

MINUTES OF CONVOCATION

Thursday, 21st November, 2002
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C. FCGA), Aaron, Arnup, Banack, Bindman, Bobesich, Campion, Carey, Carpenter-Gunn, Cass, Chahbar, Cherniak, Coffey, Copeland, Crowe (by telephone), Curtis, Ducharme, Feinstein, Finkelstein, Furlong, Go, Gottlieb, Harris, Hunter, Laskin, Lawrence, Legge, MacKenzie, Manes, Marrocco, Millar, Minor, Mulligan, Murphy, Murray, Ortved, Pilkington, Porter, Potter, Robins, Ross, Ruby, St. Lewis, Simpson, Swaye, Topp (by telephone), Wardlaw, White, Wilson and Wright (by telephone).

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The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer welcomed to Convocation, students from the faculty of law of the University of Western Ontario's Professional Responsibility course.

Benchers were asked to consider whether there should be a call to the bar in London on July 8th, 2003.

Copies of a letter from Dean Bruce Feldthusen regarding the establishment of a steering committee to conduct an independent study of the impact of tuition increases were distributed to Convocation.

Benchers were reminded of the Equity Conference on Promoting Dialogue, Creating Change being held this evening in Convocation Hall.

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCETO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADAIN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

ADMINISTRATION

B.1. CALL TO THE BAR AND CERTIFICATE OF FITNESSB.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 21st, 2002:

Melissa Claire Abramowitz	Bar Admission Course
Jennifer Ann Barrigar	Bar Admission Course
Esther Rosetta Barrow	Bar Admission Course
John Bartolomeo	Bar Admission Course
Karie Ann Benham	Bar Admission Course
Howard Russel Reitapple Blitstein	Bar Admission Course
Dawn Marie Bourque	Bar Admission Course
Seung-Tae Byon	Bar Admission Course
Victoria Lynne Carrier	Bar Admission Course
Erika Andrea Lynn Chamberlain	Bar Admission Course
Janny Cho	Bar Admission Course
Mary Elizabeth Cremer	Bar Admission Course
Aaron Michael Dantowitz	Bar Admission Course
Winston Deonarain	Bar Admission Course
Valérie Colette Dionne	Bar Admission Course
Jenifer Dowse Pilon	Bar Admission Course
Deborah Saira Edoo	Bar Admission Course
Arielle Sarah Elbaz	Bar Admission Course
Merlin Barbara Fernandes	Bar Admission Course
Eugenio George Romano Filice	Bar Admission Course
Jodi Rebecca Fleishman	Bar Admission Course
Julie Florent-D'Aoust	Bar Admission Course
Charalampos Gousopoulos	Bar Admission Course
Hannah Alexandra Graff	Bar Admission Course
John Scott Guertin	Bar Admission Course
Malgorzata Joanna Gwiazda	Bar Admission Course
Nabeel Haque	Bar Admission Course
Gary Allan Hoftyzer	Bar Admission Course
Chad Roberts Johnson	Bar Admission Course
Richard William Johnson	Bar Admission Course
Ramona Jubilee Creasey Johnston	Bar Admission Course
Marina Dharshini Shanthakumari Justin	Bar Admission Course
Randall Hugh Kahgee	Bar Admission Course
Mehmet Karman	Bar Admission Course
Frederick Mark Kaye	Bar Admission Course
Robert James Kennedy	Bar Admission Course
Altaf Mohammed Khan	Bar Admission Course
Don Kwon	Bar Admission Course
Sébastien Jacques Daniel Lorquet	Bar Admission Course
Donald James MacInnis	Bar Admission Course
Renu J. Mandhane	Bar Admission Course
Aaron Christopher Marsaw	Bar Admission Course
Gregory Gasparo Matthews	Bar Admission Course
Kendal James McKinney	Bar Admission Course

Bradley Wayne Miller	Bar Admission Course
Miraldina Maria Moreira	Bar Admission Course
Dimitra Moudilos	Bar Admission Course
Ibiyinka Folorunso Olubunmi Ogunniyi	Bar Admission Course
Abdul-Mumin Abolade Oshodi	Bar Admission Course
Konstantina Paparis	Bar Admission Course
Angus Ian Barra Patterson	Bar Admission Course
Dionne Jacqueline Peart	Bar Admission Course
Federico Pérez Hernandez	Bar Admission Course
Raphael Moshe Pollak	Bar Admission Course
Andrew Peter Donald Prodanyk	Bar Admission Course
Rima Ramchandani	Bar Admission Course
Ethan Mark Rogers	Bar Admission Course
Daniela Ruso	Bar Admission Course
Andrea Loy Ruttly	Bar Admission Course
Nirari Sheeno	Bar Admission Course
Laurie Sourani	Bar Admission Course
Ariane Frederique Joanna Stren	Bar Admission Course
Dean Lorne Taylor	Bar Admission Course
Bryan Jong-Ming Tham	Bar Admission Course
Renée Maria Tremblay	Bar Admission Course
Shilpa Walia	Bar Admission Course
Justin James Walsh	Bar Admission Course
Ernest Glen Wheeler	Bar Admission Course
Christopher Lawrence Chao-Ch'i Wong	Bar Admission Course
Sophie Marina June Wu	Bar Admission Course
Robert Andre Zsigo	Bar Admission Course

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

B.1.4. The following candidates have completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 21st, 2002:

Dominique Dallaire	Province of Quebec
Del Lucinda Friday	Province of British Columbia
Michael Richard Rempel	Province of British Columbia
Olena Wynnycky	Province of Quebec

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

B.1.6. The following member of an approved law faculty asks to be called to the Bar and admitted as a solicitor on Thursday, November 21st, 2002, without examination, under sec. 5 of By-Law 11 made under the *Law Society Act*:

Joanna Harrington	University of Western Ontario, Faculty of Law
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B.1.7. The candidate has filed the necessary documents and complied with the requirements of the Society.

B.2. APPLICATION TO BE LICENSED AS A FOREIGN LEGAL CONSULTANT

B.2.1. The following applies to be certified as foreign legal consultant in Ontario:

Jonathane Michael Ricci

State Bar of Michigan
Juroviesky & Ricci

B.2.2. His application is complete and he has filed all necessary undertakings.

ALL OF WHICH is respectfully submitted

DATED this the 21st day of November, 2002

It was moved by Mr. Hunter, seconded by Mr. Cherniak that the Report of the Director of Professional Development & Competence containing the list of candidates for Call to the Bar and the application for certification as a foreign legal consultant be adopted.

Carried

MOTION – DRAFT MINUTES OF CONVOCATION

It was moved by Mr. Bindman, seconded by Mr. Feinstein that the Draft Minutes of Convocation of October 31st, 2002 be approved with an amendment to show that the motion to appoint a bencher election advisory group was adjourned to the November Convocation.

Carried

WILSON/HUNTER MOTION – ESTABLISHMENT OF AN INDEPENDENT AUDIT COMMITTEE

Whereas the Law Society of Upper Canada is a corporation which collects and administers an annual budget in excess of \$50,000,000,

And Whereas it has been brought to the attention of the Benchers that ‘for profit’ corporations of this size are at least encouraged to provide outside oversight on their Board of Directors in the area of financial management,

Be it resolved that an independent audit committee consisting of non bencher experts be established to advise Convocation as required and to report to Convocation annually.

The Treasurer advised that the motion to appoint an independent audit committee will be referred to the Finance & Audit Committee to determine whether there should be such a committee, who should comprise it and the financial implications of such a committee.

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar. Mr. Carey then presented them to Madam Justice Susan E. Lang to sign the Rolls and take the necessary oaths:

Melissa Claire Abramowitz
Jennifer Ann Barrigar
Esther Rosetta Barrow
John Bartolomeo
Karie Ann Benham

Bar Admission Course
Bar Admission Course
Bar Admission Course
Bar Admission Course
Bar Admission Course

Howard Russel Reitapple Blitstein	Bar Admission Course
Dawn Marie Bourque	Bar Admission Course
Seung-Tae Byon	Bar Admission Course
Victoria Lynne Carrier	Bar Admission Course
Erika Andrea Lynn Chamberlain	Bar Admission Course
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Mary Elizabeth Cremer	Bar Admission Course
Aaron Michael Dantowitz	Bar Admission Course
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Eugenio George Romano Filice	Bar Admission Course
Jodi Rebecca Fleishman	Bar Admission Course
Julie Florent-D'Aoust	Bar Admission Course
Charalampos Gousopoulos	Bar Admission Course
Hannah Alexandra Graff	Bar Admission Course
John Scott Guertin	Bar Admission Course
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Gary Allan Hoftyzer	Bar Admission Course
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Donald James MacInnis	Bar Admission Course
Renu J. Mandhane	Bar Admission Course
Aaron Christopher Marsaw	Bar Admission Course
Gregory Gasparo Matthews	Bar Admission Course
Kendal James McKinney	Bar Admission Course
Bradley Wayne Miller	Bar Admission Course
Miraldina Maria Moreira	Bar Admission Course
Dimitra Moudilos	Bar Admission Course
Ibiyinka Folorunso Olubunmi Ogunniyi	Bar Admission Course
Abdul-Mumin Abolade Oshodi	Bar Admission Course
Konstantina Papis	Bar Admission Course
Angus Ian Barra Patterson	Bar Admission Course
Dionne Jacqueline Peart	Bar Admission Course
Federico P9rez Hernandez	Bar Admission Course
Raphael Moshe Pollak	Bar Admission Course
Andrew Peter Donald Prodanyk	Bar Admission Course
Rima Ramchandani	Bar Admission Course
Ethan Mark Rogers	Bar Admission Course
Daniela Ruso	Bar Admission Course
Andrea Loy Rutty	Bar Admission Course
Nirari Sheeno	Bar Admission Course
Laurie Sourani	Bar Admission Course

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Transfer, Province of Quebec
Transfer, Province of British Columbia
Transfer, Province of British Columbia
Transfer, Province of Quebec
University of Western Ontario,
Faculty of Law

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MOTION – DONATION TO OUT OF THE COLD PROGRAM IN LIEU OF BENCHER SEASONAL PARTY

It was moved by Mr. Aaron that –

RESOLVED that the cost that would have been incurred by holding the Bencher seasonal party instead be donated to the Law Society Foundation for the Out of the Cold program.

The Treasurer ruled the motion out of order.

Mr. Aaron gave notice that the motion to donate the cost of the Bencher seasonal party to the Law Society Foundation for the Out of the Cold program will be brought forward in January 2003.

INTER-JURISDICTIONAL MOBILITY COMMITTEE REPORTRe: Foreign Legal Consultants

Mr. Millar presented the Report of the Inter-Jurisdictional Mobility Committee for approval by Convocation.

Report to Convocation
November 21, 2002

Inter-Jurisdictional Mobility Committee

Purpose of the Report: Decision

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

OVERVIEW OF POLICY ISSUE

FOREIGN LEGAL CONSULTANTS

Request to Convocation

1. That Convocation approve the proposal for revisions to the current policy on Foreign Legal Consultants as set out on pages 2 and 3 of this report.
2. That following Convocation's approval of the proposal, the provisions of the proposal be incorporated into a by-law to be approved by Convocation.

Summary of the Issue

3. The current Law Society policy on Foreign Legal Consultants (FLCs) dates from 1988.
4. Aspects of it have been interpreted in such a manner as to raise issues about whether such interpretation is appropriate and in the public interest, particularly as certain aspects of legal practice become increasingly global in nature.
5. In addition, the current process by which FLCs are licensed and monitored is inadequate.
6. The *Law Society Act* authorizes the Law Society to approve by-laws with respect to Foreign Legal Consultants. The policy has not yet been incorporated into a by-law.
7. A number of issues are not addressed in the policy including:
 - a. Reciprocity
 - b. Application fee
 - c. Renewal of licence
 - d. Regulatory features and requirements
 - e. Insurance and defalcation requirements
8. In developing its proposal the Inter-Jurisdictional Mobility Committee has considered these issues in the context of the changes to the Law Society's regulatory approach since the policy was first approved in 1988 and the growth in the last few years of policies facilitating inter-jurisdictional mobility.

THE REPORT

PROPOSAL REGARDING FOREIGN LEGAL CONSULTANTS

(* indicates provisions in current policy)

The Committee's proposal includes the principle of reciprocity, namely that lawyers from foreign jurisdictions who wish to become registered as FLCs in Ontario may only do so if Ontario lawyers are entitled to FLC privileges in that foreign jurisdiction on a similar basis to that available to FLCs in Ontario.

The proposal is as follows:

Ontario lawyers in good standing who are also members of a foreign jurisdiction will be entitled to practise Ontario law and be licensed as foreign legal consultants (FLCs). This has not been permitted under the current policy.

Ontario lawyers will be entitled to employ, partner, associate, or affiliate with FLCs in Ontario, provided this is done in accordance with Law Society By-Laws. This has not been permitted under the current policy.

To become an FLC a lawyer, whether or not he or she is also a member of the Ontario bar, will,

- a. Apply in writing to be licensed;
- b. Pay an application fee;

- c. Provide information and consent to the disclosure of information from third parties in support of the application;
- d. Renew the licence each year prior to expiration by completing the appropriate form;
- e. Pay a renewal fee.

To be eligible for a licence as an FLC a lawyer must,

- have been actively engaged in the practice of law in the foreign jurisdiction for three of the last five years or, if fewer years than that, be supervised by an approved FLC;*
- be of good character; *
- be in good standing in the jurisdiction or jurisdictions in which he or she is a member;
- maintain professional liability insurance for giving legal advice in Ontario respecting the law of the FLC's foreign jurisdiction, at least equivalent to that required of a member under the Society's insurance plan;*
- maintain defalcation coverage that specifically extends to money or other property that may be received by the person

in respect of the giving of legal advice in Ontario respecting the law of the FLC's foreign jurisdiction and have coverage at least equivalent to the coverage available to a member;

- be resident in Ontario; *
- agree not to accept, hold, transfer or in any other manner deal with funds that would, if accepted, held, transferred or dealt with by a member, constitute trust funds;
- submit to the Law Society's jurisdiction and comply with all Acts, rules, by-laws, and regulations, and rules professional conduct; *
- not in any way hold him/herself out as a member of the Ontario bar or qualified to act as a member of the Ontario bar * (unless her or she is such a member);
- state on all letterhead, advertising, and signs that he or she is an FLC and the name of the jurisdiction in which he or she is qualified to practise law; *

- not represent clients in any court or public administrative body and not participate in the preparation of documents or instruments governed by the laws of Ontario unless the client retains an Ontario lawyer to act as well; *
- notify the Law Society promptly if he or she fails to complete, satisfactorily, any CLE requirements of home jurisdiction;
- pay a licence fee in an amount determined by Convocation.

FLCs should be subject to the conduct, competence and capacity provisions of the *Law Society Act* and relevant accompanying provisions.

FLC licences should be subject to a regular mechanism for determining whether a licence should be renewed; renewed with terms; refused; or revoked during its term where an FLC is suspended or restricted under the conduct, capacity or competence provisions of the Act or where an FLC ceases to comply with the specified requirements for FLCs.

