MINUTES OF CONVOCATION

Friday, 27th June, 1997
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Aaron, Adams, Angeles, Armstrong, Arnup, Backhouse, Banack, Bobesich, Carey, Carpenter-Gunn, Carter, R. Cass, Chahbar, Cole, Cronk, Crowe, Curtis, DelZotto, Eberts, Epstein, Farquharson, Feinstein, Finkelstein, Furlong, Gottlieb, Harvey, Krishna, Lamek, Lawrence, MacKenzie, Manes, Marrocco, Millar, Murphy, Murray, O'Brien, O'Connor, Ortved, Puccini, Rock, Ross, Ruby, Sachs, Scott, Sealy, Stomp, Swaye, Thom, Topp, Wardlaw, Wilson and Wright.

.....

The reporter was sworn.

.....

IN PUBLIC

.....

ELECTION OF TREASURER

The candidates for Treasurer were Harvey T. Strosberg and Thomas Carey.

Mr. Allan Lawrence was appointed as Treasurer's scrutineer.

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

The Secretary announced the results of the election.

Harvey Strosberg - 40 votes
Tom Carey - 9 votes

Mr. Carey rose to congratulate Mr. Strosberg.

It was moved by Mr. Carey, seconded by Ms. Eberts that the vote be made unanimous and the ballots be destroyed.

Carried

Mr. Strosberg took the chair and thanked Ms. Elliott for her term as Treasurer.

Report of the Direction of Bar Admissions

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Bar Admissions begs leave to report:

B.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates having successfully completed the Bar Admission Course now have filed the necessary documents and paid the required fee and apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Friday, June 27th, 1997:

Patricia Anne Bowles	36th BAC
Wai Kwong Cheng	38th BAC
Marlett Marcia Dobson	38th BAC
Vernon Bruce Gabriel	38th BAC
Janet Esther Glendenning	36th BAC
Oswald Paul David James	38th BAC
Lesley Sharon King	38th BAC
Lisa Ann Lueske	38th BAC
Mary Clare MacKinnon	37th BAC
Marie-Lola-Sonia Maltais	38th BAC
Nadine Tara Mani	38th BAC
Bruce Code Robertson	38th BAC
Louise Shap	37th BAC
Patricia Diane Marie Sheehan	38th BAC
Michael Simpson	37th BAC
Edmond John Stokes	37th BAC
Janice Marie Zima	38th BAC

B.1.3. Transfer from another Province - Section 4

B.1.4. The following candidates having completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents and paid the required fee now apply for call to the Bar and to be granted a Certificate of Fitness at Convocation on Friday, June 27th, 1997:

Philippe David	Province of Quebec
Merry Deirdre Harper	Province of Manitoba
Earl Melvin Hill	Province of British Columbia
Paul Joffe	Province of Quebec
Esbon Anthony Ross	Province of Nova Scotia
Donna Soble-Kaufman	Province of Quebec

B.2. MEMBERSHIP UNDER RULE 50

B.2.1. (a) Retired Members

B.2.2. The following members are sixty-five years of age and fully retired from the practice of law and have requested permission to continue their memberships in the Society without payment of annual fees:

Douglas Andison	Toronto
Douglas Charles Cryderman	Ottawa
John Murray Driesman	London
Robert Gaulin	Ottawa
Robert Gilbert Godson	Bangkok, Thailand
Abraham Solomon Kellerman	Windsor
Sally Roper Lomas	Toronto
John Wan Pang Mo	Toronto
Edmund Harold Wykes	Etobicoke

B.2.3. Incapacitated Members

B.2.4. The following members are incapacitated and unable to practise law and have requested permission to continue their memberships in the Society without payment of annual fees:

Roger Calixte Galipeau	North Bay
Gerard Guay Hull	PQ
Donald Arthur Martin	Thunder Bay

B.2.5. (b) The following members are sixty-five years of age and fully retired from the practice of law and have requested permission to continue their memberships in the Society without payment of annual fees subject to their filing the appropriate forms as prescribed by Section 16 of Regulation 708:

Elizabeth Slava Budi	Toronto
Joseph Rudolph Cenek Cermak	Toronto
John Gerald Dunlap	Ottawa
Alexander Desmond Thomas Givens	North York
Marc Emile Lefebvre	Brantford
Harold Joseph Murphy	Toronto
Marlene Tannis Patricia Wood	Markham

B.2.6. Incapacitated Members

The following members are incapacitated and unable to practise law and have requested permission to continue their memberships in the Society without payment of annual fees subject to their filing the appropriate forms as prescribed by Section 16 of Regulation 708:

John Victor Barkans	Ancaster
Ellen Cherniak Brudner	Windsor
Sharon Helen Tessier	Kingston

B.2.7. (c) Termination of Retirement Status

B.2.8. The following members wish to terminate their retirement under Rule 50 and return to active status:

Harvey Brian Joseph Edwards	Waterloo
Alfred Anthony Petrone	Thunder Bay

B.2.9. (d) Termination of Incapacitated Status

Sidney W. Goldstein of Ottawa retired under Rule 50 on November 29, 1996 due to illness. The member has submitted medical evidence in support of his request to return to active status. Mr. Goldstein has returned to practice effective June 2, 1997.

Mary Grace Anne Elizabeth Robinson of Cornwall retired under Rule 50 on June 28, 1996 due to illness. The member has submitted medical evidence in support of her request to return to active status.

B.3. MEMBERSHIP RESTORED

The following member has given notice that he ceased to hold judicial office and wishes to be restored to the Rolls of the Law Society pursuant to Section 31(2) of the Law Society Act:

	Effective date
George Williams Adams Ontario Court of Justice (General Division)	April 15, 1997

B.4. RESIGNATION - SECTION 12 OF REGULATION 708 MADE UNDER THE LAW SOCIETY ACT

B.4.1. The following members have applied for permission to resign their memberships in the Society and have submitted Declarations/Affidavits in support. In all cases the annual filings are up to date. In cases where the member was engaged in the practice of Ontario law for any amount of time, the member has declared that all trust funds and clients' property for which they were responsible have been accounted for and paid over to the persons entitled thereto. They have further declared that all clients' matters have been completed and disposed of, or arrangements made to the clients' satisfaction to have their papers returned to them, or have been turned over to another lawyer. The Complaints, Audit and Staff Trustees departments all report that there are no outstanding matters with these members that should prevent them from resigning. These members have requested that they be relieved of publication in the Ontario Reports:

1. Cecil Gordon Bale of Kingston, was called to the Bar on September 22, 1967 and has never practised Ontario law. The 1997 annual fee is outstanding.

2. Patricia Colleen Bell of Oshawa, was called to the Bar on April 7, 1983 and practised law from November, 1985 to July 1995. The 1997 annual fee is outstanding.

3. Mary Catherine Binhammer of Markham, was called to the Bar on April 19, 1985 and practised law from April 1985 to January 1993. The 1997 annual fee is outstanding.

4. Warren Mitchell Bongard of North York, was called to the Bar on February 9, 1993 and practised law from February 9, 1993 to May 16, 1996. The 1997 annual fee is outstanding.

5. Gregg Paul Patrick Cancade of Vernon, British Columbia, was called to the Bar on April 9, 1976 and practised law from his call date to present. The 1997 annual fee is outstanding.

6. Craig Steven Cook of Woodbridge, was called to the Bar on February 8, 1994, and practised law from March 1994 to August 1996. The 1997 annual fee is outstanding.

7. Marion Elizabeth Crane of Whitby, was called to the Bar on April 14, 1980 and has never practised Ontario law. The 1997 annual fee is outstanding.

8. Florence Martha Deacon of Vancouver, British Columbia, was called to the Bar on April 9, 1979 and practised law until February 1984. The 1997 annual fee is paid.

9. Andrew Peter Dobrowolski of Toronto, was called to the Bar on February 7, 1996 and practised law from February 7, 1996 to January 31, 1997. The 1997 annual fee is outstanding.

10. Marvin David Dyck of Winnipeg, Manitoba, was called to the Bar on April 6, 1983 and practised law from April 7, 1983 to December 1996. The 1997 annual fee is outstanding.

11. Derek Scott Flaman of Edmonton, Alberta, was called to the Bar on February 23, 1996 and has never practised Ontario law. The 1997 annual fee is outstanding.

12. Paul Brian Nicholas Fleming of Halifax, Nova Scotia, was called to the Bar on February 20, 1981 and has never practised Ontario law. Member is suspended effective May 1, 1997 for non-payment of fees.

13. David Gisser of Winnipeg, Manitoba, was called to the Bar on April 9, 1979 and practised Ontario law for few months. The 1997 annual fee is outstanding.

14. Brian Joseph Goldkind of Vaughan, was called to the Bar on February 24, 1995 and has never practised Ontario law. The 1997 annual fee is outstanding.

15. Lorne Ross Guest of London, was called to the Bar on March 26, 1971 and practised law from April 19, 1971 to April 8, 1997. The 1997 annual fee is paid.

16. Janine Marie Hillier of Pembroke, was called to the Bar on February 3, 1994 and practised law from February 1995 to September 27, 1996. Her rights and privileges were suspended effective May 1, 1997 for non-payment of annual fees.

17. Yi-Wen Hsu of Hilversum, Netherlands, was called to the Bar on April 28, 1995 and practised law from April 28, 1995 to August 23, 1996. The 1997 annual fee is outstanding.

18. Francis Kenneth Jimmo of Scarborough, was called to the Bar on April 15, 1985 and practised law until end of 1987. His rights and privileges were suspended effective May 1, 1997 for non-payment of annual fees.

19. Daniel Joffe of Toronto, was called to the Bar on February 16, 1995 and has never practised Ontario law. The 1997 annual fee is outstanding.

20. Charis Edlan Kelso of Toronto, was called to the Bar on February 9, 1993 and has never practised Ontario law. The 1997 annual fee is outstanding.

21. John Herbert Kenney of Etobicoke, was called to the Bar on April 12, 1962 and has practised law from 1962 to 1964. His rights and privileges were suspended on May 1, 1997 for non-payment of annual fee.

22. Bernard Joseph Kwasniewski of New York, New York, was called to the Bar on February 8, 1994 and has practised law from February 1994 to April 1996. The 1997 annual fee is outstanding.

23. Rosanne Marie Kyle of Coquitlam, British Columbia, was called to the Bar on February 8, 1993 and has practised law from February 1993 to September 1995. The 1997 fee is outstanding.

24. Gerald Ian Leckie of North York, was called to the Bar on April 21, 1972 has practised law from 1972 to 1995. The 1997 annual fee is outstanding.

25. Carol Anne MacKay of Markham, was called to the Bar on February 16, 1995 and has never practised Ontario law. The 1997 annual fee is outstanding.

26. Bruce Wayne MacLean of Vancouver, British Columbia, was called to the Bar on February 5, 1996 and has practised law from August 30, 1996 to present. The 1997 annual fee is outstanding.

27. Peter David Maddaugh of Toronto, was called to the Bar on Oct 15, 1971 and practised law from 1975 to April 22, 1997. The 1997 annual fee has been paid.

28. Stephen Howard Marcus of Washington, District of Columbia, was called to the Bar on May 7, 1980 and has not practised Ontario law since 1982. The 1997 annual fee is outstanding.

29. Brenda Matte of Winnipeg, Manitoba, was called to the Bar on June 23, 1995 and has not practised Ontario law. The 1997 annual fee is paid.

30. Catherine Anne McCann-Kyte of Pembroke, was called to the Bar on June 24, 1994 and practised law from June 24, 1994 to August 30, 1996. The 1997 annual fee is outstanding.

31. Bruce Robert McDonald of Toronto, was called to the Bar on March 26, 1971 and practised law from 1971 to 1995. His rights and privileges were suspended on May 1, 1997 for non-payment of the annual fee..

32. Lara Jeanne Morris of Halifax, Nova Scotia was called to the Bar on February 16, 1995 and practised law from March 15, 1995 to November 6, 1996. The 1997 annual fee is outstanding.

33. Gavin Richard Murphy of Ottawa, was called to the Bar on March 28, 1990 and never practised law. The 1997 annual fee is outstanding.

34. Suellen Janet Murray of Halifax, Nova Scotia, was called to the Bar on February 7, 1992 and has never practised Ontario law. A portion of 1996/96 annual fee is outstanding, along with 1997 fee.

35. Jodine Marie Nieman of Marlton, New Jersey, was called to the Bar on February 7, 1992 and practised law from February 7, 1992 to May 26, 1995. The 1997 annual fee is outstanding.

36. Shari Novick of Toronto, was called to the Bar on April 15, 1988 and practised law from September 1988 to March 1, 1991. After living out of the country for six months, member returned to Ontario and was appointed a Referee/Adjudicator and held that position for 5-1/2 years. The 1997 annual fee is outstanding.

37. Kathleen Mary O'Neill of Brockville, was called to the Bar on March 30, 1990 and practised law from March 30, 1990 to June 30, 1994 as associate of Blake, Cassels & Graydon in Toronto, and practised law from January 1, 1995 to March 31, 1997 as an associate of Henderson Johnston Fournier in Brockville. The 1997 annual fee is paid.

38. Cindy Anne Peters of Calgary, Alberta was called to the Bar on February 8, 1994 and practised law until June 28, 1996. The 1997 annual fee is paid.

39. Anthony MacLeod Pilling of Hamilton, Bermuda was called to the Bar on March 25, 1966 and practised law from September 1, 1966 to September 1, 1992 and from September 1, 1992 to present engaged as a company lawyer. The 1997 annual fee is outstanding.

40. Natalija Popovic of Toronto, was called to the Bar on March 30, 1990 and have practised law from 1990 to 1995. The 1997 annual fee is outstanding.

41. Andrea Patricia Ross of Dundee, United Kingdom was called to Bar on March 22, 1991 and have practised law from March 1991 to April 2, 1997. The 1997 annual fee is outstanding.

42. Nicole Renae Scheidl of Ottawa, was called to the Bar on March 28, 1990 and have practised law from March 28, 1990 to April 28, 1996. The 1997 annual fee is outstanding.

43. Jo-Anne Sinclair of Santa Clara, California, was called to the Bar on March 30, 1990 and has not practised Ontario law since September 1995. The 1997 annual fee is outstanding.

44. Jason Michael Somer of Denver, Colorado was called to the Bar February 16, 1995 and have practised law from February 16, 1995 to August 1995. The 1997 annual fee is outstanding.

45. Katherine Jean Suffel of Ottawa, was called to the Bar on February 5, 1996 and has never practised Ontario law. The 1997 annual fee is outstanding.

46. Paul Bernard Stanley Tetro of Kanata, was called to the Bar on April 19, 1963 and practised law from call date to 1970. He then worked as a government lawyer until December 27, 1996. The 1997 annual fee is outstanding.

47. Gerald Paul Wanhella of Saskatoon, Saskatchewan was called to the Bar on March 22, 1974 and has practised law from March 22, 1974 to March 1977. The 1997 annual fee is outstanding.

48. Marc Reid Bonfield Whittemore of Kelowna, British Columbia was called to the Bar on April 13, 1981 and has never practised Ontario law. The 1997 fee is outstanding.

49. Graham David Worley of Pontypool, was called to the Bar on September 18, 1959 and has practised law until present. The 1997 fee is paid.

50. Barry Neville Zacharias of Nanaimo, British Colombia , was called to the Bar on April 18, 1988 and practised Ontario law from April 1988 to June 1990. His rights and privileges were suspended on March 28, 1991 for non-payment of the annual fee. The annual fees for 1990/91 to 1992/93 inclusive are outstanding.

51. Linda Suzanne Gadz of Los Angeles, California was called to the Bar on February 7, 1992 and practised Ontario law form July 1992 to December 1996. Her rights and privileges were suspended on May 1, 1997 for non-payment of the annual fee.

C. INFORMATION

C.1. APPLICATION TO BE LICENSED AS A FOREIGN LEGAL CONSULTANT

C.1.1. The following individual has applied to be certified as a foreign legal consultant in Ontario:

Susan Barbara Saltzman	The State of New York - Shearman & Sterling

C.1.2. The application is complete and she has filed all necessary undertakings.

C.2. READMISSION FOLLOWING RESIGNATION AT OWN REQUEST

C.2.1. The following former member has applied for readmission and has met all the requirements in that regard:

Anita Marie Bennett	Called:	March 22nd, 1991
	Resigned:	February 26th, 1993

C.3. REINSTATEMENT FOLLOWING SUSPENSION

C.3.1. The following suspended members will be reinstated upon payment of all arrears of fees or upon making the necessary payment plan arrangements with the Membership Department:

C.3.2. David Ross Drummond — Called: April 9th, 1981; Suspended: 26th February, 1988 (for non-payment of the annual fee)

George Kuzmicz — Called: April 10th, 1981; Suspended: 26th February, 1988 (for non-payment of the annual fee)

C.3.3. The Requalification Examination has been waived for both members in light of their having continued to actively practise in another Canadian common law jurisdiction since the date of their respective suspensions in Ontario.

C.4. CHANGE OF NAME

C.4.1.

From	To
Susan Blanche Arlitt	Susan Blanche Doyle (Marriage Certificate)
Jennifer Lee Pawson	Jennifer Lee Pawson Latella (Marriage Certificate)
Judy Ann Fowler	Judy Ann Fowler Byrne (Marriage Certificate)
Yael Reboh	Joelle Yael Reboh (Proof of Citizenship)
Kam Man Kwan	Simon Kam Man Kwan (Change of Name Certificate)
Patricia Jean Yurchuk	Patricia Jean Lavallee (Marriage Certificate)
Sheri Lea Snitman	Sheri Lea Kulik (Marriage Certificate)
May Yin Lau	May Yin Fung (Change of Name Certificate)
Lynda June Townsend-Robertson	Lynda June Townsend (Birth Certificate)

C.5. ROLLS AND RECORDS

C.5.1. (a) Deaths

The following Members have died:

Victor Bertram J Collins Dunnville	Called: September 20, 1934 Died: January 1, 1987
David Wilfred Boyd Smiths Falls	Called: June 20, 1929 Died: June 27, 1988

Berko Devor Hamilton	Called: September 20, 1956 Died: May 23, 1993
Charles Roger Archibald Toronto	Called: June 20, 1935 Died: March 31, 1994
John Robert Morrison Connle Hill	Called: October 20, 1955 Died: April 8, 1994
Richard Becher Hungerford Guelph	Called: June 19, 1930 Died: May 13, 1995
Lawrence Samuel Cappe Etobicoke	Called March 23, 1973 Died: September 4, 1995
William James Weir Tillsonburg	Called: September 16, 1948 Died: June 30, 1995
Mildred Emilia Caccia Toronto	Called: April 12, 1962 Died: October 3, 1995
Britton Bath Osler Toronto	Called: June 20, 1929 Died: November 11, 1995
Claude Elgin Fallis Mount Forest	Called: June 16, 1938 Died: January 21, 1996
James Warren York Jr. Stittsville	Called: March 20, 1952 Died: February 2, 1996
Stefan Alfonso Malacca Woodbridge	Called: June 25, 1959 Died: June 13, 1996
Robert Lewis Stephenson Toronto	Called: September 18, 1959 Died: September 23, 1996
Leo Albert Landreville Ottawa	Called: October 20, 1938 Died: October 4, 1996
Ilsa Janice Shore Toronto	Called: April 6, 1982 Died: October 19, 1996
Cecil Robert Croll Windsor	Called: February 18, 1932 Died: November 26, 1996
James Francis Dunn Peterborough	Called: October 18, 1945 Died: January 27, 1997
David Lafferty Mississauga	Called: June 23, 1955 Died: February 1, 1997
Harold Everett Kimberley Scarborough	Called: September 14, 1951 Died: February 5, 1997
Joseph Jean Paul Guertin Luskville	Called: June 29, 1948 Died: March 21, 1997

Huron Ross Davidson London	Called: October 20, 1920 Died: March 22, 1997
Stanley Howard Newman Toronto	Called: March 19, 1970 Died: March 27, 1997
Manning Harold Roebuck Toronto	Called: January 17, 1924 Died: April 2, 1997
Kenneth Kirby O'Hara Toronto	Called: June 29, 1949 Died: April 4, 1997
Elmer Stephen Morrison Toronto	Called: March 22, 1991 Died: April 12, 1997
Campbell Revere Osler Toronto	Called: June 29, 1948 Died: April 21, 1997
John Cullen Campbell London	Called: March 23, 1973 Died: April 25, 1997
Ralph Scott McCreath Toronto	Called: June 29, 1949 Died: May 2, 1997
Marjorie Alice Ransier Laird Palmer Willowdale	Called: September 16, 1948 Died: May 8, 1997
Albert Main Waller Burlington	Called: November 22, 1923 Died: May 13, 1997
Peter Levine Toronto	Called: November 21, 1940 Died: May 13, 1997
Roy Clement Sharp Kitchener	Called: June 15, 1939 Died: May 16, 1997

C.5.2. (b) Permission to Resign

C.5.3. The following members were permitted to resign their memberships in the Society and their names have been removed from the rolls and records of the Society.

Arnold Epstein Toronto	Called: March 25, 1966 Resigned: May 22, 1997
Irving Goodman Toronto	Called: June 25, 1959 Resigned: May 22, 1997
Frederick Bernard Sussmann Ottawa	Called: June 15, 1973 Resigned: April 3, 1997

C.5.4. (c) Disbarments

C.5.5. The following members were disbarred from the Society and their names have been removed from the rolls and records of the Society:

Christopher Stanley Godfrey North York	Called: April 14, 1978 Disbarred: April 3, 1997
Timothy Michael Kinnaird Toronto	Called: March 30, 1990 Disbarred: April 3, 1997
Sadrudin Jaffer Thornhill	Called: April 8, 1976 Disbarred: April 24, 1997
Alexandre Patterson Dufresne Republic of Korea	Called: March 29, 1977 Disbarred: April 24, 1997
Robert Noel Irving Bates Burlington	Called: March 22, 1968 Disbarred: May 22, 1997
Stanley David Goldberg Toronto	Called: March 24, 1972 Disbarred: May 22, 1997

C.5.6. (d) Membership in Abeyance

Upon their appointments to the offices shown below, the memberships of the following members have been placed in abeyance under Section 31 of The Law Society Act:

William Raymond Wolski Newmarket	Called: April 14, 1978 Appointed to the Ontario Court (Provincial Division) January 20, 1997
Arthur Murray Gans Toronto	Called: March 22, 1974 Appointed to the Ontario Court (General Division) March 18, 1997
Mary Anne Sanderson Toronto	Called: April 9, 1976 Appointed to the Ontario Court (General Division) March 18, 1997
Katherine Edna Swinton Toronto	Called: September 21, 1979 Appointed to the Ontario Court (General Division) March 18, 1997
Catherine Dick Aitken Ottawa	Called: March 20, 1975 Appointed to the Ontario Court (General Division) March 19, 1997
Julian Polika Toronto	Called: March 17, 1967 Appointed to the Ontario Court (General Division) April 7, 1997

Mary Josephine Lillian McLaughlin Nolan Windsor	Called: April 7, 1983 Appointed to the Ontario Court April 7, 1997
Bernard Joseph Manton Ottawa	Called: April 13, 1962 Appointed to the Ontario Court (General Division) April 8, 1997
Denise Elsie Bellamy Toronto	Called: April 10, 1980 Appointed to the Ontario Court (General Division) April 15, 1997
Bruce Walter Duncan Toronto	Called: September 26, 1986 Appointed to the Ontario Court (Provincial Division) May 1, 1997
George Joseph Paul Brophy Lucknow	Called: April 9, 1976 Appointed to the Ontario Court (Provincial Division) May 12, 1997
Richard Edward Jennis St. Catharines	Called: April 10, 1980 Appointed to the Ontario Court (Provincial Division) May 20, 1997
Julia Ann Morneau Owen Sound	Called: April 12, 1984 Appointed to the Ontario Court (Provincial Division) April 30, 1997

C.6. LIFE MEMBERS

C.6.1. Pursuant to Section 49, the following members are eligible to become Life Members of the Society having been called to the Bar on June 19, 1947:

Alec Zealand Beasley	Hamilton
John Stanley Boeckh	St. Catharines
James Somerville Brown	Toronto
Douglas Ian Wallace Bruce	Peterborough
Kenneth Burn	Stouffville
George Charlton Butterill	Scarborough
George William Collins-Williams	Etobicoke
Francis Costello	Kitchener
Patrick Stanley Fitzgerald	Sault Ste. Marie
James Welshe Gemmell	Toronto
Douglas Wilson Gilmour	Toronto
Edwin Alan Goodman	Toronto
Daniel Aiken Lang	Toronto
Charles Hugh Mahoney	St. Catharines
Walter Leishman McGregor	Windsor
Gerald Alastair Nash	Welland
Stuart Peebles Parker	Kimberly
Norman MacDougall Simpson	Toronto

Vernon Milton Singer	Willowdale
Robert Gordon Waldie	Toronto
William Anthes Willson	Windsor

ALL OF WHICH is respectfully submitted

DATED this the 27th day of June, 1997

It was moved by Mr. Epstein, seconded by Mr. Adams that the Report of the Director of Bar Admissions be adopted.

Carried

THE REPORT WAS ADOPTED

CALL TO THE BAR

The following candidates were presented to the Treasurer and Convocation and were called to the Bar by the Treasurer and the degree of Barrister-at-Law was conferred upon each of them. They were then taken by Ms. Eberts before Mr. Justice Gerald F. Day to sign the Rolls and take the necessary oaths.

Patricia Anne Bowles	36th Bar Admissions Course
Wai Kwong Cheng	38th Bar Admissions Course
Marlett Marcia Dobson	38th Bar Admissions Course
Vernon Bruce Gabriel	38th Bar Admissions Course
Janet Esther Glendenning	36th Bar Admissions Course
Oswald Paul David James	38th Bar Admissions Course
Lesley Sharon King	38th Bar Admissions Course
Lisa Ann Lueske	38th Bar Admissions Course
Mary Clare MacKinnon	37th Bar Admissions Course
Marie-Lola-Sonia Maltais	38th Bar Admissions Course
Nadine Tara Mani	38th Bar Admissions Course
Bruce Code Robertson	38th Bar Admissions Course
Louise Shap	37th Bar Admissions Course
Patricia Diane Marie Sheehan	38th Bar Admissions Course
Michael Simpson	37th Bar Admissions Course
Edmond John Stokes	37th Bar Admissions Course
Janice Marie Zima	38th Bar Admissions Course
Philippe David	Transfer, Province of Quebec
Merry Deirdre Harper	Transfer, Province of Manitoba
Earl Melvin Hill	Transfer, Province of British Columbia
Paul Joffe	Transfer, Province of Quebec
Esbon Anthony Ross	Transfer, Province of Nova Scotia
Donna Soble-Kaufman	Transfer, Province of Quebec

MOTION - Reports Taken as Read

It was moved by Ms. Ross, seconded by Mr. Crowe that the Draft Minutes for May 22nd and 23rd, 1997 and the following Reports be adopted:

Report of the Clinic Funding Committee

Admissions and Equity Committee Report (re: Amendment to Phase Three Requirements for Standing)
Professional Development and Competence Committee Report
Profession Regulation Committee Report (re: Committee Planning)
Special Committee on Relief and Assistance Report

Carried

Clinic Funding Committee Report

Meeting of June 12th, 1997

Clinic Funding Committee
June 13, 1997

REPORT TO CONVOCATION

Nature of Report: Information

THE CLINIC FUNDING COMMITTEE met on June 12, 1997. In attendance were:

Committee members: Paul Copeland, Chair, Pamela Mountenay-Cain, Gordon Wolfe
Joana Kuras, Clinic Funding Manager

This report contains:

1. Clinic Funding Committee Statement of Expenditures for 1996/97, attached as Schedule A. The Provincial Auditor examines the Committee's accounting records as part of the annual audit of the Ontario Legal Aid Plan.

2. Clinic Funding Committee proposed budget for 1997/98.
The Clinic Funding Committee is awaiting designation of funds by the Attorney General for fiscal 1997/98.

ALL OF WHICH is respectfully submitted

Paul Copeland
Chair
Clinic Funding Committee

June 13, 1997

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

(1) Copy of Statement of Expenditures April 1, 1996 to March 31, 1997.
(Schedule A (pages 1 - 5))

(2) Copy of Proposed Budget 1997/98.

(Schedules 1 and 2)

THE REPORT WAS ADOPTED

Admissions and Equity Committee Report

Meeting of June 12th, 1997

Re: Amendment to Phase Three Requirements for Standing

Admissions and Equity Committee
June 12, 1997

Report to Convocation

Purpose of Report: Decision Making

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Admissions & Equity Committee (the "Committee") met on June 12, 1997. Committee members in attendance were Philip Epstein (Chair), Tom Carey, William Carter, Allan Lawrence, Frank Marrocco, and Harriet Sachs. Staff in attendance were Meg Angevine, Ian LeBane, Thomas Kowall, Lynn Silkauskas, Sophia Sperdakos, and Alan Treleaven.

2. The Committee is reporting on one matter it considered. It seeks Convocation's approval of its proposals respecting the following matter:
   - Amendment to Phase Three Requirements for Standing.

AMENDMENT TO PHASE THREE REQUIREMENTS FOR STANDING

NATURE AND SCOPE OF THE ISSUE

3. On May 23, 1997 Convocation approved the 1997 Phase Three Requirements for Standing.

4. The Phase Three Requirements for Standing govern the requirements for passing Phase Three of the Bar Admission Course. This is the four month teaching term of the Bar Admission Course that follows articling and includes licensing examinations.

5. Specifically the requirements set out the rules concerning the passing standard for the course, the consequences of failure, the attendance requirement, guidelines for granting exceptions to the attendance requirement, grounds upon which special accommodation is granted, and consequences to students who violate applicable rules.

6. With some drafting changes, the 1997 Phase Three Requirements for Standing are comparable to those approved in 1996.

7. Section 3 of both the 1996 and 1997 Phase Three Requirements reads as follows:

Fail Standing

3. (1) Subject to subsection (2), a student who has not successfully completed Phase Three must repeat Phase Three in its entirety.

(2) A student who otherwise satisfies the requirements for achieving a pass standing in Phase Three, but fails one licensing examination, may repeat the course requirements related to the one failed licensing examination and write the licensing examination at the next scheduled date.

(3) A student who is unsuccessful in repeating Phase Three under subsection (1) or (2) may repeat Phase Three again, but only in its entirety, and only after satisfying the Registrar by a written application that a significant change in circumstances will likely result in successful completion of Phase Three.

8. Subsection (2) was enacted in 1996 to permit a student who, *at the end of the supplemental period prior to the commencement of the next teaching term in Phase Three*, had successfully achieved a pass standing in all Phase Three courses except one. The former Legal Education Committee and Convocation were of the view that it was appropriate to permit a student in these circumstances to repeat only the single course, rather than being obliged to repeat all of Phase Three.

9. Recent experience with the interpretation of the wording of the "one course rule" provision in section 3(2), as it relates to students writing supplemental examinations for the 38th Bar Admission Course (1996), has led the Committee to believe that clarification is necessary.

10. The purpose of the clarification is to ensure that students clearly understand that in order to be in a position to avail themselves of the "one course rule" option, they must have completed all supplementals and achieved a pass standing in all courses except one, before the commencement of the subsequent Phase Three.

REQUEST TO CONVOCATION

11. Convocation is requested to approve additional wording in section 3(2). It is proposed that the form of the motion be as follows:

MOVED THAT Section 3(2) of the Phase Three Requirements for Standing, approved on May 23, 1997, be amended to read as follows: (additional wording underlined)

(2) A student who, *by the commencement of the subsequent Phase Three,* has otherwise satisfied the requirements for achieving a pass standing in Phase Three, but has failed one licensing examination, may repeat the course requirements related to the one failed licensing examination and write the licensing examination at the next scheduled date.

THE REPORT WAS ADOPTED

Professional Development and Competence Committee Report

Meeting of June 12th, 1997

Professional Development and Competence Committee
June 12, 1997

Report to Convocation

Nature of Report: Information

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Professional Development and Competence Committee ("the Committee") met on 12 June, 1997. In attendance were Derry Millar (Chair), Eleanore Cronk, Michael Adams, Kim Carpenter-Gunn, Mary Eberts, Ronald Cass, Helene Puccini and Donald Lamont with staff members Wayne Mowat, Alan Treleaven, Janine Miller, Paul Truster, Mary Shena and Susan Binnie.

1. The Committee is reporting on four matters:

- the progress of the working group formed in January, 1997 to consider budget issues relating to County and District Law Libraries;

- the composition and first meetings of the Post-Call Education Advisory Group;
- Specialist Certification applications and recertifications approved in Committee;
- a review of current and new policy issues proposed by the Committee for 1997-98.

2. This report contains:

- directions to the Working Group on Budget Issues for County and District Law Libraries

  (a) to present a revised report on the collection of library funding to Committee in September, 1997, and
  (b) to move to a review of policy issues that could underlie consideration of amendments to sections of Regulation 708 dealing with County and District Law Libraries;

- a report by the Director - Continuing Legal Education on the membership and first meetings of the Post-Call Education Advisory Group, formed to carry out action plans that constitute part of the follow-up to the *Report on Post-Call Learning for Lawyers* (adopted by Convocation on 24 January, 1997);
- a report on Specialist Certification applications and recertifications approved in Committee on 12 June, 1997;
- a report setting out current and new issues that the Committee proposes to address during 1997-98, with priorities and time lines for issues.

I. REPORT OF BUDGET WORKING GROUP ON COUNTY LIBRARY ISSUES

The Chair of the Budget Working Group, Michael Adams, presented a draft report on the funding of County law libraries. After discussion and review, the Committee agreed that the working group should revise the report in light of comments by Committee members, that additional information should be collected and incorporated into the report, and that the revised report should be brought back to Committee in September, 1997.

The Committee confirmed that, as part of its mandate, the working group should consider policy issues that might potentially underlie future amendments to sections of Regulation 708 pertaining to County and District Law Libraries. This task should be carried out prior to consideration of specific proposed amendments. The working group was asked to bring a report to Committee on such policy issues in the Fall of 1997.

II. FOLLOW UP TO REPORT ON POST-CALL LEARNING FOR LAWYERS

On January 24, 1997 Convocation adopted certain recommendations in the Report of the Mandatory Continuing Legal Education Subcommittee, *Post-Call Learning For Lawyers*. Among them was a recommendation that the Law Society should

assemble an advisory group whose short term goal is to define planning needs for post-call education and the means to meet those needs, and whose long term goal is to oversee their realization.

A footnote to the recommendation stated that

in defining planning needs, the advisory group should consider among other things its possible role in providing guidelines to providers, enhancing curriculum planning in continuing legal education, ensuring province-wide delivery of continuing legal education, ensuring the ongoing development of written learning supports, and participating in the ongoing improvement of the means by which 'competent practice' can be systematically explored and explained for the benefit of the profession.

The Professional Development and Competence Committee reported several appointments to the Post-Call Education Advisory Group in its report to Convocation of 4 April, 1997. Additional appointments have been made and the Director of Continuing Legal Education, Paul Truster, presented the following names of current members:

Michael Adams	bencher, practitioner
Larry Banack	bencher, practitioner
Kim Carpenter-Gunn	bencher, practitioner
Brian Bucknall	practitioner, representing CBAO
Alexandra Chyczij	Executive Director, The Advocates' Society
Prof. Bruce Feldthusen	Faculty of Law, University of Western Ontario
Heather McArthur	CLE director, CBAO
Paul Perell	practitioner
Elaine Pitcher	practitioner
Timothy Ray	practitioner, also representing The Advocates' Society
Lorraine Shalhoub	practitioner
Alan Treleaven	Executive Director, Education, LSUC
Paul Truster	CLE Director, LSUC

(A practitioner from northern Ontario may be added to the group.)

The group has agreed to meet every other Tuesday, with those outside Toronto participating by conference-call. Two meetings have taken place and discussion has so far focused on identifying weaknesses in current approaches to CLE. The third meeting will aim in part at the identification of simple improvements to CLE that could be made promptly and at little or no cost.

III. REPORT ON SPECIALIST CERTIFICATION NEW APPLICATIONS AND RECERTIFICATIONS APPROVED IN COMMITTEE ON JUNE 12, 1997.

(In addition to the Chair and five of the benchers listed above, benchers Heather Ross, David Scott, Gerald Swaye and Dan Murphy were present for this item of Committee business.)

The Professional Development and Competence Committee is pleased to report the Committee's approval of the following lawyers for certification:

Civil Litigation:	Robert Colson (of Toronto) J. Daniel Dooley (of Barrie) W. Eric Kay (of Toronto) James Vigmond (of Barrie) William W. Walker (of Belleville) David S. Young (of Toronto)
Immigration Law:	Paul Vandervennen (of Toronto)
Labour Law:	Susan Ballantyne (of Ottawa) Harvey Beresford (of Toronto) Richard Drmaj (of Toronto) Frederick Hamilton (of Toronto)
Workers' Compensation Law:	John Russell (of Ottawa)

The Professional Development and Competence Committee is pleased to report the Committee's approval of the following lawyers for recertification for an additional five years:

Civil Litigation:	J. Brian Casey (of Toronto) E. Marshall Green (of Barrie) Roy Filion (of Toronto) John S. Kelly (of Toronto) William Manuel (of Toronto) David S. Wilson (of Toronto) Robert B. Wilson (of Windsor)
Criminal Law:	John J. Donohue (of Toronto) Dean D. Paquette (of Hamilton) Steven Skurka (of Toronto)

IV. REPORT ON POLICY ISSUES FOR COMMITTEE FOR 1997-98

The Committee reviewed policy issues proposed as Committee issues to be addressed in 1997-98 and approved a Committee "Issues List." The Committee set priorities among issues and furnished time lines where possible in order both to assist Convocation in setting priorities and to develop a detailed Committee work plan for 1997-98.

The Committee's issues are set out in two pages of charts attached to this report. (See Appendix A, pp 8-9.) The first chart presents the ongoing work of the Committee to Convocation. It comprises Committee work in progress, including matters growing out of issues addressed in the current year, 1996-97.

The second chart proposes four new issues for the Committee. The list of new items is not intended to be exclusive or to prevent further items being added now or in future months. One high-priority new issue is the matter of a requalification policy. This issue requires prompt attention and the Chair will discuss with the Chair of the Admissions and Equity Committee which committee should take carriage of the matter. A Committee recommendation will be reported to Convocation for approval.

Three more new issues have been identified but they have not yet been given time lines in view of (a) their lower priority and (b) the number of issues currently ongoing in the Committee. The Committee will report to Convocation when time lines have been developed for these issues.

