department and Policy and Legal Affairs develop draft "Guidelines for Lawyers Acting in Aboriginal Residential School Cases" to be co-ordinated through the joint working group of EAIC and the Committee. The working group, following similar initiatives by other law societies in Canada, prepared the Guidelines for review and approval by EAIC and the Committee.

Overview of the Guidelines and the Consultation Process

18. Although based on the August 2000 CBA Guidelines, the Society's Guidelines have been drafted to reflect relevant provisions of the Society's *Rules of Professional Conduct* and the advisory purpose of similar Society Guidelines. They are intended to educate and provide guidance to the profession on the Rule-based standards, in this case, applicable to counsel representing parties in residential school abuse litigation.

19. The Guidelines deal with the following issues in appropriate detail:
    - the special nature of these claimants' cases
    - the unique demands that these cases put on the lawyer and other law office staff
    - competence to act prior to accepting clients in these matters
    - culturally appropriate methods in making legal services available to claimants, including consideration of the potential vulnerability of some claimants
    - clear communication and client comprehension regarding all aspects of the lawyer and client relationship and the legal process in which the client is involved
    - the lawyer's accessibility to clients and clear lines of communication with the client
    - sensitivity to the emotional, spiritual and intellectual needs of claimants and an effort to understand and respect claimants' cultural roots, customs and traditions.

20. The working group, in addition to requesting comments on the proposed Guidelines from representatives of the Aboriginal community and certain legal organizations, sought input from the profession on the proposed Guidelines in the spring of 2002. The working group in its call for input[2] indicated that it was "interested in views on the scope, detail and comprehensiveness of the proposed Guidelines, and their ability to be practically applied."

21. In response to the call for input, the Society received ten written responses from lawyers and organizations. In addition, three meetings were arranged, with members of the Aboriginal community, Department of Justice counsel and counsel representing various churches. The written responses and input received at the meetings are summarized at the end of this report (beginning at page 17), without attribution.

22. A number of constructive comments and criticisms were made on the draft Guidelines. Most were directed at clarification of the scope of the Guidelines, their ultimate purpose and the need for use of proper terminology and descriptions, given the specific type of legal matter the Guidelines address. These changes included the following:
    a. Replacing the term "survivor" with "claimant", as a result of advice from the Aboriginal community that for some people, the term "survivor" carries a stigma and should not be used in the context of the Guidelines.
    b. Defining other terms used in the Guidelines (i.e. "respect" and "healing").
    c. Acknowledging that although the Guidelines may be a useful information piece for counsel involved in these matters representing parties opposing the claimants, the majority of the Guidelines are focussed on the obligations of claimants' counsel.
    d. Referencing in the Guidelines a list of resources for lawyers acting for claimants.

23. The Guidelines unanimously approved by EAIC and the Committee appear below.

GUIDELINES FOR LAWYERS ACTING IN ABORIGINAL RESIDENTIAL SCHOOL CASES

These Guidelines are provided as a tool primarily to assist members of the Law Society of Upper Canada who act for claimants in cases involving Indian residential schools ("the residential schools"). While the word "Indian" is the title used by government and in laws or other official documents to refer to the Aboriginal people of Canada, the term "Aboriginal" will be used in the context of these Guidelines.

The Guidelines were prepared in the context of the Aboriginal community's unique experience and history with the residential schools across Canada. The Guidelines reflect a response to calls from the Assembly of First Nations, Rotiio> taties Aboriginal Advisory Group, the Law Commission of Canada, and the Canadian Bar Association for law societies to implement safeguards for Aboriginal claimants engaged in legal processes. These Guidelines are in keeping with the spirit and letter of the *Rules of Professional Conduct* ("the Rules"). In particular, rule 1.03(1)(b)

[2] The call for input, with the proposed Guidelines, was published in the *Ontario Lawyers Gazette*, the *Ontario Reports* and on the Society's web site.

recognizes that lawyers have a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights law in force in Ontario.

While these Guidelines address issues relating specifically to claimants in legal matters involving the schools, the principles in the Guidelines may apply to lawyers acting in cases involving other claims of institutional abuse or other vulnerable clients. The Guidelines also provide guidance of a general nature, which lawyers acting on behalf of individual defendants, churches or government will find useful in their representations.

The Guidelines are meant to be educational and should be read in conjunction with the Rules. The Guidelines have been created to identify appropriate practices in the area of residential school litigation with a view to ensuring the competence and professional conduct of the Ontario Bar in providing legal services and non-discriminatory access to legal services in Ontario for claimants in these actions.

In these Guidelines, words such as "respect" and "healing" are used throughout. These words have significant meaning in an Aboriginal world-view. For the purposes of these Guidelines, "respect" reflects either an acceptance of the importance of the issue referred to, or polite, honourable, kind and careful consideration of the person referred to. "Healing" refers to the claimant's emotional, psychological, physical and spiritual journey towards health and wellness in his or her life, and in his or her relationships with family and community.

Background information on the residential school experience and a list of resources for lawyers acting for claimants may be obtained through the Society's website *[specific web link to be inserted]* or through the Society's Equity Initiatives or Practice Advisory areas.

General

1. Given the specific knowledge required to responsibly serve the legal needs of Aboriginal Peoples or represent other parties to these claims, the special nature of residential school cases, and the various legal processes that exist in those cases, lawyers should ensure they are competent to act prior to accepting clients in these matters. Rule 2.01 provides a definition of a "competent lawyer". Rule 2.01(h) states that being a competent lawyer includes "recognizing limitations in one's ability to handle a matter, or some aspect of it, and taking steps to ensure the client is appropriately served." Competence also involves "performing all functions conscientiously, diligently, and in a timely and cost-effective manner" (rule 2.01(e)). Lawyers should avoid unnecessary delay and encourage clients to pursue expeditious resolution of these claims, with particular care to avoid delays in cases involving ill or aging claimants.

2. Recognizing that this type of litigation creates additional demands for lawyers and their staff, lawyers should be aware of the possible need for training for law office personnel to effectively manage the practice and maintain competent legal service to clients. Lawyers acting in residential school cases are encouraged to ensure that employee assistance programs and counseling are available for law office lawyers and staff.

3. Lawyers should recognize and respect that claimants may be seriously damaged from their experiences, which may include cultural damages resulting from being cut off from their own society, culture and traditions and removed from their parents. These experiences may be aggravated by claimants having to relive their childhood abuse, and healing may be a necessary component of any real settlement for claimants. Accordingly, lawyers should take into account that any redress provided to claimants may include a broader range beyond the monetary. Lawyers should endeavour to understand and respect claimants' cultural roots, customs and traditions.

Guidance for Claimants' Counsel

4. Lawyers should recognize and respect the unique nature of residential school cases and appreciate claimants' need for "healing" in the legal process. Lawyers should recognize and respect the special nature of claimants' cases and should assist in facilitating their client's healing process through, where possible:
    a) identifying and providing referrals to appropriate community resources, including counseling resources, to assist the client;
    b) referring their client to treatment programs, if appropriate;

c) recognizing and respecting the need for the client to develop a personal support network.

Lawyers should review these options with the client at the beginning of and throughout the retainer.

5. Lawyers should recognize and respect that residential school cases place unique demands on the lawyer and other law office staff by virtue of the complicated legal issues, the emotional nature of such cases, the additional amount of time and resources required for each case, the special needs of claimants, the potential need for crisis intervention and management, and the lawyer's role in facilitating the claimant's healing process. Lawyers should recognize and respect that these demands may place a practical limit on the number of cases which they can competently and responsibly take on at any one time. Lawyer must also remember that they must act consistent with their responsibilities to their clients.

6. If lawyers pursue claims through a class action, lawyers should ensure that the claimants understand the nature of a class action and the need for a representative group of claimants from whom the lawyer will take instructions. The lawyer should also implement appropriate information distribution systems for the benefit of all claimants.

7. Lawyers should appreciate the need for the utmost sensitivity in dealings with claimants. Lawyers should ensure that the methods they employ in making legal services available to claimants are culturally appropriate and comply with Rule 3.06, in particular Rule 3.06(2)(c) which prohibits unconscionable or exploitive means in offering legal services to vulnerable persons or persons who have suffered a traumatic experience and have not yet had a chance to recover. Lawyers should make reasonable efforts to ensure that initial communications offering legal services to claimants are welcomed and respectful. Care should be taken to ensure that these communications will not result in further trauma to the claimant. Subject to protecting and advising the client with respect to solicitor and client privilege, lawyers may wish to consider having community support people available at the initial meeting with the client and should recognize that claimants may require support people to be present throughout various stages of the legal retainer.

8. Lawyers should ensure that advertising aimed at soliciting claimants is in good taste, is not false or misleading, and complies with Rule 3.04.

9. Lawyers acting on behalf of claimants must comply with Rule 2.08 and ensure that all fees and disbursements are clearly communicated to the claimant in a way that is understandable. Given the unique nature of residential school cases and needs of claimants, lawyers should make reasonable efforts to ensure that there is clear and understandable communication regarding the lawyer and client relationship, the legal process including settlement and alternative dispute resolution processes, responsibilities of lawyer and client, and fees and disbursements. Accordingly, lawyers should, whenever possible, meet in person with the claimant before establishing a lawyer and client relationship or accepting retainers from residential school claimants.

10. Lawyers may enter into an arrangement with a claimant for a contingent fee provided the arrangement is in accordance with rules 2.08(3), (4) and (5).

11. Lawyers acting for claimants should ensure that they are accessible to claimants for whom they are acting and that clear lines of communication exist with the claimants. Lawyers should recognize and respect the special communication needs that some claimants may have including language barriers, cultural barriers, and limited access to telephone service. Lawyers may be required to consider the services of interpreters, as necessary. Lawyers' written communications to claimants should be in an understandable and accessible format and lawyers should make reasonable efforts to follow up to ensure client comprehension. Rule 2.01 defines a "competent lawyer" to be one who communicates at all stages of the matter in a timely and effective manner that is appropriate to the age and abilities of the client, and performs all functions conscientiously, diligently, and in a timely and cost-effective manner. This also involves being clear with the client about what the legal system can and cannot deliver, and, depending on the circumstances, involving the client in determining the approach to gathering information relevant to the claim. Lawyers

should also be prepared to deal with a claimant's progressive disclosure of issues related to the claim, given the emotional restraints that many claimants may experience.

12. Sensitivity to the emotional, spiritual and intellectual needs of claimants is necessary in the provision of legal services to claimants. Lawyers acting for claimants should recognize and respect that many claimants have had control taken from their lives and were victims of child and sexual abuse and therefore, as clients, should be routinely informed about and consulted as much as possible on the direction of their case. Lawyers should ensure that they obtain instructions from claimants at every stage of the legal process. Lawyers should also recognize and respect that for claimants, interaction with lawyers and the legal process can be extremely stressful and difficult.

13. Lawyers should recognize and respect that claimants are often at risk of suicide and/or violence toward themselves and others, and should seek appropriate instruction and training for all law office staff to deal with such occurrences. Lawyers should be aware of available and appropriate resources and supports in order to make referrals when crisis intervention is warranted.

Summary of Input Received on Draft Guidelines

Introduction

In response to the call for input on the draft Guidelines, the Society received ten written responses from various lawyers and organizations. In addition, three meetings were arranged, with members of the Aboriginal community, Department of Justice counsel and counsel representing various churches. The written responses and input received at the meetings are summarized in this memorandum, without attribution except as noted below.

The Guidelines on which the submissions were made contained 12 paragraphs. The Guidelines approved by EAIC and the Committee were expanded to 13 paragraphs by the addition of new paragraph 6.

Background

Information received from Department of Justice counsel during the consultation provided some context for the issue, as follows:

- The Deputy Prime Minister oversees the Office of Indian Residential Schools, uniquely established to resolve these cases in a policy context. The Department of Justice supports the office, and between 80 and 90 Justice lawyers in Canada work on these cases.
- There are approximately 11,000 claims. Justice estimates at the conclusion of these matters to have 12,000 to13,000 validated claims of abuse. In an informal survey, about 70 firms across the country have identified as serving as plaintiffs' counsel. The bulk of claims are in Alberta and Saskatchewan (3000 to 4000 each). Between 800 and 900 claims are in Ontario, and include both primary and secondary claims.