The Background

9. In October 1988, Convocation adopted the report of the Special Committee on Foreign Lawyers. Based on the recommendations in that report Convocation agreed to license Foreign Legal Consultants (FLCs) to provide advice on the law of their jurisdiction while residing in Ontario. The report and the current policy that emerged from that report are set out at Appendix 1.
10. Pursuant to the 1988 policy the Law Society may license foreign lawyers to practise the law of their jurisdiction in Ontario as FLCs. The applicant must,
 - a. be a member in good standing in the home jurisdiction;
 - b. be actively engaged in the practice of law of that jurisdiction for at least three of five preceding years; ¹
 - c. reside in Ontario; ²
 - d. be of good character;
 - e. be insured under a professional liability insurance plan in an amount and form satisfactory to the Law Society;

¹ If the lawyer has practised for fewer than three of the five preceding years he or she must be under the supervision of a foreign legal consultant already licensed and the supervisory arrangement must have been approved by the Law Society.

² If the applicant is not already a resident he or she must undertake to become one as soon after the granting of the licence as is practicable.

- f. undertake to observe the rules of conduct of the Law Society; and
 - g. undertake to submit to the Law Society's jurisdiction with respect to his or her practice in Ontario.
11. An FLC may not,
 - a. hold him/herself out as qualified to act as a member of the Law Society;
 - b. represent clients in any Court or before any public administrative body;
 - c. provide advice on matters of Ontario law (includes Canadian law applicable in Ontario);
 - d. prepare or participate in preparing any document or instrument that is or may be governed by the laws of Ontario unless the client has also retained a member of the Law Society who participates in the preparation.
 12. FLCs must identify themselves as such and identify the jurisdiction from which they originate on their letterhead, signs and any other advertising.
 13. Rule 3.02 (1) of the Rules of Professional Conduct precludes FLCs using the name of their law firm in Ontario, since this would run afoul of the permissible firm name rule.
 14. Since the establishment of the policy the number of lawyers interested in being licensed as FLCs has gradually increased. This has coincided with an increase in the global nature of certain aspects of legal practice.
 15. In addition, interest in developing a national strategy on FLCs resulted in the inclusion of a section on Foreign Legal Consultants in the 1994 Inter-Jurisdictional Practice Protocol (IJPP). Appendix 2 contains Appendix 3 of the IJPP addressing FLCs.
 16. Beginning in 1993, Canada, the United States and Mexico sent representatives from their professional bodies/representative legal organizations to negotiate an international agreement on FLCs. In June 1998, the parties signed a joint recommendation, including a model rule ("model rule agreement"), but their respective governments have not yet ratified the recommendations and there are no indications when, if at all, this might occur. Appendix 3 contains the resolution and proposed model rule.
 17. In February 1999, amendments to the *Law Society Act* included specific provisions and by-law making authority for licensing and regulating FLCs. The legislative and by-law making authority with respect to FLCs is set out at Appendix 4. A by-law based on the current policy has not been brought to Convocation for consideration in part because concerns have been raised about the current policy.

The Current Policy – Approach and Proposed Changes

18. A number of issues have arisen with respect to the current policy that the Committee has considered in developing its proposal.
- Lack of Reciprocity Requirement
19. The current policy does not include any provision for reciprocity. In other words there is no requirement that the foreign jurisdiction in which an FLC is licensed as a lawyer accept lawyers from Ontario as FLCs in that jurisdiction. The Committee is of the view that reciprocity should be part of Ontario's regulatory approach to FLCs. Reciprocity invites jurisdictions to establish links on regulatory approaches in an environment of increasing globalization. This is important for the public interest and for the bars in each jurisdiction.
- Application of the Current Policy
20. The current policy has been interpreted to mean that,
 - a. an Ontario lawyer, who is also qualified in a foreign jurisdiction and who is an FLC in Ontario, cannot also practise Ontario law; and

- b. certain arrangements among Ontario lawyers and FLCs are not permitted, specifically,
 - i. an FLC cannot be an employee, partner or affiliate in an Ontario law firm;
 - ii. an FLC cannot employ an Ontario lawyer or associate with an Ontario lawyer in ways that may be permitted by the foreign lawyer's home jurisdiction.
- 21. In fact the policy does not appear to prohibit any of these activities, or to address them one-way or the other.
- 22. Ontario lawyer practising both Ontario and foreign law
It is difficult to justify prohibiting an Ontario lawyer from practising Ontario law if he or she is also an FLC. If an Ontario lawyer otherwise complies with all the Law Society's requirements for its members it is arguably unjustifiable to interfere with the lawyer's ability to practise Ontario law.
- 23. Moreover, the effect of this interpretation of the policy is to force clients to retain multiple lawyers, when one qualified lawyer could easily address their matters in a seamless fashion. It is difficult to imagine how the interpretation protects the public, since the lawyer is qualified, as a member of the foreign jurisdiction's bar and Ontario's. Regulatory rules and requirements that apply to members and those that relate to FLCs protect the public.
- 24. A factor that should be taken into account on this issue relates to trust money. Currently, FLCs are not permitted to open and hold funds in trust. If that continues to be the case, it will be important to ensure that the Ontario lawyer who is also an FLC does not blur the lines between the trust accounting rules for Ontario lawyers and those for FLCs. This can be accomplished through establishing a regulatory scheme that identifies Ontario lawyers who are FLCs, (as proposed below), as well as through the Law Society's spot and focused audit program.
- 25. The current Law Society application of the policy on the issue of dual or multiple qualification goes against both the IJPP approach and the model rule agreement. It differs as well from the approach taken in British Columbia and Alberta.
- 26. The BC provision states:
Dual Qualification
A lawyer, other than a retired or non-practising member, who is qualified to practise law in a foreign jurisdiction, may act as a practitioner of foreign law in British Columbia without obtaining a permit, provided the lawyer holds liability insurance that
 - (a) specifically extends to the lawyer's activities as a practitioner of foreign law in British Columbia, and
 - (b) is in a form and amount at least reasonably comparable to that required of lawyers under Rule 3-21(1).
- 27. The Alberta provision states:
A reference to "a member with foreign legal qualifications" in relation to a foreign country or a political subdivision of a foreign country means a member of the Society who is authorized to practise law in that foreign country or political subdivision by reason of a membership in an extraprovincial law society in that country or political subdivisions or otherwise.
- 28. In British Columbia members of the Law Society who are also licensed in foreign jurisdictions are not required to apply for a permit. In Alberta they are required to follow the same procedure as any other applicant for licensing as an FLC. The IJPP mirrors the BC approach.
- 29. The Committee recommends following the Alberta approach. Requiring everyone to apply for the FLC licence ensures that the Law Society is able to monitor FLC behaviour generally and, in the case of members, is in a position to monitor that they have not blurred the lines between the FLC activities and their practice as members.

Affiliation/Association/Employment Between Members and FLCs

30. There are two issues with respect to arrangements between members and FLCs that require review. The first issue is the ability of an Ontario lawyer to employ, partner or affiliate with an FLC. The second issue is the ability of an FLC to employ an Ontario lawyer or associate with an Ontario lawyer in ways that may be permitted by the foreign lawyer's home jurisdiction.
31. By-Laws 25 and 32 permit multi-discipline partnerships/associations and affiliations between lawyers and non-lawyers. The by-laws generally do not restrict the type of non-lawyer individual who, or entity that, may partner/associate or affiliate with a lawyer.¹ The by-laws alone would not restrict an Ontario lawyer or law firm from,
 - a. partnering with an FLC or employing an FLC as contemplated in the multi-discipline practice scheme in By-Law 25; or
 - b. affiliating with an FLC as contemplated in By-Law 32 for the joint marketing and delivery of legal and FLC services.²
32. Although the Society's policy on FLCs does not prohibit these forms of association, it has been interpreted to disallow them. It is important to remember that when the policy was first enacted the Law Society did not permit MDPs.
33. The Society's policy does not appear to restrict arrangements that an FLC may enter into with an Ontario lawyer by way of employment or association, even though it has been interpreted to disallow them. For example, the policy does not prohibit an Ontario lawyer from being employed by an FLC to provide the services of an Ontario lawyer. The policy also does not address arrangements that may be permitted in the FLC's home jurisdiction with Ontario lawyers (for example, an American jurisdiction's scheme for multi-discipline partnerships). However, although the Law Society policy does not prohibit a member from being an employee of an FLC or a partner in an FLC, certain restrictions in other aspects of the Law Society's regulatory structure make such arrangements unworkable. For example:
 - a. the name of an Ontario lawyer's law practice must comply with rule 3.02(1) of the *Rules of Professional Conduct*, which essentially restricts the name to that of the lawyer, or deceased or retired members of the firm and indicates that the firm name may only include the names of persons who are qualified to practise law in Ontario or in any other province or territory of Canada where the law firm carries on its practice;³
 - b. while an American jurisdiction may permit a form of multi-discipline partnership, the Society's MDP regime requires that an Ontario lawyer who partners with non-lawyers (which, in the Committee's view, includes FLCs) must control the law practice;
 - c. Ontario lawyers must maintain trust accounting books and records for their practices in accordance with the by-laws and observe the regulations concerning the handling of trust money.
34. The 1998 model rule agreement, referred to earlier and in Appendix 3 of this report, includes a section on forms of association that would permit, for example,
 - a. a Toronto lawyer being employed by a New York law firm;

¹ By-Law 25, s. 3 provides that the individual (non-lawyer) must be one "who practises a profession, trade or occupation that supports or supplements the practice of law."

² By-Law 32 on affiliations specifically excludes interprovincial and international law firms from its scope, which for the purposes of this discussion should be considered as entities separate from FLCs. However, the language in ss. 1(1) of By-Law 32 could be interpreted to exclude FLCs ("In this By-Law, "affiliated entity" means any person or group of persons other than a person or group of persons authorized to practise law in or outside Ontario".)

³ This rule will be reviewed by the Professional Regulation Committee, which will consider whether a more flexible approach to firm names is warranted.

- b. a Los Angeles law firm entering into a partnership with a Vancouver law firm; or
 - c. a Toronto law firm entering into an economic relationship (other than a partnership) with a Chicago lawyer.
- 35. That section also indicates that the rules around forms of association do not prohibit, for example, a lawyer who is a partner in a law firm formed with foreign lawyers in the foreign jurisdiction from being a partner in his or her home jurisdiction's law firm at the same time.
- 36. Based on the considerations set out above the Committee recommends that,
 - a. Ontario lawyers in good standing who are members of the bar of a foreign jurisdiction should be entitled to practise both Ontario law and the law of the foreign jurisdiction as licensed FLCs.
 - b. Despite being members of the Ontario bar, they should be required to apply for a licence as an FLC;
 - c. Ontario lawyers should be permitted to employ, partner, associate or affiliate with FLCs in Ontario, in accordance with the requirements of By-Laws 25 and 32;
 - d. Ontario lawyers should not be permitted to be employed by FLCs or enter into arrangements in Ontario with FLCs as may be permitted within the FLC's home jurisdiction. For valid reasons, the Law Society's current regulatory provisions may make such arrangements unworkable and it will be important to carefully consider the impact on the public interest that any expansion of the provisions may have before permitting such arrangements.
- 37. These recommendations are reflected in the Committee's full proposal as set out at pages 2 and 3 of this report.
- Application Fee/Annual Fee/Renewal Process

- 38. Currently, applicants for licensing as FLCs are not required to,
 - a. pay a fee;
 - b. renew their licence at regular intervals; or
 - c. file information with the Law Society at regular intervals, including notifying the Law Society when they cease to work as FLCs.
- 39. This is a different approach than is taken to members of the Law Society, who are required to pay both annual fees and administrative charges for processing other types of applications, and be monitored by the Law Society. So, for example, applicants for Specialist Certification pay application and renewal fees in addition to their annual fee for membership in the Law Society. Similarly, a professional corporation that wishes to practise law must apply for a certificate of authorization pursuant to By-Law 34, pay an initial application fee, comply with certain rules, renew annually and pay an annual renewal fee.⁴
- 40. The benefit of a renewal process is that the Law Society has an effective way to monitor the presence of FLCs in the jurisdiction and ensure that the FLC requirements are being met. Currently, the Law Society has no process in place for monitoring FLCs. The consequence is that the Society may not know if a licensed FLC continues to work as such or continues to meet the residence requirements or comply with other rules.⁵
- 41. The Committee recommends that a process be put in place with respect to FLCs that mirrors the approach taken to professional corporation applications for certificates of authorization. It would entail,

⁴The application fee and re-application fee for renewal for specialist certification is \$321. The annual fee is \$214 for each year of the five-year term. The application fee for a certificate of authorization (for professional corporations) is \$250 and the renewal fee is \$75.

⁵The Law Society's authority over the FLCs has been limited to refusing to license an applicant or charging non-licensed practitioners under the unauthorized practice rules.

- a. an initial written application (currently done);
 - b. an application fee for processing (new);
 - c. an annual renewal application that would ask FLCs to respond to certain questions (new); and
 - d. a renewal fee (new).
42. The Committee further recommends that applicants continue to be required to provide certain specified information about their regulatory record elsewhere, provide information in support of the application, and consent to the disclosure of information from third parties in support of the application. This mirrors the approach followed with respect to inter-jurisdictional mobility among Canadian jurisdictions.
43. This approach would also protect the public, by providing a regular mechanism for determining whether a licence should be renewed. A licence to act as an FLC could be,
- a. renewed;
 - b. renewed with terms attached to address concerns raised during the previous term of the licence or in the renewal application;
 - c. refused;
 - d. revoked during its term for specified reasons.
44. Another advantage of this approach is that the Law Society will be in a position to provide information to other bodies, should an FLC request that the Law Society do so. So, for example, although the Law Society would not provide certificates of good standing, it would be in a position to indicate if an FLC is in compliance with all the applicable rules and indicate whether there are complaints against the FLC.
45. Such an approach would conform to the IJPP provisions, the model rule agreement, and the BC and Alberta approaches, all of which provide for licensing applications, renewals and fees.
46. In October 1993, the Law Society did, in fact, approve a recommendation of the Finance Committee that FLCs be charged a non-refundable application fee of \$1000 (plus GST) and an annual fee of \$500 (plus GST). This was to be done through an amendment to then Rule 50. The amendment was not implemented because of concerns expressed by the then Legislation and Rules Committee about whether there was, at the time, legislative authority to license FLCs.
- Regulatory Provisions
47. Currently, although FLCs undertake to observe the standards of professional conduct in Ontario, the Law Society does nothing to monitor this and does not have clear rules, beyond the policy, to which the FLCs may be held.
48. Although the policy requires FLCs to be insured, the Law Society does not monitor this requirement.
49. The Law Society does not track complaints against FLCs.
50. The Law Society's by-law making authority respecting FLCs provides the opportunity to specify the regulatory requirements to which FLCs must adhere and the enforcement mechanism.
51. The Committee proposes that a by-law provide that an applicant for licensing as an FLC must,
- a. have been actively engaged in the practise of law in the home jurisdiction for three of last five years or if less than that will be supervised by an approved FLC; (requirement under current policy; similar to IJPP)