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE - ONGOING ISSUES
June 12, 1997

Issue	Processes	Timing
1. Law Society response, as governing body of profession, to Reports of Canadian Bar Association Task Force on Systems of Civil Justice and the Ontario Civil Justice Review	1. Committee member, at Treasurer's request, to ascertain full details of implementation plans for both reports. 2. Treasurer to formally request LSUC involvement in all aspects of implementation relevant to LSUC including groups concerned with legal education and ADR, and to emphasise role of LSUC to CBA in relation to: - legal education, through BAC and through post-call education; - ADR training in Bar Admission Program - and in Rules of Prof. Conduct, emphasis on *pro bono* services and ADR options for clients 3. PD&C Committee to identify relevant ADR issues, including regulatory problems and appropriate role for LSUC as regulator, for referral to Futures' Task Force or a new Task Force or appropriate body. 4. Competence issues to be considered in cooperation with LSUC Task Force on Competence and in light of ongoing work of Task Force. 5. The Solicitor/Client Relationship - Committee to review information on standards of practice (ISO-9000) and quality assurance programs as one aspect of client rights.	Report in September Staff to work on issues over summer
2. Budget issues relating to collection of funding for County and District Libraries	Draft report prepared by Budget Working Group on County Law Libraries and reviewed in Committee June, 1997. Revisions being made by working group and staff.	Report to Convocation due Sept, 1997
3. Future technological and library needs for County and District Law Libraries; assessment of user needs and library system structure.	Report under preparation by Technology Working Group on County Law Libraries - group includes CDLPA and MTLA representation	Report to Convocation due November 1997

4. Funding Distribution Issue for County and District Law Libraries	To be considered in relation to report of Technology Working Group to Committee (fall, 1997) and in light of possible merger between CDLPA, MTLA, and CBAO.	Budget Working Group
5. As part of review of budget and technological issues (above #2 and #3), analysis of policy issues underlying any potential amendments to sections of Regulation 708 dealing with County and District Law Libraries	Budget working group expressed concern that sections of Regulation 708 do not fit with current financial role or other activities of LSUC vis-à-vis County Libraries.	Budget working group and staff to bring policy issues back to Committee in fall, 1997
6. Continuing follow-up to Report on Post-call Learning for Lawyers, as detailed in revised Action Plans for Report	Post-Call Legal Education Advisory Group is meeting on implementation of Action Plans	Decision on Mandatory Continuing Legal Education to be made in fall of 1998.
7. Review of Specialist Certification Program	Staff are working on model program for Specialist Certification in Ontario.	Interim report to Committee in fall of 1997.

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE - NEW ISSUES
12 June, 1997

Issue	Commentary	Assigned To	Priority
8. Establishing requirements for Requalification	Guidelines for requalification are needed to put the recommendations of the Joint Subcommittee on Requalification (1994) into effect promptly. Approach will depend on several factors including question of passage of package of amendments to *Law Society Act* and findings of Competence Task Force. Requalification may be dealt with in this Committee or, alternatively, by the Admissions and Equity Committee.	Staff to work on issues over summer	high priority
9. Consideration of CLE Issues			moderate priority
10. LSUC Lawyer Referral Program - request by Committee for ABA Model Supreme Court Rules governing such programs			low priority
11. LSUC Professional Standards - policy issues underlying publication of checklists and whether practice management list should be developed in 1988/89			low priority

THE REPORT WAS ADOPTED

Professional Regulation Committee Report

Meeting of June 12th, 1997

Re: Committee Planning)

Professional Regulation Committee
June 12, 1997

REPORT TO CONVOCATION

Purpose of Report: Information and Decision-Making

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on June 12, 1997. In attendance were:

   Carole Curtis (Chair)
   Neil Finkelstein (Vice-Chair)
   Paul Copeland
   Niels Ortved
   Hope Sealy
   Stuart Thom

   Staff: Janet Brooks, Lesley Cameron, Sue McCaffrey, Patricia Rogerson, Michael Seto, Stephen Traviss, Jim Varro, and Jim Yakimovich

2. This report contains

   - the Committee's proposals for:
     - a policy on reference to prior Invitations to Attend at discipline hearings[1];
     - a policy on use of technology in the discipline process;
     - a plan for the Committee's work on its next group of prioritized issues.
   - Information on
     - the continuing work of the revised Rules of the Discipline Process working group;
     - the provision of a *pro bono* duty counsel program at discipline hearings;
     - operations of the Secretariat departments.

REFERENCE TO PRIOR INVITATIONS TO ATTEND AT DISCIPLINE HEARINGS

A. NATURE AND SCOPE OF THE ISSUE

3. The Committee reviewed the policy decision by Convocation at a recent Discipline Convocation on what reference could be made at a discipline hearing to the record of a lawyer's prior Invitation to Attend (ITA).

4. Convocation determined that no reference to ITAs should be made in the report of a hearing panel.

---

[1]Deferred from May 23, 1997 Convocation.

B. BACKGROUND

How the Issue Arose

5. In the case before Convocation out of which this issue arose, the Discipline Committee made reference to the ITA in its reasons as a factor in determining the recommended penalty. This particular ITA resulted when a formal complaint was reduced at hearing to an ITA.

6. Concern was expressed in Convocation that reference was made to the ITA as if it were part of the lawyer's disciplinary record. Convocation's decision was that reference to the ITA should be removed from the report of the Discipline Committee as it forms no part of the lawyer's discipline record.

The Invitation to Attend Procedure

7. The ITA is a procedure authorized by the Chair and/or Vice-Chairs of Discipline ("the Chair and/or Vice-Chairs"), based on the information of investigatory staff, through which a matter of complaint is concluded. It can also result when a formal discipline charge is withdrawn at hearing, and the hearing panel decides to proceed with the matter by way of an ITA.

8. The ITA is an *in camera* meeting, not a hearing or proceeding, and no reporter is present to record it. An ITA does not form part of a lawyer's public discipline record and other than advice to the complainant (as the source of the matter which led to the ITA) of the fact that it was held, it is not disclosed to anyone beyond the Law Society.

9. Section 10 of Regulation 708 under the *Law Society Act* reads:

> *Where there comes to the notice of the Society, as a result of a preliminary investigation by the Secretary or otherwise, information that indicates that a member may have been guilty of a minor breach of discipline or that indicates there is a possibility that conduct may result in a breach of discipline, the Committee or the chair or vice-chair may direct the Secretary, without any formal complaint being completed and filed, to invite the member to appear before the Committee to enable it to make an informal investigation of the matter, and the Committee, in addition to any of its other powers, may after such informal investigation advise the member with respect to the matter.*

10. Although ITAs are discussed in terms of addressing a "minor breach of discipline" or conduct that "may result in a breach of discipline", it would also appear that they could be considered an extension of the investigation of professional misconduct or conduct unbecoming a barrister and solicitor.

11. In practice, a lawyer's discipline history (as distinct from a discipline record)[2] is not referred to by discipline counsel.

---

[2]A discipline history may include discipline charges withdrawn at hearing, the fact that an ITA was held, or the fact that a letter of advice was issued to the lawyer by the Chair of Discipline.

12. There may be an exception to that general rule when the facts of the conduct leading to an ITA illustrate the same conduct as that before a discipline hearing panel.

C. POLICY DISCUSSION

The Committee's Views

13. The Committee recognized that in any discussion on the use of information about an ITA in the context of current disciplinary proceedings against a lawyer, relevance of the conduct issues addressed at the prior ITA to the current disciplinary charge(s) is the appropriate test. If such information is meaningful in the context of the current disciplinary matter, it should, if possible, be available for use by the hearing panel.

14. The Committee, however, accepted that the confidential nature of an ITA as a process authorized by the Chair and/or Vice-Chairs limited the use of information about the fact of the ITA, and did not dispute that feature of the design of the process.

15. Accordingly, in those cases where ITAs are authorized by the Chair and/or Vice-Chairs as a matter of disposition of the complainant's and the Law Society's issue(s), the Committee agreed that no reference should be made in the report of a hearing panel of the fact of the ITA, even if the facts of that matter are relevant to the conduct issues addressed at the hearing. This occurrence of the ITA is confidential to the lawyer and the Law Society, save and except for the notice provided to the complainant of the fact of the ITA.

16. The Committee felt, however, that where an ITA disposes of a matter authorized and pursued as a formal complaint, but which was withdrawn at a public hearing and "reduced" to an ITA, reference to the fact of such an ITA could be made in the reasons of a subsequent hearing panel if relevant.

17. In the above case, the fact of the ITA is noted publicly by the hearing panel as the manner in which the case will be disposed of, although the ITA itself proceeds *in camera*. Accordingly, the fact of this occurrence of the ITA is in the public realm and cannot be considered a matter of confidence between the lawyer who was subject of the formal discipline charge and the Law Society.

18. The Committee believes that this limited application of the historical fact of an ITA will allow hearing panels, if appropriate, to take judicial notice of relevant facts, and thereby facilitate use of all relevant information to ensure a meaningful and complete process.

19. The Committee, however, presents its views as one option to Convocation for its decision on this policy matter.

Options and Alternatives for Decision by Convocation

20. Convocation should decide:

a. Whether to affirm its existing policy decision, namely, that no reference to an ITA should be made in the reasons of hearing panels;

b. Whether to allow the fact of an ITA to be included in the reasons of hearing panels in current discipline matters based on relevance of the issue(s) in the ITA to the current matter, in the limited case where the ITA arose from the withdrawal of a formal discipline charge at hearing;

c. Whether the fact of an ITA, the facts of which are relevant to a case before a hearing panel, should be disclosed and available for use by the panel in its decision and reasons for decision.

Option c. essentially involves a re-consideration of the ITA process, and specifically whether the confidential nature of an ITA, in disallowing disclosure of what may be relevant information from being used by hearing panels, is justified as a matter of policy within the design of the ITA procedure.

TECHNOLOGY IN THE DISCIPLINE PROCESS

A. NATURE AND SCOPE OF THE ISSUE

21. The Committee was instructed by Convocation to study technology in the discipline process.[3] The Committee struck a working group [4]to review the subject and report its findings to the Committee.

22. The Committee reviewed the working group's findings at its May 8 and June 12, 1997 meetings. This report summarizes the Committee's consideration of the issue.

B. BACKGROUND

23. The focus of the study was primarily on the use of technology in the hearing process but touched on technological aids in other areas of the process. Questions canvassed by the Committee's working group included:

- under what circumstances should a hearing or part of a public or *in camera* hearing be held electronically, either by conference call or similar means?
- what criteria should be satisfied to determine whether a hearing should be held electronically?
- could or should penalties, such as a reprimand, be issued electronically?
- who should bear any extra expense associated with an electronic hearing?

---

[3]This was an issue identified by the Committee for review, which Convocation confirmed for study on January 24, 1997.

[4]Paul Copeland (Chair), Hope Sealy, Stuart Thom and staff members Janet Brooks and Jim Varro.

- how could available technology otherwise enhance the merits or effectiveness of the process, in any of the investigation/preparation/hearing/penalty stages?

Current Use of Technology in the Discipline Process

Statutory/Regulatory/Rule Provisions

24. There is no statutory impediment to the use of technology in the process.[5]

25. The revised Rules of the Discipline Hearing Process adopted by Convocation on April 25, 1997 contemplate electronic pre-hearing conferences (Rule 3.06) and hearings (Rule 5.02(c)).

26. The provisions of the *Statutory Powers Procedures Act* ("*SPPA*") on electronic hearings were noted, including those which allow the tribunal to consider prejudice to a party if a hearing proceeds electronically and which give the tribunal the authority to act to prevent abuses of its process generally.[6]

27. The SOAR[7] Sample Rules of Practice drafted pursuant to s. 25.1 of the *SPPA* include a useful section on electronic hearings and set out the following "relevant factors" to be considered by the tribunal:

- suitability of the electronic technology for the subject matter of the hearing;
- whether the nature of the evidence is appropriate for an electronic hearing, including issues of credibility and the extent to which facts are in dispute;
- the extent to which the matters in dispute are questions of law;
- the convenience of the parties;
- the cost, efficiency and timeliness of proceedings;
- avoidance of unnecessary length or delay;
- ensuring a fair and understandable process;
- the desirability or necessity of public participation or public access to the tribunal's process; and
- fulfilment of the tribunal's statutory mandate.

28. Reforms to the regulatory process included in the legislative package currently with the office of the Attorney-General were examined. Of relevance to this study were the provisions which

---

[5]See Appendix 1 for relevant provisions of the *Law Society Act* and Regulations.

[6]See Appendix 1 for these provisions. Section 5.2(1) of the *SPPA* states: "A tribunal may hold an electronic hearing in a proceeding, in accordance with its rules made under section 25.1." The working group of the Committee on the revised Rules of the Discipline Hearing Process is aware that procedural rules are required for this feature of the process, and will review that requirement once the policy concerning technology in the process is set by Convocation.

[7]Society of Ontario Adjudicators and Regulators. See Appendix 1 for certain excerpts.

- provide for a reprimand or an admonishment in writing;
- provide for hearings to be conducted in the absence of the lawyer; and
- give Convocation rule-making authority for discipline proceedings.

Current Practice

29. The Society has held portions of discipline hearings by telephone[8], including the penalty portion of hearings where reprimands were issued.

30. On occasion, the Society has reimbursed travel expenses to lawyers and complainants to attend discipline hearings at Convocation. In 1995 and 1996, approximately $2000.00 was paid.

31. Invitations to Attend have also been held by telephone on at least three occasions. The decision to use this method emanated from a discussion among the Chair and Vice-Chairs of the Discipline Committee in early 1995 who decided that the procedure could apply where the lawyer was geographically remote from the Society's offices.

Other Jurisdictions

Organization	Commentary
Law Societies	
Law Society of British Columbia	Technology is not employed to a great extent. Pre-hearing conferences on minor, "short duration" matters may be held by teleconference. In one case at hearing, the member (who consented) participated by teleconference, where the issues were non-contentious and all exhibits had been exchanged in advance of the hearing. Video conferencing has not yet been employed, although it has been explored in one case where the member is incarcerated in an American prison. In this case, the institution would not permit video conferencing although the discipline panel was prepared to do so.
Law Society of Saskatchewan	Teleconferencing has occasionally been used as a hearing medium but only in cases involving adjournments or where there has been an agreed statement of facts and the matter of sentencing is to be dealt with by the benchers at Convocation. To date, there has been no suggestion that use of electronics during the discipline process should be expanded beyond that.

[8]These cases generally involved agreed statements of fact and a recommendation for a joint submission for a penalty.

Law Society of Manitoba	There have been no requests for electronic hearings or video hook-up. Given that most Manitoba lawyers practice in Winnipeg, the Society does not anticipate that there will be much movement towards conference calling.
Nova Scotia Barristers' Society	There has been little use of technology in the regulatory process. In one case, a witness who had moved from the jurisdiction gave evidence by telephone.
Law Society of New Brunswick	The Society has not had occasion to question the use of technology in the discipline process.
Law Society of Prince Edward Island	There is no program for the use of technology in the discipline process.
Law Society of Newfoundland	The various technological possibilities for the discipline process have not yet been considered by the Society. Respecting the Internet, confidentiality is an issue, but otherwise, there is no reason why the Society should not be open to options now used by the Supreme Court.
Other Organizations	
College of Physicians and Surgeons of Ontario	Teleconferencing has not been used for hearings but has been employed for pre-hearing conferences. New discipline procedural rules include the requirement for filing all motions for electronic hearings in advance. The anticipation is that the College will be doing more in the way of electronic hearings.
Ontario Association of Architects	Two teleconference hearings have been held involving out of town members, but each dealt with procedural matters with no disputed facts and no requirement for witnesses. A hearing would not be held electronically unless there was agreement on the facts. The *SPPA* rules and procedures for electronic hearings have not yet been used by the discipline committee.
Professional Engineers of Ontario	There have been no electronic hearings, and no need for them to date. All hearings are held in Toronto (average number of hearings in a year is roughly 7).
Institute of Chartered Accountants of Ontario	No electronic hearings have been held. The small number hearings in a year (35) is one factor which has affected any requirement for them.

Ontario Securities Commission	Three or four hearings in the past year have been held by teleconferencing where there has been a joint hearing between Ontario and regulators in British Columbia, Alberta and Quebec. Recently, scanning technology for document-intensive cases has been pursued as a means of presenting electronic evidence before the tribunal (under the *SPPA*, the tribunal has the authority to accept such evidence). The Commission is less than a year away from the first hearing using this technology, which is of tremendous assistance to investigators in certain cases.

The Courts

32. Several years ago, the Supreme Court of Canada instituted video-conferencing nation-wide for applications before the Court. This facility is available to lawyers upon request to the Court office, using Bell Canada technology. The Court maintains selected sites across the country with a dedicated room for counsel. The Court sends confirmation of the arrangements to the participants in advance of the hearing, noting the date, time and place.

33. Courts in Ontario are actively pursuing the integration of computer technology, including video-conference links, through the Integrated Justice Project. Currently, a pilot project in Ottawa employs a procedure in the criminal remand court, where, on consent, accused at detention centres are connected via video-conference link with the judge and counsel at the courthouse.

Current Technology

34. Appendix 2 is a chart which summarizes some current technology available in the marketplace, which could be used in the discipline process. A brief description and cost information is provided.

C. POLICY OBJECTIVES

35. In considering how to best use technology in the hearing process, and in stating a policy to prescribe the circumstances for that use, the Society must ensure that it continues to fulfill its statutory mandate in exercising its disciplinary authority appropriately and in the public interest. An added benefit of technological enhancements may be the improvement of access to the process.

D. OPTIONS ANALYSIS

The Role Statement

36. Of relevance to this discussion are the following sections of the Society's Role Statement:

2.6 The duty to govern in the public interest implies a responsibility to ensure that members of the public may inform themselves as to the manner in which that duty is being discharged. It is therefore important that the Law Society continue conducting its proceedings in public and communicating its decisions not only to the profession but also to the public. Such openness is important for the Law Society in carrying out its duties as a democratic institution.

3.1 It is sometimes assumed that the public interest must necessarily be opposed to the interest of the profession and that, in fulfilment of its duty to govern in the public interest, the Law Society can give no consideration to the interest of the profession. This is not so. Ideally, what is in the public interest will also be in the interest of the profession. It is only when the two interests conflict that the Law Society must subordinate the interest of the profession to that of the public.

3.6 In the final analysis, the public interest will always be paramount in determining the activities, policies and programs of the Law Society. It is only if the profession is seen to be serving the public interest that it will maintain public confidence and command public respect.

7.6 Many of the provisions of the Law Society Act and its regulations arise from the Society's obligation to uphold the integrity and honour of the legal profession - for example:

...

- *the power to prescribe the financial books, records and accounts to be maintained by members who practise, and the power to examine and audit those records;*
- *the duty to investigate complaints of professional misconduct or conduct unbecoming a barrister and solicitor;*
- *the prescription of procedures to be followed in investigating and hearing complaints;*
- *the power to impose disciplinary sanctions (up to and including disbarment and cancellation of membership) on members guilty of professional misconduct or conduct unbecoming;*

...

Policy Considerations

37. The Committee considered the following policy issues.

The Public Perception

38. Given the high degree of public interest that can be associated with the prosecution and disposition of a discipline matter, the question is whether in the public eye the Society's authority over the lawyer is fully realized when the lawyer does not physically appear at the hearing, and the matter proceeds electronically.

The Effect on the Law Society

39. In keeping with the Role Statement, the Society must be assured that its public discipline process meets the Society's obligation of governance, by being accessible to the public. Could technological aids impact on the effectiveness of the process? If panel members, the lawyer (and perhaps his or her counsel), Society's counsel and a court reporter are at different locations but connected electronically, how is the public accessibility requirement of the hearing achieved?

The Effect on the Lawyer

40. It may be that certain penalties, such as a reprimand, by their nature are most effectively given to a lawyer in person. In some cases, it may be important to the Society's exercise of its governance authority that the lawyer appear in person before Convocation or Committee.

Convenience to the Lawyer

41. There may be situations where it may be impractical or difficult for the lawyer to attend at the Law Society's premises and other means of proceeding are available. For example, a lawyer may be out of Ontario with no intention of returning. Requiring that lawyer to attend may create an unreasonable financial burden for the lawyer. Another example is health. A lawyer may not be suffering from a debilitating illness to the extent that he or she is immobilized, but when the effort required to attend at the Society poses an undue hardship, this may be a circumstance to be considered in allowing the matter to proceed without the lawyer's personal attendance.

The Committee's Views

Policy Statements

42. Technological uses or enhancements must be measured against the ultimate goal the Society seeks to achieve when exercising its governing role through the discipline process. Ensuring the integrity of the process should always outweigh accommodations for the convenience of participants.

43. The Committee recognized that technological advancements are occurring daily. Accordingly, the policies outlined in this report, drawn after an overview of current technology, should be monitored and revisited, as appropriate, to ensure that consideration is given to any future technology which may have some application to and which may serve to enhance the Society's disciplinary process.

Suggested Approach

44. As a matter of practice, disciplinary matters should proceed as "in person" oral hearings at Osgoode Hall before a Discipline Committee.[9]

---

[9]This is in keeping with the revised Rules of the Discipline Hearing Process, which state that hearings should be held at Osgoode Hall; provision is made to apply for an alternative location.

45. As an *exception* to this practice, technology and electronic means may be made available as a mode of proceeding with the hearing or part of a hearing, after weighing relevant factors[10]. It is envisaged that hearings would proceed electronically in matters where a pre-hearing conference has been held, there are agreed facts and a joint submission on penalty, the lawyer is geographically remote and the hearing panel is satisfied that the relevant factors have been addressed.

46. The following factors should be considered when a party wishes to proceed with a hearing or part of a hearing electronically:

- the nature of the discipline charge;
- issues of credibility, and ensuring that it can be accurately measured and ascertained;
- the simplicity or complexity of the issues;[11]
- geographic location of the lawyer or witness;
- ability of the panel to assess the demeanour of individuals participating electronically;
- the overall costs, to the Society, lawyers and in some cases the public, of proceeding electronically or in person[12]. At present, the Society, as the provider of any electronic capability, would likely absorb the reasonable cost of the technology involved;
- the ability of the Society to effectively impose penalty by a means other than the lawyer's attendance before Committee or Convocation. For example, if the lawyer were practising law in another jurisdiction, arrangements may be made with the Law Society for that jurisdiction to arrange a time and place at which the lawyer will be present for delivery of the penalty;
- the attitude of the lawyer. There may be great merit in requiring some lawyers to attend in person for the hearing and penalty to ensure that the most effective and appropriate disposition of the case has been made.

47. The determination of whether a hearing should proceed electronically should be made upon motion to the Hearings Management Tribunal at the first instance, or if necessary, by the hearing panel in advance of the hearing, in accordance with the revised Rules of the Discipline Hearing Process.

48. If a hearing proceeds electronically, to ensure that public awareness of and accessibility to the process is maintained, at least one panel member must be present at Osgoode Hall, together with the Law Society's discipline counsel and the reporter. This would most commonly occur when the absent parties are connected by teleconferencing.

49. Respecting Invitations to Attend, consistent with the current policy,

---

[10]The SOAR Sample Rules identified earlier in this paper include some of the relevant factors.

[11]For example, if the lawyer is charged with failing to file and completes the filings before the discipline matter is concluded, this could affect how the hearing proceeds and is disposed of.

[12]It may be more economical to bring a witness to Toronto for a hearing, for example, than to provide a video hook-up for that *viva voce* evidence.

- lawyers should attend at Osgoode Hall unless they can establish appropriate grounds to justify not attending, such as being geographically remote from Toronto, and the Invitation can be held by teleconferencing;
- this is subject to the discretion of the Chair and/or Vice-Chairs of the Discipline Committee, and may depend on some of the factors identified above, including the nature of the matter for which the Invitation is scheduled and the attitude of the lawyer.

50. Respecting the pre- and post-hearing stages of the discipline process, to the extent that it is an enhancement to the process, any applicable technology should be used as long as the integrity of information and requisite confidentiality is maintained.

Summary

51. The Committee believes that the above policy statements and suggested means of implementing them reflect an appropriate balance between ensuring the best approach to a process of great importance to the Society's governance responsibilities and the use of technology in that process. However, these views are presented as one option for Convocation's consideration.

52. To that end, Convocation may wish to discuss questions such as:

a. Whether the policy is too restrictive and should be restated to allow for broader or more innovative use of technology, perhaps even as an integral part of the disciplinary process;
b. Whether the policy, in providing for the use of technology in restricted circumstances, opens the door to an ultimately broader and perhaps unwarranted use, which may impact on the integrity of the disciplinary process.

Options and Alternatives for Decision by Convocation

53. Convocation should decide:

a. Whether the policy statements and suggested approach are acceptable;
b. If so, whether the policy is stated concisely or completely enough to provide direction for implementation of the means to achieve the policy;
c. Whether the policy, if not acceptable, should be restated to reflect either:
    i. A less restrictive approach, allowing broader use of technology, or
    ii. A more restrictive approach, which would effectively disallow technology except perhaps in the most exceptional circumstances.

COMMITTEE PLANNING

54. All of the Committee's high priority issues from its issues list approved by Convocation last January for its work plan have been assigned and will be concluded through the Committee by June 1997, or are subsumed in Convocation's task forces which have ongoing mandates.

55. Accordingly, the Committee prioritized its "middle" priority issues[13] and is presenting them to Convocation as the basis for the Committee's work plan commencing in the fall of 1997, in connection with Convocation's priority planning.

56. The matters to be studied, in the order as prioritized by the Committee, are:

- a disclosure policy for disciplinary hearings;
- a review of the conflict of interest rules of professional conduct;
- a review of Rule 13, commentary 6 of the Rules of Professional Conduct, dealing with lawyers' financial obligations;
- a policy discussion of issues related to discipline authorization of non-reporting of claims to the Lawyers' Professional Indemnity Company (LPIC) and failure to comply with LPIC filing requirements;
- development of guidelines for proper use of material introduced *in camera* at discipline hearings;
- a policy on the ethics of a lawyer's sexual relationship with a client;
- a re-evaluation of the Rule 20 requirement[14]; and
- a review of the Law Society's authority to apply for judicial review of itself.

INFORMATION

A. REVISED RULES OF THE DISCIPLINE HEARING PROCESS

57. As reported in May, 1997, Convocation directed the Committee to review the issues which related to the deletion of one Rule of the revised Rules of the Discipline Hearing Process[15], namely, Rule 9.08 (dealing with Convocation's policy of deference to decisions of hearing panels).

58. The Committee's working group on the revised Rules is directing legal research on that issue which should be available at the Committee's September 1997 meeting.

59. Two other issues raised in the debate at Convocation, namely, mediation as a feature of the Rules and the matter of Convocation being seized in a matter, are also being considered by the working group for scheduled review in the fall.

B. PRO BONO DUTY COUNSEL AT DISCIPLINE HEARINGS

---

[13]Appendix 3 to this report includes a fuller description of the issues in the "middle" priority section of issues list approved at the January 24, 1997 Convocation. It should be noted that the Committee moved the Rule 13 issue up from the "low" priority list and added the review of conflicts issues as a new priority.

[14]Rule 20 of the Rules of Professional Conduct requires Convocation's approval for a lawyer to hire a disbarred or suspended lawyer, or one that has been permitted to resign as a matter of discipline.

[15]Adopted by Convocation on April 25, 1997.

60. In January 1997, the Committee was instructed by Convocation to study the feasibility of a *pro bono* duty counsel program at discipline hearings. Currently, the Law Society provides duty counsel only at Discipline Convocation.

61. The Committee reviewed a staff discussion paper which, among other things, considered:

- the cost of administering the program
- the structure of the program (eg. should it be similar to a legal aid system)
- limitations of duty counsel, or the scope of their responsibilities
- the desire of lawyers to act as *pro bono* counsel in discipline proceedings
- any conflict in administering a program for the Law Society.

62. The Committee, as reported to Convocation on April 25, 1997, also contacted five other legal organizations[16] for input on the need for such a program, design issues and how or by whom the program should be run.

63. The Advocates Society, in meeting with the Committee's representatives on June 4, 1997, indicated that it was prepared to administer the duty counsel program. While details of the design and implementation have yet to be confirmed, the following have been proposed for the program:

- The Advocates Society would compile a roster of lawyers who would act *pro bono* for lawyers appearing before the Society's Discipline Committee.
- The Advocates Society would determine the qualifications, including such things as year of call and experience level.
- A simple financial means test, using that developed by Legal Aid for its duty counsel as a model, should be developed and implemented by the Law Society for lawyers accessing the program.
- Training, using experienced members of the litigation bar, should be provided by the Law Society.
- Advertising or notification of the program to the profession will be done by the Advocates Society. Proposals include a brochure, and possibly a notice in the *Ontario Lawyers Gazette*.

64. The Committee will continue discussions with the Advocates Society and will report in the fall.

C. OPERATIONS OF THE SECRETARIAT DEPARTMENTS

65. Lesley Cameron, Senior Discipline Counsel, on behalf of the Secretary, Richard Tinsley reported briefly on two matters:

---

[16]**The Canadian Bar Association, The Advocates' Society, County and District Law Presidents Association, Metropolitan Toronto Law Association and Criminal Lawyers Association.**

a. Project 200
The re-design phase of this operational reorganization initiative, which encompasses the Law Society's regulatory departments, is scheduled for completion at the end of June, when a report will be presented to senior management. The implementation of the re-design will commence thereafter.

b. Hiring of Discipline Counsel
Interviews of applicants for the three discipline counsel positions currently vacant are proceeding. The most recent opening is a result of Jane Ratchford's departure in July 1997 to the law firm of Fogler Rubinoff.

APPENDIX 1

STATUTORY/REGULATORY PROVISIONS

LAW SOCIETY ACT

DISCIPLINE

Complaint and hearing

33.-(1) No disciplinary action under section 34, 35, 37 or 38 shall be taken unless,

(a) a complaint under oath has been filed in the office of the Secretary and a copy thereof has been served on the person whose conduct is being investigated;

(b) the person whose conduct is being investigated has been served with a notice of the time and place of the hearing; and

(c) a committee of Convocation has heard evidence of or on behalf of the complainant and, if the person whose conduct is being investigated appears at the hearing and so requests, has heard the evidence and any evidence on the person's behalf and has reached the decision that the person is guilty.

Power to take sworn evidence

(2) Any person presiding at a hearing may administer oaths to witnesses and require them to give evidence under oath.

Failure to appear

(3) If the person whose conduct is being investigated fails to appear in answer to the notice at the time and place appointed, the hearing may be conducted in the person's absence.

Disciplinary hearings to be closed to the public

(4) Hearings shall be closed to the public but, if the person whose conduct is being investigated requests otherwise by a notice in writing delivered to the Secretary before the day fixed for the hearing, the committee may conduct the hearing in public or otherwise as it considers proper.

Adjournments

(5) A hearing may be adjourned at any time and from time to time.

Attendance of person being investigated

(6) A person whose conduct is being investigated, if present in person at the hearing, has the right to be represented by counsel, to adduce evidence and to make submissions, and any such person may be compelled to attend and give evidence in the manner provided in subsection (10), but such person shall be advised of the right to object to answer any question under section 9 of the Evidence Act and section 5 of the Canada Evidence Act.

Examination and cross-examination

(7) At a hearing, the complainant and the person whose conduct is being investigated have the right to examine the witnesses called by them respectively and to cross-examine the witnesses opposed in interest, including the deponent of an affidavit or a statutory declaration submitted in evidence.

Hearing of evidence

(8) The oral evidence submitted at a hearing shall be taken down in writing or by any other method authorized by the Evidence Act.

Rules of evidence

(9) The rules of evidence applicable in civil proceedings are applicable at a hearing, except that an affidavit or statutory declaration of any person is admissible in evidence as proof, in the absence of evidence to the contrary, of the statements made therein.

Summons to witness

(10) The Treasurer, the chair or vice-chair of a committee of Convocation, or the Secretary may, and the Secretary upon application of a person whose conduct is being investigated shall, issue a summons in the prescribed form commanding the attendance and examination of any person as a witness, and the production of any document or thing, the production of which could be compelled at the trial of an action, before the committee at the time and place mentioned in the summons and stating that failure to obey the summons will render the person liable to imprisonment on an application to the Ontario Court (General Division), but the person whose attendance is required is entitled to the like conduct money and payment for expenses and loss of time as upon attendance as a witness at a trial in the Ontario Court (General Division).

Failure of witness to appear, etc.

(11) If any person,

(a) on being duly summoned to appear as a witness makes default in attending; or

(b) being in attendance as a witness refuses to take an oath legally required to be taken, or to produce any document or thing in the person's power or control legally required to be produced by the person, or to answer any question which the person is legally required to answer; or

(c) does any other thing which would, if the committee had been a court of law having power to commit for contempt, have been contempt of that court, the person presiding at the hearing may certify the offence of that person under his or her hand to the Ontario Court (General Division) and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any submissions that may be offered in defence, punish or take steps for the punishment of that person in the like manner as if the person had been guilty of contempt of court.

Decision

(12) The decision taken after a hearing shall be in writing and shall contain or be accompanied by the reasons for the decision in which are set out the findings of fact and the conclusions of law, if any, based thereon, and a copy of the decision and reasons therefor, together with a notice to the person whose conduct is being investigated of his or her right of appeal, shall be served upon him or her within thirty days after the date of the decision.

Service of documents

(13) Any document required to be served under this Act upon a person whose conduct is being investigated shall be served personally upon the person or by mailing a copy thereof in a registered letter addressed to the person at the person's last known residence or office address as shown by the records of the Society, and service shall be effected not less than ten days before the date of the hearing or the event or thing required to be done, as the case may be, and proof by affidavit of the service is sufficient. R.S.O. 1990, c. L.8, s. 33.

...

Appeal to Convocation

39.-(1) Any member who has been found guilty under section 37 or any student member who has been found guilty under section 38 and, in either case, has been ordered to be reprimanded in committee, may appeal from the order of reprimand to Convocation within fifteen days from the day upon which the person is served with the order of the committee.

Procedure and record

(2) An appeal under this section shall be by motion, notice of which shall be served upon the Secretary, and the record shall consist of a copy of the proceedings before the committee, the evidence taken, the committee's report and all decisions, findings and orders of the committee in the matter.

Orders

(3) Upon the hearing of an appeal under this section, Convocation may vary the punishment imposed by the committee or may refer the matter or any part thereof back to a committee with such directions as it considers proper or may make such order as it considers proper in the circumstances.

Disqualification

(4) No bencher who sat on the committee of Convocation when the order appealed from was made shall take any part in the hearing of the appeal in Convocation.

Decision final

(5) Subject to section 44, the decision of Convocation under this section is final and not subject to any further appeal. R.S.O. 1990, c. L.8, s. 39.

...

s. 63 ¶1 Subject to the approval of the Lieutenant Governor in Council, Convocation may make regulations respecting any matter that is outside the scope of the rule-making powers specified in section 62, and, without, limiting the generality of the foregoing,

1. Respecting any matter ancillary to the provisions of this Act with regard to the admission, conduct and discipline of members and student members or any class of either of them and the suspension and restoration of their rights and privileges, the cancellation of memberships and student memberships, the resignation of members, and the readmission of former members and student members;

REGULATION 708

s. 9(7) Where at the conclusion of the hearing of a complaint or amended complaint against a member, such complaint or amended complaint has been established to the satisfaction of the Committee and the Committee has not by order reprimanded the member, the Committee shall report in writing to Convocation setting forth a summary of the evidence at the hearing, its findings of fact and conclusions of law, if any, based thereon and its recommendations as to the action to be taken by Convocation on the complaint.

s. 9(8) The Secretary shall,

(a) prepare the report referred to in subsection (7) for approval by the Committee, and the Committee's approval shall be evidence by the signature thereto of the member of the Committee who presided at the hearing or in his or her absence by another member of the Committee who was present at the hearing; and

(b) serve upon the member whose conduct is being investigated a copy of the report as so approved, a notice of the time and place of the Convocation that will consider the report, a summons requiring the member to attend thereat and a notice substantially as follows:

> "If you intend to dispute any statement of fact or finding of fact contained in the attached report of the Discipline Committee at the time of its consideration by Convocation, you are required to file with the Secretary not later than the day preceding Convocation a written statement setting forth any such statement of fact or finding of fact that you intend to dispute".

STATUTORY POWERS PROCEDURES ACT

s. 5.2 (1) A tribunal may hold an electronic hearing in a proceeding, in accordance with its rules made under section 25.1.

(2) The tribunal shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.

s. 6(5) A notice of an electronic hearing shall include,

(a) a statement of the time and purpose of the hearing, and details about the manner in which the hearing will be held:

(b) a statement that the only purpose of the hearing is to deal with procedural matters, if that is the case;

(c) if clause (b) does not apply, a statement that the party notified may, by satisfying the tribunal that holding the hearing as an electronic hearing is likely to cause the party significant prejudice, require the tribunal to hold the hearing as an oral hearing, and an indication of the procedure to be followed for that purpose; and

(d) a statement that if the party notified neither acts under clause (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding.

s. 7(3) Where notice of an electronic hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6(5)(c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

s. 9 (1.2) An electronic hearing need not be open to the public.

(2) A tribunal may make such orders or give such directions at an oral or electronic hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member there may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

s. 18 (1) The tribunal shall send each party who participated in the proceeding, or the party's counsel or agent, a copy of its final decision or order, including the reasons if any have been given,

(a) by regular mail;
(b) by electronic transmission;

(c) by telephone transmission of a facsimile; or

(d) by some other method that allows proof of receipt, in accordance with the tribunal's rules made under section 25.1.

(3) If the copy is sent by electronic transmission or by telephone transmission of a facsimile, it shall be deemed to be received on the day after it was sent, unless that day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.

s.23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

SOAR SAMPLE RULES OF PRACTICE

NOTE:

The Society of Ontario Adjudicators and Regulators (SOAR) published the sample rules which follow in 1996. Reference is made in a number of sections to electronic hearings, with one part of the rules devoted specifically to that type of proceeding (part 8).

APPENDIX 2

INFORMATION ON AVAILABLE TECHNOLOGY

Type	Equipment/Facilities Required	Approximate Cost
Teleconferencing	Up to 4 lines, Law Society's telephone system can be used; for 5 or more lines, Acutel (Bell Canada) is used	Regular business long distance rates (if applicable) for 4 lines; $.29 per minute (double for long distance) using Acutel
Video-conferencing (in-house)	For multiple parties, set up equipment includes: • 27 inch TV monitor • video conferencing system for coding/decoding video/audio signals • speakers, screen, camera, microphone • a keypad to control the system • a highspeed ISDN digital phone line Facilities required include dedicated rooms in the various locations and technical assistance.	Single room costs for group video-conferencing start at $13,000; multi-person facilities require equipment in the $20,000 to $50,000 range
Video-conferencing (outside facility)	Conference room rental facilities, through providers such as Bell Canada or ADCOM	Sample costs for Bell Canada service: • 1 hour videoconference between Toronto and Montreal - $272.00 • I hr videoconference between Toronto, Ottawa and London - $600.00

Internet (Desktop) audio or audio/video conferencing	Conferences between a number of parties can be held using a personal computer and an Internet connection. One provider, VocalTec, has the capability to allow file exchanges and creation, editing and viewing documents in real time with other users worldwide. There is also a package providing video capability.	VocalTec's "Internet Phone Release 4 with Video" is available for $49.95(US) including a free bonus licence. Its "Internet Conference Professional" requires the purchase of a licence for $149.95 (US).
C-Phone Technology (similar to ViaTV)	Equipment is operated with any standard TV set and standard analog phone line and includes: • TV "set-top box", which includes a high speed digital camera and other required technical systems, and connection for the phone line • wireless remote control and microphone A Multipoint Conference Unit (MCU) is also available and connects multiple parties, displaying up to four simultaneous videos with the capability to cascade the MCUs to allow additional people on the screen. Conference sessions can be controlled by an administrator or run as an "open forum" whereby each user controls his or her own access to the MCU display.	$349.95(US) per unit, plus a monthly video network subscription fee of $19.95(US)
Document Scanners	Equipment ranges from small desk top scanners to multiple page high speed scanners capable of scanning 40 pages per minute, to create electronic data files from printed documents, photographs, etc.	A range of prices, from $331.00 for the small desk top models to $14,000.00 for the larger units. Hewlett Packard's ScanJet 5si, which operates with Novell networks (currently used by the Law Society), retails for about $4200.00.