Residential School Claims in the Context of the Civil Justice System

In response to the call for input, two lawyers, Elizabeth Grace and Susan Vella, provided what was at the time an unpublished paper on the civil justice system's response to residential school claims.[3] While the bulk of this paper is an analysis of the components of these claims in the civil justice system, the discussion of one component (respect, engagement and informed choice) is relevant to the Guidelines. The following is an excerpt from the paper:

> The objectives of respect, engagement and informed choice speak to access to justice, which is a fundamental marker for judging the adequacy of any system of redress for wrongs committed against innocent persons. … There are, however, significant practical barriers that exist which may prevent

[3] The published version will appear in Magnet and Dorey, *Aboriginal Rights Litigation Off Reserve* (Butterworths 2003, forthcoming December 2003, Chapter 5).

residential school claimants from accessing civil justice at all, let alone in an empowering and effective way. These barriers include:

1. a lack of understanding on claimants' parts as to what their realistic legal rights and remedies are,
2. a lack of understanding of the complexity and emotionally draining nature of the process which they will face in their pursuit of civil justice,
3. the difficulty in finding a lawyer who is skilled in both this type of specialized litigation and the representation of psychologically fragile trauma survivors, and will assume the financial risk typically associated with such litigation by structuring a fee arrangement which is fair and feasible, and
4. the burden of funding the costly disbursements (such as court and expert witness fees and archival research and transcript costs) associated with properly advancing their cases.

…

In order to become truly engaged in the civil litigation process, survivors need to understand the process before they commit to becoming litigants. It is only then that they can take the psychological and financial measures necessary to prepare them for the steps that must be taken and endured along the way of a civil lawsuit. Their lawyers must spend time with them explaining the process orally (preferably in-person), and not just in writing, so they have an understanding of both what the civil justice system is capable of delivering, and what it is not.

Survivors need to be told, and understand, what is entailed in moving through a lawsuit, including the fact it will typically take several years from the date of filing a claim to the actual trial date, excluding appeals, before they can expect to see any monetary compensation, assuming they are successful in proving their claims. They should be warned about the examination for discovery process and the highly personally intrusive and sometimes culturally insensitive and even hostile nature of the questioning which may occur, and which will require them to articulate in words (to which they will be held thereafter) events, emotions and conditions which they may have seldom or never before spoken about. They also need to appreciate that the discovery process may trigger flashback memories of traumatic events they have spent years trying to forget. To be prepared for the discovery process, they must spend time in advance with their lawyers discussing the process and the likely questions they will be asked as well as time on their own reflecting on what their answers will be.

Survivors must also be prepared to authorize the release of legally relevant, but highly sensitive and confidential documents, such as therapy, medical, school, and employment records. Further, defendants often take the position that criminal and welfare records are legally relevant and these may have to be released. In addition, survivors must be prepared to submit to at least two, and sometimes more, mental health assessments by health care professionals (and where lasting physical injuries are alleged, physical examinations as well). They have to be well prepared for each occasion on which they tell their story because the slightest inconsistency in what they relay may be exploited by the defence at trial, sometimes to very effective ends.

…The media and others have published unflattering reports of lawyers essentially raiding reserves and urban centres to sign up dozens, if not hundreds, of residential school clients so they can start large multi-plaintiff lawsuits. Some lawyers have apparently resorted to questionable tactics in seeking out these potential new, and often vulnerable clients. These revelations prompted the Canadian Bar Association in 2000 to issue guidelines for professional conduct in relation to the representation of aboriginal clients with residential school claims and to urge provincial and territorial law societies to do the same.

Even if survivors are fortunate enough to have found a diligent lawyer with the necessary legal expertise and sensitivities to the cultural and psychological dimensions of residential school cases, they will still be faced with the prohibitive expense of hiring that lawyer and funding the disbursements required to mount an effective case. This requires survivors, who are very often economically disadvantaged and may live in remote geographic locations which can add considerably to the expense of the litigation, to find alternative sources of funding. Given the difficulty securing alternative sources of funding, the only feasible option available to the majority of survivors is negotiation of a deferred fee arrangement with their lawyers. They

can take the form of a contingency fee arrangement, which means the fee is a percentage of the ultimate monetary result obtained, or an arrangement in which the fee is subject to a premium or discount determined by reference to the number of chargeable hours docketed, the lawyer's hourly rate, the result, and other court-approved criteria. With any kind of deferred fee arrangement, it is like the successful plaintiff will pay a larger fee than if he or she were able to pay on an ongoing basis as the services were rendered. …[W]ith a deferred fee arrangement, the possibility for exploitation of the client is always present. This possibility is enhanced when the client, for economic, psychological and cultural reasons, is not in a position to negotiate an arrangement that is fair.

From lawyers' perspective, deferred fee arrangements present the risk of not being paid at all or in full (e.g., where the claim is dismissed, the legal costs exceed the amount of the judgment awarded, or the defendants become insolvent). Because payment is delayed, the case may have to be "carried" by the lawyer for what can be an extended period of time. Consequently these arrangements can also pose serious cash flow difficulties for lawyers, especially those working on their own or in small firms. As a result, it can be difficult to find lawyers prepared to take on residential school clients and, if they do, to invest the time and resources necessary to advance the strongest claims possible on behalf of their clients. Where the clients cannot afford to fund disbursements fully, which is often the case, the lawyer may have to advance some or all of the money to cover these. Where this occurs, the financial pressures and risks for plaintiffs' lawyers become even more acute because not only are they deferring payment of their own fees (and assuming the risk of non-payment), but also they are now having to pay third parties, like experts. One solution adopted by some plaintiffs' counsel is to attempt to achieve economies of scale by amassing large numbers of clients and advancing multi-plaintiff suits. However, unless such suits are carefully managed and sufficient attention is devoted to individual clients, this method of proceeding can prove frustrating to clients who do not feel either respected, engaged, or informed.

General Comments from Respondents on the Guidelines

1. In Ontario, no one firm monopolizes as counsel for plaintiffs in numbers.

2. Anecdotal information about lawyers has been relayed by Justice lawyers. For example, it is apparent in discoveries that some lawyers have not met with clients or prepared them for discoveries (this is not unique to this type of case). They used to, but no longer, hear about "recruiting" trips at reserves and "tent shows" to solicit claims. The Law Society of Saskatchewan rule of conduct rule helped to address this activity. Saskatchewan took the initiative despite a lack of complaints and changed its marketing rule, addressing solicitation of clients in a weakened state.

3. Ontario is doing something other provinces are not doing, despite a lack of volume of litigation and no evidence of complaints, by considering these guidelines. The Yukon Territory has adopted the CBA guidelines. Nova Scotia posted the CBA guidelines but did not formally adopt them. Newfoundland considered rule amendments but decided they were not needed, as did Alberta. British Columbia reviewed the Saskatchewan rule and consulted with the CBA Aboriginal Law Section, but decided not to amend the rules (although BC has same "weakened state" wording in its rules).

4. Many counsel have inflated ideas of what a claim is worth, and this impacts on the satisfaction of the client. Lawyers must give clients a realistic sense of the worth of the claim.

5. Many of these issues could be addressed in CLE (for example, the importance of counseling).

6. Language should be used that specifically directs lawyers to meet with and prepare the client prior to examinations, etc.

7. Beyond the obvious responses of the Guidelines and rules, the Society must devote resources to the education of the bar on Aboriginal issues, work with law faculties to increase the representation of Aboriginal people in the profession and develop its education process to ensure that Aboriginal issues are appropriate reflected in its curriculum.

8. The Guidelines are replete with affirmations of assumptions (e.g. "survivors") imputing credibility and assuming a validation of complaints before any investigation is done. Care should be taken to avoid "speculative myths, stereotypes and generalized assumptions" (quoting Justice Kaufman). Otherwise, it will be more difficult for lawyers representing defendants in these cases to properly represent the interests of their clients. There is a need for sensitivity and frankness on both sides of such cases.

9. Defence counsel involved in these cases regularly attend conferences and CLE on institutional and other abuse. One issue discussed is how examination of a claimant regarding the events or circumstances of the abuse can lead to re-victimizing the person. All of the defence counsel in the experience of the respondent are respectful of this principle and this is likely reflected in the Guidelines in that this is not referred to in any substantive way.

10. The Guidelines do not define the term "healing" but place significant emphasis on it. The Society should attempt to better define the notion of healing.

11. The Guidelines appear to be principally aimed at those who are acting on behalf of victims. But the rules around sensitivity ought to apply with equal force to those acting on the other side of these claims. Special care must be taken by counsel, including government representatives, acting for defendants during the discovery and trial process. Given the fragile nature of some victims, how much is too much? The Guidelines should comment on the obligations of defence counsel in responding to these claims.

12. The Guidelines do not address the dynamic in which the most angry clients may be those who were not victims but whose parents and grandparents attended the schools and have related treatment and conditions which they endure. Counsel have a obligation to recognize the impacts which the experience and the revelation of the experience is likely to have on the individual and the family. The Guidelines should also recognize that it may be necessary to extend counseling beyond the immediate victim.

13. Similar issues may arise in a broader context, i.e. at the community level, where a variety of responses can happen, all within the incredibly politicized world of Aboriginal issues. Events may transpire in reaction to a claim that create a personal crisis for the victim and polarization within the community. It is helpful to establish effective lines of communication within a community up to and including Chief and Counsel. Further, as some victims are not welcome in their communities, it is important to lay the foundation for some understanding within the communities about the history of residential schools and the effects of residential schools, in a way that is politically sensitive and which does not unnecessarily ratchet lines of division between survivors and those who do not wish to recognize the wrongs that occurred.

14. Recruitment practices in which Aboriginal "head hunters" organize meetings at which Aboriginal organizers sign up clients to retainer agreements and are paid a fee per head is inappropriate and should be specifically dealt with the Guidelines. Also, some counsel have used questionnaires to obtain basic information or by exchange of correspondence, because of the remoteness of some of the clients. In these cases, there is no check or balance to ensure that the client is able to handle the emotional consequences of completing the questionnaire. Counsel should be encouraged not to use questionnaires unless absolutely necessary and then only with appropriate safeguards (e.g. a help line for victims or community support).

15. The Guidelines do not adequately address the obligations and complexities of class action litigation involving residential schools. The following are recommended:
    - Where practicable, counsel should have a representative group of clients from whom he or she takes instruction in the class action
    - This group controls the litigation i.e. provides instruction and is adequately informed of what is going on for each step
    - Mass mailings, a web site for information and large gatherings for communicating information may be appropriate
    - Co-counsel arrangements must be approved by the group
    - Counsel must have competence in claims of loss of language/culture if they are being pursued

Class actions are a more culturally appropriate way of prosecuting the claim.

16. The purpose of the Guidelines is unclear. If they are intended to protect clients and to assist lawyers, it would be helpful to divide them into categories and use headings.

17. Many of the statements are too general to be of much assistance (mirroring the rules, or are matters of common sense). It would be useful to include more specific suggestions.

18. The Guidelines are well-drafted, thoughtful and comprehensive, and provide an important and clear set of parameters for lawyers working in this area.

19. The Guidelines are sufficiently comprehensive to address the profound emotional and psychological issues likely to surface where aboriginal residential school litigation is pursued.

20. The Guidelines fairly and adequately recognize the unique nature of these cases. But they would be substantially improved if they expressly identified the support services, resources and programs that are available fore survivors and provided direction on how to access them.

21. The following should be added as an additional guideline:

> It is inappropriate for a lawyer involved in Aboriginal Residential School litigation to make recommendations to their client to take legal steps to delay a survivor's claim or resolution of a survivor's claim where a survivor is elderly or in poor physical health. In these cases, lawyers should encourage their clients to pursue expeditious resolution of these claims.