- b. be a member in good standing in the jurisdiction or jurisdictions of which he or she is a member; (the IJPP requires only the home jurisdiction; the Mobility Agreement requires all jurisdictions)
 - c. be of good character; (requirement under current policy; same in IJPP)
 - d. maintain professional liability insurance for giving legal advice in Ontario respecting the law of the FLC's foreign jurisdiction at least equivalent to that required of a member under the Society's insurance plan; (requirement under current policy; similar to IJPP)
 - e. maintain defalcation coverage that specifically extends to money or other property that may be received by the person in respect of the giving of legal advice in Ontario respecting the law of the FLC's foreign jurisdiction and is at least equivalent to the coverage available to a member; (requirement under current policy, but in the IJPP and would be in keeping with approach to mobility developed by the Federation of Law Societies Task Force and approved by Convocation)
 - f. be resident in Ontario; (requirement under current policy; not required in IJPP or the model rule agreement; not required in BC or Alberta)
 - g. agree not to accept, hold, transfer or in any other manner deal with funds that would, if accepted, held, transferred or dealt with by a member, constitute trust funds; (not required under current policy; provided in IJPP and model rule agreement;)⁶
 - h. submit to the host jurisdiction and comply with all Acts, rules, by-laws, and regulations, and rules of professional conduct; (requirement under current policy; in IJPP and model rule agreement)
 - i. not in any way hold him/herself out as a member of the Ontario bar or qualified to act as a member of the Ontario bar (unless he or she is a member); (requirement under current policy; similar in IJPP)
 - j. state on all letterhead, advertising, and signs that he or she is an FLC and the jurisdiction in which he or she is qualified to practise law; (requirement under current policy; similar in IJPP)
 - k. not represent clients in any court or public administrative body and not participate in the preparation of documents or instruments governed by the laws of Ontario unless the client retains an Ontario lawyer to act as well; (requirement under current policy; not in IJPP)
 - l. notify the Law Society promptly if he or she fails to complete, satisfactorily, any CLE requirements of the foreign jurisdiction; (not required under current policy; in IJPP)
 - m. pay a licence fee and renewal fee, where applicable, in an amount determined by Convocation. (not required under current policy; IJPP provides)
52. Moreover, the Committee recommends that the By-Law specify other provisions of the *Law Society Act* that would apply to FLCs. The IJPP states:
- The provisions of [the Act and Rules] respecting competence, discipline and financial responsibility of members apply with necessary changes and so far as they are applicable to a person given permission ... to act as a foreign legal consultant in the province, but the benchers have no power to disbar the person.
53. It is important that, at a minimum, FLCs be subject to the provisions of the *Law Society Act* that relate to allegations of professional misconduct or conduct unbecoming a barrister and solicitor:

⁶ If FLCs cannot hold trust funds, it will be necessary to ensure that when members of the Ontario bar are also FLCs, they follow strict rules for complying with FLCs provisions. British Columbia does not permit a practitioner of foreign law to deal with funds that would constitute trust funds, "except money received on deposit for fees to be earned in the future by the practitioner of foreign law".

- a. provisions dealing with capacity, competence and conduct investigations, applications and orders, and
 - b. provisions that support this regulation (Hearing Panels, appeals, confidentiality, inspection of documents, etc.).
54. The Committee recommends that with the addition of the regulatory provisions discussed here, an FLC licence could then be revoked or suspended, or not renewed if the FLC,
- a. is suspended or restricted under the conduct, capacity, or competence provisions; or
 - b. ceases to comply with the provisions of the FLC regime.
55. These recommendations are reflected in the Committee's full proposal as set out at pages 2 and 3 of this report.

APPENDIX 4

Excerpt from *Law Society Act* and By-Laws

Prohibition as to practice, etc.

50. (1) Except where otherwise provided by law,

(a) no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold himself out as or represent himself to be a barrister or solicitor or practise as a barrister or solicitor; and

(b) no temporary member shall act as a barrister or solicitor or practise as a barrister or solicitor except to the extent permitted by subsection 28.1 (3). 1991, c. 41, s. 4; 1993, c. 27, s. 5.

50.1 (1) Every person who contravenes section 50 is guilty of an offence and on conviction is liable to a fine of not more than \$10,000.

Offence: foreign legal advice

(2) Every person who gives legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws is guilty of an offence and on conviction is liable to a fine of not more than \$10,000.

62. (0.1) Convocation may make by-laws,

14. prescribing fees and levies relating to the functions of the Society, including fees for late compliance with any obligation, that must be paid to the Society by,

...

iv. persons who give legal advice respecting the law of a jurisdiction outside Canada, and applicants for licences to give such advice,

v. persons authorized to practise law outside Ontario who are permitted to appear as counsel in a specific proceeding in an Ontario court, and applicants for such permission,

vi. persons authorized to practise law in other provinces and territories of Canada who are permitted to engage in the occasional practice of law in Ontario, and applicants for such permission.

33. regulating the giving of legal advice respecting the law of a jurisdiction outside Canada, including requiring a licence issued by the Society, governing the issuance, renewal, suspension and revocation of licences and governing the terms and conditions that may be imposed on licences;

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

- (1) Copy of the Report to Convocation of the Special Committee on Foreign Lawyers and the current policy.
(Appendix 1, pages 16 – 22)
- (2) Copy of Appendix 3 of the 1994 Inter-Jurisdictional Practice Protocol addressing Foreign Legal Consultants.
(Appendix 2, pages 23 – 26)
- (3) Copy of the June 1988 resolution and proposed model rule on Foreign Legal Consultants.
(Appendix 3, pages 27 – 39)

It was moved by Mr. Bindman, seconded by Ms. St. Lewis that the reciprocity requirement be deleted.

Lost

It was moved by Mr. Millar, seconded by Mr. Ortved that the proposal for revisions to the current policy on Foreign Legal Consultants as set out on pages 2 and 3 of the Report be approved and the provisions of the proposal be incorporated into a by-law.

Carried

Mr. Millar thanked Sophia Sperdakos for her work on the Report.

EMERGING ISSUES COMMITTEE REPORT

Re: Privilege for Patent and Trade-mark Agents

Mr. Hunter presented the Report of the Emerging Issues Committee for approval by Convocation.

Emerging Issues Committee
November 21, 2002

Report to Convocation

Purposes of Report: Decision

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

OVERVIEW OF POLICY ISSUE

PRIVILEGE AND SELF-GOVERNANCE FOR PATENT AND TRADE MARK AGENTS

Request to Convocation

1. Convocation is requested to approve the referral of the following issues to the committee of the Federation of Law Societies dealing with regulation of non-professionals and issues related to lawyer regulation:

Whether the Law Society, and other law societies in Canada, can or should support the efforts of the Intellectual Property Institute of Canada (IPIC) to

- a. obtain the equivalent to solicitor and client privilege for patent and trade-mark agents, and
- b. establish a regulatory college for the self-governance of patent and trade-mark agents.

Summary of the Issue

2. IPIC, a national voluntary association of intellectual property professionals, has informed the Society of its desire to obtain the equivalent of solicitor and client privilege for patent and trade-mark agents, and to seek the Society's support in this effort. IPIC is also seeking self-governance for patent and trade-mark agents in Canada and is proposing that the federal government legislate a new college of patent and trade-mark agents.
3. The issue was referred to the Emerging Issues Committee ("the Committee"). The Committee met with IPIC representatives in September 2002 who explained IPIC's position on privilege and self-governance. At its October 2002 meeting, the Committee determined that as this issue has national scope, the Federation of Law Societies would be the appropriate body to determine the issues identified above, with the participation of all law societies. To that end, the Committee is seeking Convocation's approval to refer these issues to the Federation.
4. If Convocation approves the referral, the Committee will prepare material for Convocation's review early in 2003 outlining a position on the issues for transmission to the Federation.

THE REPORT

A. BACKGROUND AND NATURE OF THE ISSUE

IPIC's Request to the Society

5. In June 2002, representatives of Intellectual Property Institute of Canada (IPIC) initiated discussions with the Society on IPIC's desire to obtain the equivalent of solicitor and client privilege for patent and trade-mark agents, and to seek the Society's support in this effort. IPIC is also seeking self-governance for patent and trade-mark agents in Canada and is proposing that the federal government legislate a new college of patent and trade-mark agents.
6. The IPIC representatives explained that the Canadian intellectual property (IP) legal framework requires modernization to better support Canada's economic development, competitiveness and innovation priorities. Their view is that such a framework will help to ensure that knowledge is developed and retained in Canada and that the country has the necessary capacity to support the commercialization of this knowledge.
7. IPIC has identified two specific aspects of the current IP framework, aspects that govern the Canadian patent and trade-mark agent professions, that require modernization through amendments to the relevant federal statutes, the *Patent Act* and the *Trade-marks Act*. These are:
 - granting the benefit of privilege to communications between Canadian patent and trade-mark agents and their clients, and
 - establishing a Canadian patent and trade-mark agent self-regulatory regime.

Information on Patent and Trade-mark Agents and IPIC

8. Patent agents, who are scientists or engineers and who may be lawyers, qualify for the designation through an apprentice-like process in and rigorous examinations on all aspects of patent law and practice. The federal Commissioner of Patents regulates patent agents and maintains a register of those who may practice before the Patent Office. The examinations are jointly administered by the Canadian Intellectual Property Office (CIPO) and IPIC.
9. The procedure for becoming a trade-mark agent is similar to that for patent agents. The examinations are managed jointly by CIPO and IPIC and the Registrar of Trade-marks maintains the Register of Agents.
10. There are approximately 500 registered patent agents and 1200 registered trade-mark agents in Canada.
11. Founded in 1926, IPIC is a national association of professionals who specialize in intellectual property (patents for inventions, trade-marks, copyright, and industrial designs). IPIC is a voluntary organization (i.e. membership in it is not require to practice as either a patent or trade-mark agent). It has published a code of ethics for patent and trade-mark agents but its discipline is largely ineffective because of the voluntary membership.
12. IPIC has identified its objectives as follows:
 - To represent the interests of Canadian intellectual property practitioners;
 - To influence the development of intellectual property laws to the extent they impact intellectual property matters in Canada;
 - To be the recognized and visible authority on Canadian intellectual property law and practice;
 - To ensure high levels of knowledge, training, and ethics in Canadian intellectual property practitioners; and
 - To increase the level of intellectual property business in the Canadian economy.
13. IPIC has no control over unauthorized practice. Under the *Patent Act*, the Commissioner of Patents may remove an agent from the register for “gross misconduct or any other cause that he may deem sufficient”. Under the *Trade-Marks Act*, there is no provision relating to conduct.

IPIC's Case for Privilege and Self-Regulation

14. Patent and trade-mark agents receive a range of confidential information from clients that may include technical and/or scientific information, business plans and activities and information on competitors' activities. IPIC believes that maintaining the confidence of this information is essential to ensure the client's confidence and trust and to protect the patent and trade-mark rights of clients throughout the world.
15. Currently, no common law or statutory privilege exists in Canada for these agents. IPIC views this as problematic, given the nature of the work of the agents and the problems created within multi-disciplinary partnerships, since the agents cannot be privy to privileged information without risking loss of the privilege. The United Kingdom, Australia, New Zealand and various European countries have legislated the privilege for the agents, and the argument is that lack of privilege in Canada interferes with international dissemination of information.
16. IPIC's proposal for federal legislation providing self-regulation for the agents includes a proposal for legislated privilege. In IPIC's view, the proposal is appropriate for the following reasons:

- Canadian individuals and businesses who obtain legal advice about patents and trade-marks should not be disadvantaged because they are dealing with highly trained and specialized agents, rather than lawyers;
 - Canadian patent and trade-mark agents should not be in a position where they cannot offer services that their counter-parts in other countries can offer.
17. With respect to self-regulation, no guidelines from the Commissioner or the Registrar exist on the conduct of an agent. No procedures exist on how a member of the public can make a complaint about a registered agent, nor is there any provision for discipline, apart from removal from the register if a complaint is made. Furthermore, nothing precludes a de-registered agent from practicing, since there are no provisions in the Acts or Regulations relating to unauthorized practice.
 18. A more complete explanation of IPIC's position on these issues is found in its summary of proposals for privilege and self-governance, at Appendix 1.
 19. The IPIC representatives who met with the Committee advised that they have prepared a business case on the privilege and self-governance for Industry Canada and are addressing the issue with relevant stakeholders, including the Law Society.

B. THE COMMITTEE'S VIEW

20. The Committee felt that as this issue has national scope, the matter should be pursued in a national forum. The Committee is aware that the Federation of Law Societies has established a committee to deal with issues of regulation of non-professionals and developments that relate to lawyer regulation, and proposes that this matter be referred to it.
21. The Committee also proposes that it develop a position on the issue, for Convocation's review, and communicate that position to the Federation's committee early in 2003.

APPENDIX 1

10/22/2002

IPIC BRIEFING MEMO ON PRIVILEGE AND SELF-REGULATION FOR CANADIAN PATENT AND TRADE-MARK AGENTS

A BRIEFING MEMO

PATENT AND TRADE-MARK AGENTS: WHAT DO THEY DO?

Patent agents are scientists or engineers who may be lawyers who have been trained through an apprentice-like procedure in patent law and practice. They have passed through an apprentice-like procedure in patent law and practice. They have passed rigorous examinations on all aspects of patent law and practice including, but not limited to the patentability of inventions and the drafting of patent applications for inventions, the obtaining of patents in respect of such applications, the legal interpretation of patents and applications as they relate to matters of patentability, infringement and validity in order to provide legal advice to clients on such matters to allow clients to make business decisions. The Commissioner of Patents currently regulates patent agents and maintains a register of those who may practice before the Patent Office. The examinations are jointly managed by the Canadian Intellectual Property Office (CIPO) and the Intellectual Property Institute of Canada (IPIC).

In the course of practice, patent agents are the recipients of a spectrum of confidential information from clients including technical and/or scientific matters, client's business plans and activities, as well as information on

competitors' activities. Keeping such information confidential is essential not only to maintain client confidence and trust, but also so as not to jeopardize the patent rights of clients throughout the world. In most jurisdictions non-confidential disclosures of inventions, if they occur prior to the filing of a patent application can invalidate patent rights or severely limit them.

Trade-mark agents are often lawyers, but some are not, as one may become registered to practice by writing a set of rigorous examinations about trade-mark law and practice before the Registrar of Trade-marks. The procedure for becoming a Trade-mark Agent is akin to that for patent agents. These exams are managed jointly by CIPO and IPIC, and the Registrar of Trade-marks maintains the Register of Agents. Trade-mark agents provide legal advice to clients about the adoption of trade-marks, their availability and registrability as well as their enforceability and validity. The examinations cover all such matters. Trade-mark agents receive confidential business information from clients who could be seriously jeopardized by its disclosure. The business information is considered in the light of the law and the rights of others by the trade-mark agent who then provides legal advice to his/her client to allow the client to make a business decision.

Both patent and trade-mark agents may appear before Tribunals headed by the Commissioner of Patents and Registrar of Trade-marks, respectively, on behalf of clients.