APPENDIX 3
PROFESSIONAL REGULATION COMMITTEE
ISSUES LIST (JANUARY 1997)
"MIDDLE" PRIORITIES

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

(1) Copy of Soar Sample Rules - Abridged Version, January, 1996. (pages 29 to 39)

(2) Copy of Table re: Issues List (January 1997) "Middle Priorities". (pages 43 - 45)

ITEM RE: COMMITTEE PLANNING WAS ADOPTED

Special Committee on Relief and Assistance Report

Meeting of June 11th, 1997

Special Committee on Relief and Assistance
June 27, 1997

REPORT TO CONVOCATION

Purpose of Report: Decision Making

COMMITTEE PROCESS/NATURE AND SCOPE OF THE ISSUE

1. The Special Committee on Relief & Assistance ("the Special Committee") met on June 11, 1997 by conference call. Special Committee members participating were: Michael Adams, Donald Lamont, and Hope Sealy. Regrets were received from: Ron Cass and Jane Harvey. Mimi Hart from staff participated in the call.

2. The Special Committee is reporting on one matter it considered. It seeks Convocation's approval of an amendment to the guidelines it uses to determine eligibility for assistance from the fund established by the Report to Convocation of the Insurance Task Force and the Insurance Committee ("the Report") to assist members and former members experiencing difficulty paying the insurance levy.

BACKGROUND

3. Following approval of the Report, Margaret Angevine, then Deputy Secretary, prepared a memorandum for then bench Tom Bastedo in which she proposed guidelines for making awards from the newly created fund. The following criteria were recommended:

1. The member must demonstrate that the payment of the E & O Levy would be a significant financial hardship to the member.

2. Financial hardship is not, in and of itself, sufficient to justify the waiving of the E & O levy. In addition there must be some personal or family illness or other situation which merits special consideration of the member by the Society on compassionate grounds.

3. If a waiver is granted, it should be for a six month period only, with a further waiver granted only in the most exceptional circumstances.

4. Mr. Bastedo presented the memorandum to Convocation on March 24, 1995. The Minutes of Convocation record the following:

> It was moved by Mr. Finkelstein, seconded by Ms. Sealy that #2 (page 2) under the draft guidelines on the memorandum be amended by adding the word "necessarily" so that the first sentence of paragraph #2 then read:
>
> > 2. Financial hardship is not necessarily, in and of itself, sufficient to justify the waiving of the E & O levy. In addition there must be some personal or family illness or other situation which merits special consideration of the member by the Society on compassionate grounds.

REQUEST TO CONVOCATION

6. The Special Committee believes that the amendment at Convocation on March 24, 1995 reflected a desire to afford greater flexibility and discretion to the Special Committee to make allocations from the fund.

7. The Special Committee asks Convocation to amend paragraph #2 of the guidelines to eliminate the confusion and to afford limited discretion to make awards in circumstances where financial hardship is the basis of the application.

8. The Special Committee proposes approval of the following motion:

MOTION:

That the guidelines used by the Special Committee on Relief & Assistance to determine the outcome of applications to the fund established to assist members and former members experiencing difficulty paying the insurance levy be amended to read as follows:

> 2.Financial hardship is not necessarily, in and of itself, sufficient to justify the waiving of the E & O levy.

In addition, there will normally be some personal or family illness, or other situation which merits special consideration of the member by the Society on compassionate grounds.

THE REPORT WAS ADOPTED

Admissions and Equity Report - re: Report on the Accreditation of Foreign-Educated Lawyers and Quebec Lawyers with Non-Common Law Legal Education - June 3rd, 1997

Messrs. Epstein and MacKenzie presented the Report to Convocation.

Admissions and Equity Committee
Report to Convocation
June 27, 1997

Consideration of the Report on the Accreditation of Foreign-Educated Lawyers and Quebec Lawyers with Non-Common Law Legal Education

Purpose of Report: Decision Making

TABLE OF CONTENTS

REPORT ON THE ACCREDITATION OF FOREIGN-EDUCATED LAWYERS AND QUEBEC LAWYERS WITH NON-COMMON LAW LEGAL EDUCATION

NATURE AND SCOPE OF THE ISSUE

1. On September 14, 1995 the former Legal Education Committee appointed Gavin MacKenzie to:

   a) study the system currently in place through the National Committee on Accreditation ("NCA") for the accreditation of lawyers who have received their legal education and training either outside of Canada or through a civil law program in the province of Quebec or the University of Ottawa; and

   b) to report to the Legal Education Committee with a recommended course of action.

2. In May 1996, Mr. MacKenzie provided a draft report to the former Legal Education Committee, which approved the report for circulation to the profession and other interested groups.

3. In preparing a revised report for consideration by the Admissions and Equity Committee ("the Committee") , which assumed the responsibilities of the Legal Education Committee, and by Convocation, Mr. MacKenzie considered the written comments received.

4. At its meeting on April 10, 1997 the Admissions and Equity Committee considered the report and a number of policy options concerning the Law Society's possible response to each of Mr. MacKenzie's recommendations.

5. Convocation is requested to:

   a) consider and accept the *Report on the Accreditation of Foreign-Educated Lawyers and Quebec Lawyers with Non-Common Law Legal Education;* and

   b) consider and approve the Committee's proposals for treatment of the report's recommendations set out in Table 1.

BACKGROUND TO THE REPORT

6. A large proportion of those lawyers with foreign-training and Quebec non-common law legal education, who are NCA candidates, seek admission to the bar of Ontario. In requesting a study of the NCA's procedures, the former Legal Education Committee was particularly interested in a number of admission issues relevant to Ontario's experience.

7. The Committee identified specific issues it wished Mr. MacKenzie to consider in the course of his study. In his report he identifies and discusses these issues and a number of others his research raised and sets them out as follows:

   a) whether the NCA's standards for evaluating foreign qualifications are unfairly discriminatory;
   b) whether holders of a certificate of qualification are adequately qualified for the bar admission course, in their knowledge of relevant law and in their English or French language skills;
   c) whether the NCA requirement that most candidates complete law school courses imposes unreasonable geographic, scheduling, or financial constraints on candidates, and therefore unreasonably inhibits access to the profession for minority groups;
   d) whether the limited number of spaces in law schools for NCA candidates presents a significant barrier to access to the profession;
   e) whether the NCA's requirement that many candidates complete law school courses is an effective means of both imparting knowledge of Canadian laws and integrating foreign-educated lawyers and Quebec lawyers with non-common law legal education into the culture of Canadian common law;
   f) whether the NCA's process is effective and fair in assessing both the prior legal education and experience of candidates;
   g) whether candidates holding a certificate of qualification from the NCA are disadvantaged in finding articling positions and employment as lawyers upon graduation; and

h) whether statistical information reflecting upon the performance of students in the Bar Admission Course who have obtained a certificate of qualification from the NCA may assist in informing all interested parties with respect to possible reforms to the process.

8. Having analysed the issues, Mr. MacKenzie has made 11 recommendations.

CONTEXT WITHIN WHICH TO CONSIDER THE REPORT

9. As Convocation considers the report , it may assist to consider the recommendations in the following context:

a) The National Committee on Accreditation is a standing committee of the Federation of Law Societies. Accordingly, policy decisions concerning the operation and requirements of the NCA are within the jurisdiction of the Federation of Law Societies, of which the Law Society of Upper Canada is one of thirteen members.

b) The Law Society of Upper Canada has authority over the admission of lawyers to the bar of Ontario. Pursuant to the rules made under s.62(1) of the *Law Society Act* the Admission and Equity Committee's mandate includes developing, for Convocation's approval, "policies to ensure that the accreditation process operates in a reliable, fair, open, and equitable manner". Accordingly, in assessing its continuing role in the NCA, the Law Society of Upper Canada should be satisfied that the part of the accreditation process that is governed by the NCA's requirements meets with the Law Society's own policies for a reliable, fair, open, and equitable accreditation process.

c) While every common law province, including Alberta on a trial basis, makes use of the NCA system, British Columbia and Ontario have the largest number of candidates for accreditation through the NCA.

d) As Mr. MacKenzie identifies, the NCA is funded solely by its applicants. The Executive Director of the NCA is paid a fee that varies with the number of applicants processed, so that the NCA operates on a break even budget. The other members of the Committee are reimbursed for expenses of meeting 3 - 4 times per year, but are not otherwise paid for their participation. The NCA receives no grants or other funding from government, individual law societies, or the Federation of Law Societies. To the extent, then, that recommendations in the report have budgetary implications, the limited funding sources should be kept in mind.

e) In assessing the operation of the NCA, Mr. MacKenzie has developed three main categories of recommendations.
   (i) The largest category of recommendations proposes action for the NCA to consider to enhance or improve its procedures.
   (ii) The second category of recommendations proposes action to be considered by the Law Society of Upper Canada.
   (iii) The third category of recommendations proposes action for organizations other than the Law Society of Upper Canada or the NCA to consider.

ISSUES AND OPTIONS FOR DISCUSSION

10. In assessing the report's recommendations the Committee considered:
    a) whether it required further information before it could provide Convocation with a recommendation;
    b) whether those recommendations that propose action by the Law Society of Upper Canada are within the Law Society's mandate, are appropriately framed, and are in keeping with the Society's pursuit of an accreditation process that is reliable, fair, open, and equitable;
    c) whether those recommendations that propose action by the NCA should be supported by the Law Society of Upper Canada to the Federation of Law Societies, having considered the budgetary implications of the measures and the impact of such measures on the Law Society's own policies and procedures; and
    d) whether those recommendations that require or involve action by organizations other than the Law Society of Upper Canada or the NCA should be endorsed by the Law Society, having considered the impact of such recommendations on its own policies.

11. Using Table 1 the Committee reviewed the recommendations, the commentary on each, and the possible options for Convocation for each recommendation. The Committee's proposals to Convocation for each recommendation are set out in Column 4 of the Table.

12. The Committee proposes that the form of the motion for Convocation be as follows:

MOVED THAT THE *REPORT ON THE ACCREDITATION OF FOREIGN-EDUCATED LAWYERS AND QUEBEC LAWYERS WITH NON-COMMON LAW LEGAL EDUCATION* BE ACCEPTED AND THAT THE FOLLOWING DECISIONS BE MADE REGARDING EACH RECOMMENDATION:

Recommendation	Proposal to Convocation
1	Support the Recommendation.
2 - 6 inclusive	Support the Recommendation to the Federation of Law Societies when it considers the report.
7	Recommend that the Federation of Law Societies investigate the advisability of this recommendation.
8	Support the Recommendation to the Federation of Law Societies when it considers the report.
9	Support the Recommendation.
10	Support the Recommendation to the Federation of Law Societies when it considers the report. The Law Society should, within Ontario, encourage law schools to create an orientation program.

11 Support the Recommendation to the Federation of Law Societies when it considers the report, subject to further investigation on the extent to which further individualized assessments are feasible.

TABLE 1

Recommendation	Commentary	Possible Options for Convocation	Proposal to Convocation
1 The Law Society of Upper Canada should continue to support the NCA.	♦ In assessing whether the Law Society should have its own committee, Mr. MacKenzie notes that although there may be administrative efficiencies in forming a separate committee, there is a consensus among interested parties that to decentralize the process would be a regressive step. ♦ In its comments on the report the NCA noted the importance of maintaining a national standard in evaluation of legal credentials. ♦ Although Mr. MacKenzie makes recommendations for improvement, his report does not conclude that the NCA is flawed in a way that should result in the Law Society withdrawing from it. ♦ If the Law Society is not prepared to support the NCA it should be prepared to form its own committee, with any corresponding budgetary implications. ♦ There are no new budgetary considerations in continuing to support the NCA.	1.Support the recommendation, with or without conditions. 2. Seek more information. 3. Reject the recommendation.	SUPPORT THE RECOMMENDATION.

Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation
2. A person with expertise in comparative education and prior learning assessment should be retained to review the NCA's guidelines and the application of those guidelines to determine how (if at all) the guidelines as applied in practice might be amended to ensure (i) that to be given advanced standing applicants meet the necessary level of competence, and (ii) that applicants are treated equitably.	♦ In the NCA's comments on the report it noted that its guidelines are under constant review, with input from a number of academics and practitioners, but noted that it may benefit from a review of its processes and procedures from an expert in Administrative Law, particularly with respect to issues such as language proficiency and testing methodology. ♦ The NCA noted that it could budget for such an expenditure given enough notice. ♦ Based on current forms of financing the NCA, such budgeting for an expert would presumably occur through increased applicant fees. ♦ To the extent that the expert would consider issues of competence and equity, it would be important to ensure that the expert's proposals come before the Federation for discussion and approval, so that Law Society has an opportunity to ensure that they are consistent with the Law Society's policies.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Seek more information. 3. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT.

Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation

3 The NCA's guidelines should be amended to permit applicants who have experience working as law clerks in Canada under the supervision of one or more Canadian lawyers, to be given appropriate credit based upon an individual assessment of the extent to which (if at all) the experience they have gained has contributed to their state of preparedness to practise law in Canada. The expert referred to in recommendation 2 should be consulted to assist in the formulation of guidelines designed to implement this recommendation.	♦ The recommendation would allow for consideration of a broader range of prior learning and experience of NCA candidates. With law school places limited, the ability to reduce the length of time NCA applicants need to attend law school and, potentially, the number of NCA applicants who are required to attend law school, could be seen as a means of broadening access to the profession. ♦ The NCA has not recognized law clerk experience, and in its comments on the report expresses concern both in terms of the potential policy implications to all law societies of approving this type of experience, and in the difficulty of assessing the quality of each experience, to ensure a national standard. The NCA states that it would need direction from the Federation on this recommendation to ensure uniformity of standards. ♦ The recommendation makes it clear that depending on the nature of the experience no credit may be given. ♦ It also proposes assistance in formulating guidelines; there could be budgetary implications if an expert were retained to assist with this.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Recommend that the Federation of Law Societies investigate the advisability of this recommendation, before endorsing or rejecting it. 3. Seek more information. 4. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT.

Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation
4 Members of the NCA should continue to be drawn from legal academia, those involved in the regulation of the profession, and the practising bar. The committee should also, however, include a representative of the community of foreign-educated lawyers who is a member of an ethnocultural minority group, a designate of the Law Society of British Columbia, and the Executive Director of Education of the Law Society of Upper Canada, for the reasons discussed in section 21 above. Members of the NCA who serve as the committee's chair should hold the position for a period of two or three years. The Executive Director of the NCA should not also be a voting member of the committee.	♦ The composition of the NCA is within the jurisdiction of the Federation of Law Societies. ♦ There would appear to be no substantial budgetary implications for the Law Society of Upper Canada approving the recommendation that the Executive Director of the Law Society of Upper Canada be added to the committee, since the NCA meets only 3-4 times per year, and members' expenses are paid. ♦ Having the Law Society of Upper Canada's Executive Director of Education on the NCA provides greater opportunity to have input into the process of ensuring that accreditation is fair, reasonable, open, and equitable.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Support or reject the portion of the recommendation that recommends that the Executive Director of Education be on the NCA, and leave the balance of the recommendation up to the Federation to accept or reject. 3. Seek more information. 4. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT.

Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation
5 The NCA should continually endeavour to improve its communication of the basis of its assessments with a view to making the process more transparent generally.	♦ Due to limited staff and financial resources, the better the written package of material candidates receive the less difficult the application experience may be. ♦ Improved communication directly from the NCA may have the added benefit of reducing the number of inquiries individual law societies inevitably receive from NCA candidates.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Seek more information. 3. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT.
6 The NCA should make applicants aware of clinical legal education opportunities available at law schools, and should reduce the number of required courses applicants who are interested in pursuing clinical alternatives are required to take, where to do so would not detract from the applicants' need to satisfy substantive law requirements.	♦ The University of Ottawa Legal Clinic's comments on the report stressed the benefit of providing NCA candidates with the practical experience inherent in the clinical legal education experience. ♦ The recommendation seeks to broaden the range of experience NCA candidates may obtain in law schools, while leaving in place the exposure to substantive law. ♦ The recommendation would not compel law schools to involve NCA candidates in clinical legal courses, but it is conceivable that if the NCA approved this there would be an impact on the law schools.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Recommend that the Federation of Law Societies investigate the advisability of this recommendation, before endorsing or rejecting it. 3. Seek more information. 4. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT.
Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation

7 The NCA, in conjunction with the law schools, should arrange for the development of a language test that is designed to assess candidates with specific reference to the language proficiency required to perform competently as lawyers.	♦ The NCA has no budget for developing a language test. ♦ It is unclear how law schools would view this recommendation. The University of Victoria Law School supports the development of a test, but cannot contribute to the cost.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Recommend that the Federation of Law Societies investigate the advisability of this recommendation, before endorsing or rejecting it. 3. Seek more information. 4. Reject the recommendation.	RECOMMEND THAT THE FEDERATION OF LAW SOCIETIES INVESTIGATE THE ADVISABILITY OF THIS RECOMMENDATION.
8 Canadian citizens who obtain their legal education in other countries and who meet the requirements established by those countries for admission to the bar, should continue to be assessed in accordance with the standards applicable to all NCA candidates.	♦ The report concludes that although some administrators oppose the ability of unsuccessful applicants to Canadian law schools to gain entry through the "back door" by attending law schools in other countries and then going through the NCA, most administrators do not consider this to be a problem.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Seek more information. 3. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES CONSIDERS THE REPORT.
Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation

Recommendation	Commentary	Possible Options for Convocation	Proposal for Convocation
9 For the reasons developed in section 15 [of the report], the Law Society should pursue discussions with the University of Toronto Law School with respect to the issues of fees and services to NCA candidates, with a view to facilitating an appropriate solution to these issues.	♦ The report speaks to encouraging law schools to provide the same services to NCA and LLB candidates. The University of Toronto considers itself to be making a significant contribution to the ability of NCA candidates to find law school places. ♦ The recommendation highlights the difficulty of balancing the issue of differential fees and services against the desire to maintain the number of law school spaces for NCA candidates at the University of Toronto. ♦ The NCA notes that it has no jurisdiction over policies adopted by law schools in respect of applicants. It also notes that differential treatment with respect to services creates anxiety among applicants.	1. Support the recommendation, with or without conditions. 2. Seek more information. 3. Reject the recommendation.	SUPPORT THE RECOMMENDATION.

Recommendation	Commentary	Possible Options for Convocation	Proposal For Convocation
10 An orientation program for NCA candidates who have been admitted to Ontario law schools should be offered shortly before law school classes begin for the year, so that NCA candidates will have the benefit of an introduction to the study of Canadian law.	♦ The NCA notes that the idea is a good one, but beyond its jurisdiction and suggests the Federation might consider providing such a program. ♦ In similar vein to the concern about communication from and with the NCA, an orientation program is seen in the report as a means to reduce barriers for NCA candidates, and further assist in their familiarization with the legal process, the legal community into which they entering, and the law school itself. ♦ Law schools appear to have differing views on whether to undertake separate orientation and on who should absorb the cost. ♦ Is there a role for the Law Society in facilitating such a program?	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Recommend that the Federation of Law Societies investigate the advisability of this recommendation, before endorsing or rejecting it. 3.The Law Society should, within Ontario, facilitate an orientation program. 4. Seek more information. 5. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT. THE LAW SOCIETY SHOULD, WITHIN ONTARIO, ENCOURAGE LAW SCHOOLS TO CREATE AN ORIENTATION PROGRAM.

11 Finally, in the longer term, the NCA, with the assistance of a counsellor with the expertise referred to in recommendation 2, should move toward a system of individualized assessments of what foreign-educated (and Quebec non-common law) lawyers require to become qualified to practise law in common law jurisdictions in Canada, with the expectation that taking law school courses would be only one of a number of possible alternatives.	♦ The NCA's comments on the recommendation is that it already conducts individualized assessments, albeit based on certain standard criteria and on written applications. ♦ The recommendation's intent would appear to be to allow for consideration of a broader range of prior learning and experience of NCA candidates. With law school places limited, the ability to reduce the number of required law school courses could be seen as a means of broadening access to the profession. ♦ Individualized assessments may, as a rule, entail in-person interviews. ♦ There may be budgetary issues raised by this recommendation that have not been explored.	1. Support the recommendation to the Federation of Law Societies when it considers the report, with or without conditions. 2. Recommend that the Federation of Law Societies investigate the advisability of this recommendation, before endorsing or rejecting it. 3. Seek more information. 4. Reject the recommendation.	SUPPORT THE RECOMMENDATION TO THE FEDERATION OF LAW SOCIETIES WHEN IT CONSIDERS THE REPORT, SUBJECT TO FURTHER INVESTIGATION ON THE EXTENT TO WHICH FURTHER INDIVIDUALIZED ASSESSMENTS ARE FEASIBLE.

Report to the Admissions and Equity Committee of the Law Society of Upper Canada on the Accreditation of Foreign-Educated Lawyers and Quebec Lawyers with Non-Common Law Legal Education

June 3, 1997

by Gavin MacKenzie

TABLE OF CONTENTS

1. Introduction

At its meeting on September 14, 1995, the Legal Education Committee appointed me to serve as a special *ad hoc* sub-committee to study the system that is in place at present for the accreditation of lawyers who have received their legal education and training in other countries, or who have received non-common law legal education in Quebec, and to report to the committee with a recommended course of action.

Over several months in late 1995 and early 1996 I interviewed many people who have an interest in the accreditation process. I have also had the advantage of having had access to voluminous documentary materials. I attended a meeting of the National Committee on Accreditation ("NCA") on February 13, 1996. I am most grateful to the many people who have given so generously of their time, experience and knowledge, and who have co-operated in an effort to determine whether the present process may be improved.

I am particularly grateful to Vern Krishna (Executive Director of the NCA), Kenneth Jarvis (Chair of the NCA), Justice Joan Lax (former Assistant Dean, University of Toronto Law School), Marilyn Pilkington (Dean, Osgoode Hall Law School), Neil Gold (Professor and former Dean, University of Windsor Law School), Jim Phillips (Associate Dean, University of Toronto Law School), Alan Hutchinson (Associate Dean, Osgoode Hall Law School), Don Carter (Dean, Queen's University Law School), Alan Treleaven (Executive Director of Education, Law Society of Upper Canada), Liz Dolan (Director of Admissions, Osgoode Hall Law School), Richard Tinsley (Secretary, Law Society of Upper Canada), Susan McCaffrey (Director, Professional Standards Department, Law Society of Upper Canada), Deborah Brown (Former Registrar, Bar Admission Course, Law Society of Upper Canada), and Paul Roth (Contracts Advisor, Law Division, Ontario Hydro, and an NCA candidate).

The documentary material to which I have had access included Access!: Report of the Task Force on Access to Professions and Trades in Ontario (1989), Report of the Working Committee on Accreditation in the Legal Profession (National Counsel of Canadian Filipino Associations (Greater Toronto Area)) (1995), Conference materials, Conference of Lawyers of Foreign Jurisdictions to Discuss Prior Learning Assessment Mechanisms and Barriers to Enter Legal Profession, hosted by Hasanat Ahmad Syed, President, Human Rights and Race Relations Centre (1995), and many public and internal documents of the NCA, including minutes of meetings, statements of policy, annual reports, and statistical information.

This report was presented to the Legal Education Committee in draft form on May 9, 1996. The Committee authorized the circulation of the report to the profession and other interested persons and groups for comment. The report was provided, for example, to the deans of Canadian law schools, the Canadian Bar Association - Ontario Branch, the Canadian Alliance for Visible Minorities, the Canadian Ethnocultural Council, and the NCA itself. Also, to ensure widespread awareness of the report, announcements were placed in the July 5, 1996 edition of the *Ontario Reports* and the June/July 1996 *Benchers Bulletin* in which members of the profession were encouraged to obtain a copy of the report and to comment on it.

Copies of the report were provided to 130 persons and groups. I am grateful to the following for their thoughtful comments, which I have taken into consideration in preparing this final version of the report: the NCA, the Canadian Ethnocultural Council, the University of Ottawa Legal Clinic, the Financial Aid and Placement Department of the Law Society of Upper Canada, Dean Sanda Rogers of the University of Ottawa Faculty of Law, Dean Peter MacKinnon of the University of Saskatchewan Faculty of Law, Dean David Cohen of the University of Victoria Faculty of Law, Dean Donald Carter of Queen's University Faculty of Law, Associate Dean James Phillips of the University of Toronto Faculty of Law, Mr. Alexander J. Black, Ms. Hazelyn Ross, Mr. Tony G. Schweitzer, and Mr. Abhimanyu Jalan.

There are currently four possible means of gaining admission to the Ontario Bar:

a. obtaining a Canadian law degree (LL.B.) and completing the bar admission course successfully; passing the Ontario transfer examinations after having practised law for the required period of time in another Canadian jurisdiction (there are special additional provisions relating to certain lawyers from Quebec and Alberta);

b. meeting the academic call requirements, if the applicant is an Ontario law school dean or full-time member of an Ontario law school faculty; and

c. obtaining a Certificate of Qualification from the NCA and completing the bar admission course.

It is the fourth means of gaining admission to the Ontario Bar with which this report is concerned.

2. Issues

In the preparation of this report I have considered the following issues:

a. whether the NCA's standards for evaluating qualifications are unfairly discriminatory;

b. whether holders of a certificate of qualification are adequately qualified for the bar admission course, in their knowledge of relevant law and in their English or French language skills;

c. whether the NCA requirement that most candidates complete law school courses imposes unreasonable geographic, scheduling or financial constraints on candidates, and therefore unreasonably inhibits access to the profession for minority groups;

d. whether the limited number of spaces in law schools for NCA candidates presents a significant barrier to access to the profession;

e. whether the NCA's requirement that many candidates complete law school courses is an effective means of both imparting knowledge of Canadian laws and integrating foreign-educated and Quebec non-common law lawyers into the culture of Canadian common law;

f. whether the NCA's process is effective and fair in assessing both the prior legal education and experience of candidates;

g. whether candidates holding a certificate of qualification from the NCA are disadvantaged in finding articling positions and employment as lawyers upon graduation; and

h. whether statistical information reflecting upon the performance of students in the bar admission course who have obtained a certificate of qualification from the NCA may assist in informing all interested parties with respect to possible reforms to the process.

3. The National Committee on Accreditation

The NCA is a standing committee of the Federation of Law Societies of Canada. It is responsible for evaluating the legal training and professional experience of persons with legal credentials acquired in foreign countries (or non-common law legal credentials acquired at the University of Ottawa or in Quebec) who wish to be admitted to a common law bar in Canada other than Alberta (which has its own evaluation council, the University Co-ordinating Council).

The NCA meets approximately three or four times a year to review the material that has been submitted by applicants. Upon completion of its review of this material, the NCA issues a recommendation describing the scope and extent of any further legal education that in its judgment the applicant must complete to meet the standard achieved by graduates of Canadian law schools who have earned a Canadian LL.B. degree.

The NCA's recommendations are based on applicants' academic background and professional training and experience, and takes into consideration an array of factors including the legal system taught in the source country of legal education (whether common law, non-common law, or "hybrid"), subjects studied, grades and standing, the quality and nature of the degree-granting institution, the applicants' professional qualifications, and the length and nature of their professional legal experience. Each applicant's file is individually reviewed by the NCA.

All applicants, whether Canadian citizens who have obtained their legal education in foreign countries, Canadian citizens who have obtained non-common law legal education in Quebec, or permanent residents of Canada or foreign nationals who have obtained their legal education abroad (most applicants are permanent residents), are evaluated on the basis of the same standards. The NCA applies a uniform standard on a national basis. Applicants are not required to satisfy disparate entrance standards to practise law in Canada; they may apply to the NCA regardless of the common law province (other than Alberta) in which they wish to practise.

Most applicants (approximately two-thirds in 1995-1996) are required to attend a Canadian common law school for further studies on a part-time or full-time basis. Applicants are required to complete a stipulated number of credit hours of law studies. They are required to obtain an unconditional pass in every subject and obtain an overall grade point average that meets the law school's requirements for LL.B. students. (The grade point average requirement was introduced in 1995.)

Applicants with superior qualifications and experience may be permitted to write challenge examinations in specified legal subjects, without being required to attend a Canadian law school. The NCA has made increased use of the challenge examination option in recent years.

The challenge examination alternative has the advantage for applicants of removing the additional hurdle of gaining admission to law school; as discussed in more detail below, the number of NCA applicants who have been granted advanced standing in law school is much greater than the number of available law school seats.

Writing challenge examinations is considered an appropriate alternative only for applicants capable of learning independently in a rigorous self-study programme. The examinations are set by law school professors on the same basis as the examinations set for LL.B. students and NCA candidates who are enrolled in law school. Candidates must obtain an unconditional pass in each subject.

Upon the successful completion of the specified number of credit hours or the challenge examinations, the NCA issues a Certificate of Qualification, which signifies that the applicant has an understanding and knowledge of Canadian law equivalent to that of a graduate of an approved Canadian law school who has earned an LL.B. degree.

The obtaining of a Certificate of Qualification is a preliminary step along the road toward admission to the bar. An applicant who has obtained a Certificate of Qualification is entitled to enter the bar admission course in Ontario (and, generally, the bar admission courses in other common law provinces other than Alberta, though there is some variation from province to province) on the same basis as a graduate from an approved Canadian law school. The Certificate of Qualification does not have the effect of abridging the period of articles or other bar admission requirements. Requests for abridgement must be submitted directly to the law society to which the applicant seeks admission.

In early 1996 the name of the committee was changed from the Joint Committee on Accreditation to the National Committee on Accreditation. The adjective "joint" reflected the collaboration of the Federation of Law Societies of Canada and the Committee of Canadian Law Deans in the accreditation process. The name of the committee was changed to reflect the national scope of the committee's responsibilities. The committee's previous name occasionally caused confusion, particularly among applicants from foreign countries who were unfamiliar with the history and background of the committee.

The present members of the committee are as follows: Kenneth Jarvis, Q.C. (Chair), Dean Dawn Russell (Dalhousie University Law School), Dean Donald Carter (Queen's University Law School), Hamish C. Cameron, Q.C. (of the British Columbia Bar), Richard Tinsley (Secretary, Law Society of Upper Canada) and Professor Vern Krishna, Q.C. (Executive Director).

The members of the NCA are drawn from legal academia, those involved in the regulation of the profession, and the practising bar. At present, all members of the NCA are from Ontario or British Columbia, which by a considerable margin are the provinces in which the greatest numbers of foreign-trained lawyers seek admission to the bar.

The NCA is funded by applicants, who for the fiscal year ending June 30, 1997 will pay an application fee of $373 and an examination fee of $397. The NCA has budgeted for a surplus of slightly over $3,000 for the fiscal year.

The Executive Director is paid a fee that varies in accordance with the number of applications processed, so that if revenues are lower than budgeted, administrative costs are correspondingly reduced. This helps to ensure that the NCA operates on a break-even basis. The other members of the committee receive only reimbursement of their travel expenses.

The NCA receives no grants or other funding from government, the Federation, or any law society. Attempts to obtain government funding to facilitate the accreditation of more minority lawyers have been unsuccessful.

4. A Brief History of Accreditation

Until approximately 1960, applications for admission to the Ontario Bar from lawyers qualified to practise in other jurisdictions were rare. On the infrequent occasions on which a lawyer qualified to practise in Great Britain, the United States or Australia applied for admission, the question was decided by the Dean of Osgoode Hall Law School over a cup of tea.

At that time there was very little mobility even between provinces, partly because of such barriers as exclusionary fees.

By the early to mid-1960s law societies (and particularly the Law Society of Upper Canada) were receiving more applications, and from different countries. Kenneth Jarvis informed me that one could trace the state of world communism by reference to the countries from which lawyers were applying for admission to the Ontario Bar.

At that time, the fate of a foreign lawyer's application was decided by law school deans, who referred to a standard reference book that categorized law schools. The institutions at which applicants obtained their legal education, rather than individual applicants, were assessed.

Thereafter the Legal Education Committee of the Law Society instituted a process whereby applicants wrote examinations in Ontario. This system created hardships for many applicants who had to travel to Canada, often with their families.

Accordingly, the Legal Education Committee substituted "offshore examinations" for examinations in Ontario. In some cases, however, the Law Society learned that the examination was written not by the applicant but by a professional examination writer.

The Law Society then asked for two photographs, one for the applicant's file and one for the person who supervised the writing of the examination abroad.

After one or two cheaters were caught, a few other applicants sent duplicate pictures of the professional examination writer.

Apart from these difficulties, problems with the offshore examinations included frequent complaints from applicants in some countries (such as India) that they had inadequate resources to enable them to prepare properly to write the examinations. Moreover, the system did not enable the Law Society to assess applicants' oral language skills.

Ontario became the centre of testing at the request of other law societies. This system at least had the virtue of providing some uniformity in admission standards. Eventually, however, both the Law Society of Upper Canada and law societies in other jurisdictions recognized that it was inappropriate that Ontario approve applications for admission to bar admission courses elsewhere.

Once other provinces started to assess applications for foreign trained lawyers the criteria for evaluating legal education and training obtained in other countries varied widely from province to province. It was because of the disparate entry requirements established by the law societies of different Canadian jurisdictions that the Joint Committee on Accreditation was formed in 1977, upon the initiative of the Federation of Law Societies of Canada. The major objective of the committee has always been to apply a uniform standard on a national basis.

In the early days after the formation of the committee, applicants from Great Britain and the United States were much more likely to be admitted to the Ontario Bar than were applicants from other countries.

In recent years, another major objective of the committee has been to fine-tune its assessments of applicants to attempt to ensure that all applicants are treated equitably.

Within a few years after its formation, the committee acquired responsibility for assessing applications from Quebec lawyers who were educated in a non-common law system in Quebec and who wished to be admitted to the bar of another province (other than Alberta). Apart from this change, the functions of the committee have remained essentially the same since 1977.

5. The NCA's Means and Standards of Assessment

As we shall see, questions have been raised by both applicants and legal educators concerning the adequacy of the NCA's assessments. Indeed, the difficulty in obtaining accurate and consistent prior learning assessments is at the root of most concerns that have been raised about the accreditation process. These concerns are discussed in more detail below.

The qualifications of applicants are assessed at meetings of the committee that take place approximately three or four times annually. Before each meeting, each member of the committee is provided with a copy of each applicant's file, which is considered individually. Members of the committee do not meet the applicants. Any differences of opinion among members of the committee are resolved by majority vote after a full discussion.

The factors considered by the committee include the reputation and prospectus of the law school from which the applicant graduated (the prospectus generally sets out entrance requirements, course requirements, and language requirements); the quality of the degree obtained by the applicant (for example, whether it is a first, second, or third class degree, where applicable); the percentage of graduates who have obtained first, second, or third class degrees from the institution in question; how many years have elapsed since the applicant's graduation; whether the academic institution attended is accredited by national law associations such as the American Bar Association; the length of the academic program in law in which the applicant was enrolled; the subjects studied (for example, whether the program combined law with social sciences or humanities, or both, and the relevance of the program to Canadian law and circumstances); undergraduate pre-law education; academic performance, grades, and class standing obtained (for example, whether the applicant finished in the top or bottom 25% of the class); the acceptance in the foreign jurisdiction of the standing achieved (for instance, in England or Wales a graduate cannot become a barrister with a third class degree and the vast bulk of graduates obtain mid-second degrees); whether the applicant has been admitted to the bar by examination in the home jurisdiction; and the length, nature, and quality of the applicant's professional legal experience.

The NCA has published guidelines that are used to evaluate the credentials of applicants who have foreign law degrees. The guidelines facilitate the application of consistent standards to applicants with similar backgrounds. They also allow the NCA to apply consistent standards over a period of time so that similar cases are treated in a similar manner.

In cases in which the NCA recommends that the applicant take further education at a Canadian law school with a specified program, it stipulates a number of credit hours of law studies at a Canadian common law school that the applicant must successfully complete in order to obtain a Certificate of Qualification.

The credit hour system translates into the following approximate periods of time to be spent in a Canadian law school:

30 credit hours	1 academic year	two semesters
45 credit hours	1.5 academic years	three semesters
60 credit hours	2 academic years	four semesters

Law schools that do not use the credit hour system can translate credit hours by substituting one full academic year for every 30 credit hours.

The NCA's published guidelines differentiate among common law systems, hybrid jurisdictions, and other legal systems. Common law systems are further broken down into three sub-categories. The guidelines may be summarized as follows.

(a) *Common Law Systems*

(i) *U.S.A.*

Applicants with recent law degrees from ABA/AALS-accredited law schools in the United States are generally asked to complete between 30 and 45 credit hours in a Canadian law school. As part of their program of studies, applicants are required to complete successfully certain courses that usually include constitutional law, evidence, taxation, civil procedure and corporate law.

The specific recommendation is likely to vary depending upon the applicant's academic performance and class standing, any relevant graduate legal education and experience in law teaching at a university law school level, membership by examination in a state bar, and legal experience as a practising lawyer.

The only examples cited in the published guidelines are as follows. An applicant with a three-year law degree from an ABA/AALS-accredited law school who graduates in the top 25% of the class, has passed the state bar examinations, and has been admitted as an attorney licensed to practise law will usually be asked to pass five to eight three-hour examinations to be considered to have education and training equivalent to a law graduate from a Canadian law school. In comparable circumstances, an applicant who graduates in the bottom 75% of the class may be asked to complete 30 credit hours in a Canadian law school.

The published guidelines go on to specify that these requirements will be reduced if the applicant has professional legal experience as an attorney. For example, an applicant with a three-year law degree in the top 25% of the class, admitted by state bar examination as a licensed attorney, with one to three years of professional legal experience, would generally be asked to pass between four and six examinations; with three to five years experience, three to five examinations; and with experience in excess of five years, two to three examinations.

(ii) *England, Wales, Australia, New Zealand, West Indies, Hong Kong and Singapore*

The published guidelines specify that applicants from these countries can expect to be required to take 30 to 45 credit hours in a Canadian law school if they have obtained a second class degree or better in a three-year honours law program following upon an undergraduate degree. Applicants who take a two-year law honours program with a second division standing or better are usually asked to complete 45 to 60 credit hours. Most applicants, whether with two or three-year law honours degrees, are asked to take at least constitutional law, evidence, taxation, civil procedure and corporate law. Depending upon the applicant's particular educational background, the committee may also specify other subjects. Again, the committee credits successful completion of examinations of the law society or bar finals and completion of articles or pupillage. In addition, the committee takes into account professional legal experience, the quality of experience, and the years of practice following admission as a solicitor or barrister.

The examples cited in the guidelines are as follows.