22. The Guidelines are a mistake, for the following reasons:
    a. The well-intentioned "singling-out" of individuals for special treatment will be the subject of legitimate opprobrium at some future time.
    b. Nothing should be done with the Guidelines unless the Assembly of First Nations passes what is comparable to a Band Council Resolution approving the spirit and wording of the Guidelines. If not, there will be grumbling, criticism and blame against the Society for creating impediments which caused problems for First Nations people. Dabbling in so-called "Indian politics" is hazardous.
    c. The Guidelines would increase the expense of or cause lawyers not to be interested in these cases if they necessitate some healing component, special training for staff/employees (and constant retraining), the need for cultural recognition, limitations around communications with the clients and in-person meetings. In short, the Guidelines will discourage lawyers from acting, and in turn will cause victims to resent the Society and blame it in effect for taking away the right to obtain lawyers because of the special treatment they received.
    d. Because of a number of factors [listed in the letter], First Nations people largely continue to be unaware of the potential right they have to recovery. The Guidelines would create a chill on tendencies by lawyers to communicate those rights.
    e. With respect, the Guidelines under-emphasize the importance psychologically for victims to deal with the hurt.
    f. The chill on representation that the Guidelines will be magnified by the inability of lawyers to know at all how these concepts will be interpreted by a discipline committee.
    g. Based on the history of the complaints, very few claimants remain to come forward, and very few have come forward to date from Ontario. By pursuing Guidelines, new meaning is given to the saying closing the barn door after the horses have left. Why risk the mistake of adopting Guidelines that distinguish on the basis of race for a few hundred further claimants who are likely to come forward?
    h. The Guidelines fail to address the psychological impact of not coming forward with a claim and not bringing closure to the wrongdoing. These individuals benefit personally by addressing their demons, and depriving them of that opportunity is a mistake. The Society will be blamed for helping to deprive the victims of the opportunity to obtain legal assistance.

23. Paramount to the policy in the Guidelines are the considerations in paragraph 2, which include healing, crisis management and counseling. This type of relationship between a lawyer and client is inconsistent

with a class action, and one counsel used the Guidelines in an argument before the court against certification for a class action for these claims.

24. Myths and legends about these cases must be addressed so that the Guidelines can accurately and practically reflect reality. Not all children at the schools suffered abuse, but some children suffered some abuse at some schools. The government management of the schools was perhaps not very astute and was impersonal, but it was an institutionalized experience.

25. "Survivor" is a loaded term, and makes an underlying assumption that all claimants were abused, that a certain culture was forced on them, and that they survived the experience. Thus, the Guidelines accept as fact things that have yet to be proven. One counsel indicated that he has yet to see a case where children were forced to go the schools – either parents applied to have them sent or the children were sent by child welfare agencies in cases where the parents had abandoned the children. The suggestion is that neutral words like "former students" , "claimants" or "clients" be used instead of "survivor", especially if the argument is accepted that the very experience of being at the schools was not a bad thing.

26. The Guidelines to not appear to have relevance to defence counsel. The counsel have yet to hear a wisp of a complaint about defence counsel's actions in these claims. Defence counsel must pursue these cases diligently and fearlessly, as any advocate would. Currently, there is no balance in the Guidelines – they are one-sided in favour of survivors and the role of survivors' counsel.

27. Should the Guidelines only apply to claimants' counsel? The duties to one's client are different than the duties to the client and lawyer on the other side. The complaints noted to date all relate to claimants' counsel. The Guidelines only relate to issues with defence counsel in an anticipatory sense. Defence counsel are in an adversarial relationship, and that is difficult to regulate. The problem is not between the counsel.

28. The only specific mention of defence counsel in the Guidelines is in the last sentence of paragraph 12. The fact is that defence counsel have no duties related to the claimants' culture. Issues around culture are part of litigation. How can defence counsel challenge the claimants' argument that that culture has been interfered with and be sensitive to it (as described in the Guidelines) at the same time? One of the issues is whether, when some of these children came to the schools, they came from a traditional way of life. One counsel explained the evolution of the schools from the mid-19th century to the 1950s when integration was rejected by the aboriginal community. The view appears to be that segregation is equated with abuse.

29. The challenge is to not re-victimize the claimants. Counsel are attuned to that dynamic and regularly attend CLE on issues related to these types of claims. There is a general tension in using the legal process for healing (one counsel indicated this is why there are efforts to use the ADR process). Defence counsel are mindful of this tension. Their view is that the facts must be proved before the healing begins. The challenge is to get to the truth (in some cases, defence counsel will argue there has been no abuse) in a way that respects those who have suffered.

30. Defence counsel also act as the "messenger" to former employees of the institutional clients who are alleged to have abused the children but who are not sued as parties in the Ontario actions. They are witnesses who may not be represented or may not have the funds to be represented by a lawyer. Some are terrified of the allegations. Their interests and issues are balanced by defence counsel with those of the claimants, not without difficulty and challenges.

31. If the Guidelines are only to apply to claimants' counsel, the concerns expressed above should be alleviated by changes to the words and terms that assume abuse is proved, and that require sensitivity in the same way for defence and claimants' counsel.

32. The CBA Guidelines, as the basis for these Guidelines, appeared to apply only to claimants' counsel. The Society's Guidelines evolved to include a wider range of counsel.

33. If the unique nature of these cases results from the fact that these individuals are Aboriginal, a guideline should be formulated for dealing with all Aboriginal clients, whether the allegations relate to an Indian Residential Schools, or otherwise. If the unique nature of these cases stems from the fact that the individuals were allegedly sexually and physically abused, then the guidelines should refer to all such injured clients, regardless of race.

34. As the anecdotal evidence indicates, there have been instances where lawyers have signed up clients in bulk fashion, etc. Rule 3.06(2) of the Society's *Rules of Professional Conduct* deals specifically with this practice. If further guidance is needed in the form of guidelines, guidelines addressing the emotional sensitivity and the need for healing amongst clients who have been sexually or physically abused need not refer only to Aboriginals.

Specific Comments on Sections of the Guidelines

"Preamble"

35. Use of the word "survivor" is a concern. This term in the Aboriginal Community represents or symbolizes the point at which a person is healing. Healing is fundamental and should be given due consideration when litigating these types of cases.

36. The words "survivor" and "victim" are often used to describe a person who has experienced trauma in their lives. Many in the Community do not favour these terms. A more appropriate term should be chosen.

37. The word "respect" has different meaning for different people, but has significance meaning in the Community. A definition of the word in the preamble would be helpful.

38. More detail should be included in the Guidelines so that lawyers can assess whether a breach of the Guidelines has occurred or may occur if a particular course of action is undertaken. Notes should be added to provide concrete examples of situations to which the Guidelines apply.

39. In the preamble, "survivors" (who include descendants) does not define the claimants properly. Consider defining them as those who suffered losses or abuse while attending the schools. The term "survivor" connotes someone who is emotionally fragile and psychologically damaged. The term should be redefined to steer away from broad assumptions. "Survivor" will be offensive.

40. Many of the claims are for cultural loss, but the children as descendants are swept in, even if unintentionally.

41. The definition ["survivor'] should not be too specific, because all who attended the schools survived something. The idea is to "red flag" this type of file so the lawyer knows the specific issues surrounding these claims.

42. Within the Justice office, there has been a debate about use of "aboriginal" to describe the schools. As "Indian" is a defined term, the suggestion is that it should be used. However, "Indian residential school" is not a defined term, and should not be capitalized.

43. Although it was suggested that the term include day schools, it was noted that this is simply a public school by another name, and involved a situation different from residential schools.

44. While the principles in the Guidelines are stated to apply in other abuse/vulnerable client situations, the title does not indicate this. Could it be modified to read "Guidelines for Lawyers Involved in Institutional Child Abuse Litigation and in particular in Aboriginal Residential School Litigation"?

45. The Guidelines refer, on numerous occasions, to the "unique nature" of the Aboriginal Residential School experience. A short paragraph outlining the Residential School experience could be included here or somewhere else near the beginning of the document, similar to the following:

> From the early 19th century until well into the 20th century, large numbers of school-aged Aboriginal children, at times up to one-third of them, were sent to residential schools. Denial of access to family and culture and other forms of emotional abuse, including, for some students, physical and sexual assaults, characterized the experience of many Aboriginal children at residential schools. The effects on their mental and physical health were both immediate and long-lasting. As well, whole families and communities were affected by the residential school system. The effects of the residential school system are still felt today.

As an alternative, the suggestion could be made in the Guidelines to consult documents such as the Law Commission's Report "Restoring Dignity" for background information on the Residential School experience.

Paragraph 1

46. The question is where to go from acknowledging this issue The suggestion is that the Society and the profession need to be more pro-active. Many clients do not know how to complain to the Society. Over half of the complaints are urban-based. One cannot assume that supports and networks are always there. It is a very private issue. Given the role of plaintiff counsel, and degree to which the plaintiff relies on the lawyer, the chance that he or she will complain is very small.

47. Most lawyers will not know how to refer clients to services. Perhaps the Law Society could create resource center, and determine what resources are available.

48. Some clients my not feel the need for counseling or treatment programs and may be offended by the lawyer's suggestion or referral. All lawyers should review this possibility with their clients at the outset and throughout the retainer.

49. It would be helpful to point out that all sexual abuse survivors are vulnerable and aboriginal clients particularly so.

50. The Guidelines should state that lawyers should not take on these cases unless they are willing to embrace Aboriginal culture, and it would be helpful for a lawyer taking on these cases to speak with an elder to obtain insight into the cultural issues.

51. The Guidelines should identify the role of First Nation agencies, support groups and counseling as a primary referral source, and referrals should be made to aboriginal therapists if possible, or at least therapists who have some experience with aboriginal clients. Lawyers must recognize that among the aboriginal community views differ on the appropriateness of pursuing litigation as a remedy, and that community support may be lacking.

52. In emphasizing the needs of the Survivor first, it is suggested that rather than dealing with the needs and capacities of lawyers and their support staff, the paragraphs dealing with Survivors' needs (5, 6, 7, 9, 10, 11, and 12) should be moved to this first part, then discuss lawyers' work loads and need for EAP etc. (paragraphs 2, 3, 4,).

53. A list of available resources, programs and networks should be assembled and attached to the Guidelines. This will give the lawyer an available reference source which will help the lawyer feel comfortable that he or she has considered all possible resources for the client. The same suggestion applies to paragraph 11 for times of crisis.

Paragraph 2

54. A concern is that the Guidelines will be used to criticize lawyers. In these cases, counsel deal with very sensitive issues, and it is upsetting no matter how sensitive the counsel is. The Guidelines should recognize

that counsel must act consistent with their responsibilities to the client. A review should be done to see where the Guidelines should apply to plaintiff or defense counsel, and perhaps a statement could be added to the preamble to the effect that the Guidelines apply to plaintiff's counsel and where appropriate, to defense counsel.

55. A specialty in residential school litigation should be created by the Society and lawyers who achieve the designation should be required to attend CLE programs on these issues. They should also be required to attend workshops designed to address the issues in these cases to assist lawyers in dealing with the emotional and psychological effects the caseloads have on them.

56. This and the next paragraph appear to assist lawyers and their staff and should be in a separate section under the appropriate heading.

57. The word "additional" should appear before the words "amount of time and resources required for each case", to reflect the intention that these cases generally require additional time and resources (the word "additional" appears in paragraph 3).

Paragraph 3

58. Lawyers should be required to report annually to the Society that they have EAP providers for their offices in place.

59. Through the specialist program suggested above, lawyers could be canvassed for ideas on a how firms cope with the emotional and psychological aspects of these cases.

60. The Society should offer assistance programs to lawyers lacking experience in mass tort claims or with residential school cases. The second sentence should state "Lawyers acting in Aboriginal residential school cases should be aware of the employee assistance programs offered to lawyers and their staff by the Law Society of Upper Canada and are encouraged to participate in these programs as needed."

Paragraph 4

61. An idea is to get lawyers to identify themselves as dealing with these cases so support can be offered. It may be that they should be required to comply with training requirements, e.g. CLE, etc. There is an annual CLE program by the Canadian Institute dealing with institutional abuse cases.

