MINUTES OF CONVOCATION

Thursday, 22nd November, 2001
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Aaron, Arnup, Banack, Bindman, Bobesich, Boyd, Braithwaite, Campion, Carey, Carpenter-Gunn, Cass, Chahbar, Cherniak, Coffey, Copeland, Crowe, Divinsky, E. Ducharme, T. Ducharme, Epstein, Feinstein, Finkelstein, Go, Gottlieb, Lamont, Laskin, MacKenzie, Manes, Martin, Millar, Minor, Mulligan, Murray, O'Brien, Ortved, Porter, Potter, Puccini, Robins, Ross, Ruby, Simpson, Swaye, Topp, Wardlaw, Wilson and Wright.

.....

The reporter was sworn.

.....

IN PUBLIC

.....

TREASURER'S REMARKS

The Treasurer welcomed 10 students of Ms. Ross' Professional Ethics class from the University of Western Ontario law school.

DIRECTOR OF EDUCATION REPORT

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Education asks leave to report:

B.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates 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 22nd, 2001:

Janet Kathleen Chisholm	Bar Admission Course
Mark Anthony D'Angela	Bar Admission Course
Taro Inoue	Bar Admission Course
Kelly Fay La Rocca	Bar Admission Course
Karen Miriam Levin	Bar Admission Course
Murray Craig Shepherd	Bar Admission Course
Carolyn Louise Wilson	Bar Admission Course
Jinpeng Zhang	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 22nd, 2001:

Lisa Marie Collins	Province of Manitoba
Shauna Nicole Finlay	Province of Alberta
Jean-Claude Joseph Rioux	Province of Nova Scotia

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

B.2.1. The following apply to be certified as supervised foreign legal consultants in Ontario:

George Joseph Eydt	State of New York Hodgson Russ LLP
Lawrence Dale Pringle	State of New York Dorsey & Whitney LLP

B.2.2. Their applications are complete and they have filed all necessary undertakings.

ALL OF WHICH is respectfully submitted

DATED this the 22nd day of November, 2001

It was moved by Mr. E. Ducharme, seconded by Ms. Ross that the Director of Education Report be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Education were presented to the Treasurer and called to the Bar. They were then presented by Mr. Lamont to Madam Justice Janet Wilson to sign the Rolls and take the necessary oaths.

Janet Kathleen Chisholm	Bar Admission Course
Mark Anthony D'Angela	Bar Admission Course
Taro Inoue	Bar Admission Course
Kelly Fay La Rocca	Bar Admission Course
Karen Miriam Levin	Bar Admission Course
Murray Craig Shepherd	Bar Admission Course
Carolyn Louise Wilson	Bar Admission Course
Jinpeng Zhang	Bar Admission Course
Lisa Marie Collins	Transfer, Province of Manitoba
Shauna Nicole Finlay	Transfer, Province of Alberta
Jean-Claude Joseph Rioux	Transfer, Province of Nova Scotia

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IN CAMERA

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IN PUBLIC

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MOTION - DRAFT MINUTES

It was moved by Mr. Crowe, seconded by Ms. Ross that the Draft Minutes of Convocation of October 25th, 2001 be approved.

Carried

MOTION - AMENDMENT TO BY-LAW 9 RE: MANDATE OF ACCESS TO JUSTICE COMMITTEE

It was moved by Mr. Crowe, seconded by Mr. Ross that:

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 9
[COMMITTEES]

THAT By-Law 9 [Committees] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999, May 28, 1999, December 10, 1999 and July 26, 2001 be further amended as follows:

1. The By-Law is amended by adding the following:

ACCESS TO JUSTICE COMMITTEE

Mandate
16.4 The mandate of the Access to Justice Committee is to develop, for Convocation's approval, policy options for promoting access to justice throughout Ontario.

COMITÉ SUR L'ACCÈS À LA JUSTICE

Mandat
16.4 Le Comité sur l'accès à la justice élabore et soumet à l'approbation du Conseil des options de politiques visant à promouvoir l'accès à la justice en Ontario.

Carried

EMERGING ISSUES COMMITTEE REPORT

Re: Motion to Amend By-Law - Mandate of the Emerging Issues Committee

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

Emerging Issues Committee
November 22, 2001

Motion to Amend By-Law 9 -
Mandate of the Emerging Issues Committee

Purpose of Report: Decision

Prepared by the Policy and Legal Affairs Department

AMENDMENT TO BY-LAW 9 ON THE
MANDATE OF THE EMERGING ISSUES COMMITTEE

1. On July 26, 2001, By-Law 9 on Committees was amended to add the mandate of the new Emerging Issues Committee ("the Committee"). The mandate currently reads:

> Emerging Issues Committee
>
> 16.2 The mandate of the Emerging Issues Committee is to monitor emerging policy issues affecting the Society and the legal profession that do not fall directly within the jurisdiction of any other standing committee, to undertake and direct research into such policy issues and to develop for Convocation's approval strategic plans and other proposals relating to such policy issues.

2. As the mandate indicates, the Committee was created to provide long range information on all matters of concern to the Law Society as regulator of the legal profession in Ontario. Any restriction on that mandate would impinge on the Committee's effectiveness in developing relevant issues into practical subjects for consideration by Convocation, its other standing committees or task forces.

3. In the view of the Committee's co-chairs, the current wording of the mandate, in particular, the inclusion of the phrase "that do not fall directly within the jurisdiction of any other standing committee", would restrict the Committee in fulfilling its role, inconsistent with the originally understood intent. The co-chairs believe that as the Committee's work begins, the issues it considers may relate either directly or indirectly to the mandates of other committees or task forces. This fact should not prevent the Committee from reviewing issues and determining an approach that will inevitably involve other committees or task forces in a more specific examination of the issues.

4. Accordingly, the co-chairs are presenting a motion to amend to the Committee's mandate by deleting the phrase "that do not fall directly within the jurisdiction of any other standing committee".

ADDITION TO THE MEMBERSHIP OF THE COMMITTEE

5. The co-chairs are requesting that Convocation appoint Stephen Bindman as a member of the Committee.

DECISION FOR CONVOCATION

6. Convocation is requested to

   a. amend the mandate of the Emerging Issues Committee in section 16.2 of By-Law 9 on Committees by deleting the phrase "that do not fall directly within the jurisdiction of any other standing committee", and
   b. appoint Stephen Bindman as a member of the Committee.

7. Motions to effect the above appear below.

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 9
[COMMITTEES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON NOVEMBER 22, 2001

MOVED BY

SECONDED BY

THAT By-Law 9 [Committees] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999, May 28, 1999, December 10, 1999 and July 26, 2001 be further amended as follows:

1. Section 16.2 of the By-Law is amended by striking out "that do not fall directly within the jurisdiction of any other standing committee/qui ne sont pas directement du ressort des autres comités permanents".

APPOINTMENT TO THE EMERGING ISSUES COMMITTEE

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON NOVEMBER 22, 2001

MOVED BY

SECONDED BY

That Stephen Bindman be appointed as a member of the Emerging Issues Committee.

.....

It was moved by Mr. Ortved, seconded by Mr. Epstein that:

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 9
[COMMITTEES]

THAT By-Law 9 [Committees] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999, May 28, 1999, December 10, 1999 and July 26, 2001 be further amended as follows:

1. Section 16.2 of the By-Law is amended by striking out "that do not fall directly within the jurisdiction of any other standing committee/qui ne sont pas directement du ressort des autres comités permanents".

and THAT Stephen Bindman be appointed as a member of the Emerging Issues Committee.

Carried

FINANCE & AUDIT COMMITTEE REPORT

Re: Transfer to Working Capital Reserve
Re: Capital Expenditures Carried Forward to 2002
Re: Cheque Signatory

Mr. Ruby presented the Report of the Finance & Audit Committee for approval by Convocation.

Finance and Audit Committee
November 22, 2001

Report to Convocation

Purpose of Report: Decision
Information

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on September 20, 2001. Committee members in attendance were: Ruby C. (c), Crowe M. (vc), Epstein S. (vc) Cass R., Diamond G., Divinsky P., Lamont D., Lawrence A., Porter J., Swaye G., Wright B.. Also attending were Mulligan G., Wilson R. as chair and member of the LibraryCo Inc. board respectively. Staff in attendance were Tysall W., Grady F., Cawse A., and Hebditch S., Executive Director of LibraryCo Inc.

2. The Committee is reporting on the following matters:

Decision

- Transfer to Working Capital Reserve.
- Capital Expenditures carried forward to 2002.
- Cheque Signatory.

Information

- General Fund and Compensation Fund Financial Statements for the nine months ended September 30, 2001 (page 5 and 13).
- Investment Compliance Reports at September 30, 2001 (page 15).
- LibraryCo Inc. Financial Statements for the six months ended June 30, 2001 (page 21).
- LibraryCo Inc. Budget, Strategic and Business Plans.

FOR DECISION

TRANSFER TO WORKING CAPITAL RESERVE

1. The Statement of Revenues and Expenses for the General Fund on page 6 of this report projects a General Fund Surplus of $5,783,000 at the end of 2001. The projected surplus in 2001 is a potential source of funding for the Working Capital Reserve approved by Convocation in 1997.

2. The Law Society's main revenues streams are not collected equally over the year and the main intention of this Reserve is to provide cash for the Law Society to fund operating expenses which generally accrue evenly over the year.

3. The Committee recommends that Convocation approve the transfer of $3,000,000 from the 2001 General Fund surplus to the Working Capital Reserve.

CAPITAL EXPENDITURES CARRIED FORWARD TO 2002

4. A memorandum attached as page 22 of this report describes the status of capital expenditures in 2001. Certain projects in the 2001 Facilities Capital budget may not be completed by year end. Any overspending on capital projects for 2001 will be offset by project under spending and additional membership fee revenue in excess of budget.

5. In addition, the memorandum recommends that $600,000 be transferred from the 2001 Griffith's contingency to the Capital and Technology Fund to finance ongoing departmental moves in 2002.

6. The Committee recommends that Convocation approve:

- that capital projects approved but not completed in 2001 be completed in 2002 using funds already allocated in the Capital and Technology Fund;
- the transfer of $600,000 from the 2001 unspent contingency to the Capital and Technology Fund.

CHEQUE SIGNATORY

7. The Law Society's Cheque Signing Authority Policy provides for designated Benchers in close proximity to Osgoode Hall to act as signatory for cheques in excess of $100,000 or manually prepared cheques. With the appointment of Mr. Clayton Ruby as Chair of the Finance and Audit Committee a replacement Bencher in close proximity to Osgoode Hall is required. Mr. Julian Porter has agreed to fulfill this role.

8. The Committee recommends that Convocation approve Mr. Julian Porter as a cheque signatory on the Law Society bank accounts.

FOR INFORMATION

INTERIM FINANCIAL STATEMENTS AS AT SEPTEMBER 30, 2001

9. The Committee received the report from the Audit Committee and the following:
   - Law Society General Fund financial statements for the nine months ending September 30, 2001 (attached from page 5);
   - Lawyers Fund for Client Compensation Statement of Revenues, Expenses and Fund Balance and Balance Sheet for the nine months ending September 30, 2001 (attached from page 13);
   - Investment Compliance Reports at September 30, 2001 (attached from page 15).

INTERIM FINANCIAL STATEMENTS AS AT JUNE 30, 2001

10. The Committee received LibraryCo Inc financial statements for the six months ending June 30, 2001 (attached from page 21).

LIBRARYCO INC. BUDGET, STRATEGIC AND OPERATING PLANS

11. During the budget discussion in September the Committee requested additional information from LibraryCo Inc. in regard to the financial implications of policy decisions, in particular:

    - a detailed financial analysis of projected operations in 2002;
    - the financial resources available to the corporation;
    - the envisaged use of the County Library Fund ($1.7million at December 31, 2000).

12. The Committee noted that LibraryCo was newly created, and was staffed primarily by volunteers. Many of the reporting problems that LibraryCo was intending to rectify had been in existence for a long time. The Law Society was assisting the new corporation, and would continue to cooperate in the provision of staffing resources, technical expertise and strategic direction, in order to satisfy our mutual goal of implementing the "Elliott Reports". These see the implementation of the blended model, improved accountability for funds expended, and operational improvements.

13. LibraryCo presented further information to the Committee, but the methods by which LibraryCo will implement the Elliott Reports were still unclear.

- In the new era of universal funding, LibraryCo Inc's ability to report and control various types of revenues and expenses have not yet been resolved. Revenues generated at the local association level were noted as being particularly difficult to monitor.
- A small number of associations have not provided any kind of financial report for any of the years 2000, 2001 or a budget for 2002.
- There was confusion over the timing, quantum and motivation for the projected uses of the County Library Fund provided by LibraryCo. In the absence of replacement revenues or reduction in expenses, some of the projected uses are not sustainable. For instance the long term financial implications of a reduction in LFO funding have not been incorporated, and Law Society funding may also be reduced depending on the economics of the next year.
- Information on relevant balance sheet items at the individual association level is not yet available and policy development in assessing these financial resources has not been completed.

14. The Committee noted that the LibraryCo Board was meeting on November 23, 2001 to address these and other issues and is sympathetic to the logistics of completing all that is required.

15. While it is imperative to improve financial accountability, it is envisaged that short term funding will continue to be distributed to the associations in the same ratio as prior years, but there would be no guarantee that these funding ratios and levels would continue in the future without adherence to the blended model described in the Elliott Reports and shareholders agreement. LibraryCo agreed that they would provide a detailed budget congruent with a business plan by May 1, 2002. The issue of continued funding for LibraryCo will be addressed on that date. LibraryCo's plan would address the issues above, including the detail of how the blended model is to be implemented, describe the financial implications of implementing the blended model, and describe how the financial implications would be addressed.