An applicant with an upper second class degree or better who stood in the top 25% of the program in a three-years honours LL.B. degree, who has been admitted to practice as a solicitor or barrister on the basis of examinations, and who has less than one year's practice experience will usually be asked to complete four to six examinations; with one to three years of professional legal experience, three to five examinations; with three to five years experience, two to four examinations; and with experience in excess of five years, one to two examinations.

In comparable circumstances, an applicant with a lower second class honours law degree who has been admitted by way of examination to the law society or as a member of the bar but with less than one year's experience would be asked to pass five to eight examinations; with one to three years experience, four to six examinations; with three to five years of experience, three to five examinations; and with experience in excess of five years, two to three examinations.

Applicants with third class standing or lower do not usually receive any advanced standing, though this may vary based on their admission to the law society or as a member of the bar together with post-admission professional legal experience. For example, a graduate with a third class degree from a three-year law honours program who has been admitted as a solicitor or as a barrister and has practised for one to three years may receive one year's advanced standing; with three to five years of experience, one and one-half years of advanced standing; or with experience in excess of five years, two years advanced standing.

Applicants who have been admitted as solicitors through articling (but without a law degree) are also considered for advanced standing on the basis of their particular program of studies and experience. For example, an applicant who has been admitted directly as a solicitor (without a law degree) with one to three years professional legal experience would usually be asked to pass four to six examinations; with three to five years experience, three to five examinations; and with experience in excess of five years, two to three examinations.

The NCA's guidelines provide that the committee generally gives little if any credit to applicants who have received an "external" degree, though such applicants may receive partial credit based upon subsequent professional legal experience. For example, an applicant with an external law degree who has been admitted by examination to practise as a solicitor or barrister and who has practised law for three to five years will usually be asked to complete 60 credit hours at a Canadian law school; with experience in excess of five years, such an applicant will usually be asked to complete 45 credit hours.

(iii) *India and Pakistan*

Applicants from India and Pakistan are evaluated largely on the class of their degree and their academic standing. Applicants with first class standing from an established university with English language instruction are usually asked to complete an additional 30 credit hours and, as part of their program, to take courses in constitutional law, evidence, taxation, civil procedure, and corporate law. Applicants with second class standing will usually be asked to take 60 credit hours in a Canadian common law school.

Applicants with third division standing or lower will not receive any advanced standing toward a Certificate of Qualification.

Examples provided in the NCA's guidelines are as follows.

An applicant with a three-year law degree from an established law school in India or Pakistan with first class standing and experience of less than one year would usually be asked to complete 30 credit hours in a Canadian law school or pass eight three-hour challenge examinations in specified subjects. Applicants would be required to complete successfully courses in at least constitutional law, evidence, taxation, civil procedure and corporate law.

In comparable circumstances, an applicant who has practised law for several years would usually be asked to pass five to eight three-hour examinations.

The NCA also looks at the language of instruction of the applicant's law program and may ask for evidence of demonstrated competence in the English language.

(b) Hybrid Jurisdictions

The NCA's guidelines specify that applicants from jurisdictions that have mixed legal systems with a common law component (this category includes Scotland, South Africa, Israel, and the Philippines) are considered on the basis of criteria similar to those applied to applicants with a common law background. In addition, however, the committee takes into account the extent of the common law component in the applicant's particular program.

Applicants from hybrid jurisdictions are usually asked to complete 45 to 60 credit hours in a Canadian common law faculty if they have obtained at least second division standing in a three-year honours law program following upon an undergraduate degree. Again, the committee takes into account admission to the bar, by examination, and post-qualification practical experience in the jurisdiction in which the applicant has qualified. The committee also considers relevant graduate legal education, law teaching experience and the curriculum or subjects studied as part of the law degree program.

The examples cited by the NCA in its guidelines are as follows.

An applicant with an upper division second class degree or better from a three-year honours law program following upon an undergraduate degree will generally be asked to complete 45 additional credit hours in a Canadian common law faculty.

In comparable circumstances, but with a lower division second class degree, the applicant will usually be asked to complete 60 credit hours.

Applicants with third class standing or lower do not generally obtain any advanced standing, unless they have substantial experience.

Applicants who have graduated with a two-year law degree are usually asked to complete more credit hours than those who have graduated with three-year law degrees.

The examples cited in the NCA's guidelines are as follows.

An applicant with an upper division second class degree from a three-year honours law program with several years of legal practice will usually be asked to pass five to eight examinations.

An applicant with a lower division second class degree with professional legal experience will usually be asked to complete successfully 30 credit hours or pass eight three-hour challenge examinations in specified legal subjects.

The committee also gives credit for qualifications where the applicant has been admitted directly as a solicitor or barrister without a law degree. For example, a directly-admitted solicitor with several years of experience would usually be asked to complete 30 additional credit hours or pass eight three-hour challenge examinations in specified legal subjects.

(c) Other Legal Systems

Although applicants from legal systems with no substantial common law component are considered on a case-by-case basis, applicants who have no common law exposure, whether academic or professional, in the absence of the relevant professional legal experience, are unlikely to be recommended for any advanced standing in an approved Canadian law school. At its February 1996 meeting, for example, a lawyer from Bulgaria received no advanced standing.

****

Upon completion of its review, the NCA issues a recommendation that the applicant do one of the following:

(i) pass examinations in specified areas of Canadian law;

(ii) take further education at a Canadian law school with a specified programme; or

(iii) complete a Canadian LL.B. program.

Regardless of the source country, the committee generally requires that applicants who are asked to complete 30 credit hours or less successfully complete courses in constitutional law, evidence, taxation, corporate law, and administrative law. Applicants who are asked to complete 45 to 60 credit hours are, in addition to the above, usually required to successfully complete some or all of the following courses: family law, real estate law, criminal procedure, civil procedure, commercial law, secured transactions, or debtor-creditor law.

The NCA generally gives no credit to applicants for experience working as law clerks, whether they are in Canada or abroad. The issue of whether applicants should receive credit for work as law clerks in Canada is considered below.

6. The Problems

When the NCA was formed almost 20 years ago, Canadian immigration patterns were relatively consistent and predictable, and were accordingly easier to respond to. The task of assessing the prior learning and experience of applicants has become progressively more difficult over the years. Whereas the backgrounds of applicants at one time were relatively homogeneous - the vast majority of applicants were from English-speaking countries with a common heritage - there is now much greater diversity. The resources available to assist the NCA in assessing the comparability of the legal education and training received by applicants is uneven. The number of applications has also increased dramatically since 1977.

These changes have created significant tensions among applicants, interest groups, law schools, and the NCA in recent years. The major concerns are summarized below.

7. Applicants' Concerns

Applicants object that although they admittedly require education in Canadian laws, as lawyers who are qualified to practise in other jurisdictions (often for many years), being required to return to law school is neither the fairest nor the most effective way to accomplish this objective.

They add that the treatment of NCA students by Ontario law schools varies considerably, and that in certain of the law schools little is done to integrate NCA students, who are often both older than and culturally different from most LL.B. students, and who frequently feel alienated. Because of their advanced standing, NCA students tend to be in and out of first and upper-year courses, rather than being in the same section or group of students for all of their first year courses.

Certain law schools, moreover, do not consider NCA students to be "their students", and the resources and opportunities available to NCA students are sometimes less generous than those available to LL.B. students. For example, NCA students who fail examinations may not be allowed to write supplemental examinations at the law schools, as are LL.B. students.

This sense of unfairness is exacerbated for NCA candidates studying at the University of Toronto Law School, where the fees paid by NCA students are appreciably higher than the fees paid by LL.B. students.

Applicants also object that too few seats in law schools are made available to NCA students. The pool of NCA students who have been granted advanced standing in law school is greater than the number of available law school seats. Approximately half of NCA students applying for admission to law school in any given year are admitted (approximately 25% of applicants for LL.B. programs are admitted). In the perception of many applicants, having created a route for foreign- trained lawyers to gain admission to the Ontario Bar, the authorities have also created barriers to prevent them from being admitted.

This problem is aggravated by the fact that applicants who do not gain admission to law school must apply to the NCA again after three years have elapsed. In addition to being required to pay a further application fee, the candidate may be given less advanced standing because of the time that has elapsed, "as if it were [the candidate's] fault", as one applicant has said, "that [he or she] has failed to [gain] admission".

A frequent complaint concerns perceived difficulties in communications with the NCA. A number of applicants believe that the NCA has not done a good job communicating the basis upon which it makes its assessments, and that it appears to applicants that candidates with similar qualifications are assessed very differently, in some cases even if they come from the same country.

It is also clear that NCA students, and particularly those who are members of visible minorities, have encountered appreciably more difficulty in securing articling positions.

Finally, the view of many applicants (and interest groups) is that the number of foreign-trained lawyers who are admitted to practise in Ontario is inadequate to serve the needs of communities of immigrants from the same countries.

In summary, in the view of many applicants, the accreditation process has a discriminatory effect and imposes unreasonable and unfair burdens on many applicants.

8. Law School Concerns

Senior administrators at certain law schools are of the view that NCA assessments of applicants' qualifications are unreliable, and that many of the foreign- trained lawyers who are given advanced standing in law schools are not even at the bottom of an acceptable range of ability. In many cases the problem is aggravated by applicants' poor command of the English language. The NCA's assessment process, in the view of these administrators, is inadequately identifying problem cases.

Some law school administrators point out that in many other countries there is less competition for law school seats, and that as a result law school admission standards are much less exacting than are admission standards for Canadian law schools. This point is independently verified by the fact that a number of Canadian students who do not gain admission to Canadian law schools are able to gain admission to law schools in England and other jurisdictions. After gaining admission to the bar in the other jurisdiction, some of these students seek admission to Canadian law societies, a process they initiate by applying to the NCA.

Generally, NCA students occupy a disproportionate amount of time and expense, and place excessive demands upon the workload of faculty members. This results in part from difficulties that many NCA students have in adjusting to a new country and culture (and, in some cases, a new language), but results also from difficulties some of the applicants have in understanding the law. At one law school, approximately half of the NCA students failed at least one course, and some failed several courses. Only a small proportion of LL.B. students fail even one course.

A number of law school administrators (and, as mentioned above, a number of applicants) are of the view that the NCA has not done a good job in communicating the basis of its assessments. Two administrators from different schools remarked that they have not seen much method in the courses that NCA students are required and permitted to take. Some administrators feel that the NCA passes problems on to law schools, and keeps both law schools and students in the dark about why students are required to take both a stipulated number of courses and specified courses, both of which are the subject of continual complaints to administrators by students.

Some law school administrators feel the relationship between the law schools and the NCA is characterized by friction, whereas the NCA and the law schools should be working together as allies with a common purpose.

9. Performance of NCA Students in Bar Admission Course

Statistics that have been compiled by the NCA in recent years concerning the performance of NCA students in the Ontario and British Columbia bar admission courses confirm both the difficulty of obtaining accurate assessments of the prior learning of applicants, and the significant variations in the readiness to practise law of applicants who obtained their legal education and training in different countries.

Of 45 NCA applicants who were permitted to write challenge exams rather than attending law school, and who proceeded to take the bar admission course between 1991 and 1995 inclusive, 42 (93%) successfully completed the bar admission course without a recorded failure in any subject. In the 1995-1996 year, only eight of the 21 NCA applicants who had successfully completed challenge examinations obtained a clear pass (with no supplementals) in the bar admission course. However, a further eleven successfully completed the course after writing one or two supplementals.

The success rate of NCA applicants who came into the bar admission course through law schools was appreciably lower. Between 1991 and 1995 their overall failure rate was 31%, and varied considerably depending upon the applicant's country of origin. Particularly high failure rates were recorded by applicants from Sri Lanka (75%), India (85%), and Ghana (86%). This problem continued in the 1995-1996 year.

In contrast, the success ratio of applicants from the following countries was very high: Hong Kong (100%), South Africa (100%), Singapore (100%), Australia (100%), Scotland (100%), England and Wales (91%), and the United States (85%).

Since 1992, at least twice as high a proportion of NCA candidates have failed one or more courses than have LL.B. candidates, as the following chart demonstrates.

Year	NCA	LL.B.
1992	29.5%	11.2%
1993	30.8%	7.0%
1994	44.1%	14.5%
1995	78.1%	32.9%

Differences in performance in the bar admission course as measured by reference to the law school attended by NCA candidates do not appear to be significant. For example, in the 1995-1996 year 69% of NCA candidates who attended *each* of the University of Toronto and Osgoode Hall Law Schools graduated from the bar admission course with a clear pass or having had to write either one or two supplementals. Similarly, 22% of the NCA candidates from the University of Toronto and 23% of NCA candidates from Osgoode Hall were required to write five or more supplementals in the bar admission course.

Differences in Nature and Quality of Legal Education in Applicants' Countries of Origin

NCA applicants vary from Rhodes scholars who studied law at Oxford, to retired judges from Poland, to non-practising lawyers from non-common law jurisdictions who obtained their law degrees at night school.

Both the nature and quality of legal education and the conditions of practice differ greatly among countries, and in some cases within the same country. A practising lawyer in India may have received a high-quality legal education and had a sophisticated practice, or may have graduated from a poor law school and maintained no office, meeting clients outside courthouses.

The assessment of applications from lawyers educated and trained in the United States does not usually create problems for the NCA. The NCA recognizes only law degrees obtained from American Bar Association-approved law schools, and this provides the NCA with a high level of confidence in the quality of legal education an applicant has received. There is no national evaluation body in most other countries (including India, which has more law schools than any country other than the United States). It would be impossible for anyone to be completely familiar with the standards of the hundreds of law schools in India.

Even the best law schools in India do not have the facilities available to students at *any* Canadian law school. The NCA is able to distinguish among law schools by reputation and admission standards, but must bear in mind that the top graduates from the worst schools may be better qualified than the worst graduates from the best schools. Thus, even comparisons of the qualifications of applicants from the same country can be complicated and difficult.

Although by comparison the standards in some countries (such as England) are relatively uniform, comparisons of the qualifications of applicants from such countries with those of applicants from other countries can also be problematic.

Another factor that must be taken into consideration is the fact that in some countries (including England) a student may be admitted to law school directly from secondary school, without an undergraduate university education. Again, the problem is in determining whether the legal education obtained is truly equivalent to that obtained, generally after a student has obtained an undergraduate degree, by a Canadian-educated student with an LL.B.

The process is further complicated by the fact that the meaning of grades can vary widely from school to school and country to country. In some jurisdictions students seldom receive a grade lower than 75%, whereas in others they seldom receive a grade higher than 60%.

The quality of applicants' legal education and training is of course influenced greatly by the nature of the country's legal system. Legal education in a common law system is more likely to resemble the education received in a Canadian LL.B. program than is the legal education received in a hybrid jurisdiction or a civil law system. Canadians would hardly recognize as a legal system at all the legal systems of such countries as Russia, which are more akin to an arm of the government.

Difficulty in Assessing Equivalency of Prior Learning and Experience

The assessment of equivalency is at the heart of the accreditation process. In Access!: Report of the Task Force on Access to Professions and Trades in Ontario (1989) the task force observed that the mechanism adopted for assessing prior learning and training must be systematic and objective, and should consider not only formal education but also knowledge gained through experiential learning.

The task force recognized that experiential learning should be subject to close scrutiny, and must be relevant and well documented, while meeting the same standard of competence required of Canadian-trained candidates as specified by the occupational bodies and relevant educational institutions.

The task force described the NCA's process as a fairly sophisticated and responsive method of case-by-case equivalency assessment, and commended the NCA for the objectivity of its evaluation system and the relative comprehensiveness of its reference material on other jurisdictions.

The NCA guidelines must be constantly revised to take into account the committee's experience with the success of applicants. Although it appears that the legal profession has done a better job than most other professions and occupations in determining equivalency, the variations in bar admission course performance referred to above underline the difficulty of the task and the necessity of continually revising standards to ensure that they are as fair and merit-based as possible, so as not to set up arbitrary or artificial barriers.

10. Law Clerk Experience

A recurring problem in the assessment of prior learning and experience is the extent to which (if at all) applicants who have worked under the supervision of lawyers as law clerks, especially in Canada, should be given credit for that work.

The NCA's policy is not to recognize experience as a law clerk in formulating its assessments. Its reasons for this policy include the following:

(a) LL.B. students are not given credit for experience as a law clerk;

(b) work as a law clerk cannot be equated with the professional practice of law; and

(c) although many applicants who have practised as lawyers in foreign jurisdictions assert that they are treated as lawyers in their work as law clerks in Canada, this cannot justify credit being given for such work, as to do so would be tantamount to sanctioning the unauthorized practice of law.

Nevertheless, it is undoubtedly the case that lawyers who have qualified and who have practised in other jurisdictions who work as law clerks under the direct supervision of a Canadian lawyer gain invaluable experience that would be of real assistance to them in understanding the way in which the Canadian legal system functions. To give no credit for Canadian experience in any circumstances can create inequities, as applicants who are completely unfamiliar with the way in which law is practised in Canada may unfairly be given more credit toward a Certificate of Qualification than those who have developed an appreciation of the legal environment in Canada.

At the same time, it must be recognized that the experience of law clerks in Canada also varies widely, and that an individual assessment of what applicants have learned would have to be undertaken in order for appropriate credit to be given.

In my view, the NCA's guidelines should be amended to permit applicants with experience as law clerks obtained under the supervision of a Canadian lawyer to be given appropriate credit based upon an individual assessment of the extent to which (if at all) the experience gained has contributed to the applicant's state of preparedness to practise law in Canada.

In some circumstances, for example, meaningful work as a law clerk in Canada under the supervision of a Canadian lawyer might be sufficient to enable an applicant to obtain a Certificate of Qualification by writing challenge examinations rather than by obtaining law school credits.

11. Assessment of Language Skills

As immigration patterns have changed, applicants' ability to understand and communicate in English or French has received increased attention by the NCA and law schools. A growing proportion of applicants from countries including Sri Lanka, the Philippines, India, Pakistan, Bangladesh, and some countries in Eastern Europe and Northern Africa have not received their legal training in English or French. (In some of these countries, applicants' language skills have turned out to be poor even where law school courses are said to have been given in English.)

Facility in English or French is, of course, essential to functioning as a lawyer in Canada. It is doubtful that language is as important in any other profession as it is in the law.

At the same time, it is important to bear in mind the interests of the communities that foreign lawyers who are admitted to the bar in Canada are likely to serve. Being able to communicate with one's lawyer in one's own language without an interpreter is an invaluable advantage. Applicants' facility in other languages must be balanced with facility in English or French in an attempt to clear barriers to entry that will help to alleviate problems that members of communities whose first language is neither English or French may have in communicating with members of the legal profession.

It is also important to bear in mind that one may easily misread a person's ability based on how he or she speaks. In some cultures the prevailing means of analysis are different, often less linear than what we are accustomed to. It would be easy to confuse what seems to us to be a convoluted means of analysis with a lack of facility in the English language, or even a lack of competence in the law.

There are two main practical problems. The first is devising a test for determining applicants' level of linguistic proficiency as it applies to the legal profession specifically. The tests that are widely available include the test of English as a Foreign Language (TOEFL). TOEFL is the most widely-used test, but like other standardized tests it is a weak predictor of performance in a particular occupation, and does not test occupation-specific language. TOEFL was created in 1963 and is the most commonly used language test in North America. It is entirely multiple choice, and is a three-part test comprising listening comprehension, structure and written expression, and vocabulary and reading comprehension.

Ideally, a language test would assess the level of language proficiency applicants require to perform competently as lawyers. The NCA, in conjunction with the law schools, would be well-advised to explore the possibility of a language test being designed that would assess candidates with specific reference to the language proficiency required to perform competently as lawyers.

The second issue is at what stage and in what circumstances language skills should be assessed. Until recently, the NCA's policy was to require English language competency testing where applicants either have not undertaken their undergraduate legal education primarily in English, or have not demonstrated proficiency in English or French in materials submitted to the NCA in support of their applications. The test was administered by the Educational Testing Service in various centres in Canada, and the test score was reported on applicants' records so that it was available to law school admission committees.

At its meeting on February 13, 1996 the NCA changed its policy. It now states in the standard letter that is provided to applicants notifying them of the NCA's recommendation that the applicant has not written any English language equivalency test, and that the NCA accordingly has no basis on which to decide whether such a test is needed.

Law schools have been requiring NCA students whose first language is not English to write the TOEFL test increasingly in recent years, and the NCA expects that this requirement will become increasingly common.

12. The Needs of Communities

The NCA considers the needs of particular communities to be beyond its mandate, which is to assess the equivalency of legal education and training received outside Canada.

At the same time, a number of applicants point out that only a small proportion of Ontario lawyers are from visible minority groups, a "glaring imbalance" despite the admonition in rule 28 of the Rules of Professional Conduct that lawyers must not discriminate on the basis of race, ancestry, place of origin, colour, ethnic origin, gender, or age, among other factors. Some applicants allege that the prevailing view among members of the NCA remains Anglo-centred.

This suspicion that there may be something semi-elitist going on in the accreditation process may be due more to inadequacies in communication than to any discriminatory effect (let alone discriminatory intent) of the NCA's assessments.

In any event, to accommodate the needs of foreign-educated lawyers and their communities is likely to promote the law societies' policies of promoting diversity in the profession.

13. Applicants' Law School Experience

As mentioned above, concerns that have been expressed by applicants include the perception of a significant number of applicants that they are not well integrated with LL.B. students in law school, and that in the case of certain law schools they do not have available to them the resources that are available to LL.B. students.

The concern that NCA students are not well integrated with LL.B. students must be considered in the light of one of the purposes of requiring foreign-trained lawyers to attend law school, namely inculcating a better sense of the culture of law in Canada.

NCA students attend classes with LL.B. students. A major reason for the perceived lack of integration (as mentioned above) is that because of their advanced standing, NCA students tend to be in and out of first and upper year courses, rather than being in the same section or group of students for all of their first year courses.

The students are considered by most law schools to be "within enrollment"; in other words, they are among the law students for which the schools receive government funding based upon the number of students enrolled in the school's programs. At these schools, NCA students pay the same fees as do LL.B. students, and generally have access to the same resources. Members of faculty may not even know which students are NCA students, as they are treated the same as everyone else.

The University of Toronto Law School is the exception. A disproportionate number of NCA candidates live in the Greater Toronto Area, and accordingly the two Toronto law schools have come under considerable pressure in recent years to accept more NCA students into their law programs.

Prior to 1992, the University of Toronto Law School admitted a small number of NCA candidates when there were places available in the upper years of the LL.B. program, but as a rule the school had only a small number of available upper year places, and those places were heavily in demand also by students seeking to transfer from other Canadian law schools or seeking to study at the University of Toronto on a letter of permission.

In 1992, the University of Toronto Law School devised a separate program for NCA students that had the effect of enabling the school to admit significantly larger numbers of NCA students. The NCA students are admitted in addition to the school's fixed enrollment, which is reserved for LL.B. students (including transfer candidates). NCA students pay a fee to the law school based upon the number of courses the students are required to complete successfully. The law school receives no government subsidy for NCA students.

The fee paid by NCA students is higher than the government-subsidized tuition fee for LL.B. students, but considerably lower than the full cost to the law school of offering the NCA program. The fee paid by LL.B. students is approximately 20% of the cost of their legal education, whereas the fee paid by NCA students is approximately 50%.

NCA students who qualify are eligible for assistance pursuant to the Ontario Student Assistance Program (OSAP). Nevertheless, some NCA students have reported that they cannot afford to attend the University of Toronto Law School because of the higher fees charged.

The current University of Toronto policy, however, enables the law school to offer admission to significantly more students than was formerly the case. Before the program was put in place in 1992, only two or three NCA students a year were admitted. Over the last two years, between 18 and 20 NCA students have registered in the program (of 29-30 candidates offered admission). In proportion to its total enrolment, the University of Toronto has admitted more NCA students than any other law school (Osgoode Hall and the University of British Columbia law schools have admitted comparable numbers of NCA students in recent years, but have higher overall enrolments).

In the first year of its NCA program (1992-1993), the University of Toronto Law School encountered considerable difficulty because of the demands that were being placed on the school's resources by NCA students. The law school found that a much higher proportion of NCA students than LL.B. students invoked the appeals process, sought to write supplemental examinations, and applied for financial assistance, for example.

The law school concluded that it should regard itself as a subcontractor of the NCA that provides specified services for a fee. Since then, NCA students have been told at the outset that the services provided by the law school are:

(a) offering courses and examinations required by the NCA;
(b) assessing students' performance in these courses and examinations; and
(c) reporting these results to the NCA.

Certain resources are available at the University of Toronto law school to NCA students though they are not specifically listed in the Terms and Conditions of Admission that are provided to NCA students before they commence their studies. These include access to the national articling database, the law school's articling handbook, reference material, and the Law Society of Upper Canada's vacancy list.

Complaints by NCA students about the University of Toronto's policies have been frequent. The complaints have focused on the fact that NCA students must pay higher fees then LL.B. students, yet are provided with fewer services.

Complaints about the differing treatment of LL.B. and NCA students have contributed significantly to the perception of foreign-trained lawyers that we have erected discriminatory barriers to entering the profession.

Although the policies of the University of Toronto Law School were unquestionably devised for the commendable purpose of enabling more NCA candidates to be admitted to law school, in my view it is important that law schools be encouraged by the Law Society of Upper Canada, the Federation of Law Societies of Canada, and the NCA, to make the same services and resources available to LL.B. and NCA students alike, and for the same fee.

In response to the draft report circulated in mid-1996, the University of Toronto Law School has made it clear that it has no intention of reducing the fees charged to NCA students to the level of fees charged to LL.B. students: "We have no intention of providing such a large subsidy." It has also made it clear that if the Law Society were to endorse a recommendation with this effect "the result may well be a decision to substantially scale back, or more likely eliminate, the programme". If the programme were eliminated, however, qualified NCA students would presumably be admitted "within enrolment", as at other law schools. Also as at other law schools (such as Osgoode Hall, where a comparable number - although a smaller proportion - of NCA students are admitted), these students would be eligible for the same services as LL.B. candidates.

In summary, the differential treatment of NCA and LL.B. students both in fees charged and services received has given rise to frictions that must be eliminated for the accreditation process to be seen as fair and equitable. At the same time, it is to be hoped that these frictions may be eliminated or at least minimized without a substantial reduction in the number of available spaces for NCA students at the University of Toronto Law School.

I have accordingly recommended that the Law Society should pursue discussions with the University of Toronto Law School with respect to the issues of fees and services to NCA candidates with a view to facilitating an appropriate solution to the issue.

14. The Goals of Accreditation

Having considered the tensions that have become apparent in recent years, it is worth standing back to consider the goals of the accreditation process and the extent to which those goals have been realized.

The material provided to applicants by the NCA is silent on the subject of the goals of accreditation.

To some extent, however, the goals of the process can be discerned from the evolution of the committee.

One goal of the process is to allow access to the legal profession to certain groups that have been excluded in the past. A related goal is to promote diversity in the profession. It is not part of the NCA's function, however, to attempt to gauge the needs of communities in Canada that may be under-represented in the profession.

A further (and, if anything, an even more important goal) is to maintain a high standard of competence and ethics among lawyers admitted to practice in Canadian jurisdictions. The NCA also seeks to treat applicants who were educated and trained abroad fairly, when compared to both Canadian-educated

and other foreign-educated candidates. The committee recognizes that the process must be "transparent", so that applicants can see that they are being treated fairly and as individuals. It is important for this reason that the standards be clear and understandable.

An issue raised by two of the law school administrators whom I interviewed was whether the fact that a qualified applicant was a lawyer in another country should in itself be sufficient reason to facilitate that person's becoming a lawyer in Canada, in the absence of a demonstrated need for lawyers with particular language skills and cultural backgrounds. It has been pointed out that there is a strong feeling that most Canadian jurisdictions are "over-lawyered" already, and that the admission of ever-increasing numbers of lawyers often creates competence and quality of service problems.

A competing view is that even in the absence of proof of a demonstrated need in a particular community, a high proportion of the foreign-educated applicants are likely to be well positioned to serve communities whose legal needs are not being met at present. Moreover, it would distort the fairness of the process if applicants were required to meet a variable standard that changed depending upon the availability of lawyers who are capable of serving particular communities at a given time. Accordingly it is the view of the NCA (with which I agree) that the needs of particular communities in Canada should not be a weighty consideration in the assessment of applicants' credentials.

The goals of the process must be borne in mind in considering the controversial issues that are addressed in this report.

NCA Reforms and Policies

The NCA has reconsidered its policies from time to time in an attempt to meet legitimate concerns that have been raised.

For example, as mentioned above, the NCA recently adopted a change to its standard letter containing its recommendation so that it is clear on the face of the letter that the applicant has not written the TOEFL test, and that the committee has no basis on which to determine the applicant's facility with the English language.

The NCA has also increased the number of applicants who were permitted to attempt to obtain a Certificate of Qualification by writing challenge examinations by the creation of a "CQ8" category in addition to a "CQ5" category; thus, certain applicants who formerly would have been required to obtain credits by attending law school are now able to attempt to obtain a Certificate of Qualification by writing up to eight challenge examinations.

The NCA has also revised its policy that applicants merely obtain an unconditional pass in every subject studied at law school. Now applicants must also attain the overall grade point average requirement of the law schools they attend. Thus NCA applicants must meet at least the same academic standards that domestic students enrolled in Canadian LL.B. programs are required to satisfy. This change was brought about as a result of a concern on the part of law school administrators that applicants who obtain an unconditional pass in each course but have a D average, for example, have not demonstrated the necessary level of competence to enter the bar admission course. This change was effected in October 1995.

Finally, at its meeting on February 13, 1996, the NCA resolved to allow applicants at law schools that do not extend to NCA students the opportunity to write supplemental examinations, the privilege of writing a challenge examination in any course the applicant fails at such a law school. NCA applicants will be allowed only two attempts to demonstrate their competence in any particular subject. This change was effected to answer objections of NCA students at the University of Toronto Law School who (unlike NCA applicants at other law schools) could not obtain a Certificate of Qualification by successfully passing one or more supplemental examinations in courses in which the applicants failed to obtain an unconditional pass.

15. Should Ontario Have Its Own Committee?

Ontario is the province of choice for between 40 and 50% of immigrants arriving annually in Canada, and this percentage increases significantly if people who move to Ontario from other provinces within the first year or two of their arrival in Canada are included.

A high proportion of NCA applicants, similarly, wish to practise in Ontario.

In light of the increased workload of the NCA, there may be some benefits from a management perspective if the Law Society of Upper Canada were to form its own committee. At present, the NCA meets three or four times a year (as mentioned above), and either the British Columbia or Ontario members of the committee must fly across the country to attend committee meetings.

It may be possible, for example, for the members of a local committee based in Toronto to meet with a number of applicants personally, to assist in the proper assessment of the applicants' credentials and communication skills.

However, there are compelling reasons for the accreditation of foreign lawyers to continue to be managed at a national level (and for the Federation of Law Societies and other interested organizations to continue to bring the Law Society of Alberta into the fold). There is a clear consensus among interested parties that to decentralize the process would be a regressive step.

In order to appreciate the reasons for this consensus, an understanding of the fundamental importance of the portability of an LL.B. degree from an approved Canadian law school is necessary.

Sixteen universities in Canada confer approved common law LL.B. degrees, which permit graduates from those law schools to enter a bar admission course in any Canadian common law province. The only law degrees that may be obtained in Canada that do not permit graduates to enter bar admission courses in common law jurisdictions are those obtained from civil law degree programs in Quebec or Ontario (Université de Laval, Université de Sherbrooke, Université de Montréal, Université de Québec and the civil law programs at McGill University and the University of Ottawa).

If the Law Society of Upper Canada were to establish its own accreditation process, applicants could not be assured that the recommendations of the Ontario committee would be honoured by other law societies. Applicants would therefore be disadvantaged relative to LL.B. candidates.

Moreover, in view of the fact that the highest proportion of NCA applicants wish to practise in Ontario, it is likely that Ontario would become the *de facto* accreditor of foreign lawyers. Although some provinces would recognize Ontario's recommendations, others would apply their own standard. Foreign-educated lawyers would penetrate the jurisdiction with the lowest standards, and would then attempt to transfer to Ontario and other jurisdictions. (In fact, there is a concern that to some extent this happens now, as the prevailing view is that it is easier for a foreign lawyer to gain admission to the Alberta Bar after being approved by the University Co-ordinating Council instead of the NCA, and to transfer to Ontario after three years of practice, than to gain admission to the Ontario Bar through the NCA process.)

Subject to the Alberta anomaly (which members of the committee expect will be removed in the near future), the NCA strives to maintain a uniform and consistent standard across the country.

Members of the committee are also of the view that although the number of applications has increased significantly over the years, the NCA has become more efficient as it has gained experience and, particularly, because of the development of its computer database. It is by no means clear, moreover, that it would be desirable for members of the committee to meet applicants in person. Because most of the applicants are living abroad, it would be impossible to develop an equitable system for incorporating personal interviews into the accreditation process. Many educators believe, also, that personal interviews tend to introduce an undesirable subjective element into any admission process, and recommend against it.

Accordingly, the Law Society of Upper Canada should not establish its own accreditation process but rather should continue to support the NCA.

16. Is Law School What Applicants Need?

In circumstances in which the NCA concludes that applicants need only demonstrate their knowledge of Canadian law in order to establish their preparedness to enter the bar admission course, the applicants, as mentioned above, are allowed to write challenge examinations rather than attending law school. In order to answer complaints that NCA requirements have imposed unreasonable burdens on applicants, as mentioned above, the NCA has relaxed the stringency of its requirements in recent years by creating a "CQ8" requirement in addition to its long-standing "CQ5" requirement; that is, applicants who formerly would have been required to attend law school are now awarded a Certificate of Qualification if they complete up to eight challenge examinations successfully.

The unwritten reason for requiring other applicants to attend law school rather than preparing independently to write examinations is that applicants who fall short of the CQ8 standard, in addition to learning Canadian laws, require socialization in the culture or ethos of Canadian law.

There would appear to be a clear consensus that for these applicants some such socialization process is required. The real issue is whether law school is the most effective means of answering that need.

Law school administrators report that in fact what NCA applicants need varies widely. In an ideal system, programs (whether taught in law school or elsewhere) would be targeted to the specific needs of applicants from particular jurisdictions with a common legal culture.

The Dean of one Ontario law school noted what he considered to be an incidental but important benefit of the present system, in which NCA candidates are integrated in classes with LL.B. students: the diversity of backgrounds of NCA students adds to the richness of the law school experience for everyone else.

The Human Rights and Race Relations Centre in consultation with an advisory group of lawyers educated and trained in India and Pakistan has recommended that foreign lawyers who have been in practice for ten years or more be entitled to obtain credit for working for a period of two years with a law firm to better understand our legal system and to prepare them to write challenge examinations in lieu of having to obtain between 30 and 45 credit hours in law school. Under this proposal, candidates would be entitled to appear on matters in which members of the bar do not have an exclusive right of audience (such as landlord and tenant, immigration, traffic, and small claims court cases). The proposal suggests that such an alternative would be preferable to the present system, in which (to adopt the example cited in the proposal) a lawyer who has had a successful practice in Pakistan over a period of 35 years "must sit with kids in law school", then article and pass the bar admission course examinations.

There would appear to be a consensus among law school administrators that NCA candidates would benefit from an orientation program, as a minimum. To require NCA candidates to start law school courses without such a program is considered unfair, bearing in mind the diverse cultural backgrounds of NCA candidates.

Such an orientation program could be offered, for example, on consecutive Saturday mornings in August. NCA candidates who will be starting law school at either the University of Toronto or Osgoode Hall in September could meet together at one of those two schools. If NCA students attending other Ontario law schools were unable to travel to Toronto to be in attendance, perhaps video-conferencing facilities could be used to enable NCA candidates attending other Ontario law schools to participate in the orientation program.

The orientation program would be geared specifically to foreign-educated lawyers, and would not focus on either substantive or procedural law. Rather, it would focus on features of the Canadian legal system and culture that students educated in Canada are likely to appreciate before entering law school. In short, the orientation program would be an introduction to the study of Canadian law.

Such a program should be made available to NCA candidates who are preparing to write challenge examinations as well as to those who are required to attend law school. A major purpose of the program would be to overcome the alienation experienced by NCA candidates. As mentioned in the Report of the Working Committee on Accreditation in the Legal Profession (National Council of Canadian Filipino Associations (Greater Toronto Area), March 1995), "those preparing to write examinations felt they were alone in the struggle, while those attending university felt alienated from the rest of the student population".

The University of Ottawa Community Legal Clinic has recommended that NCA candidates be made aware of clinical legal education opportunities available at law schools, and that candidates wishing to pursue clinical legal education alternatives be allowed to do so in lieu of certain course requirements. In my view this is a constructive recommendation that could well assist the candidates' integration into the Canadian legal culture.

In the longer term, we should be moving toward a system in which the further education of NCA candidates is better matched with the needs of individual candidates (or at least groups of candidates). At present, law schools do not have the resources to craft special programmes designed to meet NCA candidates' needs.

It will probably not be practical in the foreseeable future for law schools to create an NCA program specifically tailored to the needs of, say, Sri Lankan lawyers. What may be more practical, however, would be for a counsellor to take a careful look at the needs of lawyers from particular jurisdictions to determine what they need in order to be qualified to practise law in Canada. The counsellor could then attempt to determine the extent to which those needs may be fulfilled by law school courses, and what additional programmes or services would be necessary in order for candidates from the jurisdiction in question to become qualified.

Candidates themselves could be asked to make suggestions concerning the services they would consider to be of assistance in preparing them to practise.

The process of becoming qualified as a foreign-educated lawyer to practise in a new jurisdiction has been compared to developing a new speciality in mid-career. If a real estate lawyer were to take up immigration law after 15 or 20 years of practice, that lawyer would be unlikely to return to law school to do so. Such a lawyer would be more likely to do a variety of different things in order to become prepared to practise in a new field, including for example meeting with established specialists, attending immigration hearings, attending continuing education courses, and reading in the field. Attending law school courses would be one of only many possible alternatives.

One of applicants' major criticisms of the NCA's usual requirement that applicants obtain a specified number of law school credits is that the applicants -- who are often very experienced practitioners -- are treated like children. Moving toward individualized assessments with a range of options other than attending LL.B. courses at law school is a direction that we should be striving to pursue in the future.

17. "Back Doors"

As mentioned above, the admission standards of Canadian law schools are higher than those of most other jurisdictions. Only one of every five or six qualified applicants to Canadian law schools is successful in obtaining a seat.

Qualified applicants who are unable to obtain admission to Canadian law schools are generally welcomed into the law schools of other jurisdictions, such as some schools in the United Kingdom (where they pay tuition in the range of £5,000 a year). It is common for Canadians who obtain admission to foreign law schools to apply to the NCA with a view to becoming qualified in Canada after they have completed their legal education.

Although some argue that disappointed applicants to Canadian law schools should not be able to obtain access to the profession in Canada through the back door, and that to allow access to such applicants unfairly favours candidates whose families are sufficiently affluent to afford a foreign education, the prevailing view among most (but not all) law school administrators is that such candidates do not generally present problems while in law school and that the practice should not be discouraged.