THE INTELLECTUAL PROPERTY INSTITUTE OF CANADA (IPIC)

This is the professional organization in Canada for Intellectual Property Practitioners including agents, lawyer agents and others who have an interest in IP. It is a voluntary organization. IPIC has a close relationship with CIPO, Industry Canada, and Heritage Canada and has worked towards the development of stronger IP laws in Canada and throughout the world, towards the development of stronger IP laws in Canada and throughout the world, including the substantial changes that have occurred as a result of the FTA, NAFTA and the WTO. IPIC has a Code of Ethics that governs the behaviour and practice of its members and hence the two professions. However, its discipline process is largely ineffective because of its voluntary membership. Further, CIPO and IPIC have no control over unauthorized practice. Anyone, including lawyers may practice in the areas of patents and trade-marks without benefit of registration, and obviously in the absence of any training.¹

SELF-REGULATION FOR PATENT AND TRADE-MARK AGENTS IN CANADA

CURRENT REGIME

The Commissioner of Patents and the Registrar of Trade-marks currently govern agents in Canada. Sections 12, 15 and 16 of the *Patent Act* relate to patent agents, with Section 16 allowing the Commissioner "for gross misconduct or any other cause that he may deem sufficient" to remove an agent or attorney from the register of patent agents. Sections 12 to 19 of the Patent Rules deal with examinations, who may be registered as a patent agent and how one stays on the register. In the case of trade-mark agents, Section 28 of the *Trade-Marks Act* and Sections 18 to 23 of the Regulations govern agents, although there is no provision relating to conduct at all.

PROBLEMS WITH THE CURRENT REGIME

Thus there are no guidelines from the Commissioner or the Registrar as to how to conduct oneself as an agent, there is no indication as to how a member of the public can make a complaint about a registered agent, nor is there any provision for any discipline, but removal from the register if a complaint is made. Furthermore, there is nothing that precludes a de-registered agent from practicing, since there are no provisions in the Acts or Regulations relating to unauthorized practice.

IPIC is a voluntary professional organization for intellectual property professionals that espouses a modern code of ethics, and adherence to high professional standards. It provides education at all levels to its members, and liaises with the Canadian government and internationally with other government and professional organizations. IPIC works with CIPO to set and mark exams for agents. However, the most severe form of discipline available to IPIC

¹ Report prepared for IPIC on Self Management Structures, Gavin MacKenzie, September 10, 1999

members is expulsion from the Institute for gross misconduct, a penalty that is largely ineffective since membership is not required to practice.

In September 10, 1999, Gavin MacKenzie² delivered a report to the Intellectual Property Institute of Canada relating to the Self-Regulation of the Profession. In this report, Mr. MacKenzie stated:

“The current regulatory regime is seriously ---and I would go so far as to say fundamentally – flawed, for reasons discussed below.”

No single regulatory body that is responsible for admission, professional standards and conduct, and discipline exists for agents in Canada. Registration before the Commissioner and the Registrar is not the equivalent of obtaining a license to practice these professions. Only registered patent agents may file and prosecute patent applications before the Patent Office on behalf of applicants. However, the lack of registration does not stop non-registered persons from performing all the tasks of a registered agent except for the signing of documents filed in the Patent Office which an applicant may sign itself.

The Acts do not cover how agents may carry on their practices. Earlier rules covered agents’ offices and advertising but these have been repealed.

While the self-imposed standards of the profession are generally quite high, those who practice and who are neither members of IPIC or registered with CIPO are subject to no controls of any sort. Unfortunately, there are no easy ways to regulate such activity.

In summary:

- (1) The licensing processes for agents are not as effective as is found in other professions.
- (2) The complaint and disciplinary process is insufficient as provided by the Commissioner and the Registrar, and IPIC.
- (3) IPIC is ineffective because it is a voluntary organization without statutory authority.
- (4) The Commissioner, the Registrar and IPIC have no ability to control unauthorized practice.

The regime in place does not meet the standards of the regulatory bodies of other Canadian professions, which are typically governed by a council comprising members of the profession and public representatives, together with a full-time staff engaged in establishing and enforcing professional standards through admission and discipline processes.

PROPOSAL TO RECTIFY THE SITUATION

IPIC recommends that the Government empower, through legislation, a new College of Patent and Trade-mark Agents to be responsible for the governance of the professions including admission, conduct, complaints and discipline. The broad objectives of the College would encompass ensuring that consumers and stakeholders, including CIPO are able to rely on licensed Canadian Patent and Trade-mark Agents as being knowledgeable and proficient members of the profession and protecting consumers and other stakeholders from licensed and unlicensed persons practicing as agents who do not comply with standards of competence and conduct or who otherwise practice in an unauthorized manner.

² Mr. MacKenzie is an elected benchler of the Law Society of Upper Canada. He chairs the Law Society’s professional regulation committee (which is responsible for professional conduct and discipline) and is co-chair of its strategic planning committee and its task force on the reform of the Rules of Professional Conduct. Mr. MacKenzie is the author of *Lawyers and Ethics: Professional Responsibility and Discipline* (Carswell-Thomson, 1993 with annual supplements). He has been retained as an expert witness on professional responsibility issues in litigation in the United States and Canada.

IPIC would continue to perform its roles as a provider of education programs for the profession, as well as its liaison roles with other stakeholders and CIPO regarding the laws and practice relating to intellectual property in Canada and abroad.

The new College would be modeled on the Canadian Institute of Actuaries, the only other federally regulated profession in Canada. The *Actuaries Act* was created in 1965 and comprises only eight sections that deal with its objects, head office location, membership, council and powers. By-laws are enacted which detail governance provisions, election of council members and rules of professional conduct. Similar legislation would allow the proposed new College flexibility to effect changes to its standards and enforcement mechanisms without requesting and awaiting amendments to its governing statute.

PRIVILEGE FOR PATENT AND TRADE-MARK AGENTS

CURRENT REGIME

There is no common law or statutory privilege for patent and trade-mark agents in Canada. The Federal Court of Canada has consistently found that communications between clients and agents are not protected by privilege: *Whirlpool Corp. v. Camco. Inc.* (1997), 72 C.P.R. (3d) (F.C.T.D.); *Montreal Fast Print v. Polylok Corp.* (1999), 74 C.P.R. (2d) 47 (F.C.T.D.)

There is even conflicting authority as to whether solicitor-client privilege attaches to communications with solicitors acting as patent agents. The courts recognized solicitor-client privilege for lawyer/patent agents in the following cases: *Lumonics Research Ltd. v. Gould* (1983), 70 C.P.R. (2d) 11 (F.C.A.); *F.P. Bourgault Industries Air Seeder Division Ltd. V. Flexi-Coil Ltd.* 64, C.P.R. (3d) 70 (F.C.T.D.); and *Sunwell Engineering Co. v. Mogilevsky* (1986), 9 C.P.R. (3d) 479 (Ont. S.C.). However the court did not recognize this privilege for lawyers doing agency work in *Montreal Fast Print v. Polylok Corp.* (supra).

PROBLEMS WITH THE CURRENT REGIME

Patent agents are knowledgeable in the technology of the patents they draft. Patent and trade-mark agents are specialists in the legal issues relating to patents and trade-marks. Consequently, patent and trade-mark agents are particularly qualified to advise clients on whether or not they can get a patent or a trade-mark registration; and whether or not someone else is infringing upon their rights. Clients who come to patent and trade-mark agents should be able to divulge their confidential information regarding their inventions, their trade-marks, and their business plans without fear that all of this information can be later divulged in a court proceeding relating to these very rights.

At the present time, Canadians who are clients of patent and trade-mark agents are not protected by privilege in the way that they should be.

The purpose of privilege is to ensure frank communication between a client and his or her legal advisor, to facilitate decisions on what a client should do. The communications between a patent or trade-mark agent and his or her client clearly meet two of the three requirements set out in the case of *Canada v. Solosky*³: The communication entails the seeking or giving of legal advice and it is intended to be confidential by the parties. The difference here is that the legal advice is coming from trained and qualified patent and trade-mark agents and not lawyers.

There are also problems in multi-disciplinary partnerships, since agent partners cannot be privy to solicitor-client information without risking a loss of the privilege.

The lack of privilege also creates a problem for Canada on the international stage. Britain, New Zealand and Australia have legislated privilege for patent and trade-mark agents. Amendments to the European Patent Convention will be enacted this year to provide for privilege for all European Patent Attorneys (18 countries) registered to practice before the European Patent Office. In Japan, steps are being taken to accomplish the same

³ [1980] S.C.R. 821

goal. In the U.S., although there is no legislation for agents, the courts have extended privilege to patent agents who are registered before the U.S. Patent and Trademark Office. The U.S. courts have also noted that in the case of trade-mark agents:

“I am confident that where Congress allows non-attorneys to practice law before federal agencies, a commensurate attorney-client privilege arises over communications with clients necessary to practice in the areas authorized.”

John Labatt Limited v. Molson Breweries 898 F. Supp. 471 (E.D. Mi 1995)

From a practical perspective, an agent who does not have privilege is disadvantaged in dealing with Canadian and U.S. clients. In Canadian litigation, the communications will be disclosed. In U.S. litigation, the same is true. The U.S. courts will recognize privilege of foreign agents where the foreign country grants such privilege. Thus information given to an agent from Britain could not be produced; while information given to a Canadian agent could be produced.

PROPOSAL TO RECTIFY THE SITUATION

IPIC recommends that privilege be given to the communications between patent and trade-mark agents and their clients relating to patent and trade-mark matters, by means of legislation.

Privilege is necessary to recognize the reality of the practice of patent and trade-mark agents. As stated by the New Zealand Court of Appeal:

“For many years, patent attorneys felt at a disadvantage in that, although effectively giving legal advice, the communications between them and their clients were not protected from production in any proceedings. Yet, at times these communications were highly confidential. Understandably, there was some agitation to reform the law.”

Frucor Beverages Limited v. RT Fyers et al. (decision dated Feb. 19, 2001)

The policy reasons behind such legislation are twofold:

- (1) Canadian individuals and businesses who obtain legal advice about patents and trade-marks should not be disadvantaged because they are dealing with highly trained and specialized agents, rather than lawyers; and
- (2) Canadian patent and trade-mark agents should not be in a position where they cannot offer services that their counterparts in other countries can offer.

The legislation to protect communications between patent and trade-mark agents and their clients is consistent with the overall approach of the law in recognizing the need to protect confidential disclosures and legal advice between those qualified to give the advice (in this case patent and trade-mark agents) and those who need it, their clients.

It was moved by Mr. Hunter, seconded by Mr. Cherniak that Convocation refer the issues of privilege for patent and trade-mark agents and the establishment of a regulatory college for the agents to the Committee of the Federation of Law Societies and that the Emerging Issues Committee report back to Convocation in early 2003 with a position to transmit to the Federation.

Carried

TASK FORCE ON THE CONTINUUM OF LEGAL EDUCATION REPORT

Mr. Hunter presented the Task Force on the Continuum of Legal Education Report for information only.

Task Force on the Continuum of Legal Education
November 21, 2002

Information Report to Convocation

Purpose of Report: Information

Task Force Members

George Hunter, Chair
Barbara Laskin
Gregory Mulligan
Niels Ortvad

INFORMATION

OVERVIEW

Summary of Issue

1. In April 2002 the Task Force submitted an interim report to Convocation with a proposed new framework for admission to the Law Society of Upper Canada.
2. Convocation authorized the Task Force to seek input from lawyers, legal organizations, law schools, and BAC section heads, faculty and students on the direction set out in the report.
3. The Task Force proposed to return to Convocation with a final report in September 2002.
4. In accordance with Convocation's direction the Task Force has spent a number of months engaged in the consultation process and has undertaken further research into the issues discussed in the interim report and the questions raised by benchers at that time.
5. The consultations undertaken to this date have revealed support for many aspects of the proposal, but as well, the need for greater information on other points.
6. The Task Force requires further time to complete its consultations and to conduct further study of the issues. This is essential to ensure that the Task Force's final recommendations are complete, reflect the Law Society's competence mandate, and satisfy Convocation's direction to consult appropriately.
7. The Task Force will return to Convocation in the spring of 2003 with a further progress report and proposed deadline for its final report.

THE REPORT

Background

8. On April 25, 2002 the Task Force on the Continuum of Legal Education provided its interim report to Convocation outlining a proposed new direction for the bar admission process in Ontario. The Task Force sought authorization from Convocation to consult with lawyers, legal organizations, law schools, and BAC section heads, faculty, and students on the proposed direction.
9. Convocation authorized the consultation process.

10. The Task Force's intention was to provide a final report in September 2002.

The Consultation Process

11. The Task Force has undertaken a number of steps to consult with interested parties on its interim report. To bring the consultation process to the profession's attention the following steps were taken:
 - a. A Notice to the Profession in French and English was placed in the *Ontario Reports* in June 2002, advising the profession of the report and requesting comments by August 12, 2002;
 - b. A Notice was also printed in the *Ontario Lawyers Gazette* and posted on the Law Society's web site;
 - c. When few comments were received by the deadline, the Task Force extended the deadline to mid-September;
 - d. The Notices also informed the profession of the location of an on-line bulletin board where comments could be posted;
 - e. Letters and a copy of the report were sent to a wide range of legal organizations requesting comments by August 19, 2002. The deadline was extended to September 16, 2002. A list of these organizations is set out at Appendix 1 to this report;
 - f. Letters were sent to approximately 900 articling principals in July 2002 requesting their comments on the report by September 1, 2002;
 - g. The report was brought to the attention of and discussed with the Deans of Ontario's law schools.
12. The Task Force has received written comments from 17 individuals and five legal organizations.
13. On September 18, 2002 the Task Force heard oral submissions from representatives from l'AJEFO and Rotiio'taties. The representative from the Equity Advisory Group (EAG) was unable to attend, but the joint submission from EAG and the Equity and Aboriginal Issues Committee (EAIC) was available for the Task Force's review and was summarized by the Acting Equity Adviser, Jos9e Bouchard.
14. On September 18, 2002 the Task Force also met with four of the bar admission course section heads, Jeff Cowan (Public), Janet Leiper (Criminal), Michael Watson (Civil), and Donald Thomson (Real Estate).
15. Also, on September 18, 2002 the Task Force met with a group of articling principals from diverse work and practice settings including large firms, small firms, sole practitioners and government, and from locations around the province.
16. Meetings at the 6 Ontario law schools have either taken place or are upcoming.

Continued Consultations and Research

17. The consultations with section heads, articling principals and equity, francophone and Aboriginal representatives, as well as the written submissions received, have demonstrated support for many of the components of the Task Force's proposed framework, but have also raised questions about other aspects and illustrated the need for further research and consultation with respect to details of how the proposal would be implemented.
18. Such continued consultation will ultimately allow the Task Force to provide Convocation with an in-depth description of its proposal and more detailed responses to the issues raised by benchers in April 2002 and during the consultation process.

The Law Society's Professional Development and Competence Mandate

19. In its interim report the Task Force noted that its views have to some extent been guided by the Law Society's new, increased commitment to supporting members in their efforts to maintain and enhance their competence, *post-call*. The Law Society is currently developing a number of initiatives that focus on the importance of lawyers' commitment to lifelong learning. The Competence Model approved by Convocation in March 2001 is a professional development model, the essential component of which is the professional's commitment to maintaining and enhancing competence throughout his or her career.
20. Since Convocation's consideration of the Task Force's interim report, the Professional Development and Competence Committee (now the Professional Development, Competence & Admissions Committee) has submitted for Convocation's approval, the proposed design for the remaining components of the March 2001 competence model. The designs of all the components have now been approved and implementation is underway. The Professional Development and Competence department, which is responsible for pre-call and post-call issues, is facilitating the development of a structure to implement Convocation's policies for pre and post-call learning and competence.
21. The Task Force is of the view that the process in which it is engaged must be pursued in context if it is to result in a recommendation that reflects the best interests of the public and the profession. Many of the supportive learning tools the Task Force has envisioned for the bar admission process overlap with the implementation of the post-call competence mandate. Given that the two processes are operationally linked and given the stage of implementation at which the competence mandate currently stands, it is wise to allow some further opportunity for the competence model to be implemented before finalizing the recommendations of the Task Force.
22. The Task Force believes that in the coming months the links between the two aspects of the department will become even clearer and the Task Force's ultimate recommendations will benefit from the overlap. For example, there may be supportive tools developed for lawyers that may also support and enhance the articling program and support aspects of the professional responsibility and practice management course that would continue to be taught in the BAC.
23. While the Task Force continues its work, the current BAC program will continue to operate and must continue to reflect the needs of the candidates for admission and the Law Society's competence mandate. This may entail improvements to current operations so that the pre-call component is a seamless part of the overall competence mandate. These operational issues and shifts will be useful to further inform the Task Force's work.