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

(1) Statement of Revenues and Expenses for the General Fund. (pages 5 - 21)

(2) Copy of a memorandum from Ms. Wendy Tysall to the Finance and Audit Committee dated October 29, 2001 re: 2001 Capital Expenditures. (pages 22 - 25)

It was moved by Mr. Ruby, seconded by Mr. Crowe that $3,000,000 be transferred from the 2001 General Fund surplus to the Working Capital Reserve; that the capital projects approved but not completed in 2001 be completed in 2002 using funds already allocated in the Capital and Technology Fund; that $600,000 be transferred from the 2001 unspent contingency to the Capital and Technology Fund and that Mr. Julian Porter act as a signatory for cheques on the Law Society bank accounts.

Carried

PROFESSIONAL DEVELOPMENT & COMPETENCE COMMITTEE REPORT

Re: Amendment to Policy Regarding Non-Payment of Specialist Fees by Certified Specialists

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

Professional Development & Competence Committee
November 22, 2001

Report to Convocation

Purpose of Report: Policy - For Decision
Information

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

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on November 8, 2001. Committee members in attendance were Earl Cherniak (Chair), Kim Carpenter-Gunn (Vice-Chair), Bill Simpson (Vice-Chair), Gordon Bobesich, Carole Curtis, Abe Feinstein, Barbara Laskin, Janet Minor, Greg Mulligan, Helene Puccini, and Rich Wilson. Staff in attendance were Diana Miles, Director of Professional Development and Competence, Janine Miller, Sophia Sperdakos, and Paul Truster.

2. The Committee is reporting on the following matters:

   Policy - For Decision

   - Amendment to Policy Regarding Non-Payment of Specialist Fees by Certified Specialists

Information

- Report on Specialist Certification Matters Finalized by the Certification Working Group on November 8, 2001 and Approved in Committee on November 8, 2001
- Appointment of Certification Working Group Members
- Information Report on LibraryCo Activities

POLICY - FOR DECISION

AMENDMENT TO POLICY REGARDING NON-PAYMENT OF SPECIALIST FEES BY CERTIFIED SPECIALISTS

Background

1. When the Specialist Certification Program was created in 1986 it was mandated to be a self-sustaining program. In 1993, the former Certification Board (now the Certification Working Group) was asked to deal with the issue of non-payment of annual fees and, with Convocation's approval, adopted the following policy.

> *In the case of late or non-payment of fees, the Specialist will be sent reminder notices twice during the four months following the billing date and if the Specialist fails to pay fully the Specialist Certification Annual Fee four months after the fee due date, the member's name will be removed from the list of currently certified specialists and Convocation will be so notified. In order to have a name added again to the list of currently certified specialists, an administration fee of $50.00 will be imposed. The Board will consider a policy on revocation of certificates for non-payment of annual fees at a later point in time. (Convocation: May 28, 1993)*

2. No revocation policy was developed.

Issue

3. The Certification Working Group, certification program staff and the Committee agree that the above policy has, on occasion, resulted in an abuse of the specialist designation, since it has not, in effect, prevented a lawyer who is in arrears from continuing to advertise, and benefit from, the designation.

4. In addition, the current policy is cumbersome to administer for both the Specialist Certification program office and the Finance Department and interferes with efforts to meet the specialist certification program mandate of self-sufficiency.

Recommendation

5. Having considered the issue raised by the current policy, the Committee accepts the recommendation of the Working Group that in the case of non-payment of fees, arrears, and cheques drawn on accounts with insufficient funds, the following steps be taken:

a) Following the regular 30-day billing cycle, the certified specialist lawyer will receive a second follow up invoice with a 30-day deadline and a letter outlining the consequence of not meeting his or her financial obligation. Specifically, the lawyer will be informed that non-payment will result in a revocation of the designation, publication of this fact in the *Ontario Reports*, with the reasons for the revocation and notification that improper use of the designation is contrary to the Rules of Professional Conduct.

b) Within the above 30-day period, there will be a verbal follow-up by the program administrator to ensure that the lawyer has received and read the letter and understands the consequences.

c) The lawyer will be provided with a third and final 30-day notice.

d) At the end of the notice period, if payment has not been received, the specialist designation is revoked and this fact will be published in the *Ontario Reports*, with the reasons for the revocation and notification that improper use of the designation is contrary to the Rules of Professional Conduct. (Rules 3.03(1)(g) and3.05(2)).

e) A lawyer whose certificate has been revoked for non-payment will be required to wait two years before seeking re-entry into the program and will be treated as a new applicant. The outstanding fees will have to be paid in full before the application is considered.

f) The working group will have discretion to consider the impact of special circumstances on the application of the policy.

Request to Convocation

6. Convocation is requested to consider the Committee's recommendation set out in paragraph 5 and, if appropriate, approve it.

INFORMATION

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE CERTIFICATION WORKING GROUP ON NOVEMBER 8, 2001 AND APPROVED IN COMMITTEE ON November 8, 2001

1. 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	James H. Cooke (Windsor)
Immigration Law	Matthew M. Moyal (Toronto)

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

Family Law	Thomas G. Bastedo, Q.C. (Toronto) Terrence W. Caskie (Toronto) R. John Harper (Hamilton) Ricki D. Harris (Toronto) Paul S. Pellman (Toronto)

3. The Committee is pleased to report approval of the membership of John Morrissey (Toronto) and Robert MacDonald (Ottawa) on the Intellectual Property Law Specialty Committee. The membership on the Intellectual Property Law Specialty Committee is as follows:

Donald Cameron (Toronto)	Diane Cornish (Ottawa)
Elizabeth G. Elliott (Ottawa)	Janet Fuhrer (Ottawa)
Robert A. MacDonald (Ottawa)	John Morrissey (Toronto)
Greg Piasetzki (Toronto)	Timothy Sinnott (Toronto)

MEMBERSHIP ON SPECIALIST CERTIFICATION WORKING GROUP

1. The Committee approved the members of the Certification Working Group whose role is to consider applications for certification and re-certification. The members, effective November 8, 2001 are: Gerald Swaye (Chair), Larry Banack, Stephen Bindman, Kim Carpenter-Gunn, Janet Minor, Helene Puccini, and Bill Simpson.

STATUS REPORT ON LIBRARY CO

1. Convocation is provided with an information report, set out at Appendix 1, on a number of financial issues affecting LibraryCo.

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

(1) Copy of a memorandum from Mr. Greg Mulligan to the Professional Development and Competence Committee dated November 2001re: Information Report - LibraryCo. (Appendix 1 (page 6))

It was moved by Mr. Cherniak, seconded by Ms. Carpenter-Gunn that in the case of non-payment of fees, arrears, and cheques drawn on accounts with insufficient funds, the following steps be taken:

a) Following the regular 30-day billing cycle, the certified specialist lawyer will receive a second follow up invoice with a 30-day deadline and a letter outlining the consequence of not meeting his or her financial obligation. Specifically, the lawyer will be informed that non-payment will result in a revocation of the designation, publication of this fact in the *Ontario Reports*, with the reasons for the revocation and notification that improper use of the designation is contrary to the Rules of Professional Conduct.

b) Within the above 30-day period, there will be a verbal follow-up by the program administrator to ensure that the lawyer has received and read the letter and understands the consequences.

c) The lawyer will be provided with a third and final 30-day notice.

d) At the end of the notice period, if payment has not been received, the specialist designation is revoked and this fact will be published in the *Ontario Reports*, with the reasons for the revocation and notification that improper use of the designation is contrary to the Rules of Professional Conduct. (Rules 3.03(1)(g) and3.05(2)).

e) A lawyer whose certificate has been revoked for non-payment will be required to wait two years before seeking re-entry into the program and will be treated as a new applicant. The outstanding fees will have to be paid in full before the application is considered.

f) The working group will have discretion to consider the impact of special circumstances on the application of the policy.

Carried

It was moved by Mr. Aaron that the Cherniak/Carpenter-Gunn motion be amended to provide that upon notification by a person whose payments have lapsed that the Complaints Department be notified.

The Treasurer ruled the motion out of order.

It was moved by Mr. Aaron, seconded by Mr. Topp that the words "and the membership of that person in the Law Society shall be suspended accordingly" be added at the end of subparagraph (d) on page 4.

The Treasurer ruled the motion out of order as an amendment to the main motion.

Mr. Aaron requested that his motion be treated as a Notice of Motion to be brought back to the next Convocation following the meeting of the Professional Regulation Committee.

INTER-JURISDICTIONAL MOBILITY COMMITTEE REPORT

Re: Status Report on the Work of the Federation of Law Societies Task Force on Mobility and the Law Society's Committee on Inter-Jurisdictional Mobility

Mr. Millar presented the Report of the Inter-Jurisdictional Mobility Committee for information only.

Inter-Jurisdictional Mobility Committee
November 22, 2001

Report to Convocation

Purpose of Report: Information

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

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on September 19, 2001, October 9, 2001 and November 9, 2001. The members of the Committee are: Derry Millar (Chair), Gavin MacKenzie (Vice-Chair), John Campion, Gillian Diamond, Abe Feinstein, George Hunter, and Niels Ortved. The Treasurer is an *ex officio* member of the Committee.

2. The Committee is reporting to Convocation on the following:

FOR INFORMATION

- Status Report on the Work of the Federation of Law Societies Task Force on Mobility and the Law Society's Committee on Inter-Jurisdictional Mobility

STATUS REPORT

Federation of Law Societies Task Force

1. In August 2001, the Federation of Law Societies established a National Task Force on Mobility to examine full mobility rights and conditions for lawyers in Canada. The Task Force members are:

Vern Krishna (Chair)	
George Hunter	Ontario
Eric Macklin	Alberta
Marc McCrea	Nova Scotia
Francis Gervais	Quebec

2. The decision to establish a Task Force grew out of the ongoing policy work that has been undertaken across the country to provide greater flexibility to lawyers who, in the interests of serving their clients, wish to provide legal services outside the province in which they are called to the bar. In particular the Federation sought to consider possible ways to,

   (a) build upon the Inter-Jurisdictional Practice Protocol signed in February 1994, which permits members in good standing in any signatory province in Canada to provide legal services in any other signatory province for a maximum of 10 matters over 20 days in any 12 month period (the "10-20-12 rule");[1] and

   (b) consider broader application of the western provinces protocol, which entitles members in good standing in any signatory province in Canada to provide legal services for up to 6 months in a 12 month period (the "6-12 rule").[2]

3. In accordance with the Mobility Resolution that established the Federation Task Force a survey was sent to law societies requesting information on their,

   (a) admission requirements
   (b) professional liability insurance
   (c) defalcation/ compensation funds
   (d) rules of professional conduct
   (e) trust accounting requirements
   (f) post-call requirements.

4. The Task Force held an initial meeting on October 1, 2001 at which it identified issues for discussion and considered, in general terms, possible minimum requirements that should underlie any national mobility scheme. In accordance with its mandate, the Task Force has prepared a plan of action setting out its approach, the areas of principle on which the Task Force has agreed, the issues it will consider and its time table. The plan of action is set out at Appendix 1. The Task Force's next meeting is December 4, 2001, at which time it will develop the broad parameters of its interim recommendations.

Law Society of Upper Canada Committee on Inter-Jurisdictional Mobility

5. Following the establishment of the Federation of Law Society's Task Force on Mobility, Convocation approved the establishment of a committee on Inter-Jurisdictional Mobility. The Committee's mandate, as set out in By-law 9 made pursuant to the *Law Society Act*, is as follows:

> The mandate of the Inter-Jurisdictional Mobility Committee is to develop for Convocation's approval policy options on all matters relating to the inter-jurisdictional mobility of members of the legal profession.

6. The Committee's immediate priority, since its establishment, has been to consider the nature of the issues currently being addressed by the Federation Task Force, with a view to developing the Law Society's position and participating in the development of the Task Force's recommendations.

---

[1]Convocation approved a by-law implementing the protocol in June 2001. The by-law includes a number of provisions regarding, among other things, insurance, compensation funds, good standing, and attornment to Ontario's Rules of Professional Conduct.

[2]Currently, only British Columbia, Alberta, Saskatchewan and Manitoba are signatories.

7. The purpose of this information report to Convocation is to,

(a) set out the considerations underlying the Committee's approach to the issues; and

(b) outline the general approach the Committee has developed in anticipation of the Task Force meeting on December 4.

CONSIDERATIONS UNDERLYING THE COMMITTEE'S APPROACH

Long Standing Recognition of Mobility Principle

8. The Law Society of Upper Canada, like most of the other provinces and territories in Canada, has already recognized the value and importance of inter-provincial mobility in a number of ways. This recognition is evidenced by the Law Society's provisions regarding,
   (a) transfer of lawyers from other provinces in Canada to Ontario (By-law 11);
   (b) appearance by an out-of province lawyer as counsel in a specific proceeding (By-law 22);
   (c) inter-provincial practice of law (10-20-12 rule) (By-law 23); and
   (d) foreign legal consultants (Convocation policy 1988).

9. This recognition, particularly as set out in By-Law 23, has provided the Committee with an appropriate context for its analysis of the issues before the Federation Task Force.

National and International Trends Toward Enhanced Mobility

10. The Committee's approach has also been affected by the fact that as the discussion of mobility of the legal profession goes forward it does so in the context of a number of external factors that must be taken into account:
   (a) A number of national and international agreements, to which law societies are not signatories, but to which they are or may become subject, are affecting the need to make greater provision for mobility. Among these agreements are:
      (i) The Agreement on Internal Trade (AIT)[3];
      (ii) The North American Free Trade Agreement (NAFTA); and
      (iii) General Agreement on Trades in Services (GATS).