Thus, when Canadians who receive their legal education abroad meet the admission requirements in the foreign jurisdiction they should continue to be assessed in accordance with standards applicable to all applicants.

18. Composition of NCA

As mentioned above, the members of the NCA are drawn from legal academia, those involved in the regulation of the profession, and the practising bar. Of the six members of the committee two are law school deans, one is a practising lawyer, one is the Secretary of the Law Society of Upper Canada, and one is a former Secretary of the Law Society of Upper Canada and a founding member of the committee. The sixth member of the committee is the Executive Director of the NCA.

With the exception of the Executive Director, each of the members of the NCA is a representative of a constituency that is well situated to contribute to the work of the committee. Law school representation is important for self-evident reasons. The Secretary of the Law Society is positioned to bring to bear to the issues considered by the committee a familiarity with problems encountered in the regulation of the profession in such areas as admission and discipline. A representative of the practising bar is likely to be able to bring to the issues a perspective informed by the practical realities of practice.

The present Chair of the NCA, Mr. Jarvis, is one of the founding members of the committee, and brings to the committee's deliberations (among many other things) a historical context and a sense of continuity that would be missed if all of the members of the committee were to serve for relatively short periods.

The Executive Director processes the applications and makes recommendations to the committee concerning their disposition. He has acquired a considerable store of knowledge about the standards of legal education at particular law schools in many jurisdictions, and has developed an invaluable computer database.

Most models of organizational governance prescribe a clear separation between board and staff. Although the NCA may not be analogous to most other organizations, there are good reasons of policy underlying the prevailing view that staff members whose recommendations are to be considered by boards should not themselves be voting members of the board. There is of course a natural inclination for staff members in such situations to adopt their own recommendations. What is required is an independent and detached review of such recommendations. In my view, therefore, while the Executive Director should of course continue to attend committee meetings to present his recommendations, he should not be a voting member of the NCA.

Certain interested constituencies are unrepresented on the committee. In my view, the community of foreign-educated lawyers who are most directly affected by the process should have a representative on the committee. As recommended by the Canadian Ethnocultural Council, this representative should be a member of an ethnocultural minority group. Because of the number of NCA candidates in British Columbia, a designate of the Law Society of British Columbia should also be a member of the NCA. Finally, the Executive Director of Education for the Law Society of Upper Canada should also be a member of the committee, so that the NCA will have the benefit of the Executive Director's experience with NCA candidates in the bar admission course.

The major function of the committee is the assessment of the qualifications of applicants. A common complaint levelled at the committee is that assessments are inaccurate or inconsistent, or both. It would be desirable for the committee to obtain input from a person with expertise in comparative education and the assessment of prior learning to ensure that the standards which the NCA has developed in fact meet the criteria discussed above. If a person with these qualifications were to become a member of the committee, the committee would have the benefit of that input on a continuing basis.

Three positions on the committee (those of the two law deans and the practising lawyer) have generally been filled for periods of a few years before the incumbent is replaced. This has contributed to a renewal that is desirable. A similar sense of renewal may be achieved if the chair of the committee were to hold that position for a period of two to three years as well.

19. Conclusion

The NCA has made great strides in increasing access to the legal profession in Canada for lawyers who have acquired their legal education and qualifications in other countries. It has gathered a considerable store of information concerning the educational standards of law schools in many countries, and it recognizes the need to continue to expand its database of information, particularly in respect of certain South Asian countries. The detailed guidelines that it has published meet the criteria specified by the 1989 *Report of the Task Force on Access to the Professions and Trades in Ontario*: they are systematic and objective, and consider not only formal education but (subject to the qualification, addressed above, that applicants receive no credit for experience acquired working as a law clerk in Canada) consider also knowledge gained through experiential learning. I have no reservations about recommending that the Law Society of Upper Canada continue to support the NCA.

As a result of one of several recent policy changes, more applicants than was formerly the case are now permitted to write challenge examinations. Approximately one-third of NCA candidates enrolled in the bar admission course in the 1995-1996 term had successfully completed challenge examinations. A significant majority of candidates who have successfully completed challenge examinations encounter no or minimal problems in successfully completing the bar admission course.

The problems that have arisen in recent years have involved NCA candidates who have been required to return to law school to complete a specified number of credit hours in order to obtain a Certificate of Qualification that will enable them to enrol in the bar admission course. The problems may be summarized as follows:

1. A number of experienced law school administrators are of the view that despite the fact that the NCA's guidelines appear to be clear and objective, many of the candidates who are given advanced standing in fact do not meet a minimum level of competence. NCA students as a whole require more time, attention and resources than do LL.B. students. The English language skills of some applicants are inadequate.

2. NCA applicants are of the view that they are treated unfairly in comparison to LL.B. students, particularly at the University of Toronto Law School, where they are charged significantly higher fees yet are offered fewer services than are LL.B. students.

3. NCA students feel alienated in law school and question whether returning to law school is the most appropriate means of instilling in foreign lawyers - often with many years of experience - the necessary knowledge of Canadian laws and the necessary appreciation of Canadian legal culture.

It is doubtful that these legitimate concerns could be properly addressed without obtaining any additional funding. In formulating the recommendations that follow, I have attempted to be sensitive to considerations of expense, but pending deliberation by the Admissions and Equity Committee, Convocation, and the Federation of Law Societies, I have not attempted to cost the recommendations.

I have not recommended that the number of law school spaces available for NCA candidates be increased. Apart altogether from considerations of cost and the improbability of persuading governments to act on such a proposal in an era of spending restraints, the number of spaces available for qualified NCA candidates is already appreciably higher than the number of spaces available for qualified LL.B. candidates, and law school administrators are satisfied that a significant number of NCA candidates who have gained admission would not have been able to do so if they were required to compete for spaces in LL.B. programmes.

My recommendations are as follows:

1. The Law Society of Upper Canada should continue to support the NCA.

2. A person with expertise in comparative education and prior learning assessment should be retained to review the NCA's guidelines and the application of those guidelines to determine how (if at all) the guidelines as applied in practice might be amended to ensure (i) that to be given advanced standing applicants meet the necessary level of competence, and (ii) that applicants are treated equitably.

3. The NCA's guidelines should be amended to permit applicants who have experience working as law clerks in Canada under the supervision of one or more Canadian lawyers to be given appropriate credit based upon an individual assessment of the extent to which (if at all) the experience they have gained has contributed to their state of preparedness to practise law in Canada. The expert referred to in recommendation 2 should be consulted to assist in the formulation of guidelines designed to implement this recommendation.

4. Members of the NCA should continue to be drawn from legal academia, those involved in the regulation of the profession, and the practising bar. The committee should also, however, include a representative of the community of foreign-educated lawyers who is a member of an ethnocultural minority group, a designate of the Law Society of British Columbia and the Executive Director of Education of the Law Society of Upper Canada, for the reasons discussed in section 21 above. Members of the NCA who serve as the committee's chair should hold the position for a period of two or three years. The Executive Director of the NCA should not also be a voting member of the committee.

5. The NCA should continually endeavour to improve its communication of the basis of its assessments with a view to making the process more transparent generally.

6. The NCA should make applicants aware of clinical legal education opportunities available at law schools, and should reduce the number of required courses applicants who are interested in pursuing clinical alternatives are required to take where to do so would not detract from the applicants' need to satisfy substantive law requirements.

7. The NCA, in conjunction with the law schools, should arrange for the development of a language test that is designed to assess candidates with specific reference to the language proficiency required to perform competently as lawyers.

8. Canadian citizens who obtain their legal education in other countries and who meet the requirements established by those countries for admission to the bar should continue to be assessed in accordance with the standards applicable to all NCA candidates.

9. For the reasons developed in section 15 above, the Law Society should pursue discussions with the University of Toronto Law School with respect to the issues of fees and services to NCA candidates with a view to facilitating an appropriate solution to these issues.

10. An orientation program for NCA candidates who have been admitted to Ontario law schools should be offered shortly before law school classes begin for the year, so that NCA candidates will have the benefit of an introduction to the study of Canadian law.

11. Finally, in the longer term, the NCA, with the assistance of a counsellor with the expertise referred to in recommendation 2, should move toward a system of individualized assessments of what foreign-educated (and Quebec non-common law) lawyers require to become qualified to practise law in common law jurisdictions in Canada, with the expectation that taking law school courses and writing challenge examinations would be only two among a number of possible alternatives.

.....

A debate ensued.

It was moved by Mr. MacKenzie, seconded by Mr. Epstein that the Report on the Accreditation of Foreign-Educated Lawyers and Quebec Lawyers with Non-Common Law Legal Education be accepted and that the decisions set out in the Report regarding each recommendation be confirmed.

Carried

It was moved by Ms. Ross, seconded by Ms. Stomp that recommendation #1 re: support the Recommendation, be adopted and the remaining recommendations be tabled and the NCA hold consultations and discussions with the Committee of Law Deans and the Federation and other Law Societies.

Withdrawn

Mr. Krishna did not vote.

THE REPORT WAS ADOPTED

Competence Task Force - Interim Report

Mr. Millar spoke to the Committee's Report on the work of the Task Force to date.

Competence Task Force - Interim Report
June 27, 1997

Report to Convocation

Purpose of Report: Information

TABLE OF CONTENTS

NATURE AND SCOPE OF THIS REPORT

a) Terms of Reference

1. On February 28, 1997 Convocation approved the Terms of Reference for the Competence Task Force (the "Task Force"). Pursuant to the Terms of Reference the Task Force was directed to:

   a) Review the major studies conducted on competence and lawyers.
   b) Begin to consider for what possible purposes the definition of competence must be capable of being used, so as to be able to choose an appropriately versatile working definition.
   c) Provide Convocation with an outline for its work and a time line for completion of Phase I. The Task Force would also use this opportunity to present to Convocation any supplemental questions or issues on which it may need direction. This would be done at the April 25 Convocation.
   d) Choose/articulate a working definition - (possibly 2 so as to provide Convocation with options).
   e) Provide Convocation with an interim report on a definition for its approval at June Convocation.
   f) Return to an analysis of the purposes for which the definition should be used. In other words, consider what the role or responsibility of the Law Society should be in the competence of its members - developing, maintaining, improving, enforcing. The Task Force would refine the definition to ensure it conforms with its conclusions.

   g) Provide Convocation with a final report on Phase I at November Convocation including an outline for how Phase II should proceed.

2. In accordance with the governance process the Task Force is to report to Convocation at each stage of its process.

b) Purpose of this Report

3. By the nature of its mandate the Task Force has been considering how the Law Society currently defines, facilitates, and regulates the competence of the profession, and how it might better address this issue.

4. This report has three purposes, all directed at providing Convocation with information on the work of the Task Force to date and the direction in which the Task Force is proceeding.

5. The first purpose of this report is to provide Convocation with the context within which the Task Force is operating. It has become apparent to the Task Force that much previous consideration of the competence issue has, and is, being done. This includes work done within the Law Society itself and approved by Convocation.

6. The second purpose is to set out for Convocation the considerations and assumptions that underlie the Task Force's approach to date. These considerations and assumptions are the foundation upon which the Task Force is proceeding, both in developing a working definition of competence, and in assessing how that definition will be applied to Law Society functions and programs.

7. The third purpose is to provide Convocation with a "work in progress" update on the competence definition for its consideration. This consists of the constituent elements the Task Force is considering for the definition.

8. Benchers are requested to provide their comments on this report to the Task Force by July 15, 1997.

CONTEXT WITHIN WHICH THE TASK FORCE IS WORKING

a) Review of Major Studies Done on Competence and Lawyers

9. As the first step in its work the Task Force has reviewed a number of the studies conducted in the United States, Canada, and Australia that have dealt with lawyer competence both for the purposes of educational curriculum design and from the perspective of the role legal regulatory bodies must assume in monitoring competence.

10. Prior to the 1980s little work had been done to analyse what lawyers do and articulate how a competent lawyer could be identified. Over the last 15 years, however, in an effort to define competence, there have been numerous such studies surveying lawyers, law students, and teachers, observing lawyers at work, and studying statistics that identify practice problem areas and causes of claims.

11. The studies the Task Force has reviewed describe the lawyering role in various ways, some focusing on the general attributes required of a lawyer, others on the requisite "competencies" members of the profession must display, and still others on the critical skills in which lawyers must be versed. Whatever approach is used, however, much of what emerges from the studies is similar in nature if not in emphasis.

12. Briefly stated, the following points can be extrapolated from the studies:

    a) Studies conducted for the purpose of developing educational curriculum have tended to identify lists of skills that a competent lawyer must possess. Studies undertaken with the broader perspective of assisting the practising lawyer in maintaining competence or guiding regulatory bodies in their dealings with members have tended to focus on the *functions* that lawyers perform and the *context* within which they work.[1]

---

[1]In developing assessments for the specialist accreditation program in New South Wales the designers of the competency standards for each specialty considered three possible conceptions of the nature of competence: (1) a task-based or behaviourist approach in which competence is "conceived of in terms of the discrete behaviours associated with the completion of atomised tasks"; (2) a general attributes approach that concentrates on the those attributes that "are crucial to effective performance... with the context in which they are applied ignored"; or (3) an holistic approach , which seeks to "marry the general attributes approach to the context in which these attributes will be employed". The holistic approach was chosen as being the most realistic approach to analyzing how lawyers work. See Gonczi, Andrew et al. "Performance Based

b) An analysis of the type of knowledge, skills, and attributes lawyers should have has been important to gaining an understanding of the components of competence, but it is the manner in which these are interwoven to serve client needs that is critical to an understanding of what lawyers do. Professional competence must be understood as a complex system rather than as a checklist of features. [2]

c) Studies have concluded that lawyers must possess and *be able to interweave*

(i) technical proficiency in the tools of their profession,
(ii) intellectual ability,
(iii) judgment,
(iv) practical wisdom,
(v) common sense,
(vi) understanding of personal limitations,
(vi) ethical standards, and
(vii) practice management and administration skills.

d) Virtually all of the studies that have sought to identify the practice skills of the profession have addressed the following as integral to the profile of the competent lawyer:

(i) legal knowledge;
(ii) communication skills;
(iii) ability to gather and manage facts, synthesize them, and apply the relevant law to the facts;
(iv) research and legal writing skills;
(iv) problem solving ability both in the more technical sense of negotiating resolutions and in the broader sense of assisting the client to develop ideas and solutions and meet objectives; and
(v) advocacy skills.

e) Some studies attempt to assess whether a given feature of competence is more important than another. Certain attributes are identified as "overarching" components that are so fundamental to the ability of the lawyer to perform competently that they are central to the definition.

Assessment and the NSW Law Society Specialist Accreditation Program", (1994) 12 *Journal of Professional Legal Education", no 2, 135.*

[2] In discussing the education of lawyers Carrie Menkel-Meadow considers that such education must deal with the cognitive, behavioural and experiential, affective and normative aspects of being and learning as a professional. She considers them to be "intertwined and related to each other, not necessarily in any particular linear or hierarchical order". See Menkel-Meadow, Carrie, " Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report - Of Skills, Legal Science and Being a Human Being", (1994) 69 *Washington Law Review,* 593.

f) Virtually all of the studies focus primarily on the creation or articulation of a model of competence for the legal profession. It is not their aim to design *mechanisms* by which such definitions or models can actually become part of the structure of legal education or governance of the profession.

b) Law Society Work on Competence

(i) Professional Competence Orders

13. In recent years the Law Society has made specific efforts to address the issue of regulating competence. In particular, the former Professional Standards Committee and the Reforms Implementation Committee proposed statutory amendments to the *Law Society Act* to provide for the better regulation of professional standards of competence in the legal profession.

14. The report of the Reforms Implementation Committee was approved by Convocation in February 1992. The procedural code for better regulating the competence of members of the profession is now contained in section 40 of the legislative amendments to the *Law Society Act,* approved by Convocation and currently with the Attorney General of Ontario.

15. In the Reform Implementation Committee's report, it set out its rationale for the proposals it was presenting.

> The proposals for regulating professional competence reflect two policies. The first policy, on which there appears to be broad consensus, is that concerns about professional competence should generally be dealt with through remedial rather than disciplinary procedures, provided that such an approach will adequately protect the interests of clients. The second policy ... is that the Law Society should have statutory authority to inquire into the competence of members of the profession...The assumption that, once qualified for admission, every member of a profession will necessarily continue to maintain standards of competence in a rapidly changing legal environment, is not, in the view of the Committee, an assumption which can be justified.

16. Section 40 (1) and (2) of the amendments to the *Law Society Act* provide that:

40.-(1) A member may be subject to a professional competence order under this part where it is found that the member has failed, or is failing, to meet standards of professional competence.

(2) A member fails to meet standards of professional competence where,

(a) there are deficiencies in,
(i) the member's knowledge, skill, or judgment,
(ii) the member's attention to the interests of clients,
(iii) the records, systems, or procedures of the member's practice, or
(iv) other aspects of the member's manner of practice; and

(b) the deficiencies may reasonably be expected to impair significantly the quality of service to clients.

17. The proposed amendments contain a detailed procedural code. A member against whom a professional competence order (PCO) is made will be subject to a variety of requirements ranging from remedial education, to practice review, to limitations on the right to practice, and, in the event of breaches of the PCO, to possible suspension.

18. The amendments provide a meaningful procedure by which patterns of incompetent behaviour can be mandatorily and meaningfully addressed outside of the discipline stream.

(ii) Special Committee to Review the Rules of Professional Conduct

19. In November 1992 Convocation established the Special Committee to Review the Rules of Professional Conduct with specific terms of reference including:

- Does the rule set forth a standard of conduct that is appropriate for lawyers as members of a self-governing profession when considered from the standpoints of
  a. the public; and
  b. the legal profession?

- Are the structure and wording of the rule adequate to communicate the appropriate standard and to give guidance to the members of the profession?

20. Working groups were organized to consider each rule and amendments, and work was done on Rule 2 in 1993 and 1994. The Special Committee to Review the Rules of Professional Conduct did not complete the rules review, however, as other events overtook the Committee. The Committee no longer exists.

(iii) Joint Committees of Legal Aid and Professional Standards

21. In April 1993 the Joint Committees of Legal Aid and Professional Standards made recommendations to Convocation concerning the need for an improved approach to competence standards for the profession generally, and in particular for those members of the profession on the legal aid panel. One of the recommendations approved by Convocation is particularly relevant to the work of this Task Force:

...

> 3. That the Professional Standards Committee, in its capacity as a working group reviewing Rule 2 of the Rules of Professional Conduct, define competence in terms of a general standard of acceptable practice, taking into consideration the legislative amendments proposed with respect to professional standards as a result of the Reform Implementation Committee's report. The question in any case whether a member had practiced to standard would be determined on evidence with respect to the appropriate standard in the circumstances of that case.

(iv) LPIC and Complaints Statistics/Competence Standards

22. The Task Force has also received preliminary statistical information from both the Complaints department and LPIC. On the face of the information received there appears to be significant similarity in the way in which complaints and claims emerge. Ineffective management of client expectations, including poor communication and failure to follow client instructions, conflicts of interest, shoddy work habits, and delay are major causes of claims and complaints.

23. As a result of its analysis of claims and their causes LPIC is developing loss prevention initiatives aimed at improving the competence of its insured. The goals are to assist claims-free members to remain claims free and to provide those members who have claims with better insight into the causes of their difficulties and strategies to avoid them.

(v) Specialist Certification

24. The Task Force is also aware of the competence related goals and intent of the Specialist Certification program. The program was begun in 1986 with a view to assisting consumers to identify lawyers who have demonstrated a certain level of ability and experience in a certain field of law.

25. The Professional Development and Competency Committee is currently engaged in a review of the Specialist Certification program. The Committee is particularly interested in enhancing the competence standards of the program and, like the Task Force, is in engaged in consideration of the indicia of competence that should be used to assess practitioners for specialist certification.

(vi) Additional Law Society Competence-Related Activities

26. The Task Force recognizes that there are numerous additional means by which the Law Society furthers the goals of professional competence. Some of the efforts currently directed towards assisting the profession in understanding and maintaining competence include:

1. The Rules of Professional Conduct;
2. Practice checklists in criminal law, family law, wills and estates, and real estate, with work to be commenced on an immigration law checklist;
3. The Practice Review Program's criteria used to evaluate problems existing in the practices of those members in the program;
4. Phase One of the Bar Admission Course designed with a view to exposing students to the fundamental lawyering skills of professional responsibility and practice management, research, interviewing, legal writing and drafting, negotiation, and advocacy;
5. Phase Three of the Bar Admission Course, including practice oriented reference materials in substantive areas of law;
6. Continuing Legal Education publications and programs;
7. the Practice Advisory Service;
8. Articling Guidelines; and
9. Discipline decisions.

(vii) MCLE Subcommittee Report on Post-Call Learning

27. In January 1997 Convocation approved a number of recommendations from the MCLE Subcommittee among which was a statement of minimum expectations for post-call learning for the profession. The statement articulates the link between competence and ongoing professional learning.

- *Professional competence is maintained and enhanced by ongoing professional development and education.*
- *The Law Society has an obligation to encourage and monitor professional development and education, and to foster the creation and development of learning supports both in the public and the profession's interest.*
- *Membership in the legal profession requires a conscious commitment by all members of the profession to ongoing professional development and education and to self-assessment of educational need.*
- *Fulfilment of such a commitment enhances the ability of all members to meet their obligation to the public to provide effective and competent service, to adapt to and function in a changing and challenging environment, and to maintain and enhance their expertise and overall competence.*
- *While members of the profession have individual responsibility for and direction over the conduct of their professional development and education, all members of the profession have a collective interest in this responsibility being fulfilled.*
- *The professional development and education members of the profession undertake should include both informal education through self-study, reading, and research, and more formal education through participation in continuing education programs.*
- *The Law Society, the Canadian Bar Association - Ontario, the law schools, county and district law associations, other continuing legal education providers, the County and District Law Presidents' Association, providers of library resources and facilities, and the members of the profession should collaborate to ensure that the development of educational policies, opportunities, and programs becomes a priority.*

c) Application by the Task Force of Previous Work

28. The previous studies, both external and internal, have formed the framework from the which the Task Force is developing its approach and emphasis. The internal work has been less concerned with the details of a definition than it has with the manner in which the Society regulates competence effectively, while the external work has focused on definitions.

29. The studies highlight the dilemma of determining an appropriate approach to the role of the regulatory body in competence when its goal is both to create a more thorough definition of competence and to articulate clearly the purposes the definition is to serve.

30. To consider the best way to proceed the Task Force has found it useful to identify first the assumptions and considerations that underlie its work. As it develops the definition and approach it can return to these underlying themes to test the validity of its approach.

CONSIDERATIONS UNDERLYING THE TASK FORCE'S WORK

a) The Law Society's Role in Regulating the Competence of the Profession

31. The Law Society's mission statement states, in part, that the Law Society "exists to govern the legal profession in the public interest by ensuring that the people of Ontario are served by lawyers who meet *high standards* of learning, competence, and professional conduct". (emphasis added)

32. The Law Society is, therefore, responsible to the people of Ontario to ensure that lawyers in Ontario are, among other things, learned and competent.

33. One of the commentaries to the role statement illustrates the breadth of the Law Society's acceptance of its competence-related responsibility:

> The Law Society has a public obligation, arising from [its] monopoly, to ensure that the people whom it admits to membership and on whom it confers the right to practise law, are indeed fit to practise and competent to offer legal services. The Law Society also has an obligation to ensure that its members continue to be fit, qualified and competent. A member of the public will not necessarily be in a position to evaluate the competence of a person who claims to be qualified to practise law. Membership of the Law Society of Upper Canada certifies to the world at large that the person is fit, qualified and competent...Competence to perform legal tasks undertaken on a client's behalf is also specified as an ethical requirement for the practice of law in the Society's *Rules of Professional Conduct*. Practise at an unsatisfactory standard of competence may therefore attract disciplinary sanctions.

34. The Task Force accepts as a given the view expressed in the commentary. Continued self-governance and a monopoly over the provision of certain legal services is only justified if the governing body licenses and monitors competent members and ensures the existence of appropriate measures to protect the public from lawyers who fall below the standards set.

35. Convocation has again recently endorsed the principle that it must be proactive in dealing with the issue of competence by

a) approving the following motion before Convocation on April 26, 1996:

> Moved that the Law Society reaffirm its policies of not restricting numbers entering the profession, and vigorously pursue the enhancement of lawyer competence.

b) endorsing recommendation 50(a) of the *Systems of Civil Justice Task Force Report,* which reads:

> The Task Force recommends that Law [S]ocieties place greater emphasis in the future on the enforcement of competency standards.

b) The Standard of Competence to Which the Profession is Held

36. The role statement says that members of the profession must be held to "*high* standards of learning, competence, and professional conduct". At the same time the Task Force recognizes that there will always be varying levels of performance excellence within the profession.

37. The Law Society's role as a regulator must be to expect of its members a high minimum standard of competence. In order that the Law Society protect the public, it must provide that members of the profession falling below the standard will be dealt with promptly, effectively, and consistently.

38. It should also be true, however, that the Law Society's obligation to the profession and the public further requires it to use its resources and position to assist members and those seeking admission to strive for excellence beyond the minimum standard.

39. The Task Force agrees with the views expressed by the Reforms Implementation Committee in 1992 that concerns about professional competence should generally be dealt with through remedial rather than disciplinary procedures, *provided* that such an approach will adequately protect the interests of clients. This relates to the use to which the definition of competence may be put.

c) A Definition of Competence for Widespread Use

40. The Task Force is of the view that the definition should be capable of informing any competence related work the Law Society undertakes. This is not to suggest that the definition would be designed as a detailed checklist, but rather that the definition would provide a broadly framed starting point from which more specific work would flow depending upon the particular focus of the department, activity, or procedure.

41. If this view of the role of the definition is to be workable, the development of an institutional and profession wide awareness and adherence to the definition is essential. For this to occur the definition must be relevant to the experience of the profession, reasonable, and flexible.

d) Rule of Professional Conduct

42. The Task Force is of the view that the definition should be developed as a Rule of Professional Conduct to replace the current Rule 2. This is essential for a number of reasons including:

    (i) If the profession is to be held accountable for the indicia of competence contained in the definition this should be made abundantly clear. To simply articulate a definition and exhort the profession to pay heed to it, while leaving in place the current rule 2 and the language in section 40 of the amendments to the *Law Society Act* relating to competence orders, would result in confusion and, in all likelihood, in the new definition being ignored.

(ii) Arguably, including the definition in a Rule of Professional Conduct provides the opportunity to do more than simply articulate lawyering characteristics. It allows for the provision of a code of behaviour.

(iii) This code of behaviour would provide guidance to those assessing individual complaints against members, or considering the granting of professional competence orders under section 40, or determining whether to discipline a member for breach of Rule 2.

e) Competence in the Larger Context of Law Society Work

43. The Task Force is of the view that before it completes its work in the coming months it should liaise with other groups within the Law Society that are also engaged in related work. In particular, the Professional Development and Competence Committee, whose Chair is a member of the Task Force, is examining certain aspects of competence as it relates to the Civil Justice Task Force, Requalification, and Specialist Certification. In addition, the regulatory component of Project 200 is also considering the manner in which regulatory matters and issues related to competence are addressed.

f) Reporting to Convocation

44. The Task Force understands that as it continues to develop its assumptions and considerations into a working definition it must return to Convocation for direction and advice.

"WORK-IN-PROGRESS" UPDATE ON COMPETENCE DEFINITION

45. The Task Force considers it appropriate to take an holistic approach to the definition of competence. As a regulatory body the Law Society should be interested in the functions that lawyers perform, the general attributes they must possess, and the manner in which they interweave these functions and attributes to *serve clients effectively*.

46. Although not synonymous, competence and quality of service have significant areas of overlap. Competence is not a theoretical concept, but the practical application of specialized knowledge and ability in the context of client service.

47. Although the Task Force has not yet finalized the language and structure of the competence definition it will ultimately propose, it has considered,

a) how the definition might be framed;
b) the scope of components it should address; and
c) particular components or attributes it views as essential to include.

48. The definition will be drafted to reflect the following:

a) Since competent lawyers must not simply possess certain abilities, skills, and attributes, but must demonstrate them in all professional activities, the definition and rule must be framed in active language. It is not what lawyers *can* do that is important, but what they *do* do. It is the manner in which the skills, abilities, and attributes lawyers are expected to have are interwoven to serve client needs that forms the key to the definition of competence.

b) Since the purpose of the definition or rule is not to rigidly circumscribe competent behaviour, but to frame its parameters, the language will be inclusive rather than exclusive, and broadly rather than narrowly framed. For example, there will be no attempt to describe competent practice in *specific* practice areas, but rather the critical functions and attributes that all lawyers must have. It is critical that the definition or rule reflect the reality that defining competence is not akin to solving a mathematical calculation and that standards of competence will never be static.

c) The definition should go beyond generic reference to skills, knowledge, and attributes, expanding on what is included under these components and describing the appropriate interweave among them.

d) More specifically, the Task Force will attempt to construct a definition of competence to take account of the following:

(i) legal knowledge;
(ii) problem solving;
(iii) oral and written communication, including advocacy;
(iv) legal research, drafting, and writing;
(v) fact gathering, and factual and legal analysis ;
(vi) intellectual ability, judgment, practical wisdom;
(vii) professional responsibility and ethics; and
viii) practice management and administration.

e) To the extent that the definition is contained in a Rule of Professional Conduct, it would be made clear that the ultimate assessment of whether a lawyer demonstrates competent behaviour within the meaning of the definition would be determined on the basis of evidence as to the appropriate standard in all the circumstances.

ONGOING WORK

49. In carrying on with the work for Phase I, the Task Force proposes to do the following in the coming months:

(i) Research

a) explore the complaints and LPIC information and statistics further to assess their impact on the nature of the definition; and
b) consult with the Professional Development & Competence Committee and the regulatory component of Project 200 to ensure that approaches do not conflict.

(ii) Structure

a) Develop a framework for the uses to which the definition (and Rule) would be put and a process by which to apply the definition to programs, departments, and regulatory functions.

(iii) Development

a) Determine the structure and detail of a working definition of competence; and
b) Draft the definition into a Rule of Professional Conduct.

(iv) Consultation Process

a) Consider and propose a process for consultation.

50. The Task Force proposes to report its ongoing progress to Convocation in the fall of 1997.

Benchers were asked to provide their comments on the Report by July 15th, 1997.

The Lawyers Fund for Client Compensation Committee Report

Meeting of May 21st, 1997

Mr. Ruby presented the Committee's Report on the policy proposal for reporting suspected criminal activity to the Police.

The Lawyers Fund for Client Compensation Committee
May 21, 1997

Report to Convocation

Purpose of Report: Decision Making, Information

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on May 21, 1997. In attendance were:

Clayton Ruby (Chair)
Tamara Stomp (Vice Chair)
Gordon Farquharson
Gary Lloyd Gottlieb
Sam Lerner
Stuart Thom
Rich Wilson

Staff: Sara Hickling, Maria Loukidelis, David McKillop, Richard Tinsley, Heather Werry and Jim Yakimovich

2. This report contains:

- a policy proposal concerning an amendment to the Guideline on reporting of suspected criminal activity to police authorities;
- an information report on the Committee's continuing work concerning the maintenance of an appropriate balance in the Lawyers Fund for Client Compensation;
- an information report of all grants approved by the Review Sub-Committee which have been or are in the process of being paid out.

POLICY PROPOSAL FOR REPORTING
SUSPECTED CRIMINAL ACTIVITY TO POLICE

A. NATURE OF THE ISSUE

3. The Committee is proposing an amendment to Guideline 11 of the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation (approved by Convocation on September 24, 1992) dealing with a claimant's report to the appropriate authority of criminal conduct of a lawyer.

4. As Convocation approved the original Guideline, its review and approval of an amendment thereto is required.

B. BACKGROUND

5. Guideline 11 requires a claimant, whose claim strongly suggests criminal conduct on the part of the member, to report the facts to the relevant Crown Attorney for investigation. The Guideline further stipulates that the reporting is only to be made on the instructions of the Chair or Vice Chair of the Lawyers Fund for Client Compensation Committee.

6. Guideline 11 reads as follows:

> "Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the member, the Secretary, Deputy Secretary, or an Assistant Secretary, of the Law Society on the instructions of the Chair or a Vice-Chair of the Lawyers Fund for Client Compensation Committee, shall direct the claimant to report the facts to the relevant Crown Attorney for investigation. The claimant must then satisfy the Referee that he or she has done so before the claim will be entertained."

7. Despite this guideline, the staff practice that has developed over the years is that, in appropriate cases, claimants be directed to report suspected criminal conduct to the appropriate police force. This direction is given by the staff lawyer handling the file without the direction of the Chair or Vice-Chair and the claimant is advised to contact the police as opposed to the Crown Attorney.

C. POLICY DISCUSSION

The Committee's Views

8. The Committee believes that the Guideline should be amended to generally reflect current practice, which adequately addresses how and to which authority relevant information about a lawyer's criminal conduct should be conveyed by a claimant in the appropriate situations. The following are the reasons in support of the amendment.

9. In giving such directions to claimants, the Law Society is not making a firm determination as to criminal activity. Rather, it is only suggesting there may be a basis for a criminal investigation and the ultimate decision as to whether an investigation is undertaken is strictly for the police.

10. Accordingly, there is no compelling reason why staff should be required to obtain the instructions of the Chair or Vice-Chair of the Committee to direct claimants to report matters to the police. The amended Guideline would simplify administratively the procedure relating to the reporting requirement.

11. It should be noted that requiring claimants to report suspected criminal activity to the police, while helping to ensure members do not escape criminal sanction in appropriate cases, also protects the Law Society's rights of subrogation. Crown Attorneys will not seek compensation orders pursuant to the *Criminal Code* if the police have not had a report from a particular claimant. Assuming a report has been made and criminal charges brought, the Law Society may take an assignment of any compensation order if a grant is paid.

12. It appears, as well, that from the perspective of the Crown Attorney's office, the Guideline should be amended such that any report be made to police and not a Crown Attorney. The Law Society recently received a letter from Peel Crown Attorney Paul Taylor recommending that change since the Crown Attorney's office has no investigative capabilities. Rather, it is the function of the Crown Attorney to review and prosecute charges after they have been laid by the police or a private complainant. Mr. Taylor's suggestion is in keeping with recent practice and better reflects the respective roles of the police and Crown Attorney.

Proposal for Amendment

13. The Committee recommends that Guideline 11 be amended as follows:

> "Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the member, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained."

Options and Alternatives for Decision by Convocation

14. Convocation should determine:
    a. Whether to approve the proposed amendment;
    b. Whether the language in paragraph 13 reflects the intention of the amendment.

INFORMATION

A. *MAINTAINING AN APPROPRIATE BALANCE IN THE COMPENSATION FUND*

15. In its report of May 23, 1997, the Committee advised Convocation that it was undertaking a review of the financial health of the Lawyers Fund for Client Compensation.

16. The balance of the Fund has been declining since December of 1990 when it was $31.4 million. The current balance is approximately $22 million. This is not unexpected. It reflects both our ability to deal with and pay appropriate claims quickly and a lengthy period of relatively low interest rates.

17. In addition to the balance of the Fund declining, however, the level of claims has been rising steadily. Claims at limits (maximum theoretical pay-out) currently total $15 million, a level not experienced since 1993. During the 1996 budgeting process, it was estimated grant payments in 1997 would total $4 million. Due to the increase in claims, 1997 grant payments are now expected to increase to $5 million or more.

18. While it is expected the Fund will earn $800,000 in investment income over the balance of the year, administrative expenses over the same period will also be around $800,000. Investment income will decline markedly in 1998 when significant long-term investments mature and must be replaced at much lower rates.

19. The result is that the Fund balance will easily fall below $20 million (probably $19.5 million) by year end for the first time in well over a decade. Remember, the Fund does not pay all potential grant obligations in one year -- rather, we presently pay $5 million per year. Moreover, our historic claims experience is that approximately 40% of claims at limits (maximum theoretical pay-out) ever get paid. [The Committee is examining the issue of whether this historical claims experience may be overly optimistic in view of the fact that LPIC, unlike the Fund, no longer pays mortgage brokering claims]. Clearly, a consideration of an increased levy to the Fund is appropriate.

20. Approximately 80% of all claims to the Fund concern clients who have made investments through a lawyer. Some of the Committee members were of the view that instead of raising the levy members pay to the Fund (currently $1 per year) in order to stabilize or increase the balance of the Fund, it should decrease or eliminate the coverage offered to claimants who utilize the services of a member more as an investment broker than as a lawyer. All grants from the Fund are discretionary.

21. A sub-committee has been formed to look at the issue of these investment type claims to the Fund and their impact on the declining Fund balance. The sub-committee members are Clayton Ruby (Chair), Nancy Backhouse, Hope Sealy and Rich Wilson. The Committee had its first meeting June 11th 1997, and will meet again over the summer months and report to the full Committee, and through it to Convocation, in the Fall.

22. If it is determined that it is necessary to increase the levy members pay to the Fund, the Committee wishes to have its recommendation ready in time for the Fall budgeting process which will determine the Law Society Annual Fee for 1998.