Next Steps

24. For the reasons set out above, the Task Force believes it is premature to attempt to finalize its interim report. To ensure a meaningful study of the issues and a detailed final report, it will continue the consultation process Convocation authorized.
25. The Task Force will return to Convocation in the spring of 2003 with a further progress report and a proposed deadline for its final report.

APPENDIX 1

List of Organizations from Whom Comments were sought

Advocacy Resource Centre for the Handicapped
 The Advocates' Society * #
 African Canadian Legal Clinic

Association des juristes d'expression française de l'Ontario (A'JEFO) * #
 Association of Chinese Canadian Lawyers
 Association of Law Officers of the Crown
 Canadian Association of Black Lawyers
 Canadian Association of Visually Impaired Lawyers
 Canadian Corporate Counsel Association
 County & District Law Presidents' Association (Executive feels no submission is necessary)
 Criminal Lawyers' Association
 Equity Advisory Group * #
 Family Lawyers' Association
 Indigenous Bar Association
 Medico-Legal Society of Toronto
 Metro Toronto Chinese & Southeast Asian Clinic
 Metropolitan Toronto Lawyers' Association
 Ontario Bar Association *
 Ontario Centre for Advocacy Training (OCAT)
 Ontario Crown Attorneys' Association
 Ontario Real Estate Lawyers Association
 Ontario Trial Lawyers Association *
 Refugee Lawyers Association * #
 Rotiio' taties * #
 South Asian Lawyers Association
 Women's Law Association

* denotes those that indicated they would make a submission

denotes submissions actually received

FEDERATION OF LAW SOCIETIES OF CANADA REPORT

Mr. Hunter gave an oral informational report on the work of the Federation including issues dealing with money laundering, mobility, CanLII, Legal Aid, Immigration, Paralegals and no fault insurance.

PROFESSIONAL REGULATION COMMITTEE WORKING GROUP ON CONTINGENT FEES REPORT

Mr. MacKenzie presented the Report of the Professional Regulation Committee Working Group on Contingent fees for approval by Convocation.

Professional Regulation Committee
 Working Group on Contingent Fees
 November 21, 2002

Report to Convocation

Purposes of Report: Decision

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

AMENDMENT TO RULE 2.08(5) OF THE *RULES OF PROFESSIONAL CONDUCT* ON CONTINGENT FEES

Request to Convocation

1. Convocation is asked to make the following amendment, in bold text, to subrule 2.08(5) of the *Rules of Professional Conduct* on contingent fees:
 - (5) Except as permitted by the *Class Proceedings Act, 1992*, or any order made under it, an agreement under subrule (3) shall not:
 - (a) require the lawyer's consent if the client decides to discontinue or settle his or her claims, or
 - (b) include a term that prevents the client from changing lawyers or ending the lawyer and client relationship at any time.
2. The amendment is necessary to clarify that the provisions of the *Class Proceedings Act, 1992* are not subject to this rule.

A. BACKGROUND

3. On October 31, 2002, Convocation adopted the following rule on contingent fees:

Contingent Fees and Contingent Fee Agreements

2.08 (3) Subject to subrules (1), (4) and (5), except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement signed by the lawyer and his or her client, or where the client is under a disability, by the client's litigation guardian or other duly appointed representative, that provides that the lawyer's fee is contingent, in whole or in part, on a specified disposition of the matter for which the lawyer's services are to be provided.

- (4) An agreement under subrule (3) shall contain:
 - (a) a statement of the method by which the fee is to be determined, including the percentage that may accrue to the lawyer in the event of settlement, trial or appeal, and
 - (b) a statement that the client may apply to the Superior Court of Justice for a determination of whether the contingent fee is fair and reasonable.
- (5) An agreement under subrule (3) shall not:
 - (c) require the lawyer's consent if the client decides to discontinue or settle his or her claims, or
 - (d) include a term that prevents the client from changing lawyers or ending the lawyer and client relationship at any time.

COMMENTARY

The Contingent Fee Agreement

A contingent fee agreement should:

- a. be signed by a witness, and set out the name, address, and phone number of the witness;
- b. briefly describe the nature of the client's claim;
- c. contain a simple example of how the fee will be calculated;
- d. contain a statement that the lawyer's fee may be lesser or greater than fees charged by other lawyers for similar claims and that before signing the agreement the client has the right to consult with and retain another lawyer;
- e. contain a statement that the client has the right to decide whether to accept an offer to settle his or her claim;
- f. contain a statement of who will be responsible for paying costs and disbursements, and
- g. contain a statement setting out the circumstances in which the agreement may be terminated by the lawyer or by the client and the consequences of termination, including how the lawyer's fee is to be determined in such circumstances.

Immediately after the signing of a contingent fee agreement, the lawyer should deliver a copy to the client.

The Percentage of the Award and Treatment of Costs

In determining the appropriate percentage or other basis of the contingent fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. If the lawyer and client agree that the costs award is to be paid to the lawyer, a smaller percentage of the award than would otherwise be agreed upon for the contingent fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

4. On November 12, 2002 a member of the profession communicated with Gavin MacKenzie with a concern that the subrule (5) prohibitions were inconsistent with the scheme under the *Class Proceedings Act, 1992*. In summary, the concerns were:
 - a. In class proceedings, retainer agreements must be approved by the court before they are enforceable. In a number of cases, courts have approved retainer agreements containing the clauses that the new rule purports to prohibit in subrule (5).
 - b. With respect to consent to settlement in a class proceeding, the representative plaintiff is not in the same position as a private litigant. He or she is litigating the claims of the class, not just a personal claim. The law is clear that representative plaintiffs owe fiduciary duties to the class, in particular after certification. Class counsel owe those same duties to the class. The judge also has a major role in protecting the interests of absent class members. If a particular representative plaintiff were to insist that a particular settlement offer were to be rejected, notwithstanding that the offer was in the best interests of the class, class counsel and the court arguably have a duty to determine whether the settlement proposal made sense, and if so, whether it met the standards set out in the Act. If these tests are met, the settlement ought to be approved, whether or not the plaintiff agrees with it.
 - c. With respect to changing counsel, many certification orders specifically name and appoint class counsel so the class counsel cannot be changed without the court's approval. The representative plaintiff ought not to be able to seek certification with one counsel and later purport to amend the certification order by firing that lawyer and choosing new counsel, all without court approval. The court would have a major role to play in such circumstances, as it, and not the named plaintiff or the lawyer, has the ultimate veto. The case law is clear that the courts will exercise these powers in appropriate cases, even against the wishes of the named plaintiff.

B. THE PROPOSAL

5. To clarify the fact that the *Class Proceedings Act, 1992* was not intended to be subject to the rule, and indeed cannot be made subject to the rule because it is legislation that supersedes the *Rules of Professional Conduct*, the amendment to subrule (5) noted in paragraph 1 is being proposed.
6. As this is essentially a housekeeping amendment to the new rule, the Professional Regulation Committee's working group on contingent fees, of which Mr. MacKenzie is the chair, is bringing this matter directly to Convocation, following consultation with the Chair of the Committee. Pursuant to By-Law 9 on Committees, Convocation has the authority to make (and amend) the Rules.¹²

¹ Section 15 of By-Law 9 includes the following:

Re: Amendment to the Rules of Professional Conduct on Contingent Fees

It was moved by Mr. MacKenzie, seconded by Mr. Simpson that subrule 2.08(5) of the Rules of Professional Conduct on contingent fees be amended as follows:

- (5) Except as permitted by the *Class Proceedings Act, 1992*, or any order made under it, an agreement under subrule (3) shall not:
- (a) require the lawyer's consent if the client decides to discontinue or settle his or her claims, or
 - (b) include a term that prevents the client from changing lawyers or ending the lawyer and client relationship at any time.

Carried

PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE REPORT

Mr. Cherniak presented the Report of the Professional Development, Competence & Admissions Committee for approval by Convocation.

Professional Development, Competence & Admissions Committee
November 21, 2002

Report to Convocation

Purpose of Report: Decision
 Information

Prepared by the Policy Secretariat
(Julia Bass 416-947-5228
Sophia Sperdakos 416-947-5209)

OVERVIEW OF POLICY ISSUES

PRACTICE MANAGEMENT GUIDELINES

Request to Convocation

1. That Convocation approve the Practice Management Guidelines set out at Appendix 1 to the report.
2. That Convocation authorize staff to make additions to or deletions from the "Links and Supplementary Information" column without having to return to Convocation for approval.

Rules of professional conduct

(2) Except when Convocation has established a committee other than a standing committee to prepare rules of professional conduct, subject to the approval of Convocation, the Professional Regulation Committee may prepare rules of professional conduct.

Authority of Convocation

(3) Despite subsection (2), Convocation may at any time adopt rules of professional conduct.

Summary of the Issue

3. In March 2001, Convocation approved the Professional Development and Competence Committee's Report on implementing the Law Society's competence mandate. The approved model has five components, one of which is the development of competence guidelines. The first guidelines to be developed are those relating to practice management.
4. In June 2002 draft guidelines were provided to Convocation with a request that Convocation authorize the Professional Development and Competence Committee (now PDC&A) to seek input on them from the profession.
5. The Consultation process has been completed and the guidelines are now ready to be "published" for the profession's use in accordance with the by-law making authority set out in section 62 (0.1) 11 of the *Law Society Act*, and By-law 9.
6. The Committee is of the view that the guidelines should be subject to approval by Convocation and any future changes or additions should also be provided to Convocation for its consideration and approval. However, in the Committee's view, the supportive links and supplementary information, which are provided simply as tools to assist members who wish to avail themselves of them, should not be subject to approval. To require such approval would undermine the usefulness of the guidelines as a competence-enhancing tool.

CREATION OF NEW BAC PRIZES

Request to Convocation

7. That, where a prospective donor wishes to create a BAC prize,
 - a. The Law Society should use best efforts to persuade the donor to make the donation in the form of a bursary to benefit a needy student, rather than a prize;
 - b. Bursary donors should be given the same prominence as prize donors at the Call to the Bar ceremony;
 - c. Where the donor clearly prefers the creation of a prize, the option of the donor creating the prize at one of the Ontario law schools should be discussed, and
 - d. Where a BAC prize is created the terms of the prize should be flexible enough to accommodate possible future changes in the BAC, such as a reduction in the total number of examinations.

Summary of the Issue

8. There is no clear procedure for the establishment of BAC prizes. Although most of the prizes currently in existence were approved by Convocation, some were not. There are currently dozens of prizes awarded to students in the BAC. There is no consistency in the prizes in terms of size, geography and area of law, and many of the prizes are under-funded.
9. Rising law school tuition fees have made financial conditions for BAC students more difficult and many are graduating from law school with substantial debts. This makes the creation of bursaries a higher priority than the creation of more BAC prizes.
10. A policy for the creation of new prizes would be fiscally prudent and result in a transparent, consistent procedure. If Convocation approves the Committee's proposal, the Committee will then undertake an

examination of current prizes to consider their appropriateness and continued relevance and will return to Convocation with further recommendations.

THE REPORT

Terms Of Reference/Committee Process

11. The Committee met on November 8, 2002. Committee members in attendance were Earl Cherniak (Chair), George Hunter (Vice-Chair), Bill Simpson (Vice-Chair), Abe Feinstein, Gregory Mulligan, and Rich Wilson. Staff in attendance were Julia Bass, Josée Bouchard, Diana Miles, and Sophia Sperdakos. Malcolm Heins also attended the meeting.

12. The Committee is reporting on the following matters:

Policy – For Decision

- Competence Model – Practice Management Guidelines
- Creation of new BAC Prizes

Information

- Report on Specialist Certification Matters Finalized by the Certification Working Group on September 24, 2002 and approved by the Committee on November 8, 2002.

PRACTICE MANAGEMENT GUIDELINES

Background

13. In March 2001, Convocation approved the Professional Development and Competence Committee's Report on implementing the Law Society's competence mandate. The approved model has five components, one of which is the development of competence guidelines. The first guidelines to be developed are those relating to practice management.
14. In June 2002 draft guidelines were provided to Convocation with a request that Convocation authorize the Professional Development and Competence Committee (now PDC&A) to seek input on them from the profession.
15. The consultation process consisted of the following:
 - a. Prior to the presentation of the guidelines to Convocation the draft was sent to 25 practitioners in private practice who reviewed them.
 - b. A Notice to the Profession was published in the *Ontario Reports* in French and English on July 19, 2002 and August 16, 2002 advising of the consultation on the practice management guidelines and seeking input until September 16, 2002.
 - c. A broadcast e-mail seeking input on the guidelines was sent to members of the Law Society with e-mail addresses, approximately 17,000 members.
 - d. The draft guidelines were posted on the Law Society's website at www.lsuc.on.ca under "Important Notices" with a request for input until September 16, 2002.
 - e. A notice was included in the Summer 2002 edition of the *Ontario Lawyers Gazette* seeking input on the guidelines until September 16, 2002. The Treasurer's message in that edition refers to the guidelines and the practice section includes an article on the guidelines.
 - f. A letter was sent to legal organizations and associations on August 19, 2002 seeking input on the guidelines by October 1, 2002.

- g. The guidelines were translated into French and made available on the website and upon request. The broadcast e-mail to members included e-mail in French to 149 members who have requested communication in French.
- 16. The guidelines have generated few comments. The Law Society has received a handful of e-mails, all very brief (a paragraph or two), but positive in nature.
- 17. Only one legal organization has provided written comments, although CDLPA requested the opportunity to have Diana Miles attend their plenary session in November to discuss the guidelines. This meeting will have occurred by the date of Convocation. The Law Society requested that the counties provide any comments or questions prior to the plenary session. To date no comments have been received.¹
- 18. Few changes have been made to the draft that was before Convocation in June 2002. Since June, however, many additional “links” and supporting material have been added, to assist members who wish to use such tools to improve their practice management processes.

Discussion

- 19. The practice management guidelines, contained in Appendix 1, are now ready to be “published” for the profession’s use in accordance with the by-law making authority set out in section 62 (0.1) 11 of the *Law Society Act*, which states:

Convocation may make by-laws,

11. Authorizing and providing for the preparation, publication and distribution of guidelines for professional competence.

and By-law 9, which states,

14. (2) Subject to the approval of Convocation, the Professional Development, Competence and Admissions Committee may prepare guidelines for professional competence.