62. The Society should build in language on the sensitivity issue as part of the responsibilities of lawyers to their clients.

63. If counsel lacks knowledge in areas of law relevant to these cases, they should be required to remove themselves as counsel of record or retain co-counsel who has the requisite knowledge and experience.

64. As lawyers must maintain personal balance in dealing with these cases, the Society should establish programs that specifically address the emotional needs of counsel.

65. This is stating the obvious.

Paragraph 5

66. Respecting the "vulnerable" client, perhaps lawyers should be encouraged to have support people available at the initial meeting. Support can be very broad. Support people may come with the claimant, attend the meeting, and then accompany the individual until he or she gets home.

67. Lawyers involved in these cases should be sent notices of requirements discussed in the context of specialization, information on the consequences if they fail to meet the requirements, and information on practices that have led to discipline.

68. The Guidelines should state that lawyers are not to approach anyone who has not come forward to seek legal representation. Advertising is unlikely to be successful and as the Society has a rule on advertising, this does not add much, and it would be best not to mention it at all.

69. Respecting the words "culturally appropriate" to describe the methods discussed in the paragraph, its meaning may not be entirely clear to many lawyers. It is not just the offering of services that should be done in a culturally appropriate manner. That approach should apply to the entire process of handling an Aboriginal client's case. Perhaps another paragraph could be added inviting lawyers to connect with the appropriate Aboriginal cultural centres so that they are able to act with respect and sensitivity to the client and his or her community.

Paragraph 6

70. Lawyer's advertising should be required to include information on how a client may access services should the advertisement itself trigger a crisis. The last sentence of the paragraph refers to the initial communication. Mandatory language should not be used, as these guidelines are not rules.

71. Lawyers specializing in this area should be required to include certain standard features in their advertisements approved by the Society or Rotiio> taties. The consequences of failing to observe the requirements should be disclosed.

Paragraph 7

72. Does a lawyer acting in many cases save a client fees (on the theory that the issues take less work for all cases)? The Law Commission of Canada held a conference, open to survivors and lawyers, where alternatives in processes were presented – civil litigation, criminal process, ADR, etc.

73. This paragraph should be restructured so that the first point is that all communications with survivors must be clear and understandable at every step of the way.

Paragraph 8

74. For contingent fee issues, the Society should consider the example of Saskatchewan which established a provincially operated class action fund to cover initial disbursements.

75. As this community has no ability to fund litigation, creative funding options are required i.e. those available under the *Class Proceedings Act* ought to be available to provide access to justice.

Paragraph 9

76. It may important to flag the fact that there are many emotional restraints; counsel should be prepared for the "trickle" or progressive disclosure. CLE could be very beneficial. Rotiio> taties' recommendation has been to consider creating some sort of specialist certification that would require those seeking it to maintain a level of training.

77. Issues relate to intergenerational effects and the question of the cause of action. The *Family Law Act* in Ontario creates possible claims – this will be dealt with in the Court of Appeal in November.

78. The class action issue has been raised. One view is that class actions are too broad - these cases are so different on the facts that each one would have to be examined to validate the claim and damages.

79. Lawyers must utilize the services of interpreters whenever appropriate and feasible.

80. Lawyers must use language that is appropriate and understandable, and be available to clients to answer any questions or concerns.

81. Lawyers should be required to obtain clients' informed instructions on which course of action to take, keep clients informed of all meetings and court appearances well in advance so that the clients may decide whether he or she wishes to attend and actively seek and encourage clients' participation in the planning and direction of all potential resolution processes.

82. As many clients have trust issues, the lawyer must work with the client to establish reasonable expectations and ensure that these are met or exceeded. The lawyer must be clear about what the legal system can and cannot deliver.

83. The lawyer must recognize that traditional information gathering a preparation may not be appropriate – the first meeting with the client should be used to build trust, discuss the litigation process, privilege, etc., preferably at the client's home as this shows trust and respect.

84. The client must be fully informed on what to expect from litigation and understand the legal obligations regarding records disclosure, independent medical exams and examinations for discovery.

85. The client should be involved in determining the approach to information gathering. An option is to give the client a list of information needed and some options for collecting it. The client should have the option of bringing a support person to meetings with the lawyer, mediations and discoveries. Accommodations should be made for those clients who speak through someone else.

86. The client should also be involved in the determining the approach to communications between the lawyer and client.

Paragraph 10

87. The most important issue is the loss of control. Lawyers should take into account the adversarial process and the role of lawyer. It was suggested that the language be clarified as to whom this paragraph is intended to apply (plaintiff or defense counsel).

88. The Law Society must establish a CLE program dealings with the issues arising in these cases.

89. This is a good paragraph. Some of the following ideas might also be useful:

> Lawyers should endeavour to put the needs of the survivor first and respect the survivor's decision-making ability. The lawyer should also do as much as he or she can to protect the privacy of the Survivor, if that is the wish of the Survivor, to minimize the risk of revictimization through the legal process and to ensure that the decision-making power and control over the process is in the hands of the Survivor.

90. This Guideline should also recognize that many survivors have been the victims of child and sexual abuse. The words "were victims of child abuse and sexual abuse" should be added after the words "Survivors have had control taken from their lives…"

Paragraph 11

91. The Society should assist the bar in compiling lists of resources.

92. Lawyers practising in this area should be required to receive training to recognize the symptoms or signs of crisis or risk, and to provide proof of this training in the certification or re-certification process.

93. This item should be combined with 1.

94. "In times of crisis" should be replaced with "when crisis intervention is warranted", to place the responsibility on the lawyer of knowing when to make referrals rather that just being aware of available resources and support when crises arise.

Paragraph 12

95. This is good.

96. Lawyers must ensure that support systems are in place for their clients prior to initial interviews and examinations for discovery. Lawyers should also give clients an opportunity to meet with them and the support person. The support person should be allowed to attend the examination for discovery, on the consent of other parties. The Guidelines should reflect permitting support people or alternatively, court workers or community members, to attend meetings.

97. Lawyers should accommodate a ceremony before meetings (e.g. the smudging ceremony), provide for affirmation using an eagle feather and endeavour at the initial meeting and examination for discovery to meet with the client at his or her choice of location.

98. Change the wording as follows: "Lawyers should recognize and respect that Survivors may be badly hurt by their experiences…"

This paragraph contains three important ideas that could be separated out for greater clarity:
a. the consequences of litigation may be very harsh and may result in the revictimization of the Survivor;
b. lawyers should be encouraged to a broad range of needs into account in negotiating settlements;
c. lawyers should understand and respect Survivors' backgrounds, cultures, traditions, etc.

With respect to the first idea, the Guidelines should be clearer in stating that Survivors need clear, understandable information <u>which is frequently repeated</u> not only about what will happen during the legal process, but also about what the impact of it might be on them. They need a chance to prepare themselves emotionally, spiritually and physically for what might happen to them and to build in the appropriate support networks. It is important to state that survivors must have this information right at the outset of the process so that they can determine whether legal action is appropriate at all.

With respect to the second idea, lawyers should be encouraged to take into account that any redress provided to survivors of institutional abuse may include a broader range of needs than just the monetary needs of the Survivor and his or her family. It is often not just the Survivor who has been hurt by the abuse, but also his or her family and community. The needs may be cultural, spiritual, psychological, vocational, educational and other.

The third point has been addressed above.

99. The Federal Government has denied a cause of action for "cultural" abuse claims, and clients should be aware that to establish such a tort they must be prepared for a long, hard fight.

100. The Guidelines should recognize that survivors have been removed from their parents and these words should be added before the words "customs and traditions".

POLICIES ON STAFF RESOLUTION AND DISPOSITION OF SEXUAL HARASSMENT/DISCRIMINATION COMPLAINTS

24. At its April 2002 meeting, the Committee approved two policies for the investigation of complaints:
a. the development of criteria to be used by Professional Regulation staff in resolving sexual harassment/discrimination complaints without being required to obtain the Proceedings

Authorization Committee's (PAC) approval of the resolution, in the appropriate case and with the agreement of the parties, and

b. subject to input from PAC, the ability of Professional Regulation staff to close files involving these types of complaints, where there is no reasonable prospect of securing a finding of professional misconduct based on sexual harassment/discrimination, without having to seek PAC's permission.

25. The Committee agreed that PAC should be consulted on both issues. PAC endorsed both policies and with PAC's input, the Committee received and approved the criteria prepared by regulatory staff, as described in paragraph 24a. above.

26. For the purposes of these policies, "sexual harassment/discrimination complaints" mean complaints involving harassment and/or discrimination on the basis of sex.

A. BACKGROUND

27. As a result of investigation policies adopted a number of years ago for sexual harassment/discrimination complaints, Professional Regulation staff were required to seek PAC's advice on the disposition of these complaints, including approval of any resolution. In almost every case where Professional Regulation staff have suggested a resolution or where the recommendation is that the file be closed, PAC has agreed with the disposition.

28. The Committee concluded that with the evolution of investigation techniques and the benefit of more experience, in the appropriate case and with the appropriate criteria as guidance, Professional Regulation staff should be authorized to conclude an investigation that results in a mutually acceptable resolution to the Complainant, lawyer and the Society, without PAC's approval. PAC agreed with this proposal. This development in no way diminishes the importance of the inherent features of many sexual harassment/discrimination complaints[4], or the view that often, the nature of these cases does not lend itself to resolution. It is hoped, however, that it will be a step towards dealing with complaints that can be resolved in keeping with the Society's public interest mandate.

29. In applying this policy,

- Law Society Investigation Counsel will determine if resolution is appropriate and will utilize this process to work towards a mutually agreeable disposition of the complaint, and
- the Complainant and the lawyer must both agree that the remedy is appropriate to the resolution of the complaint.

30. Similarly, when the investigation of a sexual harassment/discrimination complaint discloses no reasonable prospect of securing a finding of professional misconduct, based on the opinion of Investigation Counsel after consultation with Discipline Counsel as required, the Committee proposed that PAC's permission to close the file need not be obtained. PAC agreed with this proposal as well. It noted, however, that cases which involve issues of the credibility of the complainant would continue to be dealt with in accordance with the policy approved by the Committee in March 1998,[5] under which the appropriate cases would continue to be referred to PAC. This is in fact recognized in the criteria discussed below.

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[4] E.g. the power imbalance that often pervades these situations, the more frequent male harassment of females than the reverse, the unfortunately common scenario where a client is taken advantage of because he or she is vulnerable.

[5] The relevant portion of the PRC's March 1998 report to Convocation reads:

> 72. The prevailing practice among Discipline Counsel is to determine on the basis of all of the available evidence whether there is a reasonable prospect of obtaining a finding of professional misconduct (or conduct unbecoming), in light of the established standard which requires clear and convincing proof on the basis of cogent evidence[5]. This assessment may involve a consideration of the credibility of individual witnesses, not so as to weigh the credibility of a specific witness but only to determine

B. CRITERIA FOR RESOLUTION OF SEXUAL HARASSMENT/DISCRIMINATION COMPLAINTS

31. The following are the circumstances in which Professional Regulation staff may resolve and close complaints involving sexual harassment/discrimination.

a. The alleged misconduct on the part of the lawyer must be considered "low-risk" to the Complainant and, more generally, to the public.

The term "low risk" involves, for example, inappropriate comments (see paragraph c), but not behaviour that, for example, involves physical contact as described in paragraphs h. and i. below. Cases where credibility is in issue will require PAC's review and ultimately the Hearing Panel's

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whether there is an identifiable flaw in a witness' credibility that would prevent that person's evidence from being accepted.

73. Accordingly, the only assessment of credibility which is made by discipline counsel in all types of cases is a determination of whether there is a flaw in the evidence of a witness which seriously impugns the witness' credibility. An obvious example of such a flaw may be a perjury conviction with respect to the subject-matter of the Complaint. Less obvious flaws may result from a culmination of factors which, in isolation may not have a determinative effect, but whose collective impact is very strong.