   (b) An increasing number of clients have matters that cross provincial borders and require lawyers to be able to provide assistance in more than one jurisdiction. These are not just large corporate clients, but individuals with personal legal issues that are not neatly confined within the borders of the province where their lawyer has been called to the bar.

   (c) There are national and regional law firms that could provide more efficient service to clients by being able to move firm lawyers around the country or region as the need requires.

   (d) As other professions remove barriers to mobility, particularly the accounting profession, there is a risk that without greater mobility the legal profession may lose opportunities to provide services on a national level.

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[3]The Federation's 1994 Protocol on Inter-Jurisdictional Mobility arose out of the necessity to address the AIT.

(e) Other provinces have already expanded or are considering expanding[4] their mobility provisions beyond the original 10-20-12 rule.

Protection of the Public

11. An important feature that must underlie any ongoing discussion and expansion of mobility provisions is the *continued protection of the public* through the passage of appropriate policies and by-laws.

12. The 10-20-12 rule and the 6-12 rule have already recognized this by including provisions regarding insurance and compensation funds and providing additional protection to clients through the applicability of rules of professional conduct and discipline procedures.

13. The survey results from the laws societies have revealed broad similarity of approach on significant regulatory provisions.[5] The Committee is of the view that such similarity contributes to the feasibility of enhanced mobility because common understanding of appropriate regulation already exists.

The Meaning of Mobility

14. A discussion of mobility invariably raises the question of whether one is referring to "temporary" or "permanent" mobility. Both the 10-20-12 rule and the 6-12 rule apply to what has been called "temporary" mobility. A member in good standing in one province in Canada provides legal services in another province of Canada under specific rules that apply to non-members of that province's bar. Under those rules the lawyer cannot represent himself or herself as a member of the bar of that province and cannot hold a trust account in that province.[6]

15. Although there are a number of ways to define permanent mobility, at its foundation is the underlying principle that a lawyer from one province may work in or become a member of another provincial bar, without having to undergo a rigorous qualification process.

16. A significant issue for the Federation Task Force's and the Law Society Committee's consideration is whether enhanced temporary mobility or permanent mobility can be introduced without sacrificing the protection of the public described above.

17. The Committee is of the view that it can, provided that certain principles are adopted:
    (a) Whether a lawyer's provision of legal services in a host province is temporary is at least, in part, a matter of intent objectively assessed based on pre-determined indicia;

    (b) Having said that, in order to provide some guidance by which rules can be developed, it is appropriate to define a period of time during which legal services may be provided under a "temporary" mobility scheme.

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[4]The executives of the regulatory bodies of the Atlantic provinces recently passed a resolution for the consideration of their respective Councils/Convocations regarding entering into a protocol similar to that of the western provinces.

[5]A summary of survey findings is set out at Appendix 2. Complete survey results are available on request from Sophia Sperdakos.

[6]Note that pursuant to the western protocol a member of the bar of Alberta, for example, could work for six months in Saskatchewan and six in British Columbia.

(c) Harmonization of provincial regulatory provisions, wherever feasible, should be pursued as a long term goal, since the result will be a seamless regulatory landscape. The absence of harmonization, however, is not an impediment to enhanced mobility, whatever its nature, provided minimum rules are put in place that ensure that members of the public,

(i) are aware of the lawyers' status; and

(ii) are protected to at least the same extent as they would be if represented by a lawyer called to the bar in the clients' province.

d. In addition to those minimum rules there should be additional specific provisions that govern those exercising "temporary" mobility and specific provisions that apply when a lawyer either seeks to, or in fact, goes beyond the scope envisioned by the temporary mobility rules.

Voluntary and Reciprocal

18. The Committee's approach has been developed on the understanding that, as with the 10-20-12 rule and the 6-12 rule, participation in any enhanced mobility protocol will be *voluntary* and the protocol would apply *reciprocally* for all signatories.

COMMITTEE'S APPROACH

19. Based on the considerations set out above, and keeping in mind that the nature of discussions at the December 4th Task Force meeting may have an impact on some of the Committee's considerations, the Committee has developed an approach to the mobility issue along the following lines:

a. There should be an expansion of mobility provisions to reflect both the changing nature of client expectations and other factors that are necessitating such expansion;

b. Lawyers who are members in good standing in the province or provinces in which they have been called to the bar should be entitled to provide legal services in any other province for a period of 183 days in a 12 month period.[7]

c. In providing such service the lawyer would not be entitled to,
i. hold a trust account in his or her name;[8] or
ii. represent himself or herself as a lawyer entitled to practice law in the host province, except under the temporary rules;

d. As is the case with the current 10-20-12 rules there would be no requirement to check in with the host province during this 183 day period. There would, however, be a national registry of lawyers so that any law society could access relevant information on any lawyer;

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[7]The Committee has used 183 days rather than six months because it avoids discussion of what is meant by "six months".

[8]This is currently a provision under the 10-20-12 rules and the 6-12 rule. For practical purposes this restriction limits the kind of work a lawyer can undertake under temporary mobility provisions.

e. If the lawyer intends to provide legal services beyond 183 days or does, in fact, provide legal services beyond the 183 days he or she must forthwith notify the host law society that he or she is in the province;

f. The law society would have the discretion to extend the lawyer's temporary status or to decide that the lawyer's intent is to be "permanently" within the province and to require the lawyer to cease providing legal services within the province under the temporary rules and become a member under the permanent rules.

g. Permanent mobility would be enhanced. Any lawyer, who has been called to the bar of another province and practised for at least three years and who is a member in good standing would be entitled to apply to be called to the bar of another province. Call to the bar would be obtained by completing an application form attesting to,

i. good character; and

ii. good standing in any other province in which the lawyer has been called to the bar;

and providing

iii. an undertaking to handle only those matters in which the lawyer is competent to provide service; and

iv. certification that he or she has read all materials with respect to local law mandated by the province as required reading.[9]

h. Any lawyer who has not been called to the bar and practised for at least three years would be ineligible for the approach set out in (g) above. Such a candidate would be required to complete the bar admission course or transfer examinations of the province in question.

20. The enhanced mobility protocol would provide that every signatory agrees to minimum regulatory provisions,[10] along the following lines:

a. To be eligible to take advantage of any mobility provisions lawyers must have graduated with a common law degree from a university in Canada, been called to the bar of a Canadian province, be subject to a rule of professional conduct that provides that they will only undertake work they are competent to do and be members in good standing in all provinces in which they are members of the bar;

b. Under the temporary mobility provisions lawyers would be limited to undertaking only those activities or providing those services they are entitled to undertake or provide in their home province;

c. Each signatory province will have in place mandatory professional liability insurance and a compensation fund that provide extension of coverage to inter-provincial activities and ensure that, at a minimum, clients are compensated under the visiting lawyer's plans for at least as much as they would have received under the liability and compensation provisions in place for lawyers called in the province in which the client resides;

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[9]This would replace the current transfer examinations that each province has in place. The provinces would collaborate to develop materials of similar scope.

[10]At least until harmonization occurs that creates common approaches.

d. Lawyers exercising mobility rights will be subject to the rules of professional conduct of the host province;

e. Appropriate rules will be developed for discipline and conduct proceedings with a view to ensuring the convenience of the client and the protection of the public; and

f. Each signatory will have in place a rule of professional conduct regarding competence.

NEXT STEPS

21. As set out in the Federation Task Force's plan of action its mandate is to provide an interim report to the Federation mid-winter meeting in March 2002 and a final report in August 2002.

22. Provincial law societies will have the opportunity to consider the Task Force's interim and proposed final reports. Once the draft interim report is produced the Committee will provide it to Convocation for discussion.

APPENDIX 1: FEDERATION OF LAW SOCIETIES MOBILITY TASK FORCE PLAN OF ACTION

Federation of Law Societies National Task Force on Mobility

Plan of Action

The National Task Force on Mobility was established by the Federation of Law Societies to examine full mobility rights and conditions for lawyers and Quebec notaries in Canada.

In accordance with the Mobility Resolution the Task Force has prepared the following plan of action, to be filed with each law society:

1. In accordance with the Mobility Resolution the Task Force has surveyed all law societies with respect to their,

   a. admission requirements
   b. professional liability insurance
   c. defalcation compensation
   d. rules of professional conduct
   e. trust accounting requirements
   f. post-call requirements.

2. The Task Force will compile the results of the survey and analyse them to assess regulatory similarities and differences among the provinces. Each law society will receive copies of the compilations and the analysis.

3. The Task Force held an initial meeting on October 1, 2001 at which it identified issues for discussion and considered, in general terms, possible minimum requirements that should underlie any national mobility scheme.

4. Task Force members will report on the general nature of the October meeting to the Atlantic, western, Ontario, and Quebec law societies.

5. The Task Force's consideration of issues will be informed by, among other factors,

a. the role of law societies as regulators of the legal profession;
b. similar and different regulatory provisions from province to province that must be taken into account in developing expanded mobility;
c. the analysis of survey results;
d. the provisions of the Inter-Jurisdictional Practice Protocol;
e. the provisions of the Western Protocol; and
f. the mobility experience in Australia and in Europe.

6. In developing its approach the Task Force has, so far, agreed that the following principles should apply:

a. The protocol should be voluntary and reciprocal;

b. The terms of the protocol should satisfy each regulator's mandate to govern in the public interest;

c. In the immediate future the goal of the protocol is not to create a national regulatory scheme, but rather to,
- harmonize provincial requirements where practical to do so; or
- where more appropriate, to agree to minimum criteria that each signatory will meet, with mutual recognition of one another's regulatory provisions over and above the minimum criteria;

d. With respect to minimum admission criteria national mobility should require that anyone seeking to take advantage of the mobility provisions has;
1. a common law degree from a Canadian university;
2. call to the bar; and
- is subject to a rule of professional conduct that requires members to provide services only in those areas in which they are competent.

e. The protocol must address whether knowledge of local law must form part of the admission criteria;

f. Provisions of the protocol must,
1. ensure that clients are protected to the same extent as they would be if represented by a lawyer of their own province; and

2. consider the clients' convenience when determining which province should address issues related to lawyers' activities under the protocol.

7. Over the coming months the Task Force will continue to develop principles that should underlie the protocol.

8. The Task Force's work will be developed along the following time line:

a. By December 2001 the Task Force will develop a document of draft principles it believes should be embodied in a national mobility protocol. At this stage it will identify broad parameters of principle and structure.

b. Between December and the mid-winter Federation meeting in March 2002, there will be an opportunity for law societies to consider the principles and structure outlined, to provide the Task Force with input and direction at the March meeting.

c. Prior to and following the mid-winter meeting, the Task Force will continue to meet to consider, in more detail, the application of the principles outlined in the December report, focusing in particular on,

1. those minimum requirements that must be addressed under each of the topics set out in paragraph 1 above;

2. the extent to which efforts should be made to harmonize systems or, instead, to recognize systems already in place from province to province; and

3. the extent to which components of the protocol will need ongoing development.

d. By mid-April, 2002 the Task Force will complete a draft final report to be provided to law societies for discussion with their boards, through information sessions and other meetings.

e. The final Task Force report will be presented at the summer Federation meeting in August 2002.

Dated: October 2001

APPENDIX 2:

FEDERATION OF LAW SOCIETIES
INTER-JURISDICTIONAL MOBILITY TASK FORCE
NOVEMBER 2, 2001

RESULTS OF NATIONAL SURVEY: SUMMARY

PREPARED BY THE POLICY SECRETARIAT
LAW SOCIETY OF UPPER CANADA
(416-947-5209)

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BACKGROUND

1. In September 2001 a survey was sent to members of the Federation of Law Societies' Task Force on Mobility to be forwarded to appropriate representatives of each of the law societies of Canada and the chambre des notaires. The law societies and the chambre were requested to complete the survey and return it to the Law Society of Upper Canada for collating.

2. The survey covers 6 topic areas:
   a. Admissions
   b. Professional Liability Insurance
   c. Defalcation Insurance/Compensation Funds
   d. Trust accounting
   e. Rules of Professional Conduct (summary of results under separate cover at a later date)
   f. Continuing Competence Requirements

3. The survey results have now been collated by Strategic Communications Inc., a consulting firm, and copies are being provided to all those to whom the survey was sent. Only Nunavut has not responded to the survey.

4. The purpose of this brief report is to provide a narrative summary of the findings in each section, with the exception of the section on the Rules of Professional Conduct.[1] The report does not repeat each question, but discusses the general findings in each section.[2] For a detailed breakdown of each survey question please refer to the survey results. Although the survey provides a useful overview to the issues that are relevant to a discussion of mobility, it is clear that if Task Force recommendations include proposals for the harmonization of certain regulatory functions or the inclusion of provisions to address minimum standards it will be necessary to engage in more detailed discussions in each subject area.

5. This report relies on the information provided by each law society and the chambre des notaires. In some cases different respondents focused on different activities or issues in their answers or answered differently from what had been anticipated by the question. In such cases the analysis is extrapolated from what the answers appear to mean.

6. In general terms there is substantial similarity among the provinces in many of the broad regulatory provisions, such that mobility in principle is not impeded. But in each area there are differences that raise the question of whether harmonization of approaches should be sought or whether, in the interests of mobility, provinces could recognize one another's approaches, subject to agreement on certain fundamental components. To highlight this issue the report outlines "possible mobility issues" that arise from answers to certain survey questions.