- 20. In the PD&C Committee’s March 2000 Consultation Document, which discussed the development of competence guidelines, the Committee noted:

In view of the provisions of the Act that expressly provide for the assessment of member competence, the Law Society must develop recognized and accepted performance guidelines against which member performance in pre-determined areas can be evaluated. Guidelines will assist members to know what the Law Society expects of them. . . Guidelines concerning these subject areas would serve as a preventive tool (if members are made aware of approaches they should take to specific issues, they may avoid making errors). Further, they would help to ensure fairness in mandatory processes such as practice review and competence hearings.

- 21. In the Committee’s March 2001 report that approved a professional development competence model the Committee noted:

During [the consultation process] many participants confirmed to the Committee the need for, and benefit of, guideline development, both as a monitoring mechanism and to provide members with guidance as to the validity and reliability of their own approaches to competent performance. Many participants felt that, in view of the existence of

¹ The Metropolitan Toronto Lawyers Association provided positive feedback and constructive comments.

section 41 of the Act regarding standards of competence, the development of practice guidelines in specified areas would be important to inform members of expectations regarding competent performance.

22. Guidelines are to be used both as a supportive tool and to address competence-related issues.
23. As such it is important to have the guidelines and any subsequent changes to their substantive content approved by Convocation.
24. The guidelines also contain tools to assist members in maintaining and improving their competence. This is the “links and supplementary information” column on each page of the guidelines. Links will be added and removed on a regular basis as supportive features are added to the electronic (and print) document. These are not part of the guidelines, but are supplementary to them. To require Convocation to approve every change to these links would be a cumbersome and unnecessary procedure and would undermine one of the goals of guideline development that guidelines be flexible and easily adaptable.

CREATION OF NEW BAC PRIZES

Background

25. There is no clear-cut procedure for the establishment of new prizes in the BAC, although most of the existing prizes were approved by Convocation prior to being established.
26. Two potential prize donors have recently approached the Law Society, one proposing a prize for the top family law student in the London BAC (although such a prize already exists) and one for a more general prize to be funded by a significant donation. It is thus fairly urgent to create some clear guidelines on the approach to be followed.
27. There are currently dozens of prizes awarded to students in the BAC. There is no consistency in the prizes in terms of size, geography and area of law, and many of the prizes are under-funded. (In a year where there are two calls to the bar, for example, awards must be divided, resulting in some graduates being given cheques for \$12.50 each). A complete list of existing prizes is attached at Appendix 2.
28. Many if not most of these prizes date back to when the Law Society was essentially running a law school, and many of the prizes are of a similar nature to prizes awarded at law schools (e.g. the highest grade in criminal law or family law).
29. Some of the criteria used in awarding the existing prizes are no longer considered relevant or even appropriate, or may raise problems of interpretation (e.g. highest mark in family law in London, Ontario: students’ call locations do not always correspond with where they took the course and/or wrote the examinations).
30. The current structure of the BAC and BAC examinations is under review. The Task Force on the Continuum of Legal Education has recommended that the total number of examinations be reduced to three (a Barristers’ Examination, a Solicitors’ Examination and a Professional Responsibility Examination). If such a recommendation were ultimately implemented, examinations in this form would make most of the current prizes inapplicable.
31. For many students, the BAC is seen as a pass/fail professional examination rather than a major academic undertaking. Final qualifying exams in other professions have very limited acknowledgements of top performers.

32. Rising law school tuition fees have made financial conditions for BAC students more difficult and many are graduating from law school with substantial debt. This makes the creation of bursaries a higher priority than the creation of more BAC prizes.
33. The appropriate approach to the existing BAC prizes, many of which would become inapplicable if the examination structure were to change, is a much more complex issue than the policy on the creation of new prizes and in many cases it may necessitate resort to the courts to reopen the terms of a trust. This larger question will be brought to the Committee and Convocation for consideration in due course.
34. By-Law 11 was recently amended to permit students to be called to the bar in alphabetical order rather than in order of precedence by prize. Although prizewinners' names are read out at every call to the bar, this is not required by by-law. Prizes and prizewinners' names could simply be listed in the call to the bar program. Similarly, individuals or firms who donate bursaries could be acknowledged on the program, giving them equal prominence with prize donors. This might serve to give the necessary prominence to the donors.

INFORMATION

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE CERTIFICATION WORKING GROUP ON SEPTEMBER 24, 2002 AND APPROVED BY THE COMMITTEE ON NOVEMBER 8, 2002.

35. The Committee is pleased to report final approval of the following lawyers' applications for certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation:	Gary M. Caplan (Toronto) Albert M. Conforzi (Toronto) Jeffrey S. Leon (Toronto)
Construction Law:	Kenneth P. Eccleston (Toronto)
Family Law:	Deirdre D. Smith (Toronto)

36. The Committee is pleased to report final approval of the following lawyers' applications for re-certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation:	Robert L. Colson (Toronto) James D. Higginson (Hamilton) Marvin J. Huberman (Toronto) David B. Williams (London)
Family Law:	Douglas F. Cousins (Mississauga) Susan E. Hodgson (Ottawa) Stanley P. Jaskot (Hamilton) Esther L. Lenkinski (Toronto)

APPENDIX 2

BAC PRIZES

NAMED FOR INDIVIDUALS

1. The S. J. Birnbaum Q.C. Scholarship - First Prize (LST)
 - for the student attaining the highest grade in *Estate Planning*
2. The S. J. Birnbaum Q.C. Scholarship - Second Prize (LST)
 - for the student attaining the second highest grade in *Estate Planning*
3. The S. J. Birnbaum Q.C. Scholarship - Third Prize (LST)
 - for the student attaining the third highest grade in *Estate Planning*
4. The William Belmont Common, Q.C. Prize for Criminal Procedure (LSF)
 - for the student attaining the second highest grade in *Criminal Procedure*
5. The Ronald O. Daly Scholarship (LSF)
 - for the student attaining the highest grades in the *Bar Admission Course*
6. The Beverley Genest Prize (LSF)
 - for the student attaining the highest grade in *Family Law at London*
 - (recipient receives both medal & cash)
7. The Herbert Egerton Harris Advocacy Scholarship (LSF)
 - for the student attaining the highest grade in *Civil Litigation*
8. The Herbert Egerton Harris Advocacy Scholarship (LSF)
 - for the student attaining the second highest grade in *Civil Litigation*
9. The Margaret P. Hyndman, O.C., Q.C., D.C.L. Prize donated by the Alpha Mu Chapter, Kappa Beta Pi Legal Association (LSF)
 - for the student attaining the second highest grade in *Business Law*
10. The Samuel Lerner, Q.C. Prize in General Advocacy
 - for the student attaining the highest combined grades in *Civil Litigation, Public Law, and Family Law*
11. The Isadore Levinter Prize donated by The Advocates' Society (LSF)
 - for the student attaining the highest grade in *Public Law*
12. The Isadore Levinter Memorial Award (LSF)
 - for the student attaining the second highest grades in the *Bar Admission Course*
13. The Edwin George Long, K.C. Memorial Scholarship (LSF)
 - for the student attaining the highest grades in the *Bar Admission Course*
14. The Edwin George Long, K.C. Memorial Scholarship (LSF)
 - for the student attaining the second highest grades in the *Bar Admission Course*
15. The E. J. McGrath Prize (General Fund)
 - for the student at London who has most clearly demonstrated excellence in the skills required in Criminal Practice
 - (not determined simply by grades - London BAC staff should be asked who recipient to be)
16. The Margaret McNulty Award (LSF)
 - for the student who, among the graduates of the Faculty of Law, University of Western Ontario, attained the highest grades in the *Bar Admission Course*.
17. The Vera L. Parsons Prize (LSF)
 - for the student attaining the highest grade in *Criminal Procedure*

18. The Arthur Wentworth Roebuck Award donated by friends of the late Senator Roebuck (LSF)
 - for the student attaining the highest grade in *Family Law*
19. The Joseph Sedgwick, Q.C. Prize (LST)
 - for Criminal Procedure
20. The Elisabeth Slasor Prize donated by Gowling Lafleur Henderson LLP
 - for the student attaining the highest grade in *Estate Planning at Ottawa*
21. The Stuart Thom Prize donated by Osler, Hoskin & Harcourt (LSF)
 - for the student attaining the highest grade in *Business Law*

PRIZES NAMED FOR FIRMS OR ORGANIZATIONS

22. The Gowling Lafleur Henderson LLP Prize (LSF - Gowling Lafleur Henderson LLP)
 - for the student attaining the highest grades in the *Bar Admission Course at Ottawa*
23. The Harcourts Advocacy Award (LSF)
 - for the student attaining the highest combined grades in *Civil Litigation, Family Law and Criminal Procedure*
24. The International Academy of Trial Lawyers Plaque
 - for the student attaining the highest grade in *Civil Litigation*
(recipient has his/her name engraved [by Birks] on one of gold plates
Status: Plaque Prize only
25. The McCarthy Tétrault Business Law Prize donated by McCarthy Tétrault (LSF)
 - for the student attaining the highest grade in *Business Law at Toronto*
26. The McCarthy Tétrault Business Law Prize donated by McCarthy Tétrault (LSF)
 - for the student attaining the highest grade in *Business Law at Ottawa*
27. The McCarthy Tétrault Business Law Prize donated by McCarthy Tétrault (LSF)
 - for the student attaining the highest grade in *Business Law at London*
28. The Harrison Pensa Prize (LSF - Harrison Pensa send cheque)
 - for the student attaining the highest grades in the *Bar Admission Course at London*
29. The Practitioners' Prize in Real Estate (LSF)
 - for the student attaining the highest grade in *Real Estate*

LAW SOCIETY PRIZES

30. The Treasurer's Medal
 - for the student attaining the highest grades in the *Bar Admission Course*
(medal prize only - to be sent for engraving at Birks - no monetary gift)
31. Law Society's First Prize (out of General Fund ea. yr.)
 - for the student attaining the second highest grades in the *Bar Admission Course*
32. Law Society's Second Prize (out of General Fund ea. yr.)
 - for the student attaining the third highest grades in the *Bar Admission Course*
33. Law Society's Third Prize (out of General Fund ea. yr.)

- for the student attaining the fourth highest grades in the *Bar Admission Course*
34. The Osgoode Society for Canadian Legal History Prize
(prizes made available through the Osgoode Society offices each year)
- for the twenty-five students attaining the highest grades in the *Bar Admission Course*

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

- (1) Copy of the Practice Management Guidelines.

(Appendix 1, pages 11 – 77)

Re: Practice Management Guidelines of the Competence Model

It was moved by Mr. Cherniak, seconded by Ms. Carpenter-Gunn that the Practice Management Guidelines set out in Appendix I be approved.

Carried

It was moved by Mr. Cherniak, seconded by Ms. Carpenter-Gunn that the staff be authorized to make additions to or deletions from the “Links and Supplementary Information” column without having to return to Convocation for approval.

Carried

Re: Creation of New Bar Admission Course Prizes

It was moved by Mr. Cherniak, seconded by Mr. Simpson that where a prospective donor wishes to create a BAC prize,

- a. The Law Society should use best efforts to persuade the donor to make the donation in the form of a bursary to benefit a needy student, rather than a prize;
- b. Bursary donors should be given the same prominence as prize donors at the Call to the Bar ceremony;
- c. Where the donor clearly prefers the creation of a prize, the option of the donor creating the prize at one of the Ontario law schools should be discussed, and
- d. Where a BAC prize is created the terms of the prize should be flexible enough to accommodate possible future changes in the BAC, such as a reduction in the total number of examinations.

Carried

MOTION – ESTABLISHMENT OF A TASK FORCE TO STUDY THE PROVISION OF LEGAL SERVICES TO THOSE WITHOUT SUFFICIENT MEANS

It was moved by Mr. Wilson, seconded by Mr. Swaye that –

Whereas the Law Society of Upper Canada is dedicated to the provision of legal services to all citizens of Ontario

And Whereas during the recent past lawyers have either in concert or for private reasons preferred to refrain from the provision of services to those citizens who are of limited means and qualify for a Certificate under the Ontario Legal Aid Plan

And Whereas in the recent past the Law Society of Upper Canada terminated its direct responsibility for the operation of the Ontario Legal Aid Plan

And Whereas it is deemed proper for the Law Society to review its position relating to the responsibility that it may have to assuring that lawyers are available to fulfill their role as the providers of such services either as private practitioners or in the employ of the Government.

Be it resolved that Convocation forthwith appoint a task force to examine and report to Convocation on all matters relating to the responsibility for the provision of service to those without sufficient means, remaining with The Law Society of Upper Canada, and without limiting the scope to report on

- a) Whether it is the view of the Task Force that there is any lingering responsibility in the Law Society for the insurance that people of limited means are provided with prompt and competent legal services
- b) Whether, with the passage of the last few years, there are sufficient lawyers entering the areas of particular need e.g. Criminal Law, Family Law, Landlord and Tenant Law, where the lawyer holds themselves generally available to accept Legal Aid certificates
- c) Whether in the opinion of the Task Force it is appropriate that lawyers employed by organizations controlled by others than members of the Society (Legal Aid Ontario) provide legal services to the public.
- d) Whether the allegations of backlog within the Court system is directly or indirectly related to the public being unable for fiscal considerations to obtain legal services.

And Further Be It Resolved that funding not to exceed \$25,000 be provided to the Task Force to engage the services of experts to assist them with their work, and in addition that appropriate support staff be provided from the Law Society in order that a Report be available for consideration by the Law Society before the end of February 2003.

Mr. Wilson withdrew his motion after he was informed by Mr. Manes that this matter would be dealt with at the Access to Justice Symposium on May 28th, 2003.

EQUITY AND ABORIGINAL ISSUES COMMITTEE REPORT/Comité sur l'équité et les affaires autochtones

Mr. Copeland presented the Report of the Equity and Aboriginal Issues Committee Report for approval by Convocation.

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones
November 21, 2002

Report to Convocation

Purpose of Report: Decision
 Information

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

OVERVIEW OF POLICY ISSUE
STUDY TO EXAMINE CONTEMPORARY
LAW PRACTICE IN ONTARIO

Request of Convocation

1. That Convocation approve a study of the legal profession to examine contemporary law practice in Ontario (the Contemporary Law Practice in Ontario study) as described in Appendix 1 to be undertaken by Professor Fiona Kay in partnership with the Law Society of Upper of Canada.

Summary of the Issues

2. An information report was presented to Convocation in November 2001 to describe the proposal for a study of the legal profession.
3. One component of the report is the continuation of the Transitions in the Ontario Legal Profession study that the Law Society has supported since 1990.
4. The second component of the report is described in Appendix 1 as a study of the legal profession to examine contemporary law practice in Ontario.

THE REPORT

Terms Of Reference/Committee Process

5. The Equity and Aboriginal Issues Committee /Comité sur l'équité et les affaires autochtones (EAIC) met on November 7, 2002. In attendance were:

Paul Copeland	(Chair)
Derry Millar	(Vice Chair)

Stephen Bindman	
Nathalie Boutet	(AJEFO representative)
Thomas Carey	
Senka Dukovich	(Chair, Equity Advisory Group/Groupe consultatif en matière d'équité)

Janet Minor
Bradley Wright

Staff: Josée Bouchard, Katherine Corrick, Margaret Froh, Giang Nguyen

6. The Committee is reporting on the following matters:

Policy - For Decision

- Study to examine contemporary law practice in Ontario –page 4.

Information

- Promoting Dialogue, Creating Change; Equity and Diversity in the Legal Profession conference – page 6.