B. GRANTS PAID FROM THE COMPENSATION FUND

23. The Committee wishes to advise Convocation that the following grants have been approved by the Review Sub-Committee and have been or are in the process of being paid out:

REFEREE REPORTS

Anil K. Kapoor

a.)	Morris C. Orzech (Permitted to Resign April 15, 1996)		
	claims of:	Edwin Allen Ball	$77,568.00
		Marjorie Viola Conroy	$44,250.00
		Maureen Gosney	$79,000.00

C.A. Keith, Q.C.

a.)	Lee Edward Fingold (Disbarred January 25, 1996)		
	claim of:	Claudia Doret	Nil
b.)	Alan B. Silver (Disbarred October 27, 1995)		
	claims of:	William Cook	$65,000.00
		Frederick and Muriel Stephens	Nil
c.)	Stephen Chernoff (Disbarred September 26, 1991)		
	claim of:	Philip Assam	$3,110.00
d.)	John A. Sproule (Deceased August 19, 1994)		
	claim of:	Lebon Gold Mines Ltd.	Nil

B. Barry Shapiro, Q.C.

a.)	David A. Allport (Disbarred November 23, 1995)		
	claim of:	Antonio Valerio	$60,000.00
		Amalia Valerio	$60,000.00
		Mario Valerio	$60,000.00
		Estate of Santina Valerio	$60,000.00

b.) Gerald Grupp (Disbarred April 22, 1993)
claim of: 713869 Ontario Limited by Edward Leibovitz Nil

June Maresca

a.) Stanley D. Goldberg (Suspended Non-Payment E&O Levy)
claim of: Embassy Beach Resorts $16,719.67

Benjamin Grossberg

a.) Paul D. Squires (Disbarred September 22, 1994)
claims of:

Janet Rosner	$29,065.00
Robert and Rochelle Goldstein	$13,711.00
Martin Baranek	$9,175.00
Betty Baranek	$8,305.00
Dehaviland Supermarkets Ltd.	$8,305.00
Irwin Keltz	$8,767.00
Omega Neckwear & Apparel Ltd.	$26,331.00

Linda R. Rothstein

a.) James R. Axler (Disbarred November 26, 1992)
claim of: Wolfgang Abel $22,323.36

STAFF MEMORANDA

Heather Werry

a.) Christopher S. Godfrey (Disbarred April 3, 1997)
claims of:

Philip Demolition Inc.	$37,000.00
Janine Jankowski	$1,527.06
Magaly Bianchini and Joanne Sandrin	$130,000.00
Murray Bloomfield and Clifford Lodwick	$10,000.00
Metcon Sales and Engineering Limited	$400.00

b.) Ansis Semenovs (Disbarred April 27, 1995)
claim of: Estate of John McKerron by Arlene Burgess $9,818.05

c.) Morris C. Orzech (Permitted to Resign April 15, 1996)
claims of:

Eira Tuybens	$20,000.00
A. Bryce Reid	$35,000.00
Marjorie Semkin	$60,000.00
Joyce Adrienne Woodward	$100,000.00
Atenas and Antonio Babutac	$28,449.00
Estate of Marjorie Clarke	$20,000.00

d.) Howard W. Cohen (Disbarred April 25, 1996)
claim of: Paula Ruffino $10,000.00

e.) Solicitor #12 (Suspended Non-Payment E&O Levy January 26,1996)
claim of: Joe Caparelli $7,000.00

f.) Lawrence Sun Wong (Deceased November 11, 1994)
claims of:

Estate of Choy Wong	$60,000.00
Hing Tim Chan and Mee Ca He	$6,752.98
Michael and Sandra Lam	$65,000.00

g.)	Moshe Teller	(Discipline Suspension March 21, 1996)	
	claims of:	Astonina Pei, Po-Lan Tong and Ng-Gong Yeung	$16,250.00
		Linda and Clyde Garib	$1,150.41
		Paula Mordzynski Wajnberg	$55,839.00
		Philip Martin	$93,300.00
		Linda Martin	$13,700.00
		Laura Martin	$39,000.00
		Sansiveria Investments Limited	$100,000.00
		Harry Wasserman	$67,000.00
		Salvatore Cucci and Maria Cucci	$126,262.48
		Vange and Peter Petrou	$32,378.14
h.)	Arthur Chung	(Disbarred November 23, 1995)	
	claim of:	Siu Ming Chan	$5,000.00
i.)	David Allport	(Disbarred November 23, 1995)	
	claims of:	Giuseppe Di Blasio	$60,000.00
		Giulia Di Blasio	$60,000.00
		Macolata D'Ippolito	$60,000.00
		Carlo D'Ippolito	$60,000.00
		Richard and Elaine Caron	$100,000.00
j.)	Robert Karfell	(Deceased October 16, 1994)	
	claim of:	Juliana Rodolphe	$900.00
k.)	Johanne Lisette Bezaire	(Discipline Suspension May 23, 1996)	
	claim of:	Patricia Gordon	$20,000.00
l.)	Pierre Ouellette	(Disbarred November 23, 1995)	
	claims of:	Estate of Gordon James Holland	$30,091.58
		Filomena and Theodore Luciano	$1,000.00
		Estate of Carmine Arcuri	$43,929.15
m.)	Burkhard R.Heder	(Deceased May 15, 1996)	
	claim of:	Hoa Lieu	$3,000.00
n.)	George Struk	(Disbarred November 23, 1995)	
	claims of:	Estate of Stefania Bolesta by Michael Bolesta	$14,000.00
		Kirby Silvester, Everett Wiseman and Keith Wiseman	$4,000.00
o.)	Solicitor #31	(Suspended Non-Payment Annual Fees December 31, 1995)	
	claim of:	Larry P. Schwantz and Gloria Schwantz	$39,285.47
p.)	Terence Mayhew	(Disbarred September 17, 1987)	
	claim of:	Estate of Hedwig Remesch	$45,000.00
q.)	Carl Eric Logan	(Disbarred June 23, 1994)	
	claim of :	Estate of Ian Wood	$27,000.00
r.)	James K. deRoux	(Disbarred February 22, 1996)	
	claim of:	Shannon Pilatzke	$7,735.00
s.)	Ralph S. Jones	(Disbarred November 23, 1995)	
	claim of:	Calvin and Dorothy Crago	$32,000.00

t.)	Leon Wickham (Disbarred September 22, 1994)	
	claim of: David Daly	$1,000.00
u.)	Alexandre Dufresne (Disbarred April 24, 1997)	
	claim of: Anita Heron	$11,000.00
v.)	Thomas Alan Kelly (Disbarred November 23, 1995)	
	claim of: Marian I. Mason	$400.00

Sara Hickling

a.)	John A. Sproule (Deceased August 19, 1994)	
	claims of: Margaret Minns	$5,000.00
	Estate of Frederick Watts	$32,500.00
	Estate of Isabella Watts	$67,500.00
	Estate of Ernest T. Coutu	
	Claire Coutu (a beneficiary)	$67,000.00
	Solange Coutu (a beneficiary)	$67,000.00
	Jeannine Gauvin (a beneficiary)	$67,000.00
	Cecile Harrison	$67,000.00
	Eloise Peirson	$100,000.00
	Connie Lagerquist	$87,059.16
	Estate of Grace Wallace	$35,000.00
b.)	Stanley Goldberg (Suspended Non-Payment LPIC Fees)	
	claims of: Rosario Grande	$25,562.32
	John Lettieri	$1,829.20
c.)	Peter D. Clark (Disbarred January 23, 1997)	
	claims of: Bamidele Adeniran	$1,500.00
	Carlos Alfredo Morales Flores	$975.00
	Balaratnam Seevaratnam	$2,000.00
	Manu Patel	$2,975.00
	Masoumeh Jad	$700.00
	Mohamed Mohamud	$2,000.00
	Kwame Osei	$3,475.00
	Sherie Lee Shafer	$9,374.00
	Mohamed Ali Mohamed	$1,975.00
d.)	Robert D.L. Smith (Disbarred April 25, 1996)	
	claim of: Quality Scaffolding Industries Ltd.	$1,000.00
e.)	Byron D. Loney (Discipline Suspension June 22, 1995)	
	claim of: Brenda Strack	$3,000.00
f.)	James R. Axler (Disbarred November 26, 1992)	
	claim of: Peter and Alice Schmidt	$450.00

David McKillop

a.)	Paul Squires (Disbarred September 22, 1994)	
	claims of: Avtar Gosal	$27,500.00
	Amarjit Khattra	$16,500.00
	Mark Baranek	$1,059.10
	Marlene Baranek	$1,396.22
	Liz Gayford	$513.89

	Josef Hindel	$707.42
	Gerald Marshall	$320.35
	Anthony Raso	$2,019.79
	Janet Rosner	$8,079.05
	Martin Salve	$707.42
	Doreen Tousignant	$70,093.84
	Hilda Simon	$76,281.51
	Holland and Christopher O'Donnell	$16,425.00
	Marion Tucker	$23,210.62
	Suzie Dobbins	$32,375.00
	Marilyn McPherson	$23,200.00
	Gordon Moorehead	$37,600.00
	Guy MacCullum	$11,000.00
	Amadis Enterprises Ltd.	$430.54
	Eileen Belitz	$8,887.10
	Estates of Alan and Janet Berliancic	$993.55
	Sam and Adele Frydych	$5,940.00
	Gayford Family Trust	$993.55
	Tom and Martha Gayford	$14,900.00
	Elsie Goldstein	$496.78
	Mendel Goldstein	$993.55
	Robert and Rochelle Goldstein	$7,719.10
	Toby Gornstein	$3,153.55
	Josef Hindel	$993.55
	Estate of Sydney Jacobs	$7,153.55
	Estelle Kapp	$563.01
	Irvin Katzman	$3,853.55
	Ben Kirzner	$2,423.55
	Irwin Keltz	$993.55
	Estate of Gloria Malek	$993.55
	Linda Beazley Marshall	$1,430.00
	Gerald Marshall	$4,510.00
	Carl Newton	$993.55
	Joseph Orsetto	$993.55
	Anthony Pirri & Peter Culotta	$10,541.55
	Anthony Pirri, Peter Culotta & Santi DeGaetano	$6,006.00
	Anthony Raso	$198.71
	Janet Rosner	$7,658.84
	Harvey Simon	$1,987.10
	Helen Simon	$993.55
	Suzanne Waitzman	$993.55
	Abraham Yuffa	$10,510.32
	Darius and Yasmin Contractor	$99,256.00
	Kersi and Vera Mistry	$97,256.00
	Munir and Romila Mallo	$87,932.27
	Estate of Gloria Malek	$6,670.13
	Abraham Yuffa	$5,336.12
	Gerald Marshall	$5,336.12
b.) John Mowat Jaffey (Disbarred September 28, 1995)		
claims of:	Theresa Cairns	$16,864.00
	Marie Garbutt	$50,000.00
	Peter and Yolanda Spielman	$89,170.00
	J. David Thornton	$17,000.00

c.) David Parsons (Permitted to Resign September 27, 1996)
claim of: Bernice and Bernard Murphy $860.75

Maria Loukidelis

a.) Ansis Semenovs (Disbarred April 27, 1995)
claim of: Dorothy Chambers $1,000.00

b.) David V. Freeman (Deceased March 7, 1996)
claims of: Ignazio Genco $5,000.00
Maroulla Tsiogas $600.00

c.) Solicitor #15 (Retired or Not Working November 22, 1996)

claims of: James and Benita DesRoches	$10,000.00
Denise Cormack	$100,000.00
Richard Cormack	$100,000.00
Art Magic Carpentry Inc.	$100,000.00
Archie DelTorre	$80,442.51
Dennis DelTorre	$2,520.24
Rose Scagnetti	$2,520.24
Kent Murphy	$39,304.53
Sharon Gibb	$39,304.53
Estate of Susan Federico	$39,304.53
Timothy Ramm	$779.57
Andrea Guarino	$22,298.60
Gary Guarino	$64,298.60
Belgjyzere Kelolli	$97,949.01
Stephen and Cynthia Berneski	$24,854.06
Raymond Kolomayz	$39,416.49
James Jessop	$31,437.69
James Jessop and Ann Jessop	$3,220.00
Rita and Brian Copperthwaite	$300.00
Keith and Georgina Reynolds	$225.06
J. Patel and J. Intwala	$436.07

d.) David E. Nicholson (Disbarred November 23, 1995)
claim of: H. Adams Welding Ltd. $6,000.00

e.) Solicitor #11 (Suspended December 31, 1995)

claims of: Terence Bilcliffe and Dorin Bilcliffe	$53,030.62
Brigitte Saunders	$13,586.77
Kenneth Saunders	$2,500.00
James and Christine McKernan	$1,215.13

f.) Solicitor #14 (Discipline Pending)
claim of: Tom LeRoy $18,479.48

g.) Solicitor #2 (Suspended Non-Payment Annual Fee December 31, 1995)

claims of: Stephen Du, Helen Du and Hioatie Deng	$3,434.41
Zaka-Ud-Din Ayubi	$400.00

h.) Solicitor #19 (Suspended Non-Payment LPIC Levy December 31, 1995)
claim of: Grant MacDonald $400.00

i.)	Solicitor #6	(Discipline Suspension May 23, 1996)	
	claims of:	Karen McMahon	$2,700.00
		Philip Reid	$1,700.00
		Paul and Eunice Beck	$996.85
j.)	Stephen M. Chernoff	(Disbarred September 26, 1991)	
	claim of:	Abdul Jamal	$3,500.00
k.)	Frederick B. Sussman	(Permitted to Resign April 3, 1997)	
	claim of:	Hubert and Helen Weber	$40,453.24
l.)	Solicitor #5	(Suspended Non-Payment Filing Levy December 1, 1995)	
	claims of:	Mike Bucholtz	$950.00
		Jeanette Cliche	$600.00
		Estate of Lawrence Gorman	$558.09
m.)	Leon Wickham	(Disbarred September 22,1994)	
	claim of:	Charlie (Corrado) Mallia	$8,000.00
n.)	Murray Herman	(Deceased October 17, 1995)	
	claims of:	Anne French	$1,000.00
		Francine De Marchi	$6,500.00
o.)	Solicitor #4	(Suspended Non-Payment Filing Levy November 1, 1993)	
	claim of:	Astley Bent	$650.00
p.)	Philip Evans	(Disbarred May 23, 1996)	
	claims of:	Piara Raisauda and Jaswant Raisauda	$500.00
		Jaspal Sodhi	$400.00
		Lea Regina	$400.00
q.)	Sadrudin Jaffer	(Disbarred April 24, 1997)	
	claim of:	Harold P. Naidu	$500.00

It was moved by Mr. Ruby, seconded by Ms. Stomp that Guideline 11 be amended as follows:

> "Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the member, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained."

Carried

THE REPORT WAS ADOPTED

Professional Regulation Committee Report

Meeting of June 12th, 1997

Re: Policy on Reference to Prior Invitations to Attend at Discipline Hearings

Ms. Curtis presented the item in the Report regarding the policy on reference to prior Invitations to Attend.

It was moved by Mr. Thom, seconded by Mr. MacKenzie that Convocation affirm its existing policy decision that no reference to an Invitation to Attend be made in the reasons of hearing panels or by Discipline Counsel.

Carried

It was moved by Ms. Curtis, seconded by Ms. Stomp that Option 20(b) be adopted, namely that the fact of an Invitation to Attend be included in the reasons of hearing panels in current discipline matters based on the relevance of the issue(s) in the ITA to the current matter, in the limited case where the ITA arose from the withdrawal of a formal discipline charge at hearing.

Not Put

THE POLICY ITEM ON INVITATIONS TO ATTEND AS AMENDED WAS ADOPTED

MOTIONS - SUSPENSIONS

It was moved by Mr. Murray, seconded by Mr. Feinstein THAT the rights and privileges of each member who has not paid the Membership Fee, and whose name appears on the attached list, be suspended from July 15, 1997 and until their fee is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(see list in Convocation file)

It was moved by Mr. Murray, seconded by Mr. Feinstein THAT the rights and privileges of each member who has not paid the Errors and Omissions Insurance Levy, and whose name appears on the attached list, be suspended from July 15, 1997 and until their levy is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(see list in Convocation file)

Finance and Audit Committee Report

Meeting of June 12th, 1997

Finance and Audit Committee
June 12, 1997

Report to Convocation

Purpose of Report: Decision Making

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on June 12, 1997. In attendance were R. Murray (Chair), A. Chahbar, T. Cole, M. Crowe, E. DelZotto, G. Farquharson, P. Furlong, J. Harvey, V. Krishna, D. Murphy, P.B.C. Pepper, H. Ross, T. Stomp, G. Swaye, J. Wardlaw, R. Wilson, B. Wright.

Staff in attendance were J. Saso, R. Tinsley, W. Tysall, D. Carey, K. Corrick, R. White. Also in attendance were M. Strom (LPIC), D. Porter (Legal Aid), B. Graham (Coopers & Lybrand).

1. The Committee has three matters that require Convocation's approval:

- Architect's Report on Osgoode Hall,
- Bankrupt members: Effect of bankruptcy on obligations to pay fees and levies,
- final instalment toward the Ontario Legal Aid Plan assessable administrative expenses

2. This report contains:

- a memorandum from the Chief Financial Officer with respect to the Architect's report (pages 6 - 11),
- a limited number of copies of the Architect's Report will be available at Convocation for review
- a report prepared by the Policy Secretariat entitled "Bankrupt Members: Effect of Bankruptcy on Obligations to Pay Fees and Levies" (pages 12 - 27),
- a letter requesting the final instalment of the Society's obligation under the Legal Aid Act to remit 25% of Legal Aid's assessable administrative expenses (pages 28 - 30)

3. The Committee discussed the contents of the Architect's Report, in particular the work required to repair the Benchers' Wing exterior. Discussion was also held regarding a long term plan to ensure Osgoode Hall is kept in good repair.

4. The Finance and Audit Committee recommends to Convocation that the work required to repair the Benchers' Wing exterior commence as soon as possible. The work could be performed as one project or split into two projects. The Committee recommends that the work be performed as one project in order to reduce costs.

5. The Finance and Audit Committee, in connection with the Benchers' Wing repair, also recommends to Convocation that the borrowing of funds, if required, be approved by Convocation to finance this project as it was not contemplated in the current budget.

6. The Committee discussed the issues regarding bankrupt members and the effect of bankruptcy on the obligation to pay fees and levies. The Committee considered the following options during their debate (a full description of the options is available on page 18 of this report):

   a. Maintain the practice currently followed by the Society,
   b. Suspend the rights and privileges of bankrupt members for nonpayment,
   c. Permit the bankrupt member who has not paid fees and levies to continue to practice on condition that the fees and levies are repaid on a schedule that reflects the member's bankrupt status.

7. The Finance and Audit Committee recommends to Convocation the Law Society maintain the current practice of not suspending bankrupt members be continued in keeping with the underlying policy of the Bankruptcy and Insolvency Act to assist in the rehabilitation of the debtor.

8. The Deputy Director, Finance of the Legal Aid Plan was present at the meeting to discuss the Plan's request for an additional sum of $490,000 based on the Plan's actual assessable administrative expenses for their year ended March 31, 1997. The Legal Aid Act and Regulations require that these additional amounts be paid by June 30th. Legal Aid's original budget figure, adjusted to exclude loan interest, amounted to $6.385 million. The Law Society has, to date, contributed $6.375 million of the $6.4 million 1997 Law Society budgeted amount. The additional expenses of $490,000 are primarily the result of the Plan advancing payments at their fiscal year end as well as significant pay equity payments. The additional expenses were not contemplated in the preparation of the Society's 1997 budget and in accordance with Executive Limitations, Convocation's approval is needed to exceed that budgeted amount.

9. A meeting of the Committee has been scheduled for June 26, 1997 to obtain information regarding the composition of the Legal Aid assessable administrative expenses. Budget options will be determined at this meeting resulting in a report that will be distributed the day of Convocation.

BANKRUPT MEMBERS: EFFECT OF BANKRUPTCY ON OBLIGATION TO PAY FEES AND LEVIES

A. NATURE AND SCOPE OF THE ISSUE

1. The Committee considered whether the Law Society should continue its practice of not suspending bankrupt members for nonpayment of fees and insurance levies. The Committee seeks Convocation's approval of its proposal to continue this practice.

2. At present, Convocation does not suspend the rights and privileges of bankrupt members for nonpayment of fees and insurance levies that became due to the Law Society before the date of bankruptcy.

3. In 1995 and 1996, LPIC wrote off a total of $1,237,481.18 as a result of the nonpayment of insurance premiums, surcharge levies, bank loans guaranteed by the Law Society, and deductibles[1] by bankrupt members over the two-year period of 1995 and 1996.

4. In 1996, The Law Society wrote off $49,000 as a result of the nonpayment of the annual fee by bankrupt members.

5. The Law Society sought a legal opinion on the ability of the Law Society to suspend bankrupt members for nonpayment of fees and insurance levies.

6. The author of the legal opinion concludes that the Law Society may require a member to pay the annual fee and all insurance levies (including premiums and surcharges) due by the member in any year notwithstanding that the member becomes bankrupt during the year. Furthermore, Convocation may suspend the rights and privileges of a bankrupt member for nonpayment of fees and levies that became due to the Law Society before the date of bankruptcy. Subsequently, the member may be required to pay the fees and levies before her/his rights and privileges are reinstated, notwithstanding that the member is discharged from bankruptcy and the fees and levies are extinguished.

7. In light of this legal opinion the Committee considered whether the Law Society should continue its practice of not suspending bankrupt members for nonpayment of fees and insurance levies.

B. BACKGROUND

Law Society Act: Suspension

8. Section 36 of the Law Society Act gives Convocation the authority to suspend the rights and privileges of a member who has not paid any fee or levy that has been due and owing to the Law Society for four months or longer. Section 36 currently reads:

> If a member fails to pay any fee or levy payable to the Society within four months after the day on which payment is due, Convocation may by order suspend the person's rights and privileges as a member for such time and on such terms as it considers proper in the circumstances.

9. A member's rights and privileges may be suspended under section 36 without a hearing (section 33).

Regulation 708: Bankruptcy: Member's Obligation to Notify Secretary

10. Subsection 7(1) of Regulation 708 requires a member to notify the Secretary when the member makes an assignment in (or is petitioned into) bankruptcy. Subsection 7(1) currently reads:

---

[1]Section 36 of the Law Society Act does not give the Law Society the power to suspend a member for nonpayment of a deductible.

> Every barrister and solicitor shall forthwith notify the Secretary of the receipt of a petition to declare him or her bankrupt or of the making of a general assignment for the benefit of his or her creditors.[2]

Present Practice: Bankrupt Members

11. As stated above, Convocation does not suspend the rights and privileges of a bankrupt member for nonpayment of the fees and levies that became due to the Law Society before the date of bankruptcy.

12. The reasons for not suspending the member's rights and privileges have been as follows:

    a. Fees and levies that became due to the Law Society before the date a member makes an assignment in (or is petitioned into) bankruptcy are claims provable in bankruptcy and are extinguished when the member is discharged from bankruptcy.

    b. Nonpayment of outstanding fees and levies is the basis for suspending a member's rights and privileges. If the outstanding fees and levies are extinguished when the member is discharged from bankruptcy, there is no longer a basis for the suspension. If the member's rights and privileges had been suspended, the member would be entitled to have the rights and privileges reinstated.

    c. There is doubt whether Convocation can reinstate a member's rights and privileges on condition of payment of outstanding fees and levies that have been extinguished. One purpose of bankruptcy legislation is to relieve debtors from past debts so they can make a fresh start. The authority of Convocation to reinstate a member's rights and privileges on condition that past debts are paid may interfere with this purpose of bankruptcy legislation.

    d. If the basis of a suspension is removed when a member is discharged from bankruptcy, and there is no authority to reinstate on condition that the member pay outstanding fees and levies that have been extinguished, the suspension serves no purpose.

13. In most cases, bankrupt members meet their financial obligations to the Law Society to be certain of their right to practise. Notwithstanding this, in 1996, the Law Society wrote off $49,000 as a result of the nonpayment of the annual fee by bankrupt members.

---

[2]Under the Bankruptcy and Insolvency Act, a member may also make a "proposal" to creditors (negotiate with creditors, through a trustee/administrator, to reduce any debt and/or extend the time for payment of the debt).

Section 7 of Regulation 708 currently contains no requirement that a member notify the Secretary when he/she files a notice of intention to file a proposal or files a proposal.

14. Attachment A is a bankruptcy listing from LPIC for a two-year period ending December 1996. During that period, 191 members were bankrupt. Of that number, 117 (or 61%) were practising in 1997. The total amount written off by LPIC because of nonpayment by the 191 bankrupt members is $1,237,481.18. The amount owed by the 117 practising bankrupt members that has been written off is $471,151.55.

Legal Opinion

15. In July 1996, a legal opinion was obtained on the effect of a member's bankruptcy on the member's obligation to pay the annual fee and insurance levies (including premiums and surcharges).

16. The following is a summary of the legal opinion:

a. Under the Bankruptcy and Insolvency Act, an amount owing at the time a person becomes bankrupt is a "claim provable in bankruptcy".

b. No steps may be taken against a bankrupt person, or the person's property, to recover a claim provable in bankruptcy, other than to make a claim in the bankruptcy.

c. Once a person is discharged from bankruptcy, an amount that was a claim provable in bankruptcy is no longer owing.

d. If a member becomes bankrupt after the day that payment of the annual fee is due, the outstanding fee (or at least some portion of it) is a claim provable in bankruptcy.

e. The Law Society, therefore, may not take steps to recover the outstanding fee either during the bankruptcy or after the member has been discharged.

f. However, Convocation may suspend the member's rights and privileges for nonpayment of the fee, notwithstanding that the member is bankrupt.

g. Suspension of a member's rights and privileges for nonpayment of the outstanding annual fee is not a remedy to recover the fee. Rather, it is the withholding of a privilege for failure to satisfy the requirements (albeit financial requirements) of having the privilege. As such, it si not prohibited under the Bankruptcy and Insolvency Act.

h. Convocation may also require that the outstanding fee be paid before it reinstates the member's rights and privileges, notwithstanding that the member has been discharged from bankruptcy and the fee has been extinguished.

i. The requirement to pay the outstanding fee is a "membership requirement". It is not a means of enforcing payment of an amount that has been extinguished. Convocation does not have the authority to enforce payment of an amount that has been extinguished. It does, however, have the authority to enforce compliance with its membership requirements.

j. The authority to suspend a member's rights and privileges for nonpayment of the annual fee, and to require payment of the outstanding fee before reinstating the rights and privileges, may be exercised in respect of the following members:

- A member who makes an assignment in bankruptcy.
- A member who is petitioned into bankruptcy.
- A member who files a notice of intention to file a proposal
- A member who files a proposal

k. Convocation may also suspend a member's rights and privileges for nonpayment of insurance levies (including premiums and surcharges).

l. However, Convocation's authority to suspend a member's rights and privileges for nonpayment of insurance levies is predicated upon the levies being payable to the Law Society. If the insurance levies were payable directly to the Lawyers' Professional Indemnity Company, the Law Society could not suspend members for nonpayment pursuant to section 36 of the Law Society Act.

m. The author of the legal opinion recommends that the Law Society adopt the following practice in respect of any member who becomes bankrupt:

i. The Law Society should calculate the amount of fees and levies owing by the member attributable to the period of time before the date of bankruptcy.

ii. The Law Society should make a claim in the bankruptcy for the amount of fees and levies owing by the member attributable to the period of time before the date of bankruptcy.

iii. The Law Society should advise the member that, unless all outstanding fees and levies are paid, including the fees and levies attributable to the period of time before the date of bankruptcy, Convocation may exercise its authority under section 36 of the Law Society Act to suspend the member's rights and privileges. The Law Society should also advise the trustee in bankruptcy of its intention to suspend the member's rights and privileges for nonpayment of all outstanding fees and levies.

iv. The Law Society should treat all members equally. All members should be required to pay all outstanding fees and levies before their rights and privileges are reinstated. The Law Society may, however, exercise discretion in the terms of payment arranged with individual members.

C. OPTIONS ANALYSIS

17. The Committee considered the following courses of action:

a. Maintaining the practice currently followed by the Law Society: The rights and privileges of bankrupt members should not be suspended for nonpayment of fees and levies that became due to the Law Society before the date of bankruptcy.

b. Suspending the rights and privileges of bankrupt members for nonpayment: Members would be suspended for the nonpayment of fees and levies that became due to the Law Society before the date of bankruptcy. The rights and privileges would not be reinstated until the member has paid the outstanding fees and levies, notwithstanding that the member has been discharged from bankruptcy. The bankrupt member would be treated no differently than any other member who has failed to pay fees and levies.

c. Permitting the bankrupt member who has not paid fees and levies to continue to practice on condition that the fees and levies are repaid on a schedule that reflects the member's bankrupt status: Bankrupt members would be required to acknowledge the debt and repay it at a fixed rate. This option would treat bankrupt members differently than other members who do not pay their fees and levies, but who are not bankrupt.

18. A number of factors in support of maintaining the current practice were considered by the Committee.

19. Firstly, the current practice of not suspending bankrupt members for nonpayment of fees and levies is consistent with the underlying policy of the Bankruptcy and Insolvency Act to assist in the rehabilitation of the debtor. A bankrupt member who is suspended for nonpayment will be deprived of the right to practise law at all and will be thus unable to earn a living.

20. Secondly, the current practice is in harmony with the wishes of many members of Convocation that the Law Society be responsive to the economic needs of members who are having difficulty making ends meet financially. On November 29, 1996, Convocation received a report prepared in response to the Eberts-Ross motion, which was directed at the development and implementation of measures to improve the practising environment and economic viability of lawyers. The extent to which the economic circumstances of a lawyer should be considered in applying our regulatory scheme is an issue that is being studied by the Task Force on the Future of the Legal Profession.

21. Thirdly, additional administrative time and expenses will be required to adopt the practice suggested in the legal opinion. The Law Society's database cannot currently generate a list of practising bankrupt members who have not paid their fees. The Law Society will have to obtain that capability to properly monitor these matters. Furthermore, additional staff time would be required to administer the practice, including making the claim in the member's bankruptcy, ensuring that the trustee in bankruptcy has been notified, and generally monitoring the member's bankruptcy from that perspective.

22. On the other hand, the Committee considered the fact that the current practice does not treat all members equally. As Attachment A demonstrates, large sums of money are written off each year as a result of the nonpayment of fees and levies by bankrupt members. No other category of member is permitted, as policy matter, to continue to practise with outstanding fees and levies owed the Law Society. The result is that paying members of the Law Society are subsidizing bankrupt members.

The Committee's View

23. The Committee recommends that the current practice of not suspending bankrupt members be continued in keeping with the underlying policy of the Bankruptcy and Insolvency Act to assist in the rehabilitation of the debtor.

D. OPTIONS FOR CONVOCATION

24. Convocation must determine whether to accept the recommendation of the Committee or consider one of the other option set out in paragraph 17.

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

(1) Copy of a memorandum from Ms. Wendy Tysall to the Chair and Members of the Finance and Audit Committee dated June 5, 1997 re: Architect's Report.
(pages 6 - 11)

(2) Attachment A re: LPIC Bankruptcy Listing.
(pages 21 - 27)

(3) Copy of a letter from Mr. David Porter, Deputy Director, Finance, The Ontario Legal Aid Plan to Ms. Wendy Tysall dated May 26, 1997 re: Law Society Contribution to Legal Aid.
(pages 28 - 30)

Item - Architect's Report

It was moved by Mr. Murray, seconded by Mr. Feinstein that the renovation to the Benchers Wing exterior be done and that funds be borrowed to finance the project.

Carried

Item - Bankrupt Members

It was moved by Mr. Murray, seconded by Mr. Feinstein that the Society maintain the current practice of not suspending bankrupt members in keeping with the underlying policy of the Bankruptcy and Insolvency Act being to assist in the rehabilitation of the debtor.

Carried

THE REPORT WAS ADOPTED

Finance and Audit Committee

Meeting of June 12th, 1997

Finance and Audit Committee
June 12, 1997

Report to Convocation

Purpose of Report: Information

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on June 12, 1997. In attendance were R. Murray (Chair), A. Chahbar, T. Cole, M. Crowe, E. DelZotto, G. Farquharson, P. Furlong, J. Harvey, V. Krishna, D. Murphy, P.B.C. Pepper, H. Ross, T. Stomp, G. Swaye, J. Wardlaw, R. Wilson, B. Wright.

Staff in attendance were J. Saso, R. Tinsley, W. Tysall, D. Carey, K. Corrick, R. White. Also in attendance were M. Strom (LPIC), D. Porter (Legal Aid), B. Graham (Coopers & Lybrand).

1. The Committee is reporting on four matters:

   - Combined Errors and Omissions Insurance Fund and the Lawyers' Professional Indemnity Company financial statements for the three months ended March 31, 1997 and,
   - 1998 Budget process,
   - Preliminary review of the annual fee billing process and update on 1997 suspensions,
   - Ontario Legal Aid Plan draft financial statements for the year ended March 31, 1997

2. This report contains:

   - a report from the management of the Lawyers' Professional Indemnity Company regarding the Combined Errors and Omissions Insurance Fund and the Lawyers' Professional Indemnity Company financial statements. (pages 35 - 50)

   - a memorandum from the Chief Financial Officer with respect to the 1998 Budget process (pages 51 - 52).
   - a memorandum from the Chief Financial Officer and two Finance staff members with respect to the annual fee billing process and suspensions (pages 53 - 61).

3. The Chief Financial Officer of the Lawyers' Professional Indemnity Company attended the meeting and presented the financial statements of the Combined Errors and Omissions Insurance Fund and the Lawyers' Professional Indemnity Company. Information provided to the Committee indicated that the deficit will be retired by mid 1999.

4. The Society's Chief Financial Officer presented to the Committee a memorandum surrounding issues with respect to the preparation of the 1998 budget. The Committee was requested to consider the inclusion of budget provisions for technology, building repairs, and equity and diversity issues. The Committee took into account that the Benchers have yet to have their planning meetings and determined it would be more prudent to deal with these issues at the September meeting. However, the Committee did stress that it wanted to review the budget at least twice. Direction to staff will be provided at the September meeting of the Committee.

5. The Committee was presented with two staff reports. The first dealt with a review of the annual fee billing process and membership classes while the second deals with suspensions. The Committee was informed that a review of the payment methods was being undertaken to have more options available to the members and to take equity issues into account. The Committee also instructed staff to refund the reinstatement fee to those members that chose to pay the annual fee in two instalments and did not, through over sight or inadvertence, comply with the stipulation to submit post-dated cheques by May 1st. Since these members were suspended a reinstatement fee was required to be paid.

6. The Deputy Director, Finance of the Legal Aid Plan attended the meeting and presented to the Committee draft financial statements for the year ended March 31, 1997. The Deputy Director, Finance is attempting to have the statements finalized for Convocation.

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

(1) Combined Errors and Omissions Insurance Fund and Lawyers' Professional Indemnity Company Financial Statements for the 1st Quarter ended March 31, 1997. (pages 35 - 50)

(2) Copy of a memorandum from Ms. Wendy Tysall to the Chair and Members of the Finance and Audit Committee dated June 3, 1997 re: 1998 Budget Process. (pages 51 - 52)

(3) Copy of a memorandum from Ms. Wendy Tysall to the Finance and Audit Committee dated June 3, 1997 re: Annual Fee Billing Process and Update on 1997 Suspensions. (pages 53 - 61)

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:15 P.M.

The Treasurer and Benchers had as their guest for luncheon The Attorney General for Ontario, The Hon. Charles A. Harnick, Q.C.

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Adams, Angeles, Armstrong, Banack, Bobesich, Carey, Carter, R. Cass, Copeland, Crowe, Curtis, DelZotto, Eberts, Epstein, Feinstein, Finkelstein, Gottlieb, Lawrence, MacKenzie, Millar, Murphy, Murray, O'Connor, Puccini, Sachs, Scott, Sealy, Stomp, Swaye, Thom, Wilson and Wright.

.....

.....

IN PUBLIC

.....

FINANCE AND AUDIT COMMITTEE REPORT

Meeting of June 26th, 1997

Mr. Murray requested that the Legal Aid Draft Financial Statements and request for final payment for assessable administrative expenses be deferred until the Chief Financial Officers and Legal Aid Auditors resolved the outstanding issues.

THE REPORT WAS DEFERRED

LSUC\CBA-O Joint Committee on Electronic Registration of Title Documents Final Report

Messrs. Romanin and Leal presented the final Report on Electronic Registration to Convocation.

The Final Report of the Joint Committee on Electronic Registration of Title Documents

Table of Contents

Appendix "F" - Part III of the Land Registration Reform Act being Electronic Registration

Appendix "G" - Document Registration Agreement

FINAL REPORT OF THE LSUC/CBA - O JOINT COMMITTEE ON ELECTRONIC REGISTRATION OF TITLE DOCUMENTS

PREFACE

This is the final report (the "Report") of the Joint Committee on Electronic Registration of Title Documents (the "Committee") which was established in September, 1996 as a result of discussions between representatives of the Law Society of Upper Canada ("LSUC") and Canadian Bar Association-Ontario ("CBA-O") concerning changes in real estate conveyancing which will be required to accommodate the implementation in estate conveyancing which will be required to accommodate the implementation in Ontario of a system of remote computer registration of electronic title "documents". This new system of registration now being developed by the Ontario Ministry of Consumer and Commercial Relations ("MCCR") and Teranet Land Information Services Inc. ("Teranet") is expected to be introduced in selected areas of the province late in 1997 or early in 1998 and present projections are that the whole of Ontario will be converted to electronic title registration by the year 2000.

It is part of the LSUC's mandate to establish and maintain acceptable standards of practice and proficiency among lawyers in Ontario. The joint LSUC/CBA-O committee was therefore established with the following terms of reference:

> To consider the impact which electronic title document registration may have upon conveyancing practice and to make recommendations to the LSUC as to the procedures, courtesies and standards of practice which lawyers may reasonably held to and to expect of each other when engaged in real estate transactions involving the electronic registration of title documents.

LSUC Treasurer E. Susan Elliott nominated three practicing real estate lawyers to serve on the Committee and CBA-O nominated three practicing members of the Real Property Section as its representatives on the Committee. The County and District Law Presidents' Association ("CDLPA"), the Ontario Real Estate Lawyers Association ("ORELA") and the Lawyers' Professional Indemnity Company accepted invitations to appoint representatives to serve on the Committee. LSUC staff lawyers also participated in the work of the Committee and provided administrative support.

On September 25, 1996, James F. Leal, one of the practicing lawyer representatives of the LSUC, and Maurizio Romanin, Chair of CBA-O Real Property Section, agreed to act as Co-Chairs of the Committee.

The other members of the Committee are:

Lawrence R. Bremner
J. H. (Kim) Little, Q.C.
Frank H. M. Stolwyk
Donald V. Thomson
Kathleen A. Waters
Belinda J. James
Andrea O. Nalyzyty
Albert A. Strauss, Q.C.
David Warga

At the request of the Committee, the following persons were requested to sit as advisory members:

Lawyer R. Dalton, Q.C. (Teranet)	Robbert Blomsma (MCCR)
J. Robert Kelly, Q.C.	Michael Seto
Don Godden	(LSUC)

The Committee met on 10 occasions, in the period from September, 1996 to June, 1997. The Committee issued a preliminary report in April, 1997. A copy of the preliminary report is attached as Appendix "A". The preliminary report has been presented to Convocation, CDLPA, and the CBA-O Executive prior to the finalization and submission of this Report.

The Committee would like to thank all those individuals who contributed to its work and to this Report. In particular, the Committee would like to thank those organizations who assisted in the process of this Report and without whose help and enthusiastic co-operation this Report would not have been possible.