The Applicable Standard

74. The Committee is therefore of the view that the following standard should be applied to the authorization of sexual impropriety or other types of complaints, except in the cases described in paragraph 73 above in which the evidence is flawed in such a way as to seriously impugn the witness's credibility: *if the complainant is believed*, are there reasonable and probable grounds to believe that the Solicitor is guilty of professional misconduct?

75. If this standard is not applied, the situation arises where there would never be a hearing where a matter turns solely on credibility because the issue of credibility which requires a hearing provides an insufficient basis for a hearing; such a view would have (and has had) a disproportionate negative impact on hearings into allegations of sexual improprieties given their nature.

76. The Committee believes that the current wording of the sworn Complaint ("... has reasonable and probable grounds to believe and does believe ...") does not preclude the swearing of a Complaint where the case turns on an issue of credibility. Credibility is a matter which should be left for an oral hearing before a Discipline Committee.

77. Where the issue with respect to a Complaint is one solely of credibility, and there are no dominant factors which may strongly pre-dispose an observer considering that issue to one story or the other, the Complaint ought to proceed to a hearing.

78. This view applies to Complaints of all kinds and not only those involving alleged sexual improprieties. The underlying premise of this view is that it is not the role of counsel, or other staff, to assess the credibility of witnesses.

79. Fairness, which must be exercised in favour of both the Solicitor and the complainant, requires that issues of credibility be the subject of an oral hearing. This principle was recently affirmed by the Court of Appeal:

> Many courts in many different settings have emphasized that when a decision turns on credibility, a decision-maker should not make an adverse finding of credibility without affording the affected person an oral hearing.

assessment. However, cases involving low risk matters in which, for example, there is a discrepancy between the parties on the facts of the complaint would not necessarily be excluded from consideration for resolution.

The alleged misconduct must also be considered "low risk" to the public, in consideration of the broader issue of the public expectations of how the Society deals with these types of complaints. This may involve, for example, an assessment of whether the lawyer is likely to repeat the type of behaviour with other persons, or whether, if it can be determined, the behaviour which may be repeated with others may escalate in seriousness.

b. Each case must be assessed on its merits.

What is "low-risk" behaviour in one case may not be so in another. The particular circumstances must always be considered, including the vulnerability of the complainant. The range of behaviour in varying contexts requires a case by case assessment. Further, even though the parties to the complaint may agree on a resolution, it may be appropriate, for a number of reasons, for the lawyer to receive a caution or advice from the Society. In such cases, a letter of advice or an Invitation to Attend authorized by PAC, for example, may be a more appropriate conclusion. It is this type of case in which PAC's advice should be sought (see also paragraph k. below).

c. Scenarios which *may* be appropriate for resolution (on the understanding that the facts of each case will be assessed as to the propriety of resolution) include but are not limited to:

i. sexist jokes causing embarrassment or offence, and/or
ii. leering, and/or
iii. the display of sexually offensive material (i.e. derogatory, degrading or explicitly sexual images such as posters, e-mail, cartoons, graffiti), and/or
iv. derogatory or degrading remarks directed towards members of one sex or about one's sexual orientation or perceived sexual orientation inappropriate comments or communications.

d. While the following are more "personal" forms of harassment/discrimination, they may be considered amenable for resolution in the appropriate case (on the understanding that the facts of each case will be assessed as to the propriety of resolution), subject to PAC's review at the discretion of Professional Regulation staff. These types of complaints have, in fact, been resolved at the staff level with PAC's approval:

i. sexually degrading words used to describe a person, and/or
ii. sexually suggestive or obscene comments or gestures, and/or
iii. unwelcome inquiries or comments about a person's sex life, and/or
iv. unwelcome sexual suggestions and innuendos.

e. The Complainant and the lawyer must agree to engage in resolution in an attempt to reach a mutually agreeable disposition of the complaint.

f. Lawyer-specific factors to be considered in determining whether resolution is appropriate include:

i. Acknowledgement by the lawyer that the conduct complained of occurred
ii. A genuine expression that the conduct was inappropriate and insight into why and how it was inappropriate
iii. A willingness to take remedial steps, if warranted, to address the behavior, including a willingness to apologize to the Complainant
iv. Complaints and discipline history

g. Complainant-specific factors to be considered in determining whether resolution is appropriate include:

i. The position of the Complainant with respect to the appropriate resolution of the complaint (e.g. the willingness of the Complainant to accept an apology)
ii. The vulnerability/emotional fragility of the Complainant

iii. The willingness of the Complainant to testify at a hearing, and the ability to withstand the rigours of a prosecution

The views and wishes of the Complainant on the propriety of resolution should be considered but are not determinative of the matter.

h. Except in unusual circumstances, the complaint should not involve physical harassment. Physical harassment includes but is not limited to stroking, tickling or grabbing the Complainant or impeding or blocking movement in an attempt to get physically close to the Complainant.

i. The complaint must not involve any conduct involving criminal charges against the lawyer, such as sexual assault, indecent exposure, committing an indecent act or criminal harassment.

j. The Director of Professional Regulation must approve the proposed resolution or disposition of these complaints.

k. Professional Regulation staff will request direction from PAC when uncertainty surrounds the appropriateness of the proposed resolution, or when other questions arise relating to the merits of the disposition of the matter.

l. A report will be provided to PAC by the Director semi-annually, detailing the files involving these types of complaints that have been resolved and closed by Investigation Counsel without referral to PAC.

REPORT FROM THE PROFESSIONAL REGULATION DIVISION

32. The Quarterly Report provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Professional Regulation Division's activities and responsibilities, including file management and monitoring for the period April to June 2003.

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

(1) Copies of Member's Annual Reports.

(pages 6 – 17 and pages 20 – 31)

(2) Copy of the Professional Regulation Division's Quarterly Report April – June 2003.

(pages 66 – 108)

Re: 2003 MAR By-Law 17 Amendment

It was moved by Mr. Ducharme, seconded by Ms. Curtis that Convocation approve the amendments to By-Law 17 to adopt the Member's Annual Report (MAR) for 2003..

Carried

Re: Aboriginal Residential School Litigation Guidelines

It was moved by Mr. Ducharme, seconded by Ms. St. Lewis that the Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse be approved.

The matter was adjourned to October Convocation.

ITEMS FOR INFORMATION ONLY

- Policies on Staff Resolution and Disposition of Sexual Harassment/Discrimination Complaints

- Professional Regulation Division Report

HERITAGE COMMITTEE REPORT

Ms. Backhouse presented the Report of the Heritage Committee to Convocation.

Heritage Committee
September 25, 2003

Report to Convocation

Purpose of Report: Decision

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

OVERVIEW OF POLICY ISSUES

PROPOSAL FOR A HERITAGE PILOT PROJECT

Request to Convocation

1. That Convocation consider the Committee's proposal for a heritage pilot project to conduct in-depth interviews with senior former Treasurers, building upon the work done by the Osgoode Society and, if appropriate, approve a budget for the project of $29, 900 for the project in 2004 as described in Appendix 1 to this report.

Summary of the Issue

2. In October 2002 and March 2003, the former Heritage Committee provided Convocation with an information report outlining the manner in which it anticipated fulfilling its mandate to advise, formulate and recommend policies to Convocation on heritage matters within the Law Society and the legal profession. In its October report the Committee reported that its policy development focus and strategic direction would concentrate in two areas:

   a. Conservation and preservation of heritage assets of the Law Society of Upper Canada; and

   b. Outreach to all current and potential stakeholders regarding heritage-related matters.

3. The Committee has begun to consider in more detail the goals of the "outreach" aspect of its mandate. In the Committee's view a critical focus of the outreach must be on ensuring that the rich history of the profession afforded by the papers and recollections of its more senior or retired members is preserved.

4. The Committee is considering a number of history projects for development over the next four years. The Committee proposes that the first of these history-based projects focus on the historical contribution of our senior former Treasurers. The project would build on work done by the Osgoode Society's oral history project and include a video, photographic and document component.

5. Appendix 1 sets out the framework for the project and a proposed budget.

THE REPORT

Terms Of Reference/Committee Process

6. The Committee met on September 5 and September 11, 2003. Committee members in attendance on September 5 were Constance Backhouse (Chair) and Andrea Alexander. Committee members in attendance on September 11, 2003 were Constance Backhouse (Chair), Andrea Alexander and Allan Lawrence. Staff in attendance was: Sophia Sperdakos.

7. The Committee is reporting on the following matters:

Policy – For Decision

- Proposal for a heritage pilot project

PROPOSAL FOR A HERITAGE PILOT PROJECT

Background

8. In October 2002 and March 2003, the former Heritage Committee provided Convocation with an information report outlining the manner in which it anticipated fulfilling its mandate to advise, formulate and recommend policies to Convocation on heritage matters within the Law Society and the legal profession. In its October report the Committee reported that its policy development focus and strategic direction would concentrate in two areas:

   a. Conservation and preservation of heritage assets of the Law Society of Upper Canada; and
   b. Outreach to all current and potential stakeholders regarding heritage-related matters.

9. The Committee's report described many of the operational initiatives underway to ensure the conservation and preservation of heritage assets, including an inventory of historical furniture, documentation of historical assets and information, and conservation and long-term maintenance of Law Society collections.

10. The Committee's report also discussed potential outreach initiatives including enhanced web resources, a marketing plan to raise awareness of the historical components of the Law Society and ongoing development of display and exhibition possibilities.

Possible Initiatives for 2003-2004

11. The Committee has begun to consider in more detail the goals of the "outreach" aspect of its mandate. In the Committee's view one critical focus of outreach must be on ensuring that the rich history of the profession afforded by the papers and recollections of its more senior or retired members is preserved.

12. The history of individual lawyers, law firms both large and small, and of legal practice in communities throughout the province provides the foundation for a better understanding of the profession's past and its future as well as the imperatives that drive it.

13. The development of such history projects can also accomplish more than the preservation of the past. Such projects can,

   a. enhance the image of the profession by preserving stories about the careers of lawyers who made a positive contribution to their communities and their clients;

   b. educate younger generations about the law and thereby stimulate their interest in it as a career;

   c. by developing histories about lawyers from groups traditionally under-represented in the profession, inspire and encourage other members of those communities to seek out the profession; and

   d. link legal communities throughout the province through a shared past.

14. The Committee has also begun considering the forging of links, including monetary ones, with other organizations and groups in the development of these historical projects including,

    a. the Osgoode Society, which for some years has made an enormous contribution to the preservation of legal history through its oral history project;

    b. Boards of Education and high schools for the possible development of legal history curricula;

    c. University legal history courses and professors at law schools in the province;

    and

    d. Legal organizations that have a particular interest in the history of lawyers in different areas of law or from a range of communities and groups.

15. With these multiple goals in mind the Committee has begun developing a number of ideas for consideration over the coming four years, recognizing that the many other heritage activities and exhibits and archival functions discussed in the March 2003 report, referred to above, already occupy a substantial amount of staff time.

16. The Committee is proposing that the first of these history projects to be undertaken focus on the historical contribution of our senior former Treasurers. The project would build on work done by the Osgoode Society's oral history project and include a video and document component.

17. This project would be directed by the Law Society, using the assistance of law students to conduct extensive in-depth oral history interviews on tape and video as well as seeking archival documents, photographs, biographical materials and testimonials. It would be a pilot project, the results of which could then be used to consider how best to continue the project for other historical projects. Appendix 1 sets out a framework for the initiative and an estimated cost of the pilot project.

18. The Chair has had a preliminary discussion with the Osgoode Society to liaise between the Committee and the Society. The Osgood Society has expressed its willingness to provide whatever information it has available, subject to the consent of the subjects where necessary, and has expressed support for the further development of a document and pictorial history to supplement the interview information. Further discussions are planned.

19. In addition to this pilot project, the Committee has considered other ideas, such as the those that follow:

    a. Development of curricula packages for high schools:
        - Remembrance Day activities: This could involve research on the lawyers who lost their lives during World War I and II and would engage students in both a discussion of the consequences of war and the implications for lawyers and the profession. Information learned would enhance the Law Society's collection;

        - Equity and Diversity: This could involve research on the earliest lawyers from a wide range of ethnic and Aboriginal communities and backgrounds. Such research could be used to encourage students from groups traditionally under-represented in the law to see the law as a viable career. Information learned would enhance the Law Society's collection.