ADMISSIONS

Background

7. This section covers a broad range of issues as follows:
   a. *required credentials for admission as a student member of a law society, the Barreau or chambre des notaires*
   b. *articling requirements*
   c. *teaching term and testing requirements*
   d. *good character/other requirements*
   e. *categories of members/fee categories*
   f. *transfer rules*
   g. *occasional appearance rules*
   h. *foreign legal consultants*

Credentials for Admission

8. The requirements for admission as a student-at-law[3] in all provinces and territories are the same. All require,
   a. graduation from a law course offered by an accredited university in Canada, common or civil law, or

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[1]This material is very dense and requires more time to consider. In the interests of providing the material to the Task Force members and others as soon as possible, the analysis of the professional responsibility section will be sent separately.

[2]The paragraph numbers in this report do not coincide with the survey question numbers.

[3]In some places known as "articling student at law" or articled clerk or "stagiare".

b. the attainment of a Certificate of Qualification from the National Committee on Accreditation or, in the case of Alberta, a certificate of equivalence from the Universities Coordinating Counsel for transitional applicants or, in the case of Quebec, recognition of a foreign law degree by the Comité des equivalences.

9. The chambre requires a Canadian civil law degree and a diploma in notarial law from Université de Montréal, Laval or Sherbrooke.

10. Of the law societies, only Ontario requires that the credentials must have been obtained within a specified period immediately preceding entry as a student member. In Quebec the records of all candidates are subject to examination and inquiry by the Examining Committee, which could include an assessment of the passage of time that has elapsed since the obtainment of qualifications. For example, when a candidate holds a law degree obtained more than five years before application the Committee asks questions regarding how the candidate maintained his or her legal skills since obtaining the degree. The chambre des notaires requires the notarial law diploma to have been obtained not more than16 months before the beginning of articles.

Articling

11. All provinces, territories, and the chambre des notaires require student members to article: Quebec for 6 months; British Columbia for 9 months, Ontario for 10 months, the chambre des notaires for 32 weeks, New Brunswick for 44 weeks, Manitoba for 52 weeks, and all other provinces and territories for 12 months.[4]

12. There is substantial variety among the provinces as to when articling takes place. In Manitoba, the teaching term is spread out over the articling period. In Quebec articling takes place after the teaching term and successful completion of examinations. In Alberta, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island and Saskatchewan, articling takes place in large part during the teaching term, or perhaps more accurately stated the teaching term takes place during articling. In British Columbia articling does not take place during the term. Yukon candidates follow the BC rules. In the Northwest Territories articling takes place either before or during the teaching term. In Ontario articling takes place after the skills phase of the teaching term and before or after the substantive phase. For notaries it takes place after the teaching term.

13. Only Quebec and the Yukon appear to have no provisions for abridging or waiving articles. Other provinces in varying degrees permit recognition of a portion of articles served outside the province, recognize previous experience elsewhere, allow for abridgments on compassionate grounds, and a waiver where an applicant has completed a bar admission course elsewhere in Canada.

14. Some provinces (Manitoba, Newfoundland, Ontario) require articling students to complete some kind of professional responsibility examination or other assessment. These and other provinces integrate professional responsibility issues into the teaching term. Virtually all provinces require some type of evaluation or certification by principals as to what has been covered during the articling term. The chambre des notaires conducts 3 spot assessments, 8 weeks apart, and a final assessment at the end of articles to ensure students have received the level expected for each objective of the articling period.

Teaching Term

15. The teaching terms of the bar admission programs range in length from 5 weeks in Saskatchewan, 30 days spread over Fridays from August to April of the articling year and 9 examination days in Manitoba, 112 days from August until April in Quebec, and 18 weeks in Ontario. The remaining provinces' terms are between 7 and 10 weeks. The chambre des notaires program is a practical program combining work placement for 29 weeks and 3 weeks of teaching.

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[4]This does not indicate whether time off for vacation is permitted.

16. All provinces, except Nova Scotia and the chambre des notaires, teach some substantive law. Although there is overlap in the subjects addressed in each province, the depth of content varies widely.

17. Except in the case of Quebec notaries, all provinces and territories require students to write examinations in substantive law. Notaries write examinations during their university education. The number of examinations varies from,

NS	1 written over two days
BC	2 open book examinations, 3 hours each
SK	3
AB	6
NF	6
QU	6
PEI	7
MB	8 written and 1 oral
ON	9
NB	12 plus an exam on the Rules of Conduct and the Statues of NB

Little can be determined about the nature of the programs based only on numbers of examinations. The content, depth of information required of students and the examination formats vary widely. The exam formats vary from essay, to short answer, to multiple choice. The passing grade for most provinces is 60%. The pass in Nova Scotia and New Brunswick is 70%. In Ontario the pass varies from examination to examination using examination marking methodology: "borderline group" methodology, generally, and "Angoff" methodology for multiple choice examinations.

18. All provinces teach skills, with substantial overlap in the subjects taught. Other than Newfoundland all provinces evaluate students in some or all of the skills taught, using a variety of assessment approaches. Passing grades for skills assessments range from a Pass/Fail system to 60% or 70%.

19. The provinces have very different rules concerning the time frame within which a student member must complete bar admission requirements and be called to the bar, the most typical being 2 or 3 years.

Possible Mobility Issue

20. *The most significant issue for mobility appears to be that related to substantive law and local knowledge. If there is to be permanent mobility to what extent do the following issues need to be addressed and provisions harmonized:*

a. The depth of substantive content taught by bar admission courses;

b. The length of the bar admission course, including articling (out of concern for forum shopping);

c. The consistency of the skills taught and assessed.

Good Character

21. All provinces and territories require that applicants for call to the bar be of good character. In many cases the applicants must answer questions relating to criminal code offences, bankruptcies, discipline proceedings in other jurisdictions or professions, and some mental health questions. In some provinces the applicants must submit references.

22. In response to the question regarding additional requirements some provinces noted a requirement that the applicant be a Canadian citizen or eligible to work in Canada as a permanent resident, and that applicants sign the rolls and pay fees.

Possible Mobility Issue

23. *If there is to be permanent mobility, arguably it becomes more important that all provinces require the exact same test for proof of good character. This may be more important the more extensive the temporary mobility provisions become. Based on current provisions across the country it does not appear this would be an insurmountable problem.*

Categories of Members/Fees

24. Most of the provinces have some provisions regarding call to the bar or other accommodation for law professors and deans. In a number of provinces law professors from that province may be called to the bar without doing the bar admission course after having taught for a specified period, most often 2 or 3 years. In B.C. professors may apply for a reduction in the articling term.

25. Eight respondents have no category for "life members". Five do. Each province with such a category has a slightly different basis for eligibility, some based on age, some on years of practice, some on a combination of the two.

26. Only Ontario has a provision that provides that upon request of the Attorney General a member of a law society outside the province who is of good character may be admitted as a temporary member to work in specified circumstances.

27. All provinces, except Ontario and Quebec have categories for active/non-active or practising/ non-practising members. Many provinces have a category for retired members and Ontario and PEI have provision for honorary members. Manitoba permits admission of an applicant who possesses qualification of exceptional merit and distinction.

28. The fee categories vary somewhat. A number of provinces have active status for those who pay the annual fee and are insured, a second active category for those who are not insured and an inactive category. Others have a practising and non-practising fee category. The Northwest Territories has 12 different categories. Ontario has three fee categories for members: 100% of the fee (those in private practice), 50% for those employed, whether in law or not, and 25% for those on parental leave or in school. Quebec does not have categories but new members benefit from a rebate allowing them to pay only 30% of the fee in the first year, 70% in the second year and 85% in the third year.

29. In 2001 annual fees for active or full fee paying members were:

AB	$1055.02
BC	$1600 (approximate)
MB	$985
NB	$1027
NS	$1015
NWT	$700
ON	$1782
PEI	$1830 (2000-2001)
QU	$833 (2000-2001)
SK	$1010
CH	$950
YT	$642

Possible Mobility Issue

30. *The disparity in the fees could constitute an issue for forum shopping in a full mobility system where call to the bar in one province permits a member to practice anywhere in the country.*

Transfer Rules

31. The provisions of each province and territory are quite detailed (See Schedule 1 of the survey results). Generally speaking, provinces require some or all of the following:
    a. Passage of an examination or examinations (the nature and number of the exams vary widely)
    b. Barrister and solicitor in another province in Canada
    c. Eligible to practice law in Canada
    d. Good character
    e. Re-articling or the bar admission course where appropriate based on length of absence from active practice

Occasional Practice

32. Only the Northwest Territories and the Yukon have not signed the Inter-Jurisdictional Practice Protocol. All signatories other than Quebec have implemented the 10-20-12 provisions of the Protocol. The provisions of each province are detailed (see Schedule 2 of the survey), but largely address the issues raised in the protocol regarding insurance, compensation funds, rules of conduct, good character, membership in good standing in home province , basis for taking advantage of the 10-20-12 rules and when an application must be made.

33. Only the western provinces have expanded the 10-20-12 Protocol to permit practise for no more than six months during any 12 month period.

Foreign Legal Consultants (FLC)

34. There is no such concept in Quebec, which has requested an amendment to its governing legislation. The Northwest Territories and the Yukon do not permit foreign legal consultants.

35. Many of the provinces have similar provisions regarding foreign legal consultants including the requirement that they,
    a. are members of good standing in their home jurisdiction;
    b. are of good character;
    c. have been engaged in the active practice of law for 3, or 3 of the last 5, years;
    d. are under the supervision of another foreign legal consultant if under the specified number of years;
    e. undertake to comply with the rules of professional conduct of the jurisdiction in which they are an FLC; and
    f. do not hold themselves out as qualified member of the bar of the visiting province.

36. Only a few of the provinces require that the FLC be resident in the province, attorn to the jurisdiction in which acting as an FLC, not represent clients before courts and tribunals of the visiting province, not advise on laws of the jurisdiction in which they are an FLC, and not prepare documents governed by the laws of the visiting province unless under the supervision of a local lawyer.

37. In answer to whether there are circumstances under which a lawyer from another jurisdiction could work in the province without meeting the requirements for membership, temporary practice, transfer or occasional practice some provinces referred to in-house counsel, federal crowns, federal government, and international arbitration (Quebec).

Possible Mobility Issue

38. *The rules relating to occasional practice, transfer, and foreign legal consultants are all directly affected by the approach to mobility the Task Force will recommend. As the scope of mobility expands it will be increasingly necessary for any province wishing to take advantage of mobility to ensure local rules are in harmony with those of other provinces.*

39. *A significant issue arises as to whether the transfer examination process would be phased out in a system of permanent mobility or whether there should always be a test of knowledge of local law. This also raises the issue of how to address the distinction between civil and common law degrees.*

PROFESSIONAL LIABILITY INSURANCE

Requirement for Insurance

40. Generally, the following members are required to carry insurance:
    a. All active members in private practice or "practising law", as it is termed in some provinces, unless exempted from coverage and, in the case of the notaires, all notaries.

41. Exemptions vary from province to province and include,
    a. Crown attorneys;
    b. municipal employees;
    c. those not ordinarily resident in or carrying on practice in the province but who are insured in their home province;
    d. those employed by a single employer who do not provide legal services to persons other than the employer;
    e. law teachers who do not engage in the practice of law;
    f. Department of Justice lawyers

Levies

42. Premium levies vary from province to province and include,
    a. base levy;
    b. surcharge for paid claims;
    c. part-time reduced premium;
    d. real estate and litigation transaction levies;
    e. terminal premium for notaries leaving main class; and
    f. no levy (Quebec lawyers).

43. The base levy in 2001 was as follows:

AB	$2.564.80
BC	$1,500
MB	$1.089 after rebates
NB	$1900 plus tax
NF	$3000
NS	$2128
NT	$2000
ON	$2800
PEI	$3930
QU	none
CH	$2.950

SK	$1400
YK	$2005

44. The limit of liability is $1,000,000 for everyone except for Quebec lawyers where it is generally $5,000,000, but will be limited to $1,000,000 for occasional inter-jurisdictional practice from January 1, 2002 if approved by the Board.

45. The per member aggregate limit of liability per year is $2,000,000 for everyone except for Quebec lawyers where there is no aggregate limit this year.

46. Where there is a deductible it is typically $5000. A number of provinces have higher deductibles for subsequent paid claims or for claims in certain areas of law. Quebec lawyers and notaries, Alberta, and Nova Scotia have no deductible.

47. Generally the coverage includes innocent insured coverage for fraud, except in PEI. In Quebec innocent insured coverage for misappropriation is exclusive to those claims under occasional inter-jurisdictional practice.

48. All respondents, except the chambre des notaires indicated some provisions to extend policy coverage to inter-jurisdictional practice.

49. Generally the respondents do not require lawyers from outside the jurisdiction to pay insurance premiums for working in the visiting province, provided the lawyer has coverage in the home jurisdiction. Ontario requires such payment if the lawyer completes more than 10 real estate transaction or more than 80 hours of work. PEI requires it if the lawyer opens an office in the province and is in the province more than occasionally.

50. The Quebec Barreau, BC, Newfoundland, and Ontario extend coverage to practice outside of Canada, under a variety of provincial-specific limits.