STUDY TO EXAMINE CONTEMPORARY LAW PRACTICE IN ONTARIO

Background

7. On November 7, 2001, the Committee considered a proposal from Professor Fiona Kay, Associate Professor, Department of Sociology, Queen's University, to undertake, in partnership with the Law Society, a study of the legal profession. The proposal was presented in November 2001 to Convocation for information purposes.
8. The first component of the study is the continuation of the transitions in the legal profession study that the Law Society has supported since 1990. The study is a longitudinal study of the careers of Ontario lawyers who were first surveyed in 1990 and then re-surveyed in 1996. The findings of the first survey were presented in 1991 in the *Transitions in the Legal Profession* report¹ and relied upon by Convocation when it adopted *The Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*². The findings of the second survey were presented in 1996 in the *Barriers and Opportunities Within Law: Women in a Changing Legal Profession*³. The Law Society has been working in partnership with Professor Kay on the transition study and a report is expected in 2003.
9. The second component of the study (presented at Appendix 1), also to be undertaken in partnership with the Law Society, is a survey of the contemporary legal profession in Ontario in 2003. The study will provide statistical analyses of the contemporary legal profession by focusing on the content of legal work and changing dimensions of law practice; the day-to-day work responsibilities, autonomy and decision-making capacities of lawyers; the frequency and outcomes of court appearances; the division of labour within firms/offices; and the use of alternative dispute resolution tactics, such as mediation.
10. Professor Kay, in partnership with the Law Society, would survey career paths among law graduates selected through a random sampling of approximately 6,000 lawyers working in the province of Ontario. The sample will contain lawyers employed across a range of work environments in order to assess the full range of career paths taken in the legal profession.
11. The objective of the study is to assist the Law Society to learn more about the experiences of law graduates as they progress through their careers. The study focuses on work transitions, including promotions, changes of jobs, and the diversity of careers among members of the profession. It is a first study of its kind in Canada and will help to increase understanding of the experiences and concerns of lawyers in their professional careers. Moreover, the study is intended to contribute to future policies initiated by the Law Society of Upper Canada.
12. On November 7, 2001, the Committee approved Professor Kay's proposal and presented it to Convocation for information purposes. The Equity Initiatives Department confirmed that it would contribute funding of up to \$25,000 for the two components of the study.
13. In April 2002, the Law Foundation of Ontario confirmed that it would also provide funding to the amount of \$25,000 to Professor Kay to undertake both components of the study. The Social Sciences and Humanities Research Council is also contributing funds to the study.

¹ *Transitions in the Ontario Legal Profession, A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).

² *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997).

³ *Barriers and Opportunities Within Law: Women in a Changing Legal Profession, A Longitudinal Survey of Ontario Lawyers 1990-1996* (Toronto: Law Society of Upper Canada, 1996).

INFORMATION
PROMOTING DIALOGUE CREATING CHANGE
CONFERENCE

14. On November 21-23, 2002, the Law Society of Upper Canada, with financial support from the Department of Canadian Heritage, will be hosting a national gathering of stakeholders in the legal profession to discuss various policy and program initiatives undertaken in legal institutions and associations across the country that promote equity and diversity in the legal profession.
15. The gathering will provide a forum for information sharing on equity and diversity issues facing the legal profession in Canada, on past and current policies and programs developed to address equity and diversity issues, and on the development of collaborative strategies for future policy and program development.
16. Attendance at and participation in the national gathering is by invitation only. Members of Convocation are invited to participate in the gathering.
17. The draft agenda for the conference is presented at Appendix 2.

APPENDIX 1

STUDY TO EXAMINE CONTEMPORARY
LAW PRACTICE IN ONTARIO

1. Summary of Proposed Research

This proposal seeks support from SSHRC in a new partnership with the Law Society of Upper Canada to extend research on gender and ethnic and racial diversity, clientele, and legal tactics within the legal profession. Women and ethnic minorities have entered the legal profession in unprecedented numbers in recent years. Parallel to these demographic changes, there has taken place significant structural change involving growing bureaucratization, emerging sub-specializations, and increasing salaried employment. For women and ethnic minorities, the intersection of these changes has not resulted in open access, but rather limited opportunities at early career stages, diminished salaries, and glass ceilings at higher echelons of law practice.

This proposal broadens and extends research that the investigator has been conducting in cooperation with the Law Society of Upper Canada over the past ten years. First, I propose to develop a longitudinal study of the careers of more than 2,000 Ontario lawyers, approximately half men and half women, who were first surveyed in 1990 and then re-surveyed in 1996. I have selected a six year period between "panels" of the study to allow time for significant life events (e.g., marriages, divorces, children) and important career moves to take place (e.g., promotions, partnerships in law firms, mobility between sectors, and departures from law practice). It is crucial in assessing arguments about the advancement of women, to collect data that follow individuals across careers. The Law Society of Upper Canada has agreed to participate as a partner in this project offering a partnership of financial support to encourage completion of the project.

The third "panel" of the *Ontario Transitions Longitudinal Survey* (2002) will offer a unique opportunity to track the first cohort with a sizeable number of women among its ranks, as these lawyers enter mid to advanced career stages (12 to 26 years in law practice). The survey will focus on promotions, changes in income, areas and types of practice, departures and re-entries to practice, changes in family status and composition; time spent at work and the accumulation of billable hours; and feelings of autonomy, depression, power, and more general career satisfaction. By focussing on change over time in family characteristics (marriage and children), dispositions (commitment to work, career goals), positions (level of authority and decision-making power), as well as on billings, it will be possible to analyse changes in lawyers' experiences (such as earnings, job satisfaction and promotions) while taking into account other significant differences in life and work experiences.

Second, I propose to broaden the research to a large-scale survey of the contemporary legal profession in Ontario in 2003. This project breaks new ground by examining the legal training and early career development of ethnic/racial minorities in law. This will be among the first studies to provide statistical analyses with significant representation of minorities in a traditionally exclusive profession. This new survey is also innovative in its focus on the content of legal work and changing dimensions of law practice. Recent research calls for innovative studies that examine in greater depth the day-to-day work routines of lawyers in a changing profession. This survey will examine distribution of time across work responsibilities, autonomy and decision-making capacities, frequency and outcomes of court appearances, division of labour within firms/offices, access to and recruitment of clientele, and use of alternative dispute resolution tactics, such as mediation.

The Law Society of Upper Canada has already granted the principal investigator access to their computerized mailing lists of members, as well as cooperation through their internal committees to assist in the implementation of this survey design. This research contributes to efforts to ensure that the legal profession guarantees women and visible minorities equality of access to law and equality of opportunity for advancement within careers. The research findings also hold important implications for other professions, such as engineering, computing, academe, and medicine, that are experiencing parallel transformations.

1.1 DETAILED DESCRIPTION

Social Capital and Professional Careers in Transition: A Study of Diversity, Clientele, Time, and Legal Tactics among Lawyers

Objectives

There are two main objectives of this research plan: (1) to assess the progress and barriers to career advancement and rewards (e.g., promotions, earnings, autonomy and decision-making powers) for women within the legal profession; (2) to examine the recent entry and advancement of significant numbers of visible ethnic and racial minorities in the legal profession. Through the continuation of a longitudinal study of Ontario lawyers (focussing on gender differences), and the initiation of a new survey design in Ontario of a cross-section of contemporary legal practitioners (with a focus on ethnic/racial minorities in law practice), this study will examine obstacles across all stages of legal careers. This project will introduce 4 new foci to the study of professions: (1) a much needed study of ethnic minorities and opportunities within law practice; (2) a test of social capital theory with an emphasis on inter-firm relations, clientele recruitment strategies, and firm culture; (3) an assessment of time allocation (billable hours and hours essential to legal work, but not tallied as 'billables') and the impact of computers in the workplace (particularly on time monitoring and accountability); and (4) an exploration of career diversification, as well as emerging legal practices, including alternative dispute resolution strategies.

Context

In recent years the legal profession has undergone important structural changes, including rapid growth in the numbers of lawyers, branch offices (Daniels 1993), rising billable hours, and a trend toward salaried employment (Nelson 1988). A new stratum of salaried partners, permanent associates, and equity partners has emerged in recent years (Gilson & Mnookin 1985; Kay & Hagan 1995; Kaye 1989; Thornton 1996).

Bureaucratization has impacted law practice with a declining frequency of general practice, emerging sub-specialties in law (Heinz *et al.* 1998), and involvement in large-scale litigation (Galanter & Palay 1991).

Yet, for women, as well as ethnic minorities, the impact of these changes has been more often detrimental, with blocked opportunities at the levels of permanent associates and subordinate roles within bureaucracies (Brockman 2001; Canadian Bar Association 1993; Kay & Hagan 1998). Research studies demonstrate that women experience limited success in securing articles and first jobs (Huxter 1981), delayed partnerships (Donovan 1990; Epstein *et al.* 1995; Kay & Hagan 1995; Kay & Hagan 1998), reduced earnings (Adam & Baer 1984; Kay & Hagan 1995; Robson & Wallace 2001), under-representation in private practice (Kay 1989; Menkel-Meadow 1989) and elite specializations (CBA 1993; Kay 1991), difficulties balancing career and family responsibilities (Harrington 1993; Leiper 1998), sexual harassment (Brockman *et al.* 1992; Czapanskiy 1990) and discrimination (Brockman 1994; Epstein 1992), and higher rates of attrition from law practice (Kay 1997). Similarly, the few studies that examine ethnic minorities in law, also find disadvantage in terms of mentoring (Neallani 1990), specializations (Barrett 1999), and partnerships (Scheineson 1988).

The picture is not entirely bleak however, and evidence suggests that growing diversity in the profession has resulted in a more integrated profession with a broader array of work arrangements (Hagan & Kay 1995). Some new work suggests that women and ethnic minorities are having an important impact on the practice of law (Brockman 2001; Thornton 1996), particularly through model policies of alternative work arrangements, parental leaves, and disciplinary rules against discrimination and sexual harassment (Kay & Brockman 2000; Mossman 1998a, b). There is evidence that the income gap between men and women may be declining (Chiu & Leicht 1999; Foot & Stager 1989) and women are making progress at breaking through the 'glass ceiling' of partnership circles (Kay & Hagan 1995, 1999).

Recent reports on the Canadian legal profession explicitly recommend that the success of women and visible minorities in the profession must be monitored through continued and expanded data collection and through analysis of the kind outlined in this research proposal (see *Barriers & Opportunities in Law Report* 1996:179; *Transitions Report*, 1991:115; *CBA Touchstones Report* 1993:277-90; See also Ornstein *Lawyers in Ontario Report* 2000:ii; *Equity & Diversity for Law Firms Report* 2001:26). I pursue this recommendation with two important strategies. First, I propose to build a third "wave" of data collection to create a longitudinal study of the lives of more than 2,000 women and men Ontario lawyers who were first surveyed in 1990 and again in 1996. The *Ontario Longitudinal Transitions Survey* is concerned with a comparison of the success of women and men lawyers who were called to the Ontario Bar between 1975 and 1990. This survey enables us to track change across time with the first cohort of lawyers in Canada to include sizeable representation of women. Second, I propose to broaden the research by surveying a cross-section of lawyers in Ontario. The *Contemporary Lawyers Survey* will enable a comprehensive analysis of the current day profession, with a focus on increasing ethnic and cultural diversity.

Theoretical Framework

Three theoretical perspectives offer unique insights into the transformation of the profession and emerging disparities between women and men and dominant and minority ethnic groups in law practice. *Human capital theory* (Becker 1975, 1991; Mincer 1985) draws attention to the influence of education, on-the-job training, time investment and measures of 'productivity.' Human capital theory suggests that employees make rational choices to invest in themselves, through education, professional training, and cultivation of specializations, that will be rewarded by employers. Becker asserts that intrinsic biological differences are magnified as women and men make different choices to invest their human capital in the separate spheres of home and work. These investments are shaped by biological and socialized gender differences (Becker 1991). In the legal profession women tend to work in settings and fields of law that offer optimum conditions for achieving a balance between work and family. Unfortunately, these same positions offer lower returns on their human capital investments (Hull & Nelson 2000). The inference of this theory is that men make different choices than women in the legal practice; by placing priority on their occupational career men enhance their human capital assets and are subsequently rewarded for their professional commitment (Becker 1985).

Whereas human capital resides in lawyers' intellectual abilities and legal talents (their skills, specialization, and legal education), *social capital* inheres in the structures of their relationships. Social capital refers to the importance of resources which, although possessed by others, are available to a given individual through his or her

social relations with others (Lin 1982, 1995). The social capital appropriated from social structure may provide benefits to the individual, such as promotion within one's firm (Lin 1990; Coleman 1988) or effective mentorship (Fagenson 1989; Laband & Lentz 1995; Mobley *et al.* 1994) during the early years of law practice. Diverse networks provide access to more timely and relevant information about upcoming opportunities and about complications and contingencies lawyers might face in managing their clients' cases (Sandefur & Laumann 1998). Social capital also yields benefits in the form of influence and control: the ability to influence others (Coleman 1988) and the ability to be free of others' influence or constraint (Burt 1997). Influence also includes reputation, both of individual lawyers and their firms (Sommerland & Sanderson 1998).

Beyond social capital, denoting kinds of resources appropriable from interpersonal relationships, there is a *structural* level of analysis (Burt 1992; Cook & Whitmeyer 1992). Structure affects women, and minorities in general, in the legal profession in two ways. First, women's careers within law practice are influenced by the opportunities and barriers imposed by a pre-existing organizational structure. These organizational structures include work arrangements, such as available benefits, maternity leave policies, (in)flexibility of hours, opportunities for part-time work arrangements, scheduling of meetings and social events, and leave arrangements (Brockman 2001; Mossman 1994a, b). Second, the power of women and ethnic minorities to effect meaningful change within the profession is shaped by their structural location relative to others. Women and minorities are disproportionately represented among the lower echelons of legal practice, as associates and as junior lawyers in non-private practice settings (Epstein 1993; Hagan & Kay 1996). These structural barriers further impair the abilities of minorities to achieve leadership roles within legal practice. This disadvantaged position within the social structure of law practice implies 'invisible constraints' (Mossman 1988), including a lack of influence over others, reduced autonomy, and lower power to participate in policy decision-making within organization settings.

These theoretical perspectives are particularly relevant to an understanding of the entry and advancement of women and minorities in law practice. Each theory identifies opportunities (as well as constraints) that are vital to developing successful legal careers. For example, *human capital theory* emphasizes the importance of education from prestigious law schools, securing early articles from elite law firms, as well as the importance of billable hours in advancing career movements within law firms (Reskin & Padavic 1994). *Social capital theory* directs us to the powerful influence of personal contacts and social networks in locating articling positions in prominent firms, and to the advantages conferred from access to prominent cases and files, as well as associations that provide timely and valuable information, the opportunity to impress and influence others, and to establish professional reputations. *Structural theory* highlights the power of senior positions from which to direct or reform the organization of law practice. This approach is also sensitive to the experiences of women with children who devote greater time than men to family responsibilities. These investments are often made without reducing either career commitment or effort in legal practice, but without corresponding rewards in career advancement (Hagan & Kay 1995).