    These projects would result in a collaboration that would enhance student knowledge and understanding and, through their research, add to the historic information reposed in the Law Society's archives.

    b. A history project on the legal profession in smaller communities and among sole practitioners and small firms. This would involve development of a framework for interviewing members of the profession in various communities; seeking documentary information about practice; and coordinating

with law librarians, county and district law associations, senior members of the bar in communities, etc. Given the importance of sole practitioners and small firm practice to the legal profession such a project could be invaluable.

c. Roundtable interviews with senior or retired members of the profession with a view to learning more about the practice of law in previous decades and, where available, gathering archival documents that could be added to the Law Society's collections and knowledge.

20. In considering the feasibility of these and other projects the Committee will work with Law Society staff to consider how best to undertake such projects, utilize the archives, prioritize given staff resources, and develop partnerships to undertake such projects.

Request to Convocation

21. That Convocation consider the Committee's proposal for a heritage pilot project to conduct in-depth interviews with senior former Treasurers, building upon the work done by the Osgoode Society, and if appropriate approve a budget of $29, 900 for the project in 2004, as described in Appendix 1 to this report.

APPENDIX 1

INTERVIEW PROJECT – FRAMEWORK

Nature of the Pilot Project:	To conduct extensive and in-depth oral history interviews (on tape and video) with senior former Treasurers, building upon work done by the Osgoode Society oral history project. To collect relevant archival documents and photographs, biographical materials and testimonials.
Scope of the Pilot Project:	Four interview subjects to begin in the spring of 2004 and be completed by the fall.
Interviewers:	To minimize the cost of the project, the bulk of the work would be done by law students working part-time in the spring semester and full-time over the summer. Students would do preparatory work and background research in the spring, including research from Osgoode Society and the Law Society's Archives department.
Future Funding:	Based on the results of the pilot project, it may be possible to apply for a three year research grant to fund the continuation and expansion of the project from the Social Sciences and Humanities Research Council (SSHRC) in late 2004 for funding in 2005.

\Estimated Budget for Pilot Project:

Part-time student, spring semester (1)	$ 3200
Full time students, summer (2)	$19200
Audio-visual equipment	$ 5000
Travel, incidental, etc.	$ 2500
Total	$29,900

Re: Funding Request for Pilot Project

It was moved by Ms. Backhouse, seconded by Ms. Alexander that Convocation approve a heritage pilot project to conduct in-depth interviews with senior former Treasurers, building upon the work done by the Osgoode Society and if appropriate approve a budget for the project of $29,900.

Carried

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IN PUBLIC

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The Treasurer announced that Cynthia Petersen has been appointed as the Discrimination and Harassment Counsel.

EQUITY & ABORIGINAL ISSUES COMMITTEE/COMITI SUR L'IQUITI ET LESAFFAIRES AUTOCHTONES REPORT

ITEMS FOR INFORMATION ONLY

- Discrimination and Harassment Counsel Semi-Annual Report
- Proposed Guidelines for Lawyers Acting in Aboriginal Residential School Cases
- Public Education Events

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones
September 25, 2003

Report to Convocation

Purpose of Report: Information

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

THE REPORT

Terms of Reference/Committee Process

1. The Committee met on September 11, 2003. Committee members in attendance were Joanne St. Lewis (Chair), Derry Millar (Vice-Chair), Mary Louise Dickson, Dr. Sy Eber, Thomas G. Heintzman, Tracey O'Donnell and William J. Simpson. Other Benchers in attendance were Abraham Feinstein, Judith Potter and Heather Ross. Staff members in attendance were Josée Bouchard, Katherine Corrick, Margaret Froh and Jim Varro.

2. The Committee is reporting on the following matter:

Policy – For Decision

- Appointment of Discrimination and Harassment Counsel (in camera)

INFORMATION

DISCRIMINATION AND HARASSMENT COUNSEL SEMI-ANNUAL REPORT:
NOVEMBER 21, 2002 – JUNE 30, 2003

26. Subsection 5(1) (a) of By-law 36 – *Discrimination and Harassment Counsel* provides that:

> The Counsel shall make a report to the Committee, no later than September 1 in each year, upon the affairs of the Counsel during the period of January 1 to June 30 of that year.

27. Subsection 5(2) of By-law 36 provides that:

> The Committee shall submit each report received from the Counsel to Convocation on the day following the deadline for the receipt of the report by the Committee on which Convocation holds a regular meeting.

28. On September 11, 2003, the Discrimination and Harassment Counsel presented her Semi-Annual Report for the period of November 21, 2002 to June 30, 2003 to the Committee, in accordance with subsection 5(1) para. (a) of By-law 36 (Appendix 2).

29. This is a longer reporting period than the usual six months. In November 2002, Mary Teresa Devlin, former DHC, was appointed to the Ontario Court of Justice. Convocation appointed Cynthia Petersen on an interim basis, effective November 21, 2002. Consequently, the reporting period is extended to include the end of 2002.

30. There are differences in reporting practices between the former DHC and the interim DHC. The former DHC based reported statistics on the number of calls received rather than the number of individual callers contacting the DHC Program for information or assistance. In contrast, all of the data that has been recorded since November 2002 by the interim DHC is based on the number of individual contacts with the Program.

31. Due to the difference in recording methodology, it is not possible to make meaningful comparison of the data in order to ascertain trends. This report therefore provides a statistical overview of the activities of the DHC Program during the relevant time period, without attempting to make any comparisons with previous reporting periods.

32. During this reporting period, 110 individuals made contact with the DHC Program. On average, there were 15 new contacts per month. Of the 110 new contacts, 66 (60%) related to matters within the mandate of the DHC Program and 33 related to matters outside the mandate.

33. Of the 66 new contacts that raised issues within the mandate of the DHC Program, one third (22) involved general inquiries rather than complaints about incidents of discrimination or harassment.

34. Of the 22 general inquiries, 4 (18%) were from members of the public and 18 (82%) were from members of the profession.

35. Forty-four (44) individuals contacted the DHC Program because they had a complaint of discrimination or harassment against a lawyer or law firm in Ontario.

36. A little more than half of the complaints (26 or 59%) came from members of the public, with the remaining 41% (18) coming from members of the legal profession.

37. Of the 18 members of the profession who contacted the DHC Program with a complaint of discrimination or harassment, the overwhelming majority (15 or 83%) of complainants were female.

38. Complaints from the public were almost evenly divided between men (14 or 54%) and women (12 or 46%).

39. One third of the complaints reported to the DHC Program involved sexual harassment (including two complaints of sexual assault). This was the most voluminous category of complaint.

40. The second most voluminous categories of complaint were racial discrimination and discrimination based on disability, which together comprised another third of the total complaints.

41. Five additional grounds of discrimination and harassment were raised in the reported complaints, namely sexual orientation, religion, age, sex (including pregnancy), and family status.

42. Overall, there were 18 harassment complaints and 26 discrimination complaints. The outcome of complaints were as follows: 16 complainants reported the matter to the Law Society, 6 to the human rights commission, 1 to the police, 1 filed an internal workplace grievance, 6 sought legal advice to commence legal proceedings, 5 took no action and 4 requested mediation by the DHC.

43. During this reporting period, two mediation sessions were conducted (the third has not yet been scheduled). A successful resolution was achieved in one session. In the other, the mediation broke down without resolution and the complainant elected not to pursue any other avenue of redress.

44. The Committee noted that the DHC semi-annual reports should include definitions of harassment and discrimination and a more detailed breakdown of the statistics to outline complaints made from the public and from members of the profession.

PROPOSED GUIDELINES FOR LAWYERS ACTING IN ABORIGINAL RESIDENTIAL SCHOOL CASES

45. In September 2001, a joint working group of the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the Committee) and the Professional Regulation Committee was struck to consider a number of issues identified in connection with Aboriginal Residential School and Childhood Institutional Abuse discussed in a report to Convocation in June 2001. One issue related to the manner in which lawyers seek to represent and represent individuals who are pursuing claims arising from Aboriginal Residential School abuse.

46. The working group prepared Guidelines for lawyers acting in cases involving claims of Aboriginal Residential School abuse, based on Guidelines adopted by the Canadian Bar Association in August 2000.

47. The working group, in addition to requesting comments on the proposed Guidelines from representatives of the Aboriginal community and certain legal organizations, sought input from the profession on the proposed Guidelines in the spring of 2002. The Guidelines were revised to reflect changes proposed during the consultation process.

48. On September 11, 2003, the Committee and the Professional Regulation Committee unanimously approved the content and publication/distribution of the Guidelines, which appear in the Professional Regulation Committee report.

PUBLIC EDUCATION EVENTS

49. The Committee provides an outline of upcoming public education events (Appendix 3).

APPENDIX 1

BY-LAW 36

DISCRIMINATION AND HARASSMENT COUNSEL

Appointment
1. (1) Convocation shall appoint a person as Discrimination and Harassment Counsel in accordance with section 2.
Term of office
(2) The Counsel shall be appointed for a term not exceeding three years and is eligible for reappointment

Appointment at pleasure
(3) The Counsel holds office at the pleasure of Convocation.
No appointment without recommendation
2. (1) Convocation shall not appoint a person as Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.
Vacancy in office
(2) When a vacancy exists in the office of Counsel, the committee shall conduct a search for candidates for appointment as Counsel in accordance with procedures and criteria established by the committee.
List of candidates
(3) At the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Counsel, with brief supporting reasons.
Additional candidates
(4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.
Recommendations considered in absence of public
(5) Convocation shall consider the committee's recommendations in the absence of the public.
Application of s. 2
3. Section 2 does not apply if Convocation reappoints the Counsel under subsection 1 (2).
Function of Counsel
4. (1) It is the function of the Counsel,
(a) to assist, in a manner that the Counsel deems appropriate, any person who believes that he or she has been discriminated against or harassed by a member or student member;
(b) to assist the Society, as required, to develop and conduct for members and student members information and educational programs relating to discrimination and harassment; and
(c) to perform such other functions as may be assigned to the Counsel by Convocation.
No authority to conduct investigation
(2) Despite clause (1) (a), the Counsel has no authority to require an investigation to be conducted or to conduct an investigation under section 49.3 of the Act.
Access to information
(3) Except with the prior permission of the Secretary, the Counsel is not entitled to have any information in the records or within the knowledge of the Society respecting a member or student member.
Annual and semi-annual report to Committee
5. (1) The Counsel shall make a report to the committee,
(a) not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year; and
(b) not later than September 1 in each year, upon the affairs of the Counsel during the period January 1 to June 30 of that year.
Report to Convocation
(2) The committee shall submit each report received from the Counsel to Convocation on the first day following the deadline for the receipt of the report by the Committee on which Convocation has a regular meeting.
Confidentiality
6. (1) The Counsel shall not disclose,
(a) any information that comes to his or her knowledge as a result of the performance of his or her duties under clause 4 (1) (a); or
(b) any information that comes to his or her knowledge under subsection 4 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.
Rules of Professional Conduct
(2) For greater certainty, clause (1) (a) prevails over the Society's Rules of Professional Conduct to the extent that the Rules require the Counsel to disclose to the Society the information mentioned in clause (1) (a).
Exceptions
(3) Subsection (1) does not prohibit,
(a) disclosure required in connection with the administration of the Act, the regulations, the by-laws or the rules of practice and procedure;
(b) disclosure of information that is a matter of public record;

(c) disclosure of information where the Counsel has reasonable grounds to believe that there is an imminent risk to an identifiable individual or group of individuals of death, serious bodily harm or serious psychological harm that substantially interferes with the individual's or group's health or well-being and that the disclosure is necessary to prevent the death or harm;
(d) disclosure by the Counsel to his or her counsel; or
(e) disclosure with the written consent of all persons whose interest might reasonably be affected by the disclosure.