Possible Mobility Issue

51. *The respondents indicate a high degree of similarity at the general level of policy provisions. One issue for consideration is whether it is necessary to seek harmonization of the schemes, which will require significant work if the processes are to be melded, or whether it is more appropriate to ensure that for mobility purposes there are minimum provisions below which no signatory can go. This latter approach reflects the Inter-Jurisdiction Practice Protocol and the western Protocol approaches.*

52. *The disparity in levies could constitute an issue for forum shopping in a full mobility system where call to the bar in one province permits a member to practice anywhere in the country.*

DEFALCATION INSURANCE / COMPENSATION FUNDS

Responsibility to Pay into Fund

53. Generally speaking, at a minimum, all active or practising members contribute to the compensation funds in each province and territory. In some provinces (Ontario, NT, Quebec) all members contribute to the fund.

Programs Financed by the Fund

54. In Newfoundland, New Brunswick, Nova Scotia, PEI, Quebec and the Yukon the fund finances no programs and exists only to compensate clients. In the other provinces the funds finance a wide range of programs, including,

a. audit departments;
b. spot audits;
c. investigations (varying kinds);
d. trust review programs;
e. custodianship;
f. CLE; and
g. catastrophe insurance.

Levies

55. In 2001 the Compensation Fund levies were as follows:

AB	$96
BC	$200
MB	$65
NB	$50
NF	$52
NS	$45
NT	$125
ON	$379
PEI	$100 (practising) $50 (non-practising)
QU	$25
CH	$0
SK	$20
YT	$107

Circumstances and Process of Claims

56. The circumstances under which a claim can be made against the fund and by whom vary from respondent to respondent. (See Schedule 4 of the survey.)

57. Claims are made by application or letter to the governing body, with supporting documentation and in some circumstances by statutory declaration. A number of provinces indicated the existence of limitation periods for making the claim ranging from 6 to 24 months.

Monetary Limits for Grants

58. Most funds have limits related either to applicable grant limits or to the limit of the fund. Some have a per lawyer limit.

Possible Mobility Issue

59. *There is divergence in compensation provisions. This issue will need to be addressed to ensure that the client is not prejudiced by the fact that the compensation fund limits of the lawyer's home jurisdiction are lower than the ones in the client's province or that the basis upon which grants are made is different. It will be necessary to ensure that the client receives at least what he or she would have received if represented by a lawyer of the home province.*

Fund Insurance

60. About half the respondents have insurance for the funds of varying amounts. The rest do not.

BC	$15 million with $2.5 million deductible
MB	$10 million
CH	co-insurance for amounts paid by the fund exceeding $1.5 million per year
ON	re-insurance for total annual claims in excess of $6 million up to $20 million
SK	$4 million

Coverage Limits

61. There is a wide range of provisions regarding coverage limits:

AB	$2 million indemnity bond
BC	annual aggregate cap of $2.5 million deductible and $15 million
MB	$10.75 million
NB	N/A
NF	75% of capital in the fund at the beginning of the claims year
NS	annually the lesser of $750,000 or half the capital of the fund
NWT	N/A
CH	none
ON	none
PEI	50% of fund in year in which first claim against lawyer made
QU	N/A
SK	not clear
YK	not clear

Claims

62. The claims experience in 2001 to date

AB	$2640
BC	$627,290.69
MB	$58,746
NB	Nil
NF	Nil
NS	0 paid
NWT	None
ON	$1,353, 313
PEI	none
CH	$1,063,470
QU	$299,859.05
SK	$801,363

TRUST ACCOUNTING

Trust Accounting Records

63. The survey discloses that the requirements for traditional[5] trust accounting records are consistent throughout the Canadian provinces. Variations arise with respect to documentation relating to mortgages and charges and money held in trust for clients. British Columbia and Ontario have requirements in this regard. All the other provinces do not.

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[5]Paper documents based historically on paper based accounting.

64. As can be expected, differences arise as to documents relating to electronic transfer of trust funds. British Columbia and Ontario have requirements for retaining paper based source documents (such as requisitions signed by lawyers) while the other jurisdictions do not have requirements at all. This is presumably due to an absence of an electronic funds transfer regime for lawyers in the province.

65. Related to this are provisions dealing with maintenance of paper copies of electronically recorded records. Most jurisdictions have indicated that they have requirements for their members to maintain paper copies (Newfoundland and the Yukon do not). All jurisdictions (save Manitoba) indicate that there are no requirements for regular production of paper copies of electronic records except on request of the regulator.

66. Alberta made reference to the existence of requirements in their jurisdiction relating to estate funds handled by lawyers in a representative capacity. Ontario, by policy, has likewise required lawyers who have unilateral ability to negotiate estate funds to include these transactions in their trust recording and reporting to the law society annually. It appears that British Columbia's definition of trust funds expressly includes funds received in a member's capacity as a sole personal representative. Newfoundland and Saskatchewan have similar provisions as well.

Retention of Records

67. There is surprising variation in this requirement; ranging from "unspecified" in PEI to "indefinitely" in Quebec. Most of the other jurisdictions require 10 year retention for trust records. It should be noted that other factors affect this (such as Revenue Canada's ability to audit records going back 6 years).[6]

Possible Mobility Issue

68. *In a permanent mobility scheme it may be important to have some rules relating to retention (either harmonization or a provision that lawyers must follow the rules of the province in which the work is done). Without harmonization, in the event lawyers represent clients with activities in several provinces it will be necessary to consider multiple systems.*

Definitions of "Client" and "Trust Funds"

69. There are no material differences in the definitions of "trust money/funds", all contemplating funds received but not belonging to the member, including funds for fees for which an account has not been rendered and/or disbursements not yet incurred/made. In all reporting jurisdictions, save for Manitoba and the Northwest Territories, "client" is defined in the provisions governing books and records as including entities from whom the member receives money or other valuable property. The chambre des notaires does not define client.

Time Frame for Deposit of Trust Funds

70. All responding jurisdictions provide comparable provisions dealing with time for deposits. In each jurisdiction the requirement is for the deposit to occur "forthwith" or "promptly" and in those jurisdictions that provide further clarification, deposits must occur by the following business day.

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[6]It is difficult to know whether most lawyers are complying simply with minimum regulatory requirements or whether they are retaining records indefinitely.

Approved Depositories

71. While there appears to be essential consistency between the jurisdictions, (all responding jurisdictions permit deposits to chartered banks, trust companies and credit unions), in some jurisdictions, this is expanded to cover any member of the CDIC (Canadian Deposit Insurance Corporation). There is inconsistency in how permitted trust companies are defined. For example, Ontario refers to "registered trust corporation", while Saskatchewan refers to trust companies "whose assets are in excess of $10 million". As well Nova Scotia refers to trust or loan companies authorized by law to receive money on deposit".

Possible Mobility Issue

72. *In a permanent mobility scheme it may be necessary to develop rules to either harmonize approved depositories or ensure that the rules of the province in which the work is performed govern. Because it is not permissible to hold a trust fund under the temporary mobility provisions, this issue is different depending upon whether the discussion is about temporary or permanent mobility.*

Naming Of Trust Accounts

73. Several jurisdictions require that trust accounts been named in the name of a member or a law firm and that the account must be designated as a trust account. Manitoba[7], Newfoundland, Quebec and Saskatchewan do not require this. Alberta does not require that the account bear the name of a member/firm but does require designation as a trust account.

Separate Interest Bearing Accounts (SIBA)

74. All responding jurisdictions (except for the Yukon[8]) indicate that it is permissible for funds to be deposited into a separate interest bearing account relating to a specific client. In most instances, instructions from the client are required. Several jurisdictions (such as Manitoba) do not expressly indicate in their response that instructions from the client are required, but it is likely the case. There are some minor inconsistencies, for example, Alberta requires the trust funds be first deposited into the mixed/pooled trust account, while Ontario does not.

Required Deposits to Trust

75. This is another area of consistency between the jurisdictions. Subject to some narrow exceptions (see below) all jurisdictions require separation between funds belonging to the client ("trust funds" which must be deposited into the trust account) and funds belonging to the lawyer through billed fees/disbursements or otherwise (which must be deposited into the lawyers' general account").

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[7] Manitoba's notes indicate that the account should be in the name of the member or firm but it is not required specifically.

[8] Despite the answer given, it appears that the Yukon Legal Profession Act permits the opening of an SIBA (sec. 61(5).

76. Several jurisdictions[9] have similar provisions that allow lawyers to not deposit into a trust account where the client so requires it in writing, or that in the ordinary course of business upon its receipt is paid forthwith, in the form in which it is received, to or on behalf of the client.

Member Funds in Trust

77. As indicated above, there is a general principle of separation of client and member funds. However, several responding jurisdictions[10] permit small amounts of member funds to be held in trust. This has been rationalized as to offset any bank fees/errors and to address those situations where there are no client funds in the account (so as to prevent the bank from closing the account due to a NIL balance). It should be noted as well that most jurisdictions will provide exceptions to this if the member funds relate to a specific legal transaction handled by the firm on behalf of the member (e.g. Purchase/financing of real estate).

Permitted Withdrawals from Trust

78. All jurisdictions permit withdrawals from trust only for:

- payments made to the client
- payments made on behalf of the client[11]
- monies belonging to the lawyer through billings for fees and/or disbursements
- transfers between trust accounts (e.g. Mixed trust to a SIBA)
- corrections for errors

British Columbia also includes express provisions dealing with payments to the Law Foundation (presumably errors since they too have a requirement that interest be remitted directly by the financial institution) and for payments of unclaimed trust to the Law Society. The chambre des notaires permits withdrawals when monies are required for what they were intended.

Methods of Withdrawal of Trust Funds

79. All jurisdictions allow for withdrawal by cheque. Some jurisdictions (Ontario, Nova Scotia, PEI, Quebec and the Yukon) permit withdrawal by transfer to a bank account in the name of the member, which is not a trust account. Nine jurisdictions responded that they do not permit wire transfers while 4 jurisdictions permit wire transfers. Ontario is the only responding jurisdiction that indicates that it permits electronic transfer.[12]

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[9] Quebec and the Yukon

[10] Alberta, British Columbia and Saskatchewan

[11] Alberta requires such to be "authorized" by the client. It is not clear whether this is beyond the implied consent of the client or where the retainer agreement generally authorizes such payments.

[12] Note the inconsistency in BC's response – they had earlier reported that they required retention of electronic funds transfer requisitions.

Possible Mobility Issue

80. *This may be one of the more significant areas where harmonization would be important. However, experience in Ontario has shown that it is a difficult task to balance the facilities that financial institutions permit (designed in most instances for their commercial clients) and the traditional safeguards required by law societies/governing bodies to provide the same degree of security and safety to client funds. Simply put, most (all) non-cheque based transactions are not designed by the banks with the unique requirements of lawyers (and trusts) in mind. This having been said, if electronic funds movement is not permitted in some fashion, mobility/multi-jurisdictional practices may find it difficult to conduct basic financial transactions. While (in reality) electronic banking has inherent delays and issues in timing and reversibility, these are greatly compounded by requiring paper based transactions over a significant geographic distance.*

Requirements for Delivery of Accounts to Clients

81. All jurisdictions require preparation and delivery of accounts before funds can be transferred from trust to general. It appears that, by statute, jurisdictions accept mailing as a rebuttable presumption of delivery to the client.

Interest on Mixed/Pooled Accounts

82. All jurisdictions have Law Foundations to which interest on mixed/pooled trust accounts are paid. Most jurisdictions direct the financial institutions to remit interest to the respective Law Foundations, usually on a quarterly basis (BC has theirs semi-annually).

Reporting on Trust Shortages

83. All jurisdictions have requirements that any trust shortages be rectified immediately (PEI allows 3 days) and adequately documented in their accounting records. Additionally, several jurisdictions have reporting requirements immediately where the shortage exceeds $2,500[13].

Possible Mobility Issue

84. *Consider whether it may be of value to ensure that all provinces have an immediate reporting requirement for trust shortages over a certain specified amount.*

[13] British Columbia and Newfoundland. In Saskatchewan notice must be delivered to the executive director with respect to shortages over $100.00.

Annual Reporting

85. Except for Ontario (and it appears shortly in Manitoba), all jurisdictions require a report of an accountant in addition to an annual filing by a member.[14] [15] In relation to the content of the forms themselves, they vary in specificity greatly.

Possible Mobility Issue

86. *Consider whether rules are necessary in this context either to seek harmonization (which may be difficult) or to ensure that lawyers file forms appropriately, depending upon where they perform services. In a permanent mobility scheme, in how many jurisdictions would a lawyer file an annual report?*

Sharing of Trust Accounts by Lawyers Sharing Office Space

87. The jurisdictions vary on this. Alberta, Newfoundland, Quebec and Saskatchewan allow sharing while BC[16], Ontario, Manitoba, Nova Scotia, the Northwest Territories and the Yukon do not. New Brunswick does not specifically address the issue

Possible Mobility Issue

88. *This is a significant issue the greater the mobility. Increased space sharing arrangements that may well accompany increased mobility would presumably increase the risk of innocent clients being affected by misappropriations and/or misapplications.*[17]

MISCELLANEOUS - CONTINUING COMPETENCE REQUIREMENTS

CLE

89. Generally, no province requires members to take CLE. Ontario may require certain members to take CLE as part of a competence proceeding order or as part of the recommendations in a focused practice review report. As well, there is a continuing CLE expectation for those seeking to be certified or re-certified as specialists. Saskatchewan has an additional insurance assessment if members do not take Continuing Legal Education.

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[14] Ontario has gone to a self reporting model supported by a spot/focused audit program.