Research is only beginning to disaggregate the individual, structural, and organizational attributes that impact upon the male-female wage gap (Kay & Hagan 1995b; Ornstein 2000). Research is yet to study how this wage gap manifests itself at different stages across the careers of professionals. We know little about mobility ladders to positions of power and authority, and how these are differentially used by women and men (Reskin & Padavic 1994). Furthermore, because visible minorities have only recently entered the profession in significant numbers, there is little systematic information on their access to entry-level positions, earnings, and promotion prospects. Pursuing these previously unexplored aspects of the careers of ethnic minorities and women in the profession of law requires new developments in cross-sectional and longitudinal survey research design.

Methodology

A. The Ontario Longitudinal Survey: The current proposal builds longitudinally on the *Transitions Survey* of more than 2,000 Ontario lawyers, about half women and half men, initiated in 1990 by Fiona Kay. The study demonstrated that junior women compared with junior men in law in 1990 occupied lower positions in the power hierarchy of the profession: they were over-represented in government employment and under-represented in the private practice of law; within private practice, women experienced lower chances for partnership; women also earned less, and were more dissatisfied with their conditions of work (Kay 1991; Kay & Hagan 1995a,b; Hagan & Kay 1995). The 1996 survey revealed emerging obstacles as women confronted the challenge of having children while balancing professional demands, developing clientele networks, and ascending partnership ladders in private practice (Kay & Hagan 1999; Kay & Hagan *under review*).

However, new issues are now emerging for this cohort of lawyers, experiences common to many professionals today: issues of managing dual careers, family responsibilities and workplace commitments (including rising billable hours), and pivotal career transitions (such as partnerships, promotions, and lateral mobility). The third wave of this longitudinal survey will be conducted in 2002. I chose a six year period between waves of the Ontario surveys to allow time for children to be born, and for major career moves to take place. It is essential in assessing arguments about professional advancement, and more generally about "breaking the glass ceiling," to collect data that follow individuals over their careers. This is especially important with regard to women's careers, because it is commonly assumed that women work fewer hours and experience greater interruptions than men, particularly in the period of their careers when they have young children (Liefland, 1986). Prospective longitudinal research can be extraordinarily labour and resource intensive, and the existence of a continuing longitudinal project offers a unique and comparatively inexpensive opportunity to build on previously successful work. This survey will offer a unique opportunity to study lawyers 12 to 26 years into their careers. By tracking these professionals longitudinally, we are able to assess arguments regarding disparities in promotions and salaries, emerging diversification of career lines, and attrition from law practice.

The response rate to the mail-back questionnaire was exceptionally high in both 1990 and 1996 panels (68% and 70%, respectively). To guard against panel attrition and to enlarge the cohort with more complete data, I propose to survey in 2002 the original sample of 2,358 lawyers. The Law Society has maintained membership records of lawyers involved in this initial wave of research, and we expect a very high rate of response can be maintained in this third wave of the longitudinal design. Additional efforts will be made to track respondents no longer in the membership lists of the Law Society (through contacts and addresses provided in the 1996 questionnaires).

The survey will include a life history calendar to enumerate changes in family composition, and will allow attention to career moves and changes, including departures and re-entries to employment, as well as promotions and changes in areas of work. I will collect data on commitment to future work, length of employment and part-time spells, and numerous employment characteristics including position, sector of practice, specialization, and working conditions. The survey instrument will also include items to measure feelings of autonomy, control, and career satisfaction. A copy of the 1996 survey instruments is included in the Appendix to the proposal, to provide a baseline from which these further developments will proceed. Next I provide a background discussion of issues of mobility and earnings to introduce an example of how the new longitudinal data on Ontario lawyers will provide unique types of information about obstacles to the advancement of women and ethnic minorities in law.

1. The Gap in Earnings: Studies of salaries among Canadian lawyers demonstrate that substantial gender differences exist (Adam & Baer 1984; Ornstein 2000). Across all age groups, women earned on average less than their male counterparts. Only part of the gap in wages is explained by women's lower representation in private practice, the more lucrative sector of law practice (MacKaay 1991). Kay's 1990 study of Ontario lawyers revealed a persistent gap between the earnings of men and women and also an amplification of the earnings differential as lawyers climb the early stages of the career ladder (Kay & Hagan 1995). The proposed study, informed by human capital, social capital, and structural theories, will use techniques of decomposition analysis: (1) to assess the magnitude of salary gaps and the factors contributing to these disparities; (2) to test arguments of convergence versus growth of income disparity; (3) to explore how income gaps modulate across careers and within different sectors of law practice.

2. Partnership Prospects: Although women represent close to 50% in recent graduating law classes, they remain under-represented in the higher echelons of the profession. Regardless of experience, field of law, billable hours, clientele responsibilities, and size of firm, men have consistently higher likelihoods of attaining partnership status than women (Kay & Hagan 1994:450; Kay *under review*; MacKaay 1991). Although firms with greater representation of women have been found to be more successful in attracting and retaining institutional and corporate clients; women remain less likely to be rewarded with partnership status (Kay & Hagan, 1999). Even more concerning is recent work that suggests women associates are required to embody standards that are an exaggerated form of the "ideal partner." To attain partnership, women must demonstrate extraordinary work commitment, for example, by actively recruiting new clients, building a large network of corporate clientele, by returning swiftly from maternity leave and continuing to bill at elevated levels, and by expressing a commitment to the culture of the

firm by endorsing traditional values and goals of firm lawyers (Kay & Hagan 1998). The proposed longitudinal study will: (1) offer complete data on a sample of private practitioners, all of whom will have passed the timing of partnership decisions, enabling us to test empirically human capital, social capital, and structural explanations of partnership disparities between men and women; (2) include life course (family, marriage) and work history data, offering a unique opportunity to explore the full range of career trajectories; (3) examine data on power, autonomy, authority, and decision-making capacities among lawyers (see Wright & Singelmann 1982; Hagan *et al.* 1991), allowing us to investigate promotions and power within practice, beyond traditional partnership prospects.

3. *Departures from Practice*: Research suggests higher attrition rates of women from the legal profession (Brockman 1992, 1994; Kay 1997). In the 1996 survey of Ontario lawyers Kay and Hagan found that women, more often than their male colleagues, were excluded from opportunities to work on challenging and important files. This experience of being placed on the margins of firm practice significantly undermined women's trust in firm management and augmented their intent to quit the firm (Kay & Hagan *under review*). The *Ontario Longitudinal Transitions Survey* includes a stratum of past members of the profession. I will follow the careers of these individuals as well as track new attrition from practice. The proposed study aims: (1) to examine the extent at attrition from law practice up to 26 years past Bar admission; (2) to investigate the areas of practice most vulnerable to high rates of attrition; (3) to delineate factors contributing to attrition; (4) explore diversification of careers into other occupations; and (5) to propose strategies for retention of legal talent.

B. The Contemporary Lawyers Survey: The research plan discussed to this point has focussed entirely on differences between women and men lawyers, with little attention to the experiences of ethnic minorities in the profession. The reason for this is that the *Ontario Transitions Longitudinal Study*, based on lawyers admitted to the profession between 1975 and 1990, a period prior to the entry of significant numbers of minority lawyers. However, this feature of the legal profession is beginning to change with increasing numbers of minority law school graduates (Neallani 1992; Scheineson; Wilkins 1993)

1. *Ethnic Minorities in Law*: Evidence to date suggests that minority lawyers, although completing law school in increasing numbers, have had limited success in finding articling positions and subsequent career opportunities (Neallani 1992). The proposed study will explore career prospects of ethnic minorities across career stages. The Law Society reports that nearly 20% of recent Bar admission students self-identified as ethnic minorities. These data will be used to over-sample a stratum of minority lawyers. A sample of 3,000 lawyers in Ontario, with over-sampling of minority, lawyers will afford opportunities to study the contemporary profession, with attention to the concerns and career progress of ethnic minorities. The survey will examine earnings, career moves, field specializations, and promotions. I will also collect data on family responsibilities, job satisfaction, and career aspirations.

2. *Changing Work Responsibilities*: The *Contemporary Lawyers Survey* will also provide a focus on the changing work responsibilities of lawyers more generally. This project addresses recent calls for research to examine the *content* of legal practice and changing dimensions to legal practice (Brockman 1994; Menkel-Meadow 1989). Therefore, the survey will include questions surrounding: work responsibilities, autonomy and decision-making capacities, routine organization of legal and administrative commitments, frequency and outcomes of court appearances, division of labour within firms/offices, access to and recruitment of clientele (Seron 1993), and use of alternative dispute resolution tactics, such as mediation by lawyers (Boule & Kelly 1998; Coyle 1998). I will examine the impact of computers on law practice, particularly with reference to monitoring of billable hours. The survey is intended to reveal the changing diversity of legal tasks performed by lawyers, lawyer social networks, and career outcomes.

3. *Inclusion and Exclusion in Law*: The theoretical paradigm that in the broadest sense guides this second stage of the study (the *Contemporary Lawyers Survey*) is a social capital perspective. Social capital consists of an individual's direct relationships with others, and the resources and further relationships that are attainable through these proximate contacts (Sandefur & Laumann 1998: 484). This essentially amounts to knowing the right people and how 'to get a foot in the door.' Social capital can also result in *exclusion*. When Bourdieu (1986) speaks of social capital as a 'credential' that grants one access to elite societies of power and influence, there are simultaneously those deficient in social capital who are excluded from entry to these circles of power. The proposed study aims to identify the various forms of social capital and an understanding of important dynamics, including:

how social capital enables progress of minorities (women and ethnic minorities) in law practice, and how social capital can be squandered and used to exclude newcomers to the profession.

When this research program is complete, we will have a store of new empirical findings which will bring us much closer to resolving a number of important theoretical debates. In particular, this research will offer a unique comparative study of the career advancements and earning attainments of women and men, ethnic minority and dominant group members in Ontario. The analysis will proceed in several phases, using a range of appropriate multivariate statistical techniques. In order to study the sequencing and probability of career transitions, I will estimate continuous-time stochastic and discrete-time models using techniques of event history analysis. Models of social capital, human capital, and structural factors impacting on job satisfaction and workplace authority will be estimated using linear structural equation models. Analyses of earning differentials will involve ordinary least squares regression and techniques of decomposition analysis. I have extensive experience with each of these techniques, including recent and specialized courses in event history and linear structural equation courses at the University of Michigan.

Schedule

The major work on this project will begin in the spring of 2002, when I will finalize the survey instruments and develop address and mailing lists for the *Transitions* follow-up (tracking address changes and members who have since left the profession). The *Ontario Transitions Longitudinal Study* will be launched in the autumn of 2002. The *Contemporary Lawyers Survey* will be distributed in the spring of 2003. I will oversee coding and data entry from the surveys starting in November 2002 through July 2003. In collaboration with a graduate research assistant, I will analyse data from the surveys in 2003 through 2004. I am requesting a research time stipend for release from two one-term courses in the fall term of September 2003. The timing of this one term course release coincides with the final stages of survey mailing and data entry. The release time is essential so that I may devote my full energy to completing the survey research, analysing these data, writing the report to the Law Society, and to drafting the book manuscript.

Communication of Results

This study will produce a report to the Law Society of Upper Canada and an executive summary of findings mailed to study participants early in 2004. I expect to produce refereed journal publications based on these data. Beginning in 2003 I will write a book based on this study that will focus on equity dynamics of gender and ethnicity in law practice. I also expect to present papers based on this work at national and international meetings, including the *American Sociological Association* and *Law and Society Association* annual meetings. Finally, I anticipate that the current and planned publications will receive a measure of press attention, given the strong and continuing media interest in issues concerning gender and minority equity in the professions.

1.2 LIST OF BIBLIOGRAPHICAL NOTICES

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APPENDIX 2

PROMOTING DIALOGUE CREATING CHANGE

CONFERENCE

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

Copy of the draft agenda for the conference on Promoting Dialogue Creating Change.

(Appendix 2, pages 22 – 28)

It was moved by Mr. Copeland that Convocation approve a study of the legal profession to examine contemporary law practice in Ontario as described in Appendix 1 to be undertaken by Professor Fiona Kay in partnership with the Law Society of Upper Canada.

The motion was voted on and adopted.

REPORT FOR INFORMATION ONLYFinance & Audit Committee Report

Finance and Audit Committee
November 8, 2002

Report to Convocation

Purpose of Report: *Information*

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee (Athe Committee@) met on November 8, 2002. Committee members in attendance were: Epstein S. (vc), Cass R., Chahbar A., Coffey A., Divinsky P., Lawrence A., Swaye G., Wright B.. Staff attending were Tysall W., Corrick K., Grady F., Cawse A..

2. The Committee is reporting on the following matters:

Information

- X Interim Financial Statements for Law Society General Fund, Compensation Fund and LibraryCo Inc.
- X Investment Compliance Reports

FOR INFORMATION

INTERIM FINANCIAL STATEMENTS

1. Copies of the:
- S Law Society General Fund financial statements for the nine months ending September 30, 2002 (page 3);
 - S Lawyers Fund for Client Compensation Statement of Revenues, Expenses and Fund Balance and Balance Sheet for the nine months ending September 30, 2002 (page 7);
 - S LibraryCo Inc. Combined Statement of Revenue and Expenses for the six months ending June 30, 2002 (page 10)
- are attached.

The Finance and Audit Committee recommends that Convocation receive the interim financial statements for information.

INVESTMENT COMPLIANCE REPORTS

2. Investment Compliance Reports at September 30, 2002 (page 11 are attached confirming no deviations from policy.
The Finance and Audit Committee recommends that Convocation receive the Investment Compliance Reports for information.

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

- (1) Copy of the Law Society General Fund financial statements for the nine months ending September 30, 2002. (pages 3 – 6)
- (2) Copy of the Lawyers Fund for Client Compensation Statement of Revenues, Expenses and Fund Balance and Balance Sheet for the nine months ending September 30, 2002. (pages 7 – 9)
- (3) Copy of the LibraryCo Inc. Combined Statement of Revenue and Expenses for the six months ending June 30, 2002. (page 10)
- (4) Copy of the Investment Compliance Reports at September 30, 2002. (pages 11 – 16)

MATTER NOT REACHED

The following motion was not reached:

MOVED BY: Richmond Wilson

SECONDED BY: Allan Lawrence

Whereas the Issue of unregulated paralegals remains an unsolved matter, notwithstanding the regular request from the Judges of our Courts.

And whereas it appears unlikely that a resolution will happen without some direction and resolve from the Law Society, who for the past two years has preferred to 'work behind the scenes',

And whereas the public for whom we have a mandate to protect daily are in risk, in that legal services are more and more being provided by uneducated, unregulated, and uninsured 'amateurs',

Be it resolved that the Paralegal Task Force of the Law Society be immediately repopulated and requested to update its report to Convocation, including a review of events since the last report, an analysis and reconsideration if appropriate of the conclusions reached, and recommendations to Convocation as to what its next steps might be to effect the conclusion of this outstanding matter.

And further that it be assured that adequate funding may be requested, and that the provision of adequate staff assistance be immediately provided to permit the provision of a report within three months of the Committee being repopulated.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

The Treasurer and Benchers had as their guests for luncheon Jackson Walkden-Brown, Jennifer White, Kirk Dickson, Rhonda Fawcett, Aleksandra Belz, Monica Rathod, Seema Kallidumbil and Shannon Webb, students from the University of Western Ontario, Faculty of Law, Legal Profession (Ethics) Course.

Confirmed in Convocation this 6th day of December, 2002.

Treasurer