Made: June 22, 2001 Amended: July 26, 2001 and September 28, 2001

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

(1) Copy of the Semi-Annual Report of the Discrimination and Harassment Counsel for the period of November 21, 2002 to June 30, 2003.

(Appendix 2, pages 17 –41)

(2) Copy of upcoming public education events.

(Appendix 3, page 42)

FINANCE & AUDIT COMMITTEE REPORT

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

Finance and Audit Committee
September 11, 2003

Report to Convocation

Purpose of Report: Decision
Information

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on September 11, 2003. Committee members in attendance were: Ruby C. (c), Chahbar A., (v.c.), Bourque P., Dray P., Finkelstein N., Harris H., Lawrence A., Pattillo L., Pawlitza L., Silverstein A., Symes B., Wright B.. Benchers also in attendance were Hunter G. and MacKenzie G.. Staff attending were Heins M., Tysall W.,Grady F., Myles D., Rybka-Becker L., Cawse A..

2. The Committee is reporting on the following matters:

Decision
X Approval of cheque signatories and implementation of electronic funds transfer.
X Increase in external counsel fees.

Information
X Law Society General Fund Unaudited Financial Statements for the Second Quarter.
X Lawyers Fund for Client Compensation Fund Unaudited Financial Statements for the Second Quarter.
X LibraryCo Inc. Unaudited Financial Statements for the First Quarter.

X Investment Compliance Reports.
X 2004 budget – operational reviews.

FOR DECISION

CHEQUE SIGNATORIES

3. A copy of the Law Society's banking resolution to be updated is attached (page 8) . The resolution will name several individuals and staff positions as signatories for banking purposes. With respect to elected officials, The Treasurer, Chair and Vice Chair of Finance and Audit Committee and two designated benchers are to be signatories. Designated benchers are typically those individuals who have offices in close proximity to Osgoode Hall and are members of the Finance and Audit Committee.

4. A designated bencher is typically only called upon to sign cheques that exceed $100,000, however the cheques could be for any amount. Cheques for signature are primarily from the General Fund chequing account and Compensation Fund chequing account, but may also be from some of the other Law Society accounts. Supporting documentation is always provided so that it is clear that the payments are bona fide and have been properly requisitioned through the Law Society's system of internal control.

5. The recent Bencher election and new composition of the Finance and Audit Committee has instigated some operational changes with respect to signatories for banking purposes. The signatories appended to the banking resolution must be updated to reflect the present composition of the Finance and Audit Committee.

6. Convocation is requested to approve the following list that amends Schedule A of the banking resolution. These titles are the Authorised Signing Officers of the corporation

Title	Proposed Signing Officer
Treasurer	Frank Marrocco
Chair, Finance and Audit Committee	Clayton Ruby
Vice Chair, Finance and Audit Committee	Abdul Chahbar
Designated Bencher	Beth Symes
Designated Bencher	Derry Millar
Chief Executive Officer	Malcolm Heins
Chief Financial Officer	Wendy Tysall
Director, Policy and Legal Affairs	Katherine Corrick
Manager of Finance	Fred Grady

ELECTRONIC FUNDS TRANSFER ("EFT")

7. Convocation passed the present banking resolution in 1996. Since that time the banking industry and the Law Society have undergone a number of technological changes, which have facilitated instantaneous payment, and receipt of funds between parties. The Law Society has attempted to keep up with these advancements and has implemented a number of technological enhancements to our payment processing and cash receipt functions. Our banking resolution is deficient in addressing the next stages of these advancements which include direct deposit of employee and bencher expenses, direct payment of suppliers invoices, direct payment to members and direct transfers to LawPro and LibraryCo Inc.

8. The banking industry and corporate Canada are fast moving towards a "cheque-less" society where obligations are settled by directly depositing funds through instantaneous bank transfers to supplier's accounts. The advantages of this process are streamlined administration, improved cash management and security.

9. The present banking resolution permits the Law Society's signing officers to make deposits and transfers on a limited basis on behalf of the Law Society between bank accounts; however, EFT as now in use was

not in existence at the time the resolution was adopted. In order to make it clear we suggest that an amendment be made to our banking resolution to permit the electronic transfer of funds.

10. EFT is in many ways a much more secure method of settling obligations when compared to writing cheques. It eliminates the need for physical cheque stock thereby reducing cheque fraud and the system is physically and password protected beyond most cheque writing systems. All of the Law Society internal control measures surrounding payment processing and cash receipts will continue to be in place and monitored by both staff and our auditors Deloitte and Touche. EFT also has the advantage of instantaneously settling financial transactions, which will lead to enhanced supplier and client relationships.

11. The Finance and Audit Committee recommends that the Law Society of Upper Canada adopt Electronic Funds Transfer as an alternative method of settling obligations and receiving payments and make the necessary amendments to the banking resolution to bring this into effect.

EXTERNAL COUNSEL FEES

12. It is requested that the Law Society raises the recommended maximum hourly rates paid to all outside counsel for all services provided after October 1, 2003 as set out below:

	MAXIMUM OLD RATE	MAXIMUM NEW RATE
Senior Counsel (12 and more years experience)	$275	$325
10 - 11 years experience	$250	$300
8 –9 years	$235	$250
5 - 7 years	$215	$235
3 - 4 years	$170	$185
Counsel at Bar less than 3 years	$120	$150
Law clerks and students	$90	$90

13. These rates are guidelines and the CEO will exercise his discretion as appropriate. The Litigation Committee will be consulted if these rates are to be exceeded.

14. The rates were last increased in February 2001. The increase is required to retain counsel of appropriate quality and specialisation and to maintain parity with amounts paid to counsel in Toronto by LawPro since April 1, 2003.

15. Up to the end of August 2003 the General Fund has spent $780,000 on external counsel fees which has an annual budget of $800,000. Maximum rates are not paid to all counsel retained but if the new rates had been applied where appropriate in the current year it is estimated that the external counsel fee expense to the end of August would total $850,000. The rate increase will be taken into account in preparing the 2004 operating budget.

16. Convocation is requested to approve the increase in hourly rates for external counsel.

FOR INFORMATION

LAW SOCIETY OF UPPER CANADA GENERAL FUND
UNAUDITED FINANCIAL STATEMENTS FOR THE SIX MONTHS ENDED JUNE 30, 2003

17. The interim financial statements of the General Fund for the second quarter of 2003 were reviewed. The Committee recommends that the statements be received by Convocation for information (page).

LAWYERS FUND FOR CLIENT COMPENSATION
UNAUDITED FINANCIAL STATEMENTS FOR THE SIX MONTHS ENDED JUNE 30, 2003

18. The interim financial statements for the Lawyers Fund for Client Compensation for the second quarter of 2003 were reviewed. The Committee recommends that the statements be received by Convocation for information (page).

LIBRARYCO INC.
UNAUDITED FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2003

19. The interim financial statements for LibraryCo Inc. for the first quarter of 2003 were reviewed. The Committee recommends that the statements be received by Convocation for information (page).

INVESTMENT COMPLIANCE REPORTS

20. Investment Compliance Reports for the quarter ended June 30, 2003 for the General Fund and the Lawyers Fund for Client Compensation are attached at page . The Reports confirm there are no breaches in compliance.

2004 BUDGET –OPERATIONAL REVIEWS

21. A hybrid Zero Based Budgeting philosophy is the basis for the rotational operational reviews which are in place at the Law Society. Each year a number of activities are selected, the mandate or output of the activity is defined and then the resources to meet that output are assessed. As part of 2004 budget deliberations operational reviews for the following two operational areas were completed at the meeting:
    - Professional Development and Competence
    - Communications.

22. The two areas represent 20% of the Society's budgeted expenditures. In addition, the Information Systems department presented the Committee with an overall review of its operations, its strategic direction and anticipated resource requirements for 2004 at its March meeting. The Human Resources department underwent an internal control review conducted by our auditors, Deloitte and Touche, as part of a continuing review of the Society's control processes, the results of which were presented to the Audit Sub-Committee at its March 2003 meeting and to the Finance and Audit Committee in April 2003. Included in this review was the Finance department's payroll processes. Financial processes will continue to undergo further control reviews by Deloitte and Touche over the course of 2003.

23. In 2003, operational areas reviewed were the Compensation Fund, the Client Service Centre , the Great Library and County Libraries. In total therefore, by the end of 2004, programs utilizing approximately 70% of the Society's fiscal resources will have undergone operational reviews or systems audits over the last two years.

24. An expanded briefing on the status of Education Support Services, including the Denison Fund and the Repayable Allowance Program will be presented to the Committee.

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

(1) Copy of the Law Society's banking resolution.

(pages 8 – 15)

(2) Copy of Financial Statements.

(pages 16 – 30)

Re: Amendments to the List of Cheque Signatories

It was moved by Mr. Ruby, seconded by Mr. Chahbar that the list amending Schedule A of the banking resolution include signing officers as follows:

Frank N. Marrocco, Q.C. (Treasurer)
Clayton Ruby – Chair, Finance and Audit Committee
Abdul Chahbar – Vice Chair, Finance and Audit Committee
Beth Symes - Designated Bencher
Derry Millar – Designated Bencher
Malcolm Heins – Chief Executive Officer
Wendy Tysall – Chief Financial Office
Katherine Corrick – Director, Policy and Legal Affairs
Fred Grady – Manager of Finance

Carried

Re: Electronic Funds Transfer Procedures

It was moved by Mr. Ruby, seconded by Mr. Chahbar that the Law Society of Upper Canada adopt Electronic Funds Transfer as an alternative method of settling obligations and receiving payments and make the necessary amendments to the banking resolution to bring this into effect.

Carried

Re: Increase in External Counsel Fees

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve an increase in hourly rates for external counsel.

Carried

ITEM FOR INFORMATION ONLY

- Financial Statements

FEDERATION OF LAW SOCIETIES OF CANADA AND CANLII

Mr. Hunter presented a report of the Federation of Law Societies of Canada for information.

Ms. Janine Miller, Director of Libraries made a brief presentation on CanLII.

Convocation
September 25, 2003

Report on Federation of Law Societies of Canada

Purpose of Report: Information

REPORT

1. George Hunter will provide an oral report to Convocation on the work of the Federation of Law Societies of Canada (FLSC).

2. The following documents are attached as appendices for Convocation's information:

a.	FLSC Financial Statements as at June 30, 2003	Appendix 1
b.	FLSC Budget 2003-2004	Appendix 2
c.	By-laws as enacted May 3, 2003	Appendix 3
d.	CanLII Business Plan 2003-2007	Appendix 4
e.	Pesident Sherron J. L. Dickson's Response to CIMBL's Mortgage Best Practices, with CIMBL Report on Fraud Avoidance attached FLSC response dated August 2003	Appendix 5
f.	FLSC Committees, Representatives and Directors' Responsibilities as at August 27, 2003 (draft)	Appendix 6

Appendix 2

Budget 2003-2004

	Details	Budget	Budget	Projection Year end / Fin d'année
		2003-2004	2002-2003	30 juin 2003
REVENUE / REVENU				
General Operations / Opérations générales		978,775	952,400	954,791
Membership Levy / Cotisation des membres	*72,475 FTE members x 10,50$*	761,000	740,250	747,358
Other Revenues / Autres revenus:		217,775	212,150	207,433
Canadian Legal Information Institute (CanLII) Institut canadien d'information juridique (IJJCan)		20,000	10,000	20,000
Grant form CLE Fund towards Association of CLE Directors (ACLED) Subvention du fonds de formation pour ACLED		5,000	5,000	5,000
Interest on Investments / Intérêts sur placements		15,000	31,000	14,339
Evaluations - National Committee on Accreditation Évaluations - Comité national des équivalences		177,775	166,150	168,094
Special Projects / Projets spéciaux		75,000	319,550	87,146
National Mobility Task Force / Groupe de travail sur la libre circulation	*Not levied 2002-2003 Cotisation non perçue*	50,000	107,282	29,303
Special Litigation Committee / Comité spécial sur le litige	*Levied in / Cotisation perçue 2002-2003*	25,000	212,268	57,843