[15] Although not captured in the survey, several issues have arisen in the past. First of all, the designation of permitted accountants to complete the form is inconsistent from jurisdiction to jurisdiction. Several jurisdictions (including Ontario in the past) only permitted "public accountants" (which by definition in Public Accountant legislation essentially permits only chartered accountants - and not CGAs or CMAs, except as grand parented by the legislation) to complete the form. The remaining jurisdictions (such as Alberta, British Columbia, Saskatchewan and the Yukon) permitted a broader class of accountants to complete their forms. Additionally, the degree of review has been an issue and is inconsistent jurisdictionally. In British Columbia historically, the opinion of the accountant as to the completeness of the books and records was required as part of the form (considered to be more of an "audit"). Other jurisdictions only required certification of completion of review without opinion of completion and accuracy (considered a "review engagement").

[16] Permissible if the association is an "apparent partnership"

[17] The impact of *Greymac* and other cases have affirmed that shortages in a pooled account results in a pro rata sharing by all clients who should have funds on deposit of the available funds/shortage.

90. Currently, no province requires members to report CLE taken, with the exception that Quebec notaries who are financial planners must do so. In the future, Ontario will articulate minimum expectations for the amount of CLE a competent lawyer should take annually. Members will be required to report annually how much CLE they have taken. The report will be mandatory but the taking of CLE will not. Quebec's information system allows them to know who attended their CLE activities during the past years, but there are no obligations on members to report. Saskatchewan's Legal Education Society reports all courses members have taken.

Requalification/Refresher Programs

91. Virtually all the provinces have some requirement that lawyers who have been away from active practice for a specified period (different in each province) either pass a test, take a refresher program, or undergo an assessment or interview as to what they have done in the period of the absence. In some of the provinces (BC, Manitoba, Newfoundland, Nova Scotia) depending upon the nature and length of the absence there is discretion to require the lawyer to re-do the bar admission course, although this is reserved for instances of very lengthy absence from practice or law in general.

Practice Review/Inspection

92. A number of provinces, but not all, have focused practice review directed at those lawyers who have demonstrated deficiencies in the running of their practices. The processes can include inspection of the practices, followed by recommendations for improvement and a monitoring process to ensure implementation. In some provinces there can be limitations on the members' right to practice until improvements have been made.

93. Only Quebec has a random practice inspection program reaching every firm every 4 or 5 years. The reviews include a self-assessment 12-page questionnaire, and a three hour follow-up visit during which aspects of the practice are reviewed. A dozen files chosen randomly are reviewed and discussed with the lawyer by the reviewer. Later, upon receipt of the reviewer's report, the practice review service sends the appropriate recommendations to the lawyer.

Spot/Focused Audits

94. While many respondents indicated some form of focused audits for high risk areas, not all the provinces conduct such audits. It would appear that in most cases where there is no focused program *per se* there is a random audit program and if, in such an audit problems are found, there will be a further audit within a year or two.

Specialist Certification

95. Ontario is the only province with a specialist certification program in ten specialty areas. There is an application process, including provision of references setting out the applicant's substantial involvement with the specialty areas. There are no examinations for admission, but there may be an interview. The program is voluntary. Although Quebec does not have a program, members can be enrolled on a referral list to act as family mediators or civil and commercial mediators if they complete a CLE program specific to one of those fields.

Other

96. In response to a question about other competence related post-call programs, provinces identified the following types of supportive, non-mandatory activities:

a. CLE
b. Practice advice
c. Self-study remedial programs
d. Development of practice guidelines
e. Voluntary practice enhancement programs

	Possible Mobility Issue
97.	*While currently there are no mandatory continuing competence requirements in the provinces it may be important to consider the impact of such provisions in a province with temporary mobility provisions or in the event of a full mobility scheme that does not require a "visiting" lawyer to be called to the bar of the province. Are there implications for the clients that need to be addressed?*
98.	*Similarly, should there be an effort to harmonize "requalification" or refresher programs to ensure that forum shopping does not occur?*

.....

BILL C-36 - ANTI-TERRORISM BILL REPORT

It was moved by Mr. Feinstein and seconded by Mr. Swaye that the Anti-Terrorism Bill Report be sent to the Emerging Issues Committee to be studied and that it then be sent to the Federation of Law Societies of Canada without coming back to Convocation for approval.

The Treasurer added that Bill C-42 - Omnibus Bill be included in the referral to the Emerging Issues Committee.

Mr. Bindman did not participate in the debate nor vote.

It was moved by Mr. Campion, seconded by Mr. Gottlieb that the Feinstein/Swaye motion be amended that the Emerging Issues Committee conduct deliberations but that the results be delivered as soon as possible to the Benchers and that Convocation be assembled to consider the Report.

Not Put

Convocation agreed to adopt Mr. Ortved's suggestion that the Federation's Report be considered by the Emerging Issues Committee and that its conclusion be delivered to the Benchers for input and that Convocation reconvene to approve the final Report.

PROFESSIONAL REGULATION COMMITTEE REPORT

Re: Issues Relating to Estates Practice
Re: Report on Investigations and Discipline File Management and Caseloads

Mr. MacKenzie presented the Report of the Professional Regulation Committee for information only.

Professional Regulation Committee
November 8, 2001

Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on November 8, 2001. In attendance were:

Gavin MacKenzie (Chair)

Heather Ross (Vice-Chair)

Stephen Bindman
Gary Gottlieb
Ross Murray
Marilyn Pilkington
Judith Potter
Avvy Go

Staff: Katherine Corrick, Margot Devlin, Vivian Kanargelidis, Celia Kavanagh, Terry Knott, Malcolm Heins, David McKillop, Jo Ann Pigeon, Felecia Smith, Richard Tinsley, Jim Varro, Andrea Waltman and Jim Yakimovich.

2. This report contains information reports on

- two issues related to estates practice (whether a joint retainer exists where spouses or partners retain a lawyer to prepare wills, and whether a member who retires from practice but continues as an estate trustee is required to pay the Society's annual fee), and
- file and caseload management in the investigations and discipline departments.

INFORMATION

ISSUES RELATING TO ESTATES PRACTICE
I. JOINT RETAINERS
II. PAYMENT OF THE ANNUAL FEE FOR LAWYERS ACTING AS ESTATE TRUSTEES

I. JOINT RETAINERS

A. INTRODUCTION

3. The Committee reviewed rule 2.04(6) of the *Rules of Professional Conduct* on conflicts of interest in the context of joint retainers to determine whether "a matter or transaction" as described in the rule should include circumstances in which spouses or partners retain a lawyer together for the preparation of spousal or partner wills. The question was referred to the Committee by Advisory Services staff, who received questions from members of the estates bar about the rule's application.

4. The Committee's preliminary conclusion was that where spouses or partners attend at a lawyer's office together to make wills, in the shared knowledge of what is in each will, a joint retainer exists and the rule applies.

5. This report provides background to the issue and the reasons for the Committee's preliminary conclusions. It also outlines a consultative process that the Committee wishes to undertake before it finalizes a proposal to add a commentary to rule 2.04(6) to reflect the above conclusion.

B. BACKGROUND AND THE COMMITTEE'S REVIEW

6. Rule 2.04(6) reads:

> Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that:
>
> (a) the lawyer has been asked to act for both or all of them,
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

7. This rule is based on very similar language that appeared in commentary in the old Rules (prior to November 2000).

8. The Committee reviewed a helpful memorandum prepared by Felecia Smith, Senior Counsel, Advisory Services and Andrea Waltman, Advisory Counsel, attached at Appendix 1. The memorandum identified the questions relayed to the Law Society by members of the estates bar, discussed related legal issues, and provided options for the Committee's consideration on how the issue might be addressed.

9. The Committee considered the following questions:

   a. Does estate planning for spouses or partners that culminates in the preparation of wills for each of them constitute "a matter or transaction" within the meaning of rule 2.04(6)?
   b. If the answer to a. is yes, would it be appropriate for the spouses or partners to execute a waiver of the requirement to share information?
   c. If the answer to b. is no, what obligations does a member have to advise one of the spouses or partners that the other spouse or partner has approached the member to change his or her will, either before or after its execution?

10. After considerable discussion on the issues, aided by the options outlined in the memorandum, the Committee concluded that spouses or partners who together retain a lawyer to prepare wills for both of them, on a shared understanding of what is to appear in each will, jointly retain the lawyer. In such circumstances, the lawyer must make the appropriate disclosure, including advice to the clients that if one of the clients returns to discuss the will, or has an intention to vary it, the lawyer must advise the other party to the retainer and cannot act unless both parties consent.

11. The Committee considered that the following would indicate a joint retainer:

   - the parties attend at the lawyer's office at the same time;
   - the parties meet with the lawyer together;
   - the parties appear to have a common goal, and instruct the lawyer together on achieving that goal;
   - the wills are executed at the same time;
   - one account is rendered to both clients;
   - a single reporting letter is usually prepared for both clients.

12. The Committee did not consider it appropriate that a waiver by the clients of the requirement to share information be an option. The Rules as presently drafted do not include an ability to grant such a waiver. The Committee determined that, practically, not sharing information between the spouses or partners in an estate planning matter would defeat the efficacy of the service the lawyer is required to provide in advising the clients and fulfilling their instructions. Sharing of information about each spouses' assets, for example, would almost certainly be required to achieve an effective estate plan for both. Further, if a waiver were contemplated, the Committee acknowledged that the spouses may have to incur additional expense to obtain independent legal advice on the issue of the waiver before agreeing to such an arrangement.

C. THE COMMITTEE'S PROPOSALS

13. The Committee determined that to provide additional guidance to members in these situations, a commentary should be added to rule 2.04(6) explaining the obligations of the lawyer. The Committee reviewed a proposed draft commentary prepared by staff, which includes input from lawyer Paul Perell, the drafter for the last Rules revision in 2000.

14. The Committee's proposed commentary reads:

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to inform the other spouse or partner of the contact and to decline to act unless both spouses or partners agree.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

15. The Committee acknowledged that some lawyers in estates practices may have views that differ from the conclusion reflected in the proposed commentary, or views on how the rule on joint retainers might be interpreted in the context of spousal or partner wills. Accordingly, the Committee thought it appropriate to seek the views of members of the profession, particularly those in the estates bar, on the proposed commentary before a final version is presented to Convocation for discussion.

16. The Committee proposes to publish the commentary in the *Ontario Lawyers Gazette,* the *Ontario Reports*, and on the Law Society's web site and request comments within a specified time. The Committee will also seek comment from the Ontario Bar Association's Trusts and Estates Section.

II. PAYMENT OF THE ANNUAL FEE FOR LAWYERS ACTING AS ESTATE TRUSTEES

A. NATURE OF THE ISSUE

17. At its June 2001 meeting, the Committee began discussion on whether lawyers who no longer practice law but who continue to act as estate trustees must continue to pay the Law Society's annual fee. The issue arose as a result of member inquiries to staff in Administrative Compliance Processes.

18. The discussion continued into the fall of 2001 and the Committee has now come to preliminary conclusions on the issue. Based on a series of options discussed at the meetings, two options are being considered by the Committee:

a. that retired lawyers or lawyers who are no longer practising but continue as estate trustees must pay the annual fee, and if they do not wish to do so, must cease to act as trustee, or
b. that such lawyers be permitted to change their status to non-fee paying, provided that they give notice to the beneficiaries of their intention to do so.

19. This report provides background to the issue, the reasons for the Committee's preliminary conclusion, and the Committee's proposal for a consultative process to be undertaken before the Committee requests Convocation's final review of its conclusion and resulting proposals.

B. BACKGROUND

20. By-law 15, Annual Fee (at Appendix 2), allows members who meet certain criteria to apply for exemption from the payment of annual fees. Similarly, By-law 17, Filing Requirements, permits members to apply for exemption from filing the annual form. The general criteria applicable to both exemptions are that the member must be permanently retired from the practice of law and 65 years of age or over, or permanently disabled, and as a result, unable to practice law.

21. The Society's position to date is that members who otherwise meet the criteria for exemption in By-law 15 may not qualify for the exemption from the payment of annual fees if they continue to act as an estate trustee.[1] Once a member retires from the practice of law, but continues as an estate trustee, the beneficiaries would no longer have the protection of the lawyer's professional liability insurance through the Lawyers Professional Indemnity Company (LPIC) and may not have access to the Lawyers Fund for Client Compensation ("the Fund").[2]

22. With respect to the liability insurance issue, LPIC's position appears to be that members who are trustees who simply change their status to non-practicing, are not required to continue to maintain full LPIC coverage until the trusteeship ends, as long as they make it clear that they are not providing trustee services as a lawyer.

23. With respect to access to the Fund, the practicing or non-practicing status of the member would not necessarily be determinative of whether a grant would be made from the Fund. Grants from the Fund are by their nature discretionary. However, the Guidelines to the Fund provide that access to the fund is limited to situations where the issue arose with the member in his or her capacity as a solicitor in connection with the practice of law.

24. The Committee was asked to consider the appropriateness of the Society's position, in light of concerns raised by members applying for the fees exemption who are of the opinion that it is unfair to require payment of the fee (even at a reduced rate) in these circumstances. In all of these cases, the solicitor's work, if any, has been turned over to practicing members. These members continue to act only as trustees.

C. THE COMMITTEE'S REVIEW

25. In considering whether non-practicing members who are trustees should fall within the exemption under By-Law 15, the Committee was assisted by a memorandum prepared by Andrea Waltman, Advisory Counsel.

26. The Committee considered the following options.

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[1] *Quare* whether a trusteeship alone is covered by the definition of "practising law" contained in s. 4(5) of the By-law.

The Society is aware that some members who are trustees and who otherwise qualify for the exemption under By-Law 15, and who wish to cease practicing, are simply changing their status to "retired not working"(25% fee paying, "non-practicing"). In a practical sense, this status is no different from a non-fee paying status pursuant to By-Law 15. Non-practicing members are generally not required to maintain professional liability insurance once their status has changed, as they are not actively engaged in the practice of law.