RECOMMENDATIONS OF THE FINAL REPORT OF THE LSUC/CBA-O JOINT COMMITTEE ON ELECTRONIC REGISTRATION OF TITLE DOCUMENTS

Rec No.	Recommendation*	Page Ref.
	1. Practice Directives	
22.	That the LSUC issue a practice directive advising lawyers to print out a paper copy of the electronic charge and deliver same to the mortgagor in accordance with the requirements of the Mortgages Act discussed supra.	29
18.	That the LSUC issue a practice directive to lawyers practising real estate recommending the use of the TERS-generated Acknowledgment and Direction for all transactions involving the TERS.	27
16.	That the LSUC publish a practice directive confirming that it is proper practice for a lawyer to rely on the compliance with law statements contained in an electronic document and correspondingly, that the lawyer is not required to request and review any of the supporting evidence that was relied upon by the lawyer who actually made the statement(s).	26
38.	That the LSUC issue a practice directive confirming that, in the case of private mortgages to be discharged as part of a closing, it is appropriate for the private mortgagee and/or/his/her solicitor to release the electronic discharge for registration provided the discharge is a document listed in the DRA.	37
36.	That an Acknowledgment and Direction to be signed by the client include a provision confirming the operation of the DRA	36

26.	That the LSUC issue a practice directive advising members of the need to equip themselves electronically to provide their clients with a minimum acceptable level of service. This includes the computerization of their real estate conveyancing practices to avail themselves of the TERS.	32
33.	That the arrangements for escrow closings be standardized in the manner set out in the DRA and that practice directives issued by the LSUC recognize these procedures as acceptable practice.	36
8.	That the LSUC issue a practice directive alerting its members of the need to be vigilant regarding the activation of staff as "authorized users" and the cancellation of such authorization forthwith upon the termination of a staff member's employment. This will include the implementation of appropriate procedures to properly monitor and control the creation and discontinuance of pass phrases. The Committee feels that control over pass phrases and diskettes is tantamount to control over access to trust accounts. In fact, many of the procedures employed to administer the latter could be adapted and used to administer the former.	21
9.	That the LSUC recommend to its members that lawyers practising in association (i.e. not as partners) obtain their own account number for access to the TERS.	22
31.	The Committee has concluded that the ultimate responsibility for the contents of a document that has been approved by a clerk, paralegal or secretary who has been given approval authority rests with the lawyer responsible for the file and that a practice directive re-affirming this be issued by the LSUC	33
19.	That the LSUC amend the Real Estate Checklist to include as recommended practice the use of the Acknowledgment and Direction in all transactions involving the TERS.	27
12.	That the LSUC issue a statement notifying lawyers that this new reporting system will not be tolerant of suspended/disbarred lawyers and that the ability of these lawyers to manipulate the time lags inherent in the current reporting system will be virtually eliminated by the implementation of an automated status verification system.	23
13.	That the LSUC issue a practice directive to lawyers confirming that responsibility for any document ultimately rests with the lawyer handling the file notwithstanding that the approval authority for the document may have been delegated to a non-lawyer in the firm.	24
27.	The aforesaid practice directive should also specify that where lawyers are not prepared to participate along these lines and are therefore inconveniencing their colleagues, they should be prepared to compensate the opposing lawyer for any additional time and inconvenience caused.	32
	2. Rules of Professional Conduct/LSUC Regulation	

34.	That the LSUC amend the Rules of Professional Conduct to specifically deal with the escrow obligations of the parties to a DRA. In particular, the Rules should also specify that a breach of the escrow provisions in the DRA may result in disciplinary proceedings.	36
41.	That the LSUC undertake the appropriate actions to implement an efficient means of trust funds transfers for the payment of land transfer tax and registration fees consistent with facilitating the TERS.	42
23.	That the LSUC amend the Rules of Professional Conduct to include an obligation upon a member to notify in writing a member acting for another party in a purchase, sale or mortgage transaction, of the particulars of registration forthwith after the member has completed registration.	29
	3. Consultations with Appropriate Parties	
17.	That the LSUC and CBA-O formally request that Teranet and MCCR build into the TERS the design functionality for the generation of the Acknowledgment and Direction in the format contemplated in this Report.	27
11.	That the LSUC request that MCCR and Teranet include in the TERS the facility to check for determining that lawyers are qualified to make compliance with law statements. This should also apply if the registration is being effected on a non-remote basis directly at the LRO.	23
2.	That the LSUC and CBA-O request that MCCR and Teranet, in the future, prior to changing the fees for electronic document preparation and registration, consult with the LSUC and CBA-O	19
21.	That the LSUC and CBA-O recommend to the MCCR that the appropriate amendment to the Mortgages Act be effected to eliminate the requirement to provide a paper copy of the mortgage to the mortgagor, where an Acknowledgment and Direction in respect of the mortgage has been signed by, and delivered to, the mortgagor.	29
1.	That the LSUC and CBA-O convey to the MCCR their support of a short transition period for each LRO for the implementation of the TERS, after which the use of the paper format would be discontinued for those properties designated as subject to the TERS>	19
30.	That the LSUC and CBA-O recommend to Teranet and MCCR that a lawyer's electronic signature be required to confirm the acceptance of the format of an electronic document excerpt where a large volume of similar documentation is being produced for one or a series of related transactions. Where the document includes a compliance with law statement, the document must be approved by the lawyer making the statement.	33

29.	That the LSUC and CBA-O recommend to Teranet and MCCR that the ability to pre-approve a document for registration be included in the TERS.	33
10.	That the LSUC work with Teranet to develop a system for the immediate notification by the LSUC of member suspensions and reinstatements as well as the admission of new members and that Teranet assume responsibility for immediately updating its records regarding such members.	23
14.	That the LSUC and CBA-O request Teranet to ensure that the appropriate functionality be built into TERS to allow for emergency access to electronic documents which have not yet been registered by other members of the same firm or another authorized lawyer (in case of sole practitioners). In addition, TERS should also allow for the assignment or delegation of "work in progress" electronic documents between lawyers.	24
40.	CLOSING ARRANGEMENTS: Where each of the Vendor and Purchaser retain a lawyer to complete the Agreement of Purchase and Sale of the property, the Vendor and Purchaser acknowledge and agree that the delivery of documents and the release thereof to the Vendor and Purchaser may, at the lawyer's discretion: (a) not occur contemporaneously with the registration of the transfer/deed (and other registerable documentation), and (b) be subject to conditions whereby the lawyer receiving documents and/or money will be required to hold them in trust and not release them except in accordance with the terms of a written agreement between the lawyers. If either the Vendor's or the Purchaser's lawyer is unwilling to complete the transaction in escrow, then the unwilling lawyer (or the authorized agent thereof) shall attend at the office of the other lawyer (or at the appropriate Land Registry Office if so directed by the other lawyer) to complete the transaction. TELEFAX TRANSMISSION: The Vendor and the Purchaser agree that the delivery of documents (other than documents to be registered) on closing may occur by telefax or similar system reproducing them provided that all documents have been properly executed by the appropriate parties. The person transmitting the documents shall also provide original documents to the recipient within seven business days of the later of (a) telefax transmission of the documents, or (b) a request for the original documents by the recipient.	41

25.	The Committee has concluded that the present obligations regarding the preparation of documentation as contained in the OREA form of agreement of purchase and sale are compatible with the procedures and requirements in a remote electronic system. Accordingly, the Committee recommends that no changes to these obligations be made.	32
32.	That the appropriate discussions take place with the real estate boards so that an amendment to the OREA form of offer dealing with the Document Registration Agreement and the obligation to close in escrow can be finalized and implemented. Moreover, this amendment should specifically provide that if a lawyer refuses to close in escrow in the basis of a Document Registration Agreement, that lawyer will be required to either attend for closing at the opposing lawyer's office or at the LRO, whichever the opposing lawyer prefers.	34
35.	That the Lawyers' Professional Indemnity Company be requested to institute a program of insurance coverage relating to the risks associated with lawyers entering into DRA's.	36
28.	That the Real Property Section of the CBA-O standardize and combine into one multi-purpose document the non-registerable documents (such as undertakings to readjust, directions re: title and Income Tax Act and Family Law Act affidavits) to be used in the typical residential transaction.	32
24.	That discussions between the LSUC and financial institutions be instituted with a view to establishing a standardized procedure for the registration of discharges and to clarify the role and relationship between lawyers and lenders in registering same.	30
20.	That discussions be undertaken with mortgage lenders with a view to adjusting their mortgage requirements and instructions, so that the same are integrated with the TERS.	29
37.	That financial institutions be urged to consider authorizing discharges of their mortgages on closing as part of the procedure invoked under the DRA. Alternatively, where undertakings are to be employed to facilitate closings, that the lawyer identify who will ultimately be responsible for registering the discharge. Where the financial institution is assuming the responsibility, the lawyer must confirm the timing of registration and that notice of registration and registration particulars will be provided.	37
7.	That either the Committee (or the new committee contemplated above) be charged with the responsibility of monitoring the standards and directives initially put forward and adopted by the LSUC during a prolonged monitoring period (i.e. 2-3 years after the commencement of the roll-out of the TERS) in order to assess their performance and initiate any required changes.	20

6.	That upon completion of the Beta Test Period, either the Committee be reconvened (or a new committee struck) to review the results of the Beta Test Period in order to (if necessary) amend and finalize the recommendations and standards contained in this Report.	20
15.	That the LSUC and CBA-O continue to monitor safeguards and procedures for the prevention of fraud and bring forward additional comments and/or recommendations if the need should arise.	25
	5. Beta Testing	
4.	That the practice standards and directives contemplated in this Report be utilized as the "test" standards for the Beta Test Project.	20
5.	That the beta testers be asked to report to the LSUC and CBA-O their assessment and comments on the practice standards set out in this Report as adopted by Convocation.	20
3.	That the LSUC and CBA-O implement an educational program to provide the Beta Test Group with a thorough understanding of the recommendations contained in this Report prior to commencement of the Beta Test Project.	20
	6. Educational Initiatives	
39.	That the LSUC and CBA-O undertake or jointly undertake with other interested organizations (eg. CDLPA) the appropriate educational initiative to ensure that the members of the real estate bar are properly educated about the TERS.	38

* These recommendations have been grouped in accordance with the type of recommendation proposed.

CHAPTER 1 - OVERVIEW OF THE PRESENT PAPER SYSTEM ("PS")

1. General

Presently there exists two systems of land registration in Ontario. The Registry system consists of an inventory of instruments affecting title. It is not intended to provide direct assurances as to the ownership of any particular piece of property. Instead it is incumbent on the person reviewing title to formulate his or her own conclusions (based on the documents registered) as to the state of the title of any particular property. In contrast, the Land Titles system is intended to provide an up-to-date record of ownership and encumbrances affecting title. Simply stated, the Land Titles system produces a statement of title.

Registration of an instrument or document under the PS is effected by manually submitting (over the registration counter at the land registry office) a paper document in one of four prescribed formats, aptly named Forms 1, 2, 3 and 4. In all cases these forms contain the signature of the party conveying or charging an interest in land, or at the very least, the signature of the party purporting to be the "applicant" under the document. There is also the option of mailing documents to the land registry office ("LRO") for registration, but this option

is only generally used where the distance to the LRO prohibits physical attendance and even in these cases, where there is no urgency surrounding registration. In most cases, closings take place at the LRO with the parties ton the transaction meeting there to exchange the requisite documentation and money and then effecting the appropriate registrations. In limited cases, documents and monies may be exchanged between lawyers in escrow, pending one lawyer's successful registration of the necessary documentation.

2. Security

2.1 There is virtually no security system in place to control the ability to register the PS. Any individual who has completed the appropriate form correctly can register a document over the counter at, or by mail to, the LRO.

2.2 The PS does not distinguish between lawyers and non-lawyers who purport to register a document. Lawyers do not have any special or improved registration privileges.

2.3 Under the PS, there is no verification or recording of the identity of the person purporting to effect the registration of a document. Similarly, there is also no "check" on signatures appearing on documents.

2.4 In the PS, users have access to original records which are thus subject to loss, damage or alteration. Back-up or security files are often incomplete or out-dated because of the time lag involved in manually microfilming documents. Generally, microfilmed copies are not accessed to confirm information on the original records.

3. Document Preparation

3.1 The following is a brief description of the preparation of a document in the PS. We have used the example of a transfer with two clients involved, the transferor and the transferee, each of whom is represented by a lawyer.

3.2 The transferor's lawyer (Lawyer 1) determines which paper form to use for the particular transaction. In this case, it would be a Form 1, Transfer/Deed of land.

3.3 The appropriate information is inserted into Form 1 by Lawyer 1 and/or his or her secretary (Secretary 1). This would include the correct legal description, the parties' names, the address of the transferee and so forth.

3.4 Lawyer 1 or Secretary 1 forwards the document (via mail, courier or fax) to either the transferee's lawyer (Lawyer 1) or Lawyer 2's secretary (Secretary 2). Lawyer 2, Secretary 2 or both review the document and communicate changes (if required) to Lawyer 1 or Secretary 1 (either verbally or in writing by mail, courier or fax).

3.5 Lawyer 1 or Secretary 1 will make the requested changes (if acceptable) and confirm changes made by forwarding a revised draft of the document to Lawyer 2 or Secretary 2.

3.6 Lawyer 2 or Secretary 2 will review the revised document to confirm that the requested changes have been carried out. If the revisions are acceptable, Lawyer 2 or Secretary 2 will confirm this (either verbally or in writing via fax, courier, or mail) with Lawyer 1 or Secretary 1.

3.7 Lawyer 1 or Secretary 1 will meet with the transferor to execute the transfer in its final approved form.

4. Registration

4.1 At this juncture, both lawyers are satisfied with the form and content of the document. On the day scheduled for closing, either lawyer is able to register the document in the PS. In many cases, the actual task of registering is delegated by the lawyer to a conveyancer, clerk or paralegal.

4.2 Both sides of the transaction (either Lawyer 1 and Lawyer 2 or their authorized representatives) meet at the appropriate LRO to exchange documentation and funds. If the exchange is successful, Lawyer 2 or his/her representative will typically register the document in the company of Lawyer 1 or his/her representative by manually handing the document to the registration clerk at the registration counter. During busy periods this may involve a line-up of several hours.

4.3 Lawyer 2 will also typically tender (along with the document for registration) a cheque for land transfer tax and a cheque representing the registration fee for the document. Once these amounts have been verified, a registration number and time will be affixed to the document.

4.4 After registration, LRO staff will review the document, complete the abstracting of it and certify (if the land is in Land Titles) the change or amendment to the parcel register.

4.5 If LRO staff require minor changes to be made to a document prior to certification, the staff will usually contact the lawyer who prepared the document (as indicated on the face of the document itself) and request that the lawyer re-attend to make and initial the appropriate change. In cases where the change or correction is viewed by MCCR staff as material, typically the staff will require both parties to the document to indicate their approval prior to amending the document and proceeding with the certification of same. Failure to make the changes will result in the document not being certified and the notice of the document being expunged from the title abstract.

4.6 The following diagram (Figure 1) is intended to illustrate the workflow in the PS:

(See diagram in Convocation file)

CHAPTER 2 - OVERVIEW OF THE TERAVIEW ELECTRONIC REGISTRATION SYSTEM ("TERS")

1. General

The automation of the land registration system in Ontario involves two separate but complementary capabilities. The first revolves around the creation of a paperless electronic record-keeping system. This system will eliminate actual signatures on all principal documents affecting title. The second is the capability to remotely access the electronic system in order to obtain, create or amend information within that system.

The ability to remotely register electronic documents will in all likelihood eliminate the traditional LRO closing at which both parties to a typical transaction are in attendance. In fact, much of the potential utility of an electronic system would not be realized if LRO closings continued to be the accepted practice for real estate conveyancing. We anticipate that in an electronic system, most closings will involve the exchange of documentation through either fax, delivery or mail with funds being initially delivered in escrow and ultimately exchanged through electronic funds transfers. Documents intended for registration will be drafted, approved, exchanged and finally registered electronically through the Teraview gateway.

The TERS will only apply to lands in the Land Titles system.

2. Security

2.1 Every person who wishes to use the TERS will be registered as a user with Teranet. Upon registration, each user will be supplied with a computer diskette containing that user's individual security credentials. In addition, each registered user will create a unique pass phrase. The user must be authorized under a specific account number (attributable to a firm or a specific lawyer) to access the TERS.

2.2 Teraview records will indicate whether a registered user is a lawyer authorized to practice law in Ontario. It will be necessary for the LSUC to update Teranet regularly in order for new lawyers to become registered and for retired, suspended or disbarred lawyers to promptly be denied access to the system in their capacity as a practising lawyer.

2.3 The user's unique computer diskette must be inserted into the computer each time the user wishes to gain access to the TERS. The system will then require the individual to provide his or her personal pass phrase. The diskette and pass phrase are both necessary to gain access to the system.

2.4 The TERS contemplates four levels of access to an electronic document. These access levels are explained in further detail below but can be summarized as follows:

(a) CREATE/UPDATE - which allows a user to view and make changes to a document which has been drafted in the system, prior to registration of the document.

(b) COMPLETE/APPROVAL - which allows a user to indicate that the document is in a form acceptable for registration. If the document contains statements as to conclusions of law (as defined in the Regulations under the Land Registration Reform Act), the COMPLETE signal will only be accepted from a user who is identified as a lawyer authorized to practice in Ontario;

(c) RELEASE/REGISTRATION - which allows the user to indicate that he/she is releasing the document for registration; this signal may be indicated by the person who completed the document or may be delegated to a conveyancer or other user. Both the COMPLETE and RELEASE signals must be affixed to a document before it will be accepted by the system for registration;

(d) SEARCH - which allows the user to view the document only. This access applies to every document and every registered user once the document has been registered in POLARIS.

2.5 Users will not have access to original records. There will be a more complete, up-to-date back-up system with full copies of the information stored in two separate locations. All alterations to records will leave an audit trail.

3. Document Preparation

3.1 The following is a brief description of the preparation of a document in the TERS. We have continued to follow the example described under Document Preparation in the PS (supra).

3.2 Lawyer 1's firm wants to create the document using the Teraview system. Assume that the document is actually prepared by Secretary 1. Secretary 1 signs on to the system and begins preparation of the document through the use of a series of prompts built into the system. Secretary 1 indicates to the system that he/she will be preparing the document and that the secretary and Lawyer 1 are to be given access to the document at this time.

3.3 Secretary 1 finds the title records for the property using Teraview. Title may be identified by parcel identification number, by name of title owner or by municipal address. Certain fields of information will be automatically filled in when Secretary 1 starts to create the transfer (for example, the municipal address, the current owner's name and the legal description). These details would be confirmed and amended, if necessary, by Secretary 1. Other fields of information (for example, the transferee's name) would have to be inserted manually when preparing the transfer.

3.4 Once the transfer has been created, Lawyer 1 may sign on to TERS and review the document, making changes as required.

3.5 Lawyer 1 or Secretary 1 will then forward the document to either Lawyer 2 or Secretary 2. The individual to whom the transfer is forwarded is given UPDATE capability by the person forwarding the transfer.

3.6 The transfer is forwarded electronically using the TERS similar to the use of E-Mail. Electronic messages may accompany the document.

3.7 At Lawyer 2's office, Lawyer 2 or Secretary 2 will sign on to TERS and will view the document on his or her own computer screen and if necessary make changes or suggest changes to Lawyer 1. Any of the four individuals who currently have access to the document may make changes.

3.8 When both lawyers are satisfied with the form of document, the lawyers will signal their approval of the document by signing on to the system and indicating that the document is COMPLETE. In the initial preparation of the document, Secretary 1 would have identified Lawyer 1 and Lawyer 2 as the individuals who would be marking the document COMPLETE. The COMPLETE signals must be affixed before the transaction can proceed any further.

3.9 After the transfer has been marked COMPLETE, it is still possible for any of the four individuals with access to the transfer to make changes to it. However, if any changes are made to the transfer at this point, the COMPLETE indicator is automatically removed and each lawyer must again signal the document COMPLETE prior to registration.

4. Registration

4.1 Both lawyers have now indicated that they are satisfied with the form of transfer (using the COMPLETE signal). The document preparation may be completed in advance of the day set for closing. On the day of closing, either of the lawyers may register the document or the document may be forwarded to another person to register (e.g. a conveyancer). Prior to registration, each party, whether the lawyer or the conveyancer, must RELEASE the document for registration. Assuming each lawyer is using a conveyancer, the sequence would be as follows:

4.2 Lawyer 1 and Lawyer 2 forward the transfer to their respective conveyancers with RELEASE capability. The RELEASE capability authorizes the individual to sign on to the system and mark the document as released for registration but does not allow that person to modify the document. At this point either (a) the non-registration documents and funds have been exchanged in escrow until registration is effected, or (b) the conveyancers are meeting to exchange the documents and funds and effect registration at one of their offices.

4.3 Lawyer 1's conveyancer will sign on to the system and mark the document RELEASED for registration.

4.4 Lawyer 2's conveyancer will sign on to the system and conduct a subsearch of title and execution search. That conveyancer will then signal the document RELEASED for registration and go ahead with the registration.

4.5 Upon receipt, Teraview will deduct the registration fees from the debit account which has been set up by Lawyer 2 with Teranet. As previously discussed, the procedure envisioned under the TERS for authorizing use of the system by lawyers requires that each firm establish an account with Teranet. Individuals or firms will be required to deposit funds into this Teranet account against which access charges and on line charges will be automatically debited by Teranet. It is expected that each individual or firm as the case may be will need to be vigilant to maintain a positive balance in this Teranet account or risk having access to the system terminated or restricted pending further deposit of funds. Charges relating to a specific matter will be segregated by the user using a unique reference docket or file identifier. Information on these charges will be available to the user by accessing the system.

4.6 In addition, land transfer tax, which is calculated automatically by Teraview from the information contained in the transfer, will be transferred from the bank account of Lawyer 2. It would appear that funds for land transfer tax cannot be directly withdrawn from the lawyer's trust account but instead will be debited against the general account. After payment of these amounts the document will be registered in POLARIS. The registration is virtually instantaneous, provided that all required fields in the document have been completed and the funds are available to pay registration fees and land transfer tax. See section 12 infra, for additional discussion on the payment of land transfer tax.

4.7 After receipt of the electronic document (including the assignment of a registration number, date and time), the LRO staff will review the document, complete abstracting and certify the document. Ultimately the certification process will be done on an automated basis. Initially however, each electronic document will be manually reviewed and certified. The TERS will automatically abstract and certify the document in one or more subsequent development phases. It is presently unknown to what extent automated certification can occur for every registration. Current estimates suggest that anywhere from 80% to 90% of all registrations can be "auto-certified".

4.8 If LRO staff require changes to be made to a document prior to certification, the document may be returned to Lawyer 2 through TERS. The staff will indicate what information field may be modified and only changes to those fields will be accepted. If a document is returned for changes, its priority will be preserved. Only Lawyer 2 (i.e. the lawyer purporting to register the document) needs to indicate that the document is COMPLETE after the changes are made; however, should Lawyer 2 desire that Lawyer 1 approve the changes, he/she may notify Lawyer 1 and have him/her so indicate his/her approval by indicating the document COMPLETE. This provides an electronic trail of the approval. This requirement arises from the existing informal practice adopted by most Land Registrars allowing obvious and non-material errors to be corrected by the registering lawyer. The information fields which can be unilaterally modified by the registered lawyer are as follows:

1) capacity or share of a party;
2) address of property;
3) address for service of party;
4) deletion of related instruments;

unless the error relates to one of the items above, either both parties will be required to consent to the change or a new electronic document will be submitted.

4.9 The following diagram (figure 2) is intended to illustrate the workflow in the TERS:

(See Diagram in Convocation file)

5. Non Remote Access to TERS

Notwithstanding that the vision for the TERS contemplates a remotely accessible electronic registration system, the MCCR has stipulated that access to the system will continue to be available through computer terminals staffed by MCCR personnel at the LRO. In these circumstances, we understand that access to the system will occur through the pass phrase and identity of the registration clerk behind the counter. Present staffing and service levels at LRO's is not likely to be maintained once TERS is introduced to a LRO. Accordingly, non-remote electronic registration will in most cases take more time than registering under the PS. If a lawyer chose to register at the LRO, the lawyer's workflow or process would be similar to that discussed supra with respect to the PS, except that document creation would occur at the LRO over the counter.

6. Overview of the Regulations

6.1 The implementation of the TERS will be facilitated by Regulations passed under the Land Registration Reform Act, R.S.O. 1990, c.L.4 (the "LRRA"). As of the date of this Report, these Regulations have been passed by Cabinet and signed by the Lieutenant Governor in Council but have not been filed. Accordingly, they are to be treated as confidential and not for public release. The Regulations were reviewed extensively with the Electronic Registration Advisory Committee which is comprised of many of the same members as this Committee. A copy of the Regulations is attached here to as Appendix "B".

6.2 The Regulations set out the procedure for designating land as being within the TERS and also specify the required format and contents of the various types of electronic documents. From the perspective of this Report, the most important provisions contained in the Regulations create compliance with law statements. The actual text of these statements is set out in sections 14, 15, 19 and 20, subsection 25(2), section 30, subclause 33(1)(b)(ii) and subsection 34(2) of the Regulations. Essentially, compliance with law statements are intended to eliminate the need for paper supporting evidence for specific registrations. For example, in the PS, in order to register a transfer in Land Titles pursuant to a power of sale under a mortgage, declarations (from both the lawyer and the mortgagee) and supporting evidence (such as post office receipts evidencing service by registered mail) are required to be filed with the transfer prior to registration. In TERS, the paper evidence is replaced by statements made by a lawyer confirming that the appropriate requirements have been satisfied in order for the power of sale to be completed and the transfer to the purchaser thereunder registered. There will continue to be the ability to manually submit paper evidence if the lawyer is not prepared to utilize the compliance with law statements.

6.3 In addition to the foregoing provisions, subsection 8(1) of the Regulations stipulates that the compliance with law statements must be made by a lawyer entitled to practice in Ontario. Subsection 8(2) provides that, where a statement of fact is included in any compliance with law statement, it is made by the lawyer on the advice of the client. Subsection 40(3) specifically sets out that the lawyer making a compliance with law statement in an electronic document is not the person on whose application the registration is made for the purpose of subsection 57(1) or (12) of the Land Titles Act. The former subsection of the Land Titles Act allows a party who was wrongfully deprived of an interest in land to recover what is just from the person on whose application an improper registration (i.e. the registration that caused the deprivation) was made. The latter provision allows the MCCR to recoup funds paid out of the Land Titles Assurance Fund from the person on whose application the improper registration was made. The intended effect of subsection 40(3) is to limit any direct recourse that individuals who were deprived of an interest in land and the MCCR would have against a lawyer who made an incorrect compliance with law statement. Naturally, a lawyer may still be liable to his or her client as a result of an improperly made compliance with law statement where the client may be exposed to liability under subsections 57(1) and (12) of the Land Titles Act.

7. The Cost of Using TERS

The cost of preparing and registering electronic documents on a remote basis has been set at $25.00 per document as the "value added" fee together the statutorily prescribed registration fee currently set at $50.00 per document, thereby resulting in a total cost of $75.00 per document. These fees were established without any input from or consultation with the Committee.

8. Minimum Hardware Configuration

Attached as Appendix "C" is the minimum hardware requirements for the TERS>

CHAPTER 3 - DISCUSSION OF ISSUES AND RECOMMENDATIONS

1. List of Discussion Topics

The first task of the Committee was to formulate a list of topics for discussion and analysis at the Committee meetings. In essence, these topics provided the specific backdrop against which the Committee could apply its terms of reference. Although considerable effort went into the formulation of these

topics, they may not be exhaustive. If any specific areas have been overlooked by the Committee, we would welcome feedback on same from any interested members of the profession.

2. Dual System of Registration - Transitional or Permanent?

2.1 The Committee carefully considered the impact of the introduction of electronic document registration and the issue of a transition period in which a dual system (both paper and electronic) would be available at the option of the person wishing to register a document. The Committee was cognizant of the need to provide for public access (both lawyers and lay persons) to the title registration system and not limiting access to those persons having access to Teranet. The Committee is of the view that a dual system should not be maintained on a permanent basis but that there should be a short transitional period (60 to 90 days) after which use of the paper method in any give LRO would be discontinued for Land Titles properties (see infra). Public access to the system would be afforded through terminals at LRO's which would have staff available to assist the lay person as well as those lawyers who chose not to acquire remote electronic document registration capabilities through Teranet. As discussed supra, it would be unrealistic to expect that the current PS time frames for registering documents will apply to electronic registration at the LRO. Non-remote electronic registration will take more time than is now involved in the PS.

2.2 The Committee also acknowledges that computerization of LRO's and implementation of electronic document registration will not occur simultaneously throughout Ontario. Therefore, the PS will be in use in some LRO's for a number of years after the first introduction of the system. In light of the fact that: (a) only parcels which are in Land Titles will be functioning within TERS, and (b) the Land Titles conversion process in Ontario will not be complete prior to the introduction of TERS, there will be LRO's functioning under both a PS and the TERS.

2.3 The Committee determined that since a particular property would be in one domain or the other exclusively (i.e. within the TERS or the PS) without the possibility of being in both simultaneously, it was not within the scope of the Committee's mandate to review existing standards for the PS and comment on the adequacy of same.

Recommendation

That the LSUC and CBA-O convey to the MCCR their support of a short transition period for each LRO for the implementation of the TES, after which the use of the paper format would be discontinued for those properties designated as subject to the TERS.

That the LSUC and CBA-O request that MCCR and Teranet, in the future, prior to changing the fees for electronic document preparation and registration, consult with the LSUC and CBA-O.

3. Roll-out Schedule and Beta Testing

3.1 Attached as Appendix "D" is the proposed "Roll-Out Schedule", detailing the times and dates for the implementation of TERS in Ontario. This schedule has been provided in draft format by Teranet and may be subject to change.

3.2 The Roll-Out Schedule includes provisions for the commencement of a Beta Test Project in Middlesex sometime this summer. The Beta Test Project will run for 60 to 90 days and will be comprised of two segments. The first segment will test the TERS document production function by creating documents that are pre-populated with data from the automated land registration records. These documents will be printed over the lawyer's computer and the lawyer will register same in paper format. The second segment of the Beta Test will involve the testing of full TERS functionality. Lawyers will create documents in an electronic format and remotely register same over TERS.

3.3 Once the Beta Test is completed and any required adjustments thereto implemented, the appropriate Regulation will be passed designating the Middlesex LRO as an area where documents can only be registered in electronic format. Thereafter a sixty day transition period will be in effect which will allow for the registration of documents in either paper or electronic formal. On the expiry of the sixty day transition period, all documents must be in electronic format.

3.4 The process of passing a regulation designating an area as "electronic format only" and the accompanying sixty day transition period will apply to the rollout of the TERS across the province on an LRO by LRO basis.

3.5 The Committee appreciates the necessity of providing practice standards to the Beta Test Group. The Committee also recognizes the necessity of establishing an ongoing system to monitor the process of the Beta Testing, as in many ways that test group will also be testing the practice standards being recommended by this Committee.

Recommendation

That the LSUC and CBA-O implement an educational program to provide the Beta Test Group with a thorough understanding of the recommendations contained in this Report prior to commencement of the Beta Test Project.

That the practice standards and directives contemplated in this Report be utilized as the "test" standards for the Beta Test Project.

That the beta testers be asked to report to the LSUC and CBA-O their assessment and comments on the practice standards set out in this Report as adopted by Convocation.

That upon completion of the Beta Test Project, either the Committee be reconvened (or a new committee struck) to review the results of the Beta Test Project in order to (if necessary) amend and finalize the recommendations and standards contained in this Report.

That either the Committee (or the new committee contemplated above) be charged with the responsibility of monitoring the standards and directives initially put forward and adopted by the LSUC during a prolonged monitoring period (i.e. 2-3 years after the commencement of the roll-out of the TERS) in order to assess their performance and initiate any required changes.

4. Passwords, User Id's, Authorized Users and Lawyer/Firm Responsibilities

4.1 Access to TERS

4.1.1 Access to the TERS will be by use of a personalized diskette and a personal pass phrase. The diskette will contain the user's encrypted pass phrase thereby

allowing the diskette to be used only by someone having the user's personal pass phrase. Each user will be registered with Teranet and the TERS will track all usage and by which user. Each user must be authorized under a firm's or an individual's account number to access TERS.

4.1.2 As previously discussed, the procedure envisioned under the TERS for authorizing use by lawyers requires that each "firm" establish an account number against which access charges, on-line charges and registration fees will be charged. Land transfer tax will be deducted from the law firm's or lawyer's general account directly. It is proposed that each "firm" will be required to maintain a positive balance in its Taranet account. Charges relating to a specific matter will be segregated by the user selecting a unique reference docket or file identifier. Information on these charges will be available to the user by accessing the TERS.

4.1.3 The Committee also recognized that because:

a) access to TERS occurs at the first level through an account number assigned to the firm or individual under which users are authorized to use TERS; and

b) knowledge and control over an employee's, associate's or partner's tenure with the firm rests with the firm or individual lawyer operating the practice;

the primary level of responsibility for administering accounts, pass phrases and diskettes should in turn rest with the firm or individual that has established the account with Teranet. Accordingly, any changes as to who is authorized to access the TERS under a particular account should be reported to Teranet immediately to avoid unauthorized use of TERS which may ultimately become the responsibility of the entity responsible for the account. Presumably, if a specific user is removed from the list of authorized users under a particular account, access under that account would be denied notwithstanding that the user retained his or her diskette and passphrase.

Recommendation

That the LSUC issue a practice directive alerting its members of the need to be vigilant regarding the activation of staff as "authorized users" and the cancellation of such authorization forthwith upon the termination of a staff member's employment. This will include the implementation of appropriate procedures to properly monitor and control the creation and discontinuance of pass phrases. The Committee feels that control over pass phrases and diskettes is tantamount to control over access to trust accounts. In fact, many of the procedures employed to administer the latter could be adapted and used to administer the former.

4.2 Account Responsibility

The Committee has some concerns relating to the definition of "firm" particularly in situations where lawyers are practising in "association". Lawyers must appreciate and distinguish their particular circumstances in determining whether they should obtain their own account number with Teranet. When practising as a partner, an associate practising in the manner of an employed lawyer or an employee of a firm, in most cases the firm itself will have an account and the lawyer will use that account to gain access to the TERS. If a lawyer is practicing in a loose association with other lawyers, it will be preferable for that lawyer to obtain his/her own account pass phrases and diskettes to avoid any liability as a result of other associates using TERS.

Recommendation

That the LSUC recommend to its members that lawyers practising in association (i.e. not as partners) obtain their own account number for access to the TES.

4.3 Authority for Document Creation and Registration

4.3.1 The TERS is presently intended to utilize several levels of security which will allow different users to undertake various parts of an electronic transaction. As presently conceived, there will be four (4) levels of remote access, namely:

CREATE/UPDATE
COMPLETE/APPROVAL
RELEASE/REGISTRATION
SEARCH

4.3.2 It is anticipated that both the vendor's and purchaser's lawyer and the lawyers staff would have access to creating and approving documents (provided they do not contain compliance with law statements), releasing documents for registration and registering documents, whereas, subject to certain strict exceptions outlined in the section dealing with Electronic Document Approval, only the lawyer would be able to approve (complete) documents requiring compliance with law statements (see 4.4.1 infra). If the content of a document was subsequently changed, it would require re-approval by both lawyers.

4.3.3 It is the Committee's understanding that the functionality for ensuring that only lawyers entitled to practise can make compliance with law statements when using the TERS may not be present if the registration is occurring at the LRO. Clearly this requirement must apply universally regardless of how access to the system takes place.

4.3.4 Since subject to strict exceptions as recommended under Electronic Document Approval (Section 9.2 infra), only a lawyer can complete (approve) a document containing compliance with law statements, a system needs to be implemented whereby the LSUC promptly notifies Teranet when a lawyer is suspended or disbarred and when he/she is reinstated or admitted. Similarly, Taranet must promptly update its user authorization once notified by the LSUC. The Committee recognizes that if Teranet's records are not maintained on a current basis, a lawyer's ability to conduct real estate transactions could be impaired, resulting in financial loss to the lawyer and creating potential liability for both the lawyer and his/her client. Likewise, the inability of a suspended or disbarred lawyer to use the TES (when compliance with law statements are contemplated in the electronic document) should reduce the number of such lawyers continuing to practice unlawfully.

Recommendation

That the LSUC work with Teranet to develop a system for the immediate notification by the LSUC of member suspensions and reinstatements as well as the admission of new members and that Teranet assume responsibility for immediately updating its records regarding such members.

That the LSUC request that MCCR and Teranet include in the TERS the facility to check for determining that lawyers are qualified to make compliance with law statements. This should also apply if the registration is being effected on a non-remote basis directly at the LRO.

That the LSUC issue a statement notifying lawyers that this new reporting system will not be tolerant of suspended/disbarred lawyers and that the ability of these lawyers to manipulate the time lags inherent in the current reporting system will be virtually eliminated by the implementation of an automated status verification system.

4.4 Delegation of Document Creation Authority

4.4.1 The Committee also considered the potential for misuse by lawyers of their user diskettes and pass phrases by allowing staff to use them. At present there is no method of ensuring a lawyer in fact reviews and approves real estate documents prior to registration. Under the TERS, the lawyer must use his/her diskette and pass phrase to enter the system and review/approve documents containing compliance with law statements. It is important to distinguish between the electronic procedures to be established for approval and registration of documents in the TERS and the professional responsibilities of lawyers pursuant to the Rules of Professional Conduct (the "Rules"). Rule 16 provides that:

> ...the question of what the lawyer may delegate to a non-lawyer turns upon the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer which in the public interest must be exercised by the lawyer whenever it is required. The lawyer may permit the non-lawyer to ...draft routine documents, provided that the lawyer should not delegate to a non-lawyer ultimate responsibility for review of ...documents before signing...

4.4.2 The electronic communication of document approval through the TERS is only evidence of such approval, and lawyers must be reminded of their obligation to actually review the documents in compliance with Rule 16.

4.4.3 The fact that access to the documents prepared for any particular transaction will be limited to the two lawyers involved and their respective secretaries and clerks raised some concerns at the Committee level. The Committee's concerns relate to whether other lawyers in the designated lawyer's "firm" (which will usually correspond to the parties authorized to access TERS under a particular Teranet account) will have access to the electronic documents in the event that the designated lawyer is unavailable due to illness, vacation or so forth. It was suggested that each "firm" (or account) have a "master lawyer" capability, so that another lawyer could in an emergency assume control and gain access to the required documents. In the case of a sole practitioner, this problem might be overcome by giving another lawyer some sort of power of attorney to use the lawyer's access code, similar to giving another lawyer power of attorney on a trust account. In addition, the Committee also recognized that the TERS must include the capability of assigning or delegating certain "work in progress" electronic documents from one access group to another access group in the situation where a lawyer or a member of the firm's support staff was leaving and his/her work was being reassigned to another lawyer or support staff member.

Recommendation

That the LSUC issue a practice directive to lawyers confirming that responsibility for any document ultimately rests with the lawyer handling the file notwithstanding that the approval authority for the document may have been delegated to a non-lawyer in the firm.

That the LSUC and CBA-O request Teranet to ensure that the appropriate functionality be built into TERS to allow for emergency access to electronic documents which have not yet been registered by other members of the same firm or another authorized lawyer (in the case of sole practitioners). In addition, TERS should also allow for the assignment or delegation of "work in progress" electronic documents between lawyers.

4.5 Fraudulent Registrations

Finally there was considerable discussion about fraudulent registration of documents because of the lack of hard copies of documents and original signatures. In light of the TERS ability to not only track the source of an electronic document but also the source of any changes made to the document in the process of creating and finalizing same, the Committee is satisfied that the TERS is no worse, and may in fact be considerably better, than the PS in preventing the registration of fraudulent documents. Under the current PS, there is no proof of who actually signed the document or who prepared the document, as both the signature and the name could be fraudulent. As the TERS only allows access to registered users and provides electronic tracking of who made the changes or registered the document, it will be easier to trace any fraudulent registrations, which should in turn result in fewer attempts at fraudulent registration.

Recommendation

That the LSUC and CBA-O continue to monitor safeguards and procedures for the prevention of fraud and bring forward additional comments and/or recommendations if the need should arise.

5. Use of Compliance with Law Statements

5.1 As set out in the Overview of the TERS, the Regulations under the LRRA provide for the use of compliance with law statements in electronic documents. These statements will be used in the place of filing hard/paper copy of the evidence upon which the statement is based. The use of these statements is essential to the success of the TERS. While it will still be possible to file with the LRO the actual evidence, the Committee is of the view that this is to be discouraged as it defeats one of the underlying benefits of the TERS. It is however imperative that the lawyer obtain and retain in his/her file the evidence upon which the statement is based. This is even more important in the TERS because copies of the supporting evidence cannot be obtained from the LRO when a registration has been effected in reliance upon one or more statements. The supporting evidence retained in the lawyer's file would be used in the defense of a negligence claim against the lawyer.