TOTAL REVENUE / SOMME DES REVENUS		1,053,775	1,271,950	1,041,397

EXPENDITURES / DÉPENSES	Details	Budget 2003-2004	Budget 2002-2003	Projection 30 juin 2003
Governance / Gouvernance		143,000	90,000	90,966
Board Meetings / Réunions du Conseil	*New policy /Nouvelle politique Two face to face & 5 teleconferences / Deux réunions et 5 téléconférences*	83,000	40,000	30,987
President's Honorarium / Honoraires de la présidence		50,000	50,000	50,099
Social charges (president) / Charges sociales (présidence)		5,000		5,000
Board Member Liability Insurance / Ass. Responabilité des administrateurs		5,000		4,880
Liaison Activities / Frais de liaison		241,500	254,400	240,697
General Meetings / Assemblées générales	*Two delegates & new policy / Deux délégués et nouvelle politique*	162,500	158,400	169,713
Annual / Annuelle				
Semi Annual / Semi annuelle				
Convocations & National Conferences / Conseils généraux et Conférences nationales		35,000	55,000	29,521
Meetings of Counterparts / Réunions des contreparties		5,000	5,000	2,825
Government Relations / Relations avec les gouvernements		10,000	15,000	2,550
International Liaisons / Liaisons internationales		25,000	14,000	33,754

Intl Liaison Member Fees / Droits d'adhésion		4,000	7,000	2,334
Standing Committees / Comités permanents:		40,000	70,000	81,527
Emerging Issues Work Group / Groupe de travail sur les nouveaux enjeux				
Regulation of Non Professionnals / Comité sur la réglementation des non-professionnels				1,560
National Copyright Committee / Comité sur le droit d'auteur				

EXPENDITURES / DÉPENSES	Details	Budget 2003-2004	Budget 2002-2003	Projection 30 juin 2003
National Legal Aid Committee / Comité sur l'aide juridique				
By-Law Review Committee / Comité sur la révision des règlements				1,350
NAFTA Committee / Comité sur l'ALENA				
National Multidisciplinary Partnerships Committee / Comité national sur les associations multidisciplinaires				
National WTO Committee / Comité national sur l'OMC				9,789
Governance Task Force / Groupe de travail sur la gouvernance				68,828
Evaluations - National Committee on Accreditation / Évaluatoins - Comité national des équivalences		176,275	161,000	161,236
Professionnal Fees / Honoraires professionnels		20,000	25,000	15,174

Head Office / Siège social	358,000	352,000	341,731
Salaries / Salaires	179,000	161,000	162,687
Staff Travel / Déplacements du personnel	12,000	12,000	10,523
Rent & Taxes / Loyer et taxes	27,000	27,000	23,086
Office Supplies & Equipment, Photocopy, Printing, Telecommunication, Post and Courier / Fournitures et équipement de bureau, réprographie, impression, télécommunication, poste et messagerie	20,000	24,000	28,786
Audit Fees / Honoraires de vérification	8,000	8,000	9,750

EXPENDITURES / DÉPENSES	Details	Budget 2003-2004	Budget 2002-2003	Projection 30 juin 2003
Translation & Interpretation / Traduction & Interprétation		42,000	50,000	40,210
Subcontrating / Soustraitance		20,000	20,000	15,301
Computer, Web & Intranets / Ordinateur, Web et Intranets		45,000	45,000	51,388
Unforeseen Office Expenses / Dépenses de bureau imprévues		5,000	5,000	
TOTAL EXPENDITURES / SOMME DES DÉPENSES		1,053,775	952,400	931,331

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

(1) Copy of the FLSC Financial Statements as at June 30, 2003.
(Appendix 1, pages 1 – 27)

(2) Copy of the By-laws as enacted May 3, 2003.
(Appendix 3, pages 32 – 47)

(3) Copy of the CanLII Business Plan 2003-2007.
(Appendix 4, pages 48 – 87)

(4) Copy of President Sherron J. L. Dickson's Response to CIMBL's Mortgage Best Practices, with CIMBL Report on Fraud Avoidance attached.
(Appendix 5, pages 88 – 123)

(5) Copy of FLSC Committees, Representatives and Directors' Responsibilities as at August 27, 2003 (draft).
(Appendix 6, pages 124 – 136)

PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE REPORT

Mr. Hunter presented the Report of the Professional Development, Competence & Admissions Committee to Convocation.

Professional Development, Competence & Admissions Committee
September 25, 2003

Report to Convocation

Purpose of Report: Decision
Information

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

OVERVIEW OF POLICY ISSUES

DELETION OF THE "10-YEAR" RULE FROM BY-LAW 12

Request to Convocation

1. That Convocation approve amendments to By-law 12 to delete the "10-year" rule. If Convocation approves the amendment the Committee will return to a subsequent meeting of Convocation with the proposed amendments.

Summary of the Issue

2. Section 3 of By-law 12 requires that if, at the time a person applies for admission to the bar admission course, ten or more years have elapsed since he or she graduated from a Canadian law school approved by Convocation or received a certificate of qualification from the National Committee on Accreditation, he or she must complete such further studies as may be required by a Law Society official before being admitted to the bar admission course.

3. The other Canadian jurisdictions do not have a time requirement within which candidates must commence the bar admission program. Moreover, since the Law Society introduced the provision for the completion of further studies, the practice has been to simply require applicants to certify that they have read the BAC materials in advance of taking the course. The reason for this approach is that it has proven impractical and somewhat unrealistic to try to assess what gaps, if any, individual applicants have and what studies would address those gaps.

4. In effect, then, affected applicants are simply pre-reading what they will have to study and be tested on in the BAC once they are accepted as students. As such it is questionable whether the provision serves any real purpose.

5. The Committee is of the view that the provision serves no competence-related purpose and recommends that it be deleted from By-law 12.

6. If Convocation agrees the Committee will return to a subsequent meeting of Convocation with the proposed by-law amendments.

THE REPORT

Terms Of Reference/Committee Process

7. The Committee met on September 11, 2003. Committee members in attendance were George Hunter (Chair), Gavin MacKenzie, (Vice-Chair), Bill Simpson (Vice-Chair), Peter Bourque, Kim Carpenter-Gunn, Alan Gold, Gary Gottlieb, and Laura Legge. Abe Feinstein also attended. Staff in attendance were Diana Miles and Sophia Sperdakos.

8. The Committee is reporting on the following matters:

Policy – For Decision

- Deletion of the "10-year" rule from By-law 12

Information

- Appointments to the Specialist Certification Board
- Articling Student Placement Information

DELETION OF THE "10-YEAR" RULE FROM BY-LAW 12

Background

9. Prior to the 1999 amendments to the *Law Society Act*, former Regulation 708 provided that every student-at-law was required to complete the Bar Admission Course within ten years of graduating from an approved Canadian law school. This requirement could be modified only under exceptional circumstances. The provision was onerous and had the potential to have a disproportionate impact on women who tended to be over-represented in the students who completed law school, but deferred completing the BAC.

10. This provision of the regulation was not initially included in amendments to the Act. In 1999 the former Admissions & Equity Committee recommended and Convocation approved changes to provide that:

> If more than ten years has elapsed since an applicant to the BAC has graduated from an approved law school the Director of Education may require as a condition for admission to the BAC, and following approved guidelines, that applicants complete such further studies as the Director considers necessary to ensure that their knowledge and skills are sufficiently current.

11. This provision was subsequently amended again to include candidates who receive a certificate from the National Committee on Accreditation more than ten years before application for admission to the BAC.

12. By-law 12 section 3(1) currently reads as follows:

> *3. (1) A person may be admitted to the Bar Admission Course as a student-at-law if he or she has,*
>
> *(a) not more than ten years before his or her application for admission to the Bar Admission Course as a student-at-law,*
>
> *(i) graduated from a law course that is offered by a university in Canada and is approved by Convocation, or*
>
> *(ii) received a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans; or*
>
> *(b) (i) more than ten years before his or her application for admission to the Bar Admission Course as a student-at-law,*
>
> *(A) graduated from a law course that is offered by a university in Canada and is approved by Convocation, or*
>
> *(B) received a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans, and*
>
> *(ii) completed such further studies as may be required by the Society official.*
>
> *Requiring completion of further studies*
> *(2) For the purposes of subclause (1) (b) (ii), in determining whether to require a person to complete further studies, and in determining what studies to require the person to complete, the Society official shall consider the following factors:*
>
> *1. The period of time that has passed since the person graduated from the law course or received the certificate of qualification.*
>
> *2. The extent to which the person has made use of legal skills and knowledge since he or she graduated from the law course or received the certificate of qualification.*
>
> *3. The extent to which the person has engaged in activities that would enhance his or her ability to practise law in a competent manner if the person were to become a member.*
>
> *Nature of further studies*
> *(3) For the purposes of subclause (1) (b) (ii), the Society official may require a person to complete only studies that are related to the content of the Bar Admission Course.*

13. The other Canadian jurisdictions do not have a time requirement following law school within which candidates must commence the bar admission program. Moreover, since the Law Society introduced the provision for the completion of further studies, the practice has been to simply require applicants to certify that they have read the BAC materials in advance of taking the course. The reason for this is that it has proven impractical and somewhat unrealistic to try to assess what gaps, if any, individual applicants have and what studies would address those gaps.

14. In effect, then, applicants are simply pre-reading what they will have to study and be tested on in the BAC once they are accepted as students. As such it is questionable whether the provision serves any real competence-related or other purpose.

15. In July 2003, seven jurisdictions in Canada implemented the National Mobility Agreement. As a result, a newly called lawyer from a signatory province that has implemented the Agreement may be called to the bar of Ontario without having to write any examinations. He or she will simply have to certify that he or she has reviewed and understood certain assigned reading materials. Since none of the other provinces has a "10-year rule" like Ontario's there is the potential for a person from another province to enter the bar admission program in that province more than 10 years after completing law school, be admitted to the bar of that province and immediately thereafter be called to the bar in Ontario without having to undertake the further studies contemplated in By-law 12. This makes Ontario's requirements potentially more onerous for Ontario candidates than for those from elsewhere.

16. Given these factors, the Committee is of the view that the 10-year rule is neither fair nor necessary and does not serve a competence-related purpose.

Request to the Convocation

17. That Convocation approve amendments to By-law 12 to delete the "10-year" rule. If Convocation approves the amendment the Committee will return to a subsequent meeting of Convocation with the proposed amendments.

INFORMATION

SPECIALIST CERTIFICATION BOARD APPOINTMENTS

18. In April 2003 Convocation approved By-law 38 (Specialist Certification). Section 3 of the By-law establishes the Specialist Certification Board to be made up of seven people who the PDC&A Committee appoints without having to go to Convocation for subsequent approval.

19. The Board is to be made up of 4 benchers who are not lay benchers, 1 lay bencher, and 2 certified specialists who are not benchers.

20. In June 2003 the Committee approved a list of names to be invited to sit on the Board. All those invited have accepted. The Board members are as follows:

Elected benchers
Gerry Swaye (Chair)
Larry Banack
Kim Carpenter-Gunn
Bill Simpson
Lay bencher
Ab Chahbar

Non-bencher certified specialists
Alf Mamo
Roger Oatley

ARTICLING STUDENT PLACEMENT INFORMATION

21. Appendix 1 contains the most recent report on articling placement for students in the 45th BAC (2002-2003), for Convocation's information.

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

A copy of the Placement Report 2002/2003.

(Appendix 1, pages 8 – 19)

Re: Elimination of "10-Year Rule"

It was moved by Mr. Hunter, seconded by Mr. Ducharme that Convocation approve amendments to By-Law 12 to delete the "10-year" rule.

Carried

ITEM FOR INFORMATION ONLY

- Specialist Certification Board Appointments

CONVOCATION ROSE AT 1:00 P.M.

The Treasurer and Benchers had as their guests for luncheon Ms. Georgette Gagnon and Ms. Charlotte Kanya-Forstner.

Confirmed in Convocation this 23rd day of October, 2003

Treasurer