[2] In February 1997, the Professional Regulation Committee, in respect of the annual filing under By-law 17, determined that since trusteeships arise by virtue of the member's practice, the client had the expectation that LPIC and the Fund safeguards would be in place in relation to the administration of the estate. Accordingly, it was decided that members who also acted as trustees should not be exempt from the filing requirement unless they no longer held client property. Unlike By-Law 15, under By-Law 17, in order for a member to be exempt from filing annual forms, he or she must not hold the position of trustee. This restriction was inserted to ensure that the Society could keep track of trust monies associated with the estate.

A. No Exemption

27. Members who are trustees should not be exempt from payment of the annual fee while they are trustees. *Considerations:*

- resigning as trustee to the estate could be costly and complicated, especially when the member is the sole trustee (in such cases, an application to the court under the *Trustee Act* is required)
- unless the new trustee is a member, LPIC and the Fund protections which informed the original policy would be unavailable to beneficiaries in any event
- members may simply refuse to pay fees, be suspended, and ultimately have their membership summarily revoked.

B. Exemption, Provided Member Transfers Signing Authority

28. Members should be exempt from the payment of annual fees and continue to act as trustees, so long as they transfer signing authority over the estate accounts to a practicing member. *Considerations:*

- transferring signing authority over estate accounts may be tantamount to improper delegation of trustee powers, thereby placing the member in a breach of trust position
- once signing authority is relinquished by the trustee, he or she effectively no longer has control over those funds; in the event that the solicitor with signing authority absconds with the trust funds, the beneficiaries will be in no better position than they would have been had the trustee continued to have signing authority, and would be forced to resort to the Fund
- such an arrangement would place a heavy onus on the member assuming signing authority for the trustee accounts to scrutinize every withdrawal or transfer requested by the trustee, for fear that he or she may somehow be held liable for permitting improper payments.

C. Exemption, Provided Member Gives Notice to and Obtains Consent of Beneficiaries

29. Members should be exempt from the payment of annual fees, provided that proof is given to the Society that the member has notified the beneficiaries of his or her intention to change his or her status to a non-fee paying member, and the consequences thereof (i.e the lack of liability insurance, and the potential inability to resort to the Fund), and that the beneficiaries consent.

Considerations:

- the beneficiaries may be required to obtain independent legal advice with respect to this issue
- certain beneficiaries may not respond to the trustee's request
- development of a policy to deal with the above problem would have to be undertaken, perhaps acknowledging consent of the majority of beneficiaries as sufficient compliance.

D. Exemption, Provided Member Gives Notice to, but Need not Obtain Consent of, Beneficiaries

30. Members may change their status to non-fee paying, provided that they give notice to the beneficiaries of their intention to do so. The notice would have to contain an explanation of the consequences of retirement to the beneficiaries and set out the options available to them in terms of buying excess run off insurance coverage, etc. The beneficiaries would be entitled to weigh the pros and cons of maintaining in place the additional safeguards, but would not have the power to prevent the member from retiring.

E. Exemption-No Requirements

31. No restrictions should be placed on the member changing his or her status to non-fee paying if he or she otherwise meets the requirements for exemption under By-Law 15.

D. THE COMMITTEE'S PRELIMINARY CONCLUSIONS AND PROPOSALS

32. After considerable discussion of the above options, in recognition of differing views among the Committee members, the Committee agreed that options A and D should be considered.

33. Option A gives full weight to public interest considerations by ensuring that the protections associated with full fee-paying status (LPIC coverage and the availability of the Fund) are maintained. This option also recognizes that the public will in most cases make the assumption that because the lawyer's trusteeship flowed from his or her status as a practising lawyer, protections associated with that status will be available. While tension may exist between possible disadvantages to the estate beneficiaries on one hand if a lawyer decides to resign as estate trustee and the need to ensure the larger public interests protections on the other by requiring payment of the fee, arguably the more certain loss of the latter protections if the member does not pay the fee is more compelling.

34. Option D recognizes that requiring a lawyer who has ceased practice but maintains a trusteeship to pay the full fee is an unreasonable burden, given that the member no longer carries on a law practice. Further, the lawyer is subject to the statutory regime that imposes duties and obligations on a trustee under the *Trustee Act*. The disclosure requirement in this option will permit the beneficiaries to take appropriate steps to obtain added protections, if they so desire.

35. The Committee acknowledged that lawyers who may be affected by policy established in this area may have views on the options described above. Accordingly, as with the joint retainer issue discussed earlier in this report, the Committee thought it appropriate to seek the views of members of the profession, particularly those in the estates bar, on the proposals before a final report is presented to Convocation.

36. The Committee proposes to publish notice of the issue the *Ontario Lawyers Gazette,* the *Ontario Reports*, and on the Law Society's web site and request comments within a specified time. The Committee will also seek comment from the Ontario Bar Association's Trusts and Estates Section.

REPORT ON INVESTIGATIONS AND DISCIPLINE FILE MANAGEMENT AND CASELOADS

37. The Secretary, Richard Tinsley reported to the Committee on caseload management in the Investigations and Discipline Departments.[3] The reports appear at Appendix 3. These reports are prepared monthly for review by the Committee as part of its monitoring function respecting file management. The Committee receives general information and statistics on file management and caseloads in the departments noted above.[4] The reports in this report cover the period to the end of October 2001.

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[3]As a result of transitions in the database facility, no report from Complaints Resolution is available this month.

[4]The Chair of the Committee, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

APPENDIX 1

MEMORANDUM OF FELECIA SMITH AND ANDREA WALTMAN
ON JOINT RETAINERS AND SPOUSAL WILLS

ADVISORY SERVICES

MEMORANDUM

TO: Professional Regulation Committee

FROM: Andrea Waltman, Advisory Counsel
Felecia Smith, Senior Counsel

DATE: September 6, 2001

SUBJECT: Joint Retainers

INTRODUCTION

Advisory Services receives many inquiries about joint retainers in the context of the preparation of spousal wills. There have long been divergent views about this within the estates bar. Recently the Society has received two formal requests for the interpretation of the new joint retainer rule, and its applicability in the spousal will context.

ISSUES

1) Does estate planning for spouses that culminates in the preparation of wills for each of them constitute "a matter or transaction" within the meaning of rule 2.04(6)?

2) If the answer to #1 is yes, would it be appropriate for the spouses to execute a waiver of the requirement to share information?

3) If the answer to #2 is no, what obligations does a member have with respect to advising one of the spouses that the other spouse has approached the member to change his or her will, either before or after its execution?

BACKGROUND

These matters have been at issue for many years and remain the subject of debate among estates practitioners. The debate was brought to the forefront as a result of an article prepared in July of 1992, by Rodney Hull, Q.C. for the Errors and Omissions Bulletin of the Law Society of Upper Canada ("the Society"). In his article, Mr. Hull takes the position that the preparation of spousal wills constitutes a joint retainerule Accordingly, Mr. Hull suggests that a member should not prepare any subsequent wills, nor codicils for either of the spouses without disclosure of this request to the other spouse. In order to avoid being placed in that situation, Mr. Hull suggests advising the clients at the outset that if one of them later chooses to change their will, and approaches the member to do so, he or she will be obliged to inform the other spouse of this intention. If the parties agree, then the member may act for both, and if the parties do not so agree, the member should consider declining to act for both[5].

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5 Rodney Hull, Errors and Omissions Bulletin, Number 5, July 1992, Law Society of Upper Canada

In January of 1993, following Mr. Hull's article, correspondence was received by the Society from the then Executive of the Trusts and Estates section of the Canadian Bar Association -Ontario [now the OBA] ("the Executive"). The Executive indicated that some of the members of the section took issue with Mr. Hull's position, and inquired as to whether Mr. Hull represented the position of the Society on this matterule In response to this inquiry, it was decided that a policy should be established for dealing with this situation. Although the issue was subsequently raised for discussion at the Professional Conduct Committee, no formal decision was ever made, nor was any external policy ultimately formulated. An informal policy for dealing with inquiries to the Practice Advisory Service from members was adopted, to the effect that if at the outset of the retainer it was agreed that there could be no confidential information between the spouses, and this was acknowledged in writing by the spouses, then the spouse must be informed of any changes proposed by the other spouse. In the event that this has not been done, the member should simply refuse to draw the new will, but should *not* tell the other spouse. Stephen Traviss, then Senior Counsel, Professional Conduct revisited the issues in an October 27, 1994 paper for a continuing legal education seminar. Once again, Mr. Traviss simply sets out the issues and reinforces the fact that "this is just one area where there is a lack of unanimity amongst estate lawyers", but does not come to a formal conclusion as to the position of the Society[6].

With the November 2000 amendments and change in format to the Rules, these issues have been resurrected. Mr. Donald Carr, Q.C. has written to the Society requesting a formal interpretation of the joint retainer rule and its applicability to the preparation of spousal wills. Mr. Glenn Davis, editor of *Deadbeat*, the newsletter for the Trusts and Estates section of the OBA has made a similar inquiry. Appended to this memo is correspondence from both Mr. Carr (Appendix "A") and Mr. Davis (Appendix "B").

RULES

Rule 2.04 (6) derives from paragraph 5 of the Commentary to former Rule 5, which provided, in part:

> Before the lawyer accepts employment for more than one client in *a matter or transaction* (emphasis added), the lawyer must advise the clients concerned that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter can be treated as confidential so far as any of the others are concerned and that, if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely...If following such disclosure, all parties are content that the lawyer act, the latter should obtain their written consent, or record their consent in a separate letter to each....

Although the wording of rule 2.04(6) is quite similar, the above commentary has now become a rule. Rule 2.04(6) provides:

> Before a lawyer accepts employment from more than one client in *a matter or transaction* (emphasis added), the lawyer shall advise the clients that:
>
> (a) the lawyer has been asked to act for both or all of them,
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

DISCUSSION

Issue #1 Does estate planning for spouses that culminates in the preparation of wills for each of the spouses constitute "a matter or transaction" within the meaning of rule 2.04(6)?

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6 Stephen Traviss, Law Society Rules of Professional Conduct: Avoiding the Pitfalls in an Estate Practice, October 27, 1994, p. 8-13

In order to answer this question, it is essential to resolve the definition of "a matter or transaction", as these are not defined terms under the Rules. In his letter, Mr. Carr inquires whether the preparation of two separate wills for two separate clients, can be considered *a* [single] matter or transaction, since a technical reading of the Rule seems to connote the singular.

Definition

In its *Solicitor's Rules*, the Law Society of New South Wales has similar provisions dealing with joint retainers. Rule 9.2 provides in part that "a practitioner who intends to accept instructions from more than one party to *any proceedings or transaction* must be satisfied, before accepting a retainer to act, that each of the parties" is aware of certain facts. "For the purposes of [this rule], 'proceedings or transaction' mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind"[7].

Accordingly, if this definition were to be applied to the Ontario rule, the change in beneficiary status of a client could be construed as something which would affect the legal or equitable rights of a party.

In American Bar Association Formal Opinion 342 (Nov.24, 1975), the word "matter" refers to "a discrete and isolatable transaction or set of transactions between identifiable parties".

Black's Law Dictionary (seventh edition) defines "matter" as "a subject under consideration", and "transaction" as: "1. The act or an instance of conducting business or other dealings. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons".

The *Concise Oxford Dictionary* (ninth edition) defines matter as "an affair or situation being considered", and transaction as "a piece of business done; a deal".

To further assist in defining the terms "matter or transaction", resort may be had to some of the indicia of a joint retainer:

1. the parties attend at the lawyer's office at the same time;
2. the parties meet with the lawyer together;
3. the parties appear to have a common goal, and instruct the lawyer together on achieving that goal;
4. the wills are executed together;
5. one account is rendered to both parties; and
6. one reporting letter is usually prepared for both parties.

Case law

The conclusion as to whether the retainer is a joint one must be viewed from the perspective of the clients. What are their expectations? The case law is scant, and the one reported case on point indicates that the above indicia may not be conclusive as to the existence of a joint retainer. In the English case of *Hall v. Meyrick*[8], a widow and her common law husband visited a lawyer with a view to preparing their wills. The lawyer carried out the clients' instructions, and prepared a will for each. However, neither at the time of preparation, nor at the time of the execution of the wills, did the lawyer discuss with the clients the effect of marriage on their wills. The clients subsequently married, which had the effect of revoking the wills, and the husband then died. The wife commenced an action against the lawyer for failure to properly advise the parties. In her statement of claim, the wife alleged the existence of a joint retainer. The trial judge determined that there was no joint retainer, but rather that there were separate retainers. He made the following comment:

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7 Solicitors' Rules, Law Society of New South Wales, Rules 9.1 and 9.2

8 Hall v. Meyrick, [1957] 2 All E.Rule 722 (C.A.)

> It is not disputed that as a result of the interview two wills were drafted by the defendant, one for Mr. Hall and one for the plaintiff. The result would appear to involve a finding that instructions to draft wills were given by Mr. Hall and the plaintiff, an it was not seriously suggested that only one of them gave instructions. The real problem is whether instructions were given to the defendant jointly or severally. While it is true that Mr. Hall and the plaintiff arrived at the defendant's office together, and were both in his room when the instructions were given, I am satisfied that the instructions were given severally. Each of them, Mr. Hall and the plaintiff, wished to make a will, an each wished to confer benefits on the other, but in my view these were separate wishes and involved separate instructions[9].