5.2 Another area of concern discussed by the Committee was whether a copy of the evidence upon which a statement is made (e.g. sale papers in a power of sale transaction) ought to be given to the lawyer on the other side of the transaction. The Committee is firmly of the view that the lawyer acting for the purchase should not look at the evidence behind the statements, nor should they request or require duplicate originals or copies of the evidence upon which the statements are based, but should rely upon the provisions of the Land Titles Act as to the sufficiency of title once certified.

Recommendation

That the LSUC publish a practice directive confirming that it is proper practice for a lawyer to rely on the compliance with law statements contained in an electronic document and correspondingly, that the lawyer is not required to request and review any of the supporting evidence that was relied upon by the lawyer who actually made the statement(s).

6. Confirmation of Information and Instruction

6.1 The Committee's examination of the implications of TERS was based in large part on a detailed review of the technology and proposed procedures of TERS. Perhaps the most significant change in the practice of real estate will be the elimination of signatures on the Polaris form documents (i.e. the documents that are currently registered in order to effect a change to registered title). In the PS, the client's execution of the appropriate registration documentation (even in the absence of additional supporting evidence such as retainer letters or agreements) constitutes prima facie evidence that the lawyer is proceeding with the consent and authorization of the client. The Committee was concerned that the elimination of this basic form of evidence could give rise to greater exposure to claims or allegations of improper conduct. In order to address this concern, the Committee felt that a non-registration substitute for the Polaris document should be generated by the TERS and used by the lawyer. Accordingly an "Acknowledgment and Direction" to be executed by the client(s) was suggested by the Committee.

6.2 In an effort to streamline the system and establish a consistent format for the Acknowledgment and Direction, the Committee has requested that MCCR and Teranet include in the TERS the capability of producing a standard form of Acknowledgment and Direction. The format of this document would be generated by the system itself and would be available prior to closing for execution by the client. No additional software is required to produce this document, though it can be downloaded into the lawyer's word processing software and modified, if required.

6.3 The TERS would produce an Acknowledgment and Direction designed to accommodate each of the five different electronic registration formats, namely:

1. Confirmation of Transfer (Transferor);

2. Confirmation of Transfer (Transferee);

3. Confirmation of Charge (Chargor);

4. Confirmation of Miscellaneous Registration;

5. Confirmation of Discharge

6.4 In addition to evidencing the client's consent to the registration of one or more electronic documents, the use of the Document Registration Agreement (discussed more fully infra) will also be specifically authorized under the Acknowledgment and Direction. This is intended to inform the client that this agreement, once entered into, will circumscribe the lawyer's ability to follow instructions that are contrary to the terms of the Document Registration Agreement. Although the client's specific acknowledgment of the Document Registration Agreement may not eliminate all issues respecting the receipt of contrary instructions, it will certainly operate to minimize them and leave the lawyer in the same or even better position that he/she would be in under the PS

when a lawyer receives instructions contrary to a personal undertaking which he or she has given. In the first three instances listed above, the Acknowledgment and Direction would, in the normal course, not require a lawyer to append a copy of the Document Registration Agreement as a Schedule prior to execution by the Client. In these instances, the Acknowledgment and Direction would automatically contain all significant information to be included in the transfer or charge as prepared by the lawyer, without the lawyer being required to specifically craft or prepare same. The Committee hopes that the ease of preparation of this document will greatly foster its consistent use by the profession. The first three instances would account for the vast majority of registrations. The fourth instance, which would apply in the case of all other miscellaneous registrations, would require the lawyer to append a copy of the actual document to be registered.

6.5 Sample Copies of Acknowledgment and Direction to be generated in each of the five examples listed above are set out in Appendix "E".

Recommendation

That the LSUC and CBA-O formally request that Teranet and MCCR build into the TERS the design functionality for the generation of the Acknowledgment and Direction in the format contemplated in this Report.

That the LSUC issue a practice directive to lawyers practising real estate recommending the use of the TERS-generated Acknowledgment and Direction for all transactions involving the TERS.

That the LSUC amend the Real Estate Checklist to include as recommended practice the use of the Acknowledgment and Direction in all transactions involving the TERS.

7. Supporting Evidence to be Retained by Lawyer

7.1 The Committee discussed whether lawyers would be obligated to have clients sign paper copies of the documentation that will be registered electronically. Several concerns arose from the discussion in this area. Whether or not the client had specifically authorized the registration is dealt with under the section entitled Confirmation of Information and Instruction (supra). Concerns regarding the legal efficacy of the electronic documents (i.e. whether a mortgage that is not signed by the mortgagor can in fact legally charge the mortgagors property) have been specifically dealt with in the legislation enabling electronic registration. A copy of Part III of the LRRA is included as Appendix "F". Specifically, section 21 of Part III provides:

> 21. Despite section 2 of the Statute of Frauds Act, section 9 of the Conveyancing and Law of Property Act or a provision in any other statute or rue of law, an electronic document that creates, transfers or otherwise disposes of an estate or interest in land is not required to be in writing or to be signed by the parties and has the same effect for all purposes as a document that is in writing and is signed by the parties.

7.2 Concerns were also expressed regarding the extent to which a lawyer should be retaining in his/her file evidence relating to information provided by the client or supporting a particular document to be electronically registered. For instance, should the lawyer be confirming the client's advice which enabled the lawyer to complete the Planning Act statement on behalf of the vendor? In this simple example, the Acknowledgment and Direction, discussed supra, would confirm information disclosed on the face of the document. The Acknowledgment and

Direction does not, however, resolve the requirement for the lawyer to retain in the file the evidence accumulated by the lawyer to support any compliance with law statements.

7.3 Once the transaction is completed, and the appropriate documentation registered electronically, the TERS will generate a confirmation of registration for the person registering. Presumably, the combination of the Acknowledgment and Direction and the confirmation of registration will obviate the need (based on the mortgage lender's requirements) to provide the mortgagor with executed copies of the mortgage document. However, in order to effect compliance with section 4 of Part 1 of the Mortgages Act, it will be necessary to print out a paper copy of the electronic charge that was registered and deliver same to the mortgagor within 30 days of registration. In addition, a copy of the Standard Charge Terms utilized in the mortgage (together with the acknowledgment regarding the receipt of same) should still be provided for execution by the mortgagor.

7.4 In situations where a guarantee of the mortgage is being given, a separate guarantee must be executed inasmuch as the option of having the guarantor sign the charge in order to create the guarantee is no longer available. Lawyers should ensure that in these circumstances the terms of the guarantee are consistent with the provisions (if any) regarding the guarantee contained in any Standard Charge Terms. Notwithstanding that:

i) the guarantee itself is not created in the electronic mortgage; and

ii) notice of a power of sale does not have to be provided to a guarantor if there has been no payment by the guarantor to the mortgagor;

it may be prudent to serve notice of the sale to guarantor(s) in the mortgage under which the power of sale is proceeding, as well as to guarantors in subsequent encumbrances. In light of the foregoing, the identity and address for service of guarantors will appear in the electronic mortgage.

7.5 Although the Document Registration Agreement (discussed infra) obliges the parties thereto to provide registration particulars, the Committee felt that there should be an overriding obligation on lawyers operating in the TERS to deliver confirmation of the details of the electronic registrations to the other lawyer acting in the transaction. The Rules should be amended as necessary to incorporate this obligation.

Recommendation

That discussions be undertaken with mortgage lenders with a view to adjusting their mortgage requirements and instructions, so that the same are integrated with the TERS.

That the LSUC and CBA-O recommend to the MCCR that the appropriate amendment to the Mortgages Act be effected to eliminate the requirement to provide a paper copy of the mortgage to the mortgagor, where an Acknowledgment and Direction in respect of the mortgage has been signed by, and delivered to, the mortgagor.

That the LSUC issue a practice directive advising lawyers to print out a paper copy of the electronic charge and deliver same to the mortgagor in accordance with the requirements of the Mortgages Act discussed supra.

That the LSUC amend the Rules of Professional Conduct to include an obligation upon a member to notify in writing a member acting for another party in a purchase, sale or mortgage transaction, of the particulars of registration forthwith after the member completed registration.

8. Registration of Specific Documents

8.1 As discussed supra the Regulations set out a specific list of electronic documents that have been designed to facilitate a particular type of transaction in reliance upon compliance with law statements. For example, estate conveyancing, power of sale transactions and foreclosures can all be accomplished by utilizing specialized electronic formats that contain compliance with law statements.

8.2 The Committee was informed that it is most likely that financial institutions (mortgagees) will registered the discharge of mortgage directly by remote electronic registration. This would mean that the mortgagee would collect the fee payable on registration of the discharge as part of the pay-out funds. Upon completion of registration of the discharge, the institutional mortgagee would notify the vendor's/mortgagor's lawyer of the registration details. The Committee does not see any need to change the present practice standard regarding obtaining and following up on undertakings to discharge a mortgage. Discharges of mortgages are also discussed in section 9.5 infra.

Recommendation

That discussions between the LSUC and financial institutions be instituted with a view to establishing a standardized procedure for the registration of discharges and to clarify the role and relationship between lawyers and lenders in registering same.

9. Closing Procedures

9.1 Obligations regarding Document Preparation

9.1.1 Clause 15 of the OREA form of agreement of purchase and sale contemplates that the transfer/deed of land be prepared at the expense of the vendor and any charge/mortgage to be given back by the purchaser to the vendor be prepared at the expense of the purchaser. The preparation of these documents in electronic format does not require any change to this province-wide approach. The transfer in electronic format can continue to be prepared by the vendor's solicitor. Most of the information appearing therein would be automatically generated by the registration system itself with the vendor's solicitor only being required to manually input the parcel identification number ("PIN"), the name of the transferee(s) and the capacity in which they are purporting to take title.

9.1.2 Once the vendor's solicitor had prepared the initial form of transfer, it would then be forwarded via a form of E-mail over the Teranet network to the purchaser's solicitor for review and approval. Approval of the document would be evidence by the purchaser's solicitor affixing his or her electronic signature on the document. If the purchaser's solicitor required any changes to the transfer, these could be inserted into the document and sent back to the vendor's solicitor for approval. Both the vendor's solicitor and the purchaser's solicitor would be required to sign the document in order for the document to be registerable. Any change to the document by one party would eliminate the electronic signature of the other party to the document. A similar but opposite process would apply to the preparation of any vendor take-back mortgage.

9.1.3 The Committee felt that a potential problem could arise if one party's solicitor was not equipped with a computer and therefore unable to prepare the document(s) delegated to him or her under the offer. However, the Committee was of the opinion that lawyers wishing to practice in the real estate field should equip themselves with the necessary tools to properly service their clientele or, alternatively, be prepared to bear the costs of having the other party's solicitor prepare the document on their behalf. It was also emphasized that it would constitute professional misconduct for a lawyer to shirk his or her responsibility to prepare documentation, as well as being extremely discourteous. The Committee was not overly concerned about the likely incidence of this problem because many, if not all, real estate practitioners are or will be equipped with the appropriate hardware to accommodate TERS.

9.1.4 A similar concern stems from non-remote access to TERS (discussed in section 5 of the Overview of TERS, supra). Lawyers cannot rely on attending at the LRO to prepare and register documents in electronic format. The Committee feels that this is not a viable alternative to properly outfitting the lawyer's office with the required computer equipment to gain remote access to TERS.

9.1.5 In order to complement the efficiencies generated by the TERS, the Committee felt that for the typical residential real estate transaction, non-registerable closing documents should be standardized in the same manner that registerable documents have been standardized throughout the province. This would provide consistency, align the expectations of both parties to the transaction and facilitate the completion of the deal.

Recommendation

The Committee has concluded that the present obligations regarding the preparation of documentation as contained in the OREA form of agreement of purchase and sale are compatible with the procedures and requirements in a remote electronic system. Accordingly, the Committee recommends that no changes to these obligations be made.

That the LSUC issue a practice directive advising members of the need to equip themselves electronically to provide their clients with a minimum acceptable level of service. This includes the computerization of their real estate conveyancing practices to avail themselves of the TERS>

The aforesaid practice directive should also specify that where lawyers are not prepared to participate along these lines and are therefore inconveniencing their colleagues, they should be prepared to compensate the opposing lawyer for any additional time and inconvenience caused.

That the Real Property Section of the CBA-O standardize and combine into one multi-purpose document the non-registerable documents (such as undertakings to readjust, directions re: title and Income Tax Act and Family Law Act affidavits) to be used in the typical residential transaction.

9.2 Electronic Document Approval

9.2.1 The Committee considered the advisability of a system of "pre-approval" of electronic documents in order to eliminate last minute delays and believes that this functionality should be built into the TERS.

9.2.2 The Committee also discussed whose electronic signature should appear on a registration document in order to confirm the acceptability of the document. The consensus of the Committee members was that a lawyer's electronic signature (as opposed to a clerk's, secretary's or paralegal's) should be required in order to evidence document acceptance.

9.2.3 Although the Committee does not recommend that the scope of persons having authority to approve document in the lawyer's office be for all cases formally expanded beyond lawyers, it did recognize that in some cases such delegation would be acceptable. For instance, in the preparation of electronic transfers for a new condominium development (or any other transaction or series of transactions involving a large volume of documents), it may be appropriate to delegate approval authority to the clerk or secretary charged with the task of preparing same. An absolute prohibition on the delegation of approval authority would invariably create a tendency to informally delegate such authority by means such as the sharing of the lawyer's pass phrase and identity diskette. This informal type of delegation would give rise to even more problematic security, accountability and authorization issues. Accordingly, the delegation of the approval authority should be permitted in circumstances where the requirement for the lawyer to approve the document would place an unnecessary burden on the lawyer in light of the number, similarity and type of documentation required for a particular transaction or a series of related transactions. It is imperative that the lawyer understand and appreciate that he or she is responsible for the content of any document that has their electronic signature on it or the signature of any clerk, secretary or paralegal who has been given approval authority for the transaction by the lawyer.

Recommendation

That the LSUC and CBA-O recommend to Teranet and MCCR that the ability to pre-approve a document for registration be included in the TERS.

That the LSUC and CBA-O recommend to Teranet and MCCR that a lawyer's electronic signature be required to confirm the acceptance of the format of an electronic document except where a large volume of similar documentation is being produced for one or a series of related transactions. Where the document includes a compliance with law statement, the document must be approved by the lawyer making the statement.

The Committee has concluded that the ultimate responsibility for the contents of a document that has been approved by a clerk, paralegal ro secretary who has been given approval authority rests with the lawyer responsible for the file and that a practice directive re-affirming this be issued by the LSUC.

9.3 Where Should Closing Take Place?

9.3.1 In a properly functioning remote registration environment, this issue is to a large extent a "red herring" because there is no need for the parties to meet to exchange documents and thereafter attend at the LRO to effect registration. Non-registerable documents will be exchanged in escrow via facsimile or other electronic means. The Committee suggests (infra) that the appropriate provision be included in the OREA form of agreement to allow for the exchange of fax copies of these documents. Funds will initially be delivered (and ultimately electronically transferred) to the other party under strict escrow conditions. Registration documents will be released for registration to the party responsible for registering same under escrow guidelines. The terms and provision of the escrow arrangements will be set out in the Document Registration Agreement discussed more fully infra. Where one party to the

transaction refuses to close in escrow, that party will be required to attend at the other party's office in order to close the transaction pursuant to the terms of a specific provision which the Committee is recommending be included in the OREA form of agreement of purchase and sale.

Recommendation

That the appropriate discussions take place with the real estate boards so that an amendment to the OREA form of offer dealing with the Document Registration Agreement and the obligation to close in escrow can be finalized and implemented. Moreover, this amendment should specifically provide that if a lawyer refuses to close in escrow on the basis of a Document Registration Agreement, that lawyer will be required to either attend for closing at the opposing lawyer's office or at the LRO, whichever the opposing lawyer prefers.

9.4 Escrow Closings and the Document Registration Agreement

9.4.1 It became obvious to the Committee that a standard escrow closing arrangement between vendors and purchasers would be required in order for the full potential of TERS to be realized. Although an automated system eliminates the inefficiency of requiring both parties to attend at a LRO and physically register the appropriate documentation before possession and funds are actually exchanged, the TERS as presently envisaged reposes the actual registration function on only one of the parties to the transaction. In simple terms, either the vendor's or the Purchaser's lawyer will push the button which transmits the electronic documents to the LRO for registration. There is not (nor is it functional to develop) a simultaneous registration capability where both parties must be on-line in order to effect electronic document registration. Accordingly, immediately prior to the registration of the requisite electronic documents the parties would each want to be in the position of having satisfied all other prerequisites to a successful closing. Presumably all other documents, keys and funds have been exchanged by the parties with the release of same being predicated on registration of the electronic documents.

9.4.2 In order to standardize the arrangement and understanding about the registration of electronic documents between vendor's and purchaser's solicitor's, the Committee has prepared an agreement entitled "document Registration Agreement" (the "DRA"). It is important to emphasize that the title of this agreement is intended to underscore its very basic and limited function, that is, to govern the obligations of the parties thereto regarding the holding in escrow and release of closing documents and moneys and the corresponding registration of electronic documentation. It does not (and is not intended to) address any of the possessory issues involved in "escrow closings", as that term is frequently used in today's conveyancing environment, where occupancy of the premises is permitted prior to registration. The Committee did not feel that there was any necessity to deal with these issues inasmuch as a properly functioning remote electronic registration system would tend to eliminate much of the utility of the traditional escrow closing.

9.4.3 An alternative to signing and exchanging DRA's between lawyers in each transaction would be the adoption of the terms and provisions of the DRA as a standard closing protocol. Lawyers wishing to rely on the protocol would formally indicate so in a letter exchange between them and thereafter the transaction could be completed in accordance with the standard protocol identified.

9.4.4 A copy of the DRA is reproduced as Appendix "G".

9.4.5 The use of the DRA would be authorized and promulgated through the recommended amendment to the OREA form of agreement of purchase and sale regarding "CLOSING ARRANGEMENTS" more particularly dealt with infra. The DRA imposes a strict escrow obligation on all documentation and moneys exchanged until the preconditions for the release of the escrow are satisfied. If the preconditions cannot be satisfied, all documentation and moneys are to be returned. The DRA also imposes an obligation on the purchaser's solicitor to register the electronic documentation (including documents like a vendor take-back mortgage) that would, in the PS, be in the interests of the vendor to register. The Committee also felt that although the parties to the DRA would be the solicitors for the purchaser and vendor, that the vendor and purchaser be permitted to rely on the agreement and commence an action under same if it was breached by the opposing party's solicitor.

9.4.6 In order to encourage the use of the DRA by real estate practitioners, the Committee was of the view that additional supporting measures should be implemented. The first of these would involve an amendment to the Rules, so that a breach of the escrow framework underlying the DRA would be a serious disciplinary matter with severe consequences attached thereto. Secondly, the Committee felt that if a loss to a client arose because of a breach of the escrow provisions in the DRA, the innocent lawyer who relied on the DRA should not be penalized by a resulting claim against his or her errors and omissions coverage. Perhaps the most appropriate way to deal with this issue would be the implementation of some form of insurance protection for lawyers as an added feature under their E&O coverage. The Committee felt that a modest additional premium for this type of coverage would not be unduly onerous. The combination of these two supporting measures would engender a heightened sense of comfort and confidence in the proposed new practice directives and guidelines.

9.4.7 In addition, the Committee felt that the significance and operation of the DRA would have to be driven home to the lawyer's client. Specifically, the client must appreciate the limitations on the lawyer's ability to follow instructions that are inconsistent with the terms of the DRA, once the agreement has been entered into. It was felt that the combination of the amendment to the OREA form of offer discussed above and the inclusion of specific provisions in the Acknowledgment and Direction, confirming the authority to proceed under the DRA, would accomplish these objectives.

Recommendation

That the arrangement for escrow closings be standardized in the manner set out in the DRA and that practice directives issued by the LSUC recognize these procedures as acceptable practice.

That the LSUC amend the Rules of Professional Conduct to specifically deal with the escrow obligations of the parties to a DRA. In particular, the Rules should also specify that a breach of the escrow provisions in the DRA may result in disciplinary proceedings.

That the Lawyers' Professional Indemnity Company be requested to institute a program of insurance coverage relating to the risks associated with lawyers entering into DRA's.

That an Acknowledgment and Direction to be signed by the client include a provision confirming the operation of the DRA.

9.5 Discharge of Mortgages

9.5.1 The Committee also considered the issue of mortgage discharges as part of the closing process for purchase and sale transactions. It is unlikely that remote electronic registration capability will influence financial institutions to amend current practice and provide discharges (or more appropriately the authority to discharge) to one of the parties effecting the closing of the transaction. The Committee was of the view, however, that with the utilization of the DRA and the introduction of insurance coverage as discussed supra, many of the concerns (as is the case for private mortgages discussed below) preventing financial institutions from authorizing a discharge on closing could be addressed. Notwithstanding the foregoing, it was felt that where discharges of mortgages to financial institutions are required, the present practice of a personal undertaking from the vendor's solicitor combined with a mortgage statement for discharge purposes and the appropriate direction re: Funds will continue to be utilized. Financial institutions will seize upon the facility of remote registration as a means to generate additional revenue and accordingly amend their current practice so that the institution itself will register the discharge once adequate pay-out funds are delivered. This in turn will require that the lawyer acting for the vendor clarify at the outset (i.e. in the request for a mortgage payout statement) who will be responsible for registering the discharge. If the financial institution assumes this responsibility, the lawyer should ensure that:

a) the necessary funds (including any administrative fees and registration fees) are forwarded to the financial institution;

b) the financial institution will register the discharge within the time parameters contemplated under the lawyer's personal undertaking to the purchaser's solicitor; and

c) the financial institution will notify the vendor's solicitor of registration and the registration particulars of the discharge.

9.5.2 If the financial institution chooses instead to confer authority on the lawyer to prepare and register the electronic discharge after closing, the lawyer should obtain express written confirmation of such authority including the escrow terms (if any) upon which the authority is predicated.

9.5.3 In the case of private mortgages where personal undertakings to discharge are not acceptable, the Committee was of the view that the DRA should include the discharge of the private mortgage in its list of documents for the purchaser's solicitor to register. Presumably the private lender or its solicitor would authorize the vendor's solicitor (who in turn could authorize the purchaser's solicitor) or the purchaser's solicitor directly to register the discharge provided that a DRA was entered into between the vendor and purchaser's lawyer. Accordingly, if the transaction was not completed with the vendor's solicitor not being entitled to release the requisite funds to the mortgagee, the authority to register the discharge could not be invoked. The private lender would be entitled to the same insurance coverage under the DRA that the vendor would be entitled to if the purchaser's lawyer breached the agreement and a loss was occasioned thereby. In these circumstances, the vendor's solicitor would confirm to the private lender that a DRA was being utilized as part of the closing procedure and that the discharge of the mortgage was to be shown as a document for registration under the agreement.

Recommendation

That financial institutions be urged to consider authorizing discharges of their mortgages on closing as part of the procedure invoked under the DRA. Alternatively, where undertakings are to be employed to facilitate closings, that the lawyer identify who will ultimately be responsible for registering the discharge. Where the financial institution is assuming the responsibility, the lawyer must confirm the timing of registration and that notice of registration and registration particulars will be provided.

That the LSUC issue a practice directive confirming that, in the case of private mortgages to be discharged as part of a closing, it is appropriate for the private mortgagee and/or his/her solicitor to release the electronic discharge for registration provided the discharge is a document listed in the DRA.

10. Educational Obligations

The Committee is aware that the introduction of TERS is a significant change from the way that title registration has been handled in Ontario in the past and that the concept and technology will require a considerable educational effort by the proponents of the system (MCCR/Teranet), the professional associations and the LSUC. It is the Committee's view that such education need not be mandatory but that the parties involved should attempt to co-ordinate the presentation of as broad a range of educational courses as possible for both lawyers and support staff. Lawyers are to be encouraged to ensure that their support staff are sufficiently trained in the use of the TERS and in the limitations placed on their use thereof.

Recommendation

That the LSUC and CBA-O undertake or jointly undertake with other interested organizations (eg. CDLPA) the appropriate educational initiative to ensure that the members of the real estate bar are properly educated about the TERS.

11. Changes to the Standard Form Agreements of Purchase and Sale (OREA Agreement)

11.1 Introduction

11.1.1 Effective January 1st, 1996, the Ontario Real Estate Association's standard forms of Agreements of Purchase and Sale were adopted for use in Ottawa-Carleton, the last jurisdiction still using independent forms. The benefits of uniform documentation throughout the Province have quickly become obvious. One important benefit of standard agreements issued by a single authority is the relative ease of obtaining amendments to those documents which will thereafter have uniform application throughout the Province.

11.1.2 The implementation of TERS in Ontario will have a significant impact on the public and should therefore be referenced in the documents which are used most often by the public in connection with the purchase and sale of real estate. The standard OREA Agreements of Purchase and Sale (freehold and condominium) (the "OREA Agreements") have been examined by the Committee with a view to recommending amendments which will facilitate the implementation of the TERS and assist in the orderly and uniform practice of real estate law in Ontario.

11.1.3 As in other aspects of this Report, the Committee has examined the changes in real estate practice required by the TERS as well as the underlying goals and benefits to be achieved through its introduction. In particular, the Committee has kept in mind that one consequence of the TERS is the elimination of the traditional LRO closing.

11.1.4 Based upon its review of the goals and consequences of the TERS, the Committee is recommending two changes to the current OREA Agreements, as follows:

1. Closing Arrangements;

2. Telefax Transmissions;

11.2 Closing Arrangements

11.2.1 The first suggested amendment to the OREA Agreements deals directly with the concept of closing a real estate transaction from separate locations and also refers to an arrangements respecting closing which the Committee has recommended be dealt with by the use of the standard DRA, discussed in detail in section 9.4 supra. The purpose of this suggested amendment (which is proposed by way of adding a paragraph to the OREA Agreements) is to alert vendors and purchasers to the existence of an agreement between lawyers affecting closing and to deal with situations where one lawyer does not have the electronic capability of effecting an "Electronic Closing", or refuses to do so.

11.2.2 It is the Committee's submission that a lawyer who accepts a retainer from a client who has executed the OREA Agreement will be bound by the provisions of the suggested clause. It is also the Committee's recommendation that the contents of the final paragraph of the suggested amendment be made the subject of a commentary in the Rules as provided in section 9.4 supra. The text of the recommended amendment is set forth below.

11.3 Telefax Transmission

In keeping with the concept of the electronic closing, the Committee is also recommending the addition of a new paragraph to the OREA Agreement which would allow delivery of non-registerable closing documents by telefax. It is submitted that this would promote efficiency and reduce unnecessary client disbursements associated with closing. The Committee discussed the issue of misuse of this type of clause and concluded that given the easy availability of technology evidencing electronic fax confirmation as well as the state of law in Ontario respecting the effect of such communications, this technology should be utilized to streamline and improve the practice of real estate. The use of fax transmissions is entirely consistent with the underlying rationale for the TERS. This recommended amendment also provides for the delivery of original documentation if same is requested by the recipient. The text of the recommended amendment is set forth below.

11.4 Tender

11.4.1 Paragraph 19 of the existing OREA Agreement provides for Tender as follows:

> Tender: Any tender of documents or money hereunder may be made upon Vendor or Purchaser or their respective lawyers on the day set for completion. Money may be tendered by bank draft or cheque certified by a Chartered Bank, Trust Company, Province of Ontario Savings Office, Credit Union or Caisse Populaire.

11.4.2 The law of tender is a combination of contract law as between the parties (as evidenced by the terms of their agreement) and the Common Law. Essentially, tender is simply a process evidencing a party's willingness and ability to close a transaction. The Committee, after a careful review of this issue, concluded that it was not within the scope of their mandate to consider or suggest substantive amendments to the law of tender, nor is it in the Committee's mandate to provide a legal opinion on the adequacy of one form or another of tender. The method and sufficiency of a tender shall always be a "judgment call" of the responsible lawyer. In light of the amendment recommended in section 11.3.1 supra, the tendering of documents in order to evidence one's readiness, willingness and ability to close is expressly permitted by the combination of faxing non-registration documents and transmitting electronic documents over the TERS. Ultimately it is hoped that the entire package can be transmitted using one electronic medium. The Committee also felt that (based on their current understanding of the case law surrounding the law of tender) in most circumstances it would be sufficient for the purchaser's lawyer to include in the package of faxed documents being tendered unequivocal proof (i.e. without intending to limit what could constitute proof, a photocopy of a bank draft or certified cheque engrossed in accordance with the vendor's direction would certainly satisfy this requirement) that the purchaser was in the financial position to close.

Recommendation

CLOSING ARRANGEMENTS: Where each of the Vendor and Purchaser retain a lawyer to complete the Agreement of Purchase and Sale of the property, the Vendor and Purchaser acknowledge and agree that the delivery of documents and the release thereof to the Vendor and Purchaser may, at the lawyer's discretion:

(a) not occur contemporaneously with the registration of the transfer/deed (and other registerable documentation), and

(b) be subject to conditions whereby the lawyer receiving documents and/or money will be required to hold them in trust and not release them except in accordance with the terms of a written agreement between the lawyers.

If either the Vendor's or the Purchaser's lawyer is unwilling to complete the transaction in escrow, then the unwilling lawyer (or the authorized agent thereof) shall attend at the office of the other lawyer (or at the appropriate Land Registry Office if so directed by the other lawyer) to complete the transaction.

TELEFAX TRANSMISSION: The Vendor and the Purchaser agree that the delivery of documents (other than documents to be registered) on closing may occur by telefax or similar system reproducing them provided that all documents have been properly executed by the appropriate parties. The person transmitting the documents shall also provide original documents to the recipient within seven business days of the later of (a) telefax transmission of the documents, or (b) a request for the original documents by the recipient.

12. Payment of Land Transfer Tax and Registration Fees

12.1 Given the amounts involved, it is not expected that members deposit into the Teranet account (described in paragraph 4.5 supra) amounts to cover land transfer tax and registration costs. However, these amounts must be paid before registration is considered effective. Since LSUC regulations will not permit lawyers to allow third parties to unilaterally debit client trust accounts, alternative arrangements are being considered. One arrangement under serious

consideration is for lawyers to give Teranet authority to unilaterally debit a general account to collect these sums on registration. LSUC regulations permit members to pay from trust "money required to reimburse the member for money properly expended on behalf of a client or for expenses properly incurred on behalf of a client". While preferred, the issuance of a disbursement account prior to transferring money from the trust account to the general account is not required by regulation. Assuming that the client has provided sufficient funds to the member's trust account, it is therefore acceptable, immediately following incurrence of the land transfer tax and registration fees (probably evidenced by confirmation from Teranet that the amount will be debited from the member's general account) for the member to transfer the required sum from the trust account to the general account. As long as the incurrence of the debt precedes the trust transfer, there is no breach of LSUC regulations.

12.2 The Committee felt that for the lawyer to go through the process described above for each and every deal was untenable and that amendments to the LSUC Regulations were required to permit the direct debiting of the trust account for land transfer tax and registration fees.

Recommendation

That the LSUC undertake the appropriate actions to implement an efficient means of trust funds transfers for the payment of land transfer tax and registration fees consistent with facilitating the TERS.

CHAPTER 4 - CONCLUSION

It is important to recognize that the Committee's focus in formulating practice standards for a remote electronic registration system was two-fold. The Committee felt that its recommendations should set out clear, comprehensive and easily ascertainable guidelines that would, to the greatest extent possible, eliminate errors and inequities and maintain the integrity of our conveyancing system, in order to safeguard the public interest. At the same time it is essential that these guidelines permit and facilitate the use of an electronic remote registration system, so that lawyers and their clients can benefit from the efficiencies generated by such a system. The Committee feels that the recommendations set out in the Report strike a reasonable balance between these two objectives.

.....

There were questions from the Bench.

It was moved by Mr. Wilson, seconded by Mr. DelZotto that the Report be approved in principal to permit Beta testing.

Carried

THE REPORT WAS ADOPTED IN PRINCIPLE

Legal Aid Committee Report

Meeting of June 11th, 1997

Ms. Eberts spoke to the Legal Aid Report regarding the Interim Report on Duty Counsel financial testing.

Legal Aid Committee
June 11, 1997

Report to Convocation

Nature of Report: Information
Decision-Making

TABLE OF CONTENTS

The Legal Aid Committee met on June 11, 1997. In attendance were:

Committee members: Mary Eberts (Chair), Heather Ross (Vice-Chair) Tamara Stomp, Tom Carey, Carole Curtis, Allan Lawrence, Elvio DelZotto.

The Treasurer, Susan Elliott

Senior Management of OLAP: Robert Holden, Provincial Director, and Deputy Directors George Biggar, Ruth Lawson and David Porter.

Other OLAP Staff: Keith Wilkins, Client Services Coordinator, Elaine Gamble, Communications Coordinator, Felice Mateljan, Executive Assistant. Lesley Byfield, Program Co-ordinator, Financial Assessment attended for the duty counsel discussion.

The following item is for your approval:

1. Financial statements

The Plan's financial statements for the year ended March 31, 1997 are to be handed out at Convocation for approval.

The following matters are reported on for information only:

2. Interim report on duty counsel financial eligibility testing

The Committee received a presentation on the results of the first two months of Phase I of financial eligibility testing. The Committee decided to continue the testing program until September 30, 1997 with some changes. The changes will make the testing more equitable and consistent with the certificate qualification process and will take effect July 2, 1997. It will also alleviate many of the concerns expressed by duty counsel.

- Duty counsel will receive coaching and simpler forms to allow for better collection of data over the next three months.
- Young offenders and people in custody will be exclude from eligibility testing.
- The liquid asset cutoff level will be raised to $1,500, recognizing the needs of low income clients whose funds are needed for monthly living expenses.

A short report with the highlights and decisions is attached.

Also attached is a paper summarizing duty counsel duties. It outlines the policies and procedures for duty counsel—the services they provide, and services they will no longer provide.

3. Update on the family law services expansion

Since coverage was expanded to include most priority II cases in family law, the number of certificates issued for family law cases has increased. The Plan will continue to monitor the certificates issued and applications received to ensure that people are aware of the expansion and services available.

Attached to this report is a listing of communications initiatives which targetted clients, lawyers, staff and the judiciary in order to inform people of the changes. Also attached is a black and white copy of a brochure which is now available in French and English, and is being sent to shelters, clinics, community centres and area offices.

4. Report on consultations on systemic problems in the courts

The criminal and family bar consultation groups met again June 3 and 4 to discuss systemic changes to the judicial system which could save the Plan money. A report is being prepared and will be forwarded to the McCamus Legal Aid Review by the end of this month.

5. Financial Reports

The April Financial Reports are attached.

6. Area Committee Appointments

The Committee approved three new appointments to area committees as recommended by the Provincial Director: Stephen O'Brien in Wentworth, Peter Forsythe in Wellington and R. Clive Algie in York.

Attachments

1. Interim report on financial eligibility testing for duty counsel

2. Summary of duty counsel duties

3. Family Law Expansion - communications initiatives

4. Family law brochure

4. OLAP Financial Reports - April 1997

Professional Regulation Committee

Meeting of June 12th, 1997

Mr. Copeland presented the item in the Report on technology in the discipline process.

It was moved by Mr. Copeland, seconded by Ms. Curtis that the policy statements and suggested approach as set out in the Report be accepted.

Carried

MOTION

It was moved by Mr. Murphy, seconded by Mr. Finkelstein that the Treasurer be given authority to appoint a representative to the Federation of Law Societies and to the Provincial Judicial Appointments Committee.

Carried

NOTICE OF MOTION

"That the French translations of Amendments made between July 1, 1995 and April 30, 1997 to the English version of the Rules made under subsection 62(1) of the Law Society Act be approved."

Reasons of Convocation

The Reasons of Convocation in the matter of Timothy Michael KINNAIRD were filed.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER OF Timothy Michael Kinnaird, of the City of Toronto, a barrister and solicitor

REASONS OF CONVOCATION

Georgette Gagnon - counsel for
The Law Society of Upper Canada

Solicitor not in attendance and not
represented by counsel

IN THE MATTER of the Law Society Act,

AND IN THE MATTER of Timothy Michael Kinnaird

REASONS OF CONVOCATION DATED April 3, 1997.

When this matter came before Convocation on April 3, 1997, Convocation adopted the Report of the Discipline Committee, but it declined to accept the reasons for the recommendation as to penalty. It is unnecessary to comment in detail as to the reasons for the rejection of the recommendation other than to say that Convocation found the reasons for the recommendation flawed and not in accordance with settled principles of earlier decisions of Convocation in like matters.

Convocation, nevertheless, for the following reasons, ordered that the solicitor be disbarred.

The solicitor was found guilty of professional misconduct with respect to a very large variety of matters, including failure to serve at least 9 clients; failure to honour financial obligations incurred in connection with his practice on at least 4 occasions; breached an undertaking to the Law Society to reply to written correspondence within 2 weeks of receipt of such correspondence; breached an order of Convocation that he suspend his practice for failure to pay his annual fees by continuing to practice during a period of suspension; used his trust account for personal transactions; issued trust cheques payable to cash contrary to the Regulations; failure to cooperate with the Law Society with respect to an audit of books and records and, failure to comply with undertakings for the Law Society.

To his credit and considering the extreme volume of the number of complaints, the solicitor admitted them and apologized to the Society for their occurrence. However, the sheer volume of the complaints and the absence of any serious mitigating factors leads Convocation to conclude that the only reasonable penalty available to it must be disbarment.

While it is true that the complaints do not generally indicate a pattern of dishonesty, clearly, disbarment is not reserved only for cases of dishonesty. Among the Society's various duties in protecting the public is to do its best to ensure that the kind of conduct exhibited by this solicitor is not repeated. Where the volume of the complaints is as high as it is in this case and where so many members of the public have been injured as a result of the solicitor's conduct, absent compelling mitigating factors, the penalty of disbarment is appropriate.

The English Court of Appeal has provided insightful commentary on the nature of disciplinary proceedings and penalties. In particular, in the Bolton case, concerning the suspension of a lawyer for misconduct the Court said:

"There is, in some of these (disciplinary) orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way...but often the order is not punitive... In most cases the order of the tribunal will be primarily directed to one or to her or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence...the second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing may be trusted to the ends of the earth.

The essential issue is the need to maintain among members of the public a well founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness...the reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price."[1]

The Committee did not find that there were any compelling mitigating factors. The solicitor did not appear before Convocation and we find nothing in the record that would support a finding to the contrary. Accordingly, Convocation seeks no reasons to interfere with the Committee's recommendation and therefore orders that the solicitor disbarred.

DATED this 22nd day of May, 1997

Philip M. Epstein, Q.C.

CONVOCATION ROSE at 3:45 P.M.

Confirmed in Convocation this 26 day of September, 1997.

Treasurer

Harvey T. Strosberg

[1] (1994) W.L.R. 512, C.A.