This decision was upheld on appeal. This case, however, must be read in light of the fact that at the time it was decided the only cause of action lay in contract (not yet in tort). Given the previous state of the law coupled with some odd procedural circumstances in that case, a finding of a joint retainer would have forced the court to confront some novel and difficult liability and damage issues. If decided today, the outcome may well have been different, both in England and in Canada.

Other Jurisdictions

In the *Restatement of the Law Governing Lawyers*, the Committee on Professional and Judicial Ethics of the New York Bar Association took the position that "clients of the same lawyer who share a common interest are necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties"[10].

The Law Society of Alberta would answer issue #1 in the affirmative, provided that the appropriate disclosure was made to the clients at the outset[11]. Similarly, the Law Society of British Columbia takes the same position[12]. The Law Society of Manitoba has recently grappled with this issue as well, and has also come to the conclusion that "...the lawyer who takes joint instructions from a couple for the preparation of their wills should be guided by the provisions ... of the Code of Professional Conduct as they pertain to joint retainers."[13] The Code defines a joint retainer as "one in which a lawyer is employed by more than one client in a matter or transaction"[14].

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9 Ibid, p. 727

10 Restatement of the Law Governing Lawyers, 125 amt.c, Proposed Final Draft No. 1 (March 29, 1996), Committee of Professional and Judicial Ethics, New York Bar Association

11 Benchers Bulletin, Law Society of Alberta, 1995

12 "From the Ethics Committee", Benchers Bulletin, Law Society of British Columbia

13 Draft Notice to the Profession, Law Society of Manitoba, 2001

14 Ibid

Conclusion

In applying the above definitions and cases to spousal estate planning and will preparation, a position could be taken that if the parties attend at the lawyer's office with common estate planning goals, which may necessitate the transfer of property between spouses, and /or into new entities, such as spousal or family trusts, the legal interests of the parties are being affected by the retainer. Accordingly the definition of matter or transaction must be construed broadly, to encompass the expectations of the clients that each of their rights are being protected. Further support for this position can be found in rule1.03(1)(f) which provides that ... "a lawyer should observe the rules in the spirit as well as the letter." Finally, rule1.03(2) provides that "words importing the singular number include more than one person, party , or thing of the same kind, and a word interpreted in the singular number has a corresponding meaning when used in the plural." Accordingly, estate planning for spouses, that culminates in the preparation of wills for each of the spouses constitutes "a matter or transaction".

Issue #2 If the answer to #1 is yes, would it be appropriate for the spouses to execute a waiver of the requirement to share information?

The Rules, as they are presently drafted, do not contemplate the ability to grant such a waiver. If the Committee wishes to consider including such a right, the Rules would require amendment.

Other Jurisdictions

A review of the various provincial codes of professional conduct revealed that only the Alberta *Code of Professional Conduct* contains provisions permitting the representation of multiple parties without the sharing of information. Chapter 6, Rule 2, commentary 2.3 of the Alberta rules provides:

> In certain circumstances, knowledgeable clients in a conflict or potential conflict situation may desire representation by the same firm without the mutual sharing of material information referred to in Commentary 2.2. It may be acceptable for a firm to agree to act in such a situation provided that an effective screening device can be erected and the clients are fully apprised of, and understand, the risks associated with the arrangement. Such advice must be given by counsel that is independent of the firm involved.
>
> This kind of arrangement remains an exception to the general rule, however, and should be undertaken only when the justification is clear. In particular, multiple representation with or without sharing of information is unacceptable in a dispute or when the risk of divergence of interests is high. Responsibility remains with the lawyers to consider the factors outlined in Commentary 2.1 and to independently judge the advisability of the representation. Furthermore, the lawyers and clients involved must consider beforehand the risk that the screening device may be breached, intentionally, or otherwise, or that the lawyer acting for one of the clients will obtain information confidential to the other client through a legitimate outside source. In such a circumstance, it would be necessary for the firm to cease acting for all clients in the matter.

Even this fairly broad rule does not seem to contemplate one lawyer acting for multiple clients while maintaining their individual confidences, but contemplates different members of a firm acting in these circumstances. Accordingly, in the spousal wills situation, it does not appear as if one lawyer could act for both husband and wife, while keeping their individual confidences. However, another member of the firm could act for the other spouse in the preparation of his or her will. This may not, from a practical point of view, result in the best service to the clients. Oftentimes, to maximize a couple's estate planning, the sharing of information with respect to the spouses' respective assets may be required, or the transfer of property from one spouse to the other, or to another entity may be necessary. The above commentary also requires that before agreeing to such an arrangement, the parties should obtain independent legal advice on the retainer, a requirement which is expensive and time consuming. Therefore, it would be inappropriate to allow the spouses to waive the requirement to share information.

Issue #3 What obligations does the member have with respect to advising one of the spouses that the other spouse has approached the member to change his or her will?

When one spouse seeks to amend his or her instructions with respect to the preparation of his or her will, what are the lawyer's obligations? Can the lawyer act for the spouse seeking to make the change? Must the lawyer disclose the spouse's plan to change his or her will? Would the answers be different if the wills had not yet been executed?

There appear to be two schools of thought on these issues. There are some members of the estates bar who take the position that despite the fact that the wills have been executed, the sharing of information in respect of that joint retainer continues, and accordingly, the lawyer may not act on the subsequent will, and further, has a fiduciary obligation to advise the other spouse of the change in circumstances(Position #1). Michael Silver, in his article *Solicitor's Conflict of Interest and Breach of Duty Acting for Spouses in the Preparation of a Will* states:

> As soon as the lawyer received instructions from the husband adverse to the wife, he should have disclosed to the wife that he was receiving such instructions, or encouraged her to retain her own counsel or at least to exert legitimate moral suasion on the husband. By failing to advise the wife of the new instructions, which instructions conflicted with the wife's expectations arising from the joint meeting, the lawyer deprived the wife of her opportunity to influence her husband legitimately with respect to his testamentary dispositions[15].

Failure to inform the other spouse deprives him or her of the ability to also change his or her will, which they may have done had they been privy to the intentions of the other spouse.

This seems to be an echo of the position taken by Mr. Hull in his earlier paper, and although his position seems to be coupled with the requirement that the clients be informed of the lawyer's obligation at the outset of the retainer. His position has been adopted by the Law Society of Alberta[16].

The other school of thought holds that once the wills have been executed, the retainer is at an end, and consequently, the exchange of information in respect of that retainer is also at an end. The consultation by one of the spouses to change his or her will should be viewed as a new and separate retainer, with its own duties with respect to confidentiality and disclosure (Position #2). Proponents of this position maintain that it is inappropriate for the lawyer to act in making the requested changes without the other spouse's consent, since this would breach the prohibition against acting against a former client in the same, or a related matter (rule 2.04(4)). Under this analysis, however, disclosure would be inappropriate, as it would breach the duty of confidentiality owed to the spouse in the new retainer.

Other Jurisdictions

The Law Society of Alberta has adopted this position in situations where the clients have not been informed of the ongoing obligation to share information relevant to the joint retainer even after it arguably has ended[17]. This situation may not bar the drafting lawyer's partner or associate from acting in this regard, even without the consent of the other spouse if the

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15 Michael Silver, "Solicitors Conflict of Interest and Breach of Duty Acting for Spouses in the Preparation of a Will", (1994), 13 E.& T.J. 111 at p. 127

16 Supra note 9

17 Supra note 9

"law firm establishes that it is in the interest of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
(ii) the extent of prejudice to any party,
(iii) the good faith of the parties,
(iv) the availability of suitable alternative counsel, and
(v) issues affecting the public interest.

The Law Society of Manitoba has adopted position #2[18], although its *Code of Professional Conduct* does not include a provision similar to Ontario's Rule 2.04(5), that permits representation of the other spouse by another member of the firm in certain circumstances.

Hypothetical Situation

A member in a small town is approached by husband and wife for the purpose of preparing their mirror wills. The member takes instructions from both and prepares and sees to the execution of their wills accordingly. Several weeks later the wife returns to the member's office and advises that she has been battered by her husband, and has left with her children, and is presently living in a shelter. She further advises the member that she wishes to change her will to leave everything in trust for her children, and delete her estranged husband as executor and beneficiary. She requests that her intentions not be communicated to her estranged husband. She has had a long- standing relationship with this member, feels comfortable dealing with the member, and doesn't know any other estates lawyers. Can the member act? Can her associate or partner act? Is the consent of the husband required?

If one adopts the approach taken by the Manitoba Law Society given the existence of our Rule 2.04(5), it appears that while the member could not act, his or her partner or associate could carry out the wife's instructions , without the consent of the husband, on the basis that to do so would be in the interests of justice having regard to the factors enumerated in the above-noted rule.

To summarize, there are two differing opinions with respect to the answer to issue #3. The committee is requested to consider these divergent opinions, one requiring the ongoing sharing of information between the spouses, and the other treating this obligation as at an end, once the wills have been executed.

Options

Two options emerge:

A. Adopt a position similar to the one suggested by the Law Society of Manitoba in its draft Notice to the Profession (attached as Appendix "C") which views the preparation of spousal wills as a joint retainer, but which views proposed changes to either of the spouse's wills as a new and separate retainer requiring no disclosure to the other spouse, but creating a conflict of interest with respect to the other spouse (who would be considered a former client) which would bar the member from acting.

B. Adopt the position advanced by Mr. Hull, making it an additional requirement in the context of the preparation of spousal wills, that the member advise the clients at the outset that the sharing of information survives the execution of the wills, and that the member will be required to advise the other spouse in the event he or she is approached to make changes to the wills arising out of the initial joint retainer.

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18 Supra. note 11

CONCLUSION

Advisory Services concludes as follows:

1) Spousal estate planning, which culminates in the preparation of will for each of the spouses, falls within the meaning of joint retainer in rule 2.04(6) and constitutes "a matter or transaction" within that rule; and

2) Spouses not be allowed to waive the requirement that all information may be shared in a joint retainer situation - therefore, no amendment to the rule is necessary; and

3) A member shall be required to advise the other spouse if he or she is approached to make changes to the wills which arise out of the initial joint retainer, irrespective of whether the wills have been executed.

APPENDIX

A Letter to Law Society of Upper Canada from Donald Carr, Goodman and Carr, dated April 12, 2001

B Letter to Law Society of Upper Canada from Glenn Davis, Sun Life Financial, dated May 3, 2001

C Draft Notice to Profession, Law Society of Manitoba

APPENDIX 2

BY-LAW 15

ANNUAL FEE

Made:	January 28, 1999
Amended:	May 28, 1999
	September 24, 1999
	November 29, 2000
	April 26, 2001

Interpretation: "Society official"

0.1 In this By-Law, a "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this By-Law.

Requirement to pay annual fee
1. (1) Every year, a member shall pay an annual fee, in accordance with sections 2 and 3, unless the member is exempt from payment of an annual fee.

Exemption from requirement to pay annual fee: life members and honorary members
(2) Life members and honorary members are not required to pay an annual fee.

Same: retired and incapacitated member
(3) A member whose application to be exempt from payment of an annual fee is approved under section 4, is not required to pay an annual fee.

Amount and payment of annual fee
2. (1) The amount of the annual fee for a year shall be determined by Convocation.

Levy for Lawyers Fund for Client Compensation
(2) An annual fee shall include a Lawyers Fund for Client Compensation levy.

Payment due
(3) Payment of an annual fee is due on January 1 every year.

Amount payable
(4) Subject to subsections (5) and (6), a member shall pay the full amount of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee.

Same
(5) A member who does not practise law, including a member employed in education, in government or in a corporation in a position where he or she is not required to practise law, shall pay fifty percent of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee.

Same
(6) The following members shall pay twenty-five percent of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee:

1. A member who does not engage in any remunerative work, including the practice of law, in or outside of Ontario.

2. A member who is in full-time attendance at a university college or designated educational institution within the meaning of the Income Tax Act (Canada) and does not practise law.

3. A member who is on a maternity, paternity or adoption leave and does not practise law.

Interpretation: practising law
(7) For the purposes of subsections (5) and (6), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services.

Application of subss. (3) to (6)
(8) Subsections (3) to (6) apply only to persons who are members on January 1.

Persons admitted, etc. after January 1
(9) A person who after January 1 is admitted or readmitted as a member, or whose membership after January 1 is restored, shall pay, in respect of the year in which he or she is admitted or readmitted as a member, or in which his or her membership is restored, an amount of an annual fee determined by the formula,

$(A \div 12) \times B$

where,

A is the amount of the annual fee the person would have been required to pay under subsection (4), (5) or (6) is he or she were a member on January 1, and

B is the number of whole calendar months remaining in the year after the month in which the person is admitted or readmitted as a member or in which the person's membership is restored.

Same: payment due
(10) Payment of an annual fee by a person to whom subsection (9) applies is due on the day on which the person is admitted or readmitted as a member or on which the person's membership is restored.

Student members admitted as members
(11) Despite subsection (9), a student member who, after January 1 and before March 31 in a year, is admitted as a member shall pay, in respect of the year in which he or she is admitted as a member, the amount of an annual fee payable by a person admitted as a member on March 31.

Same: payment due
(12) Payment of an annual fee by a student member to whom subsection (11) applies is due on April 1 in the year in which the student member is admitted as a member.

Change in status
3. (1) If a member who is required to pay the full amount, or fifty percent, of an annual fee becomes entitled to pay fifty percent, or twenty-five percent, of an annual fee, the member shall pay,

(a) an amount determined by the formula

$(A \div 12) \times B$

where

A is the full amount, or fifty percent, of an annual fee, and

B is the number of whole or part calendar months during which the member is required to pay the full amount, or fifty percent, of an annual fee; and

(b) an amount determined by the formula

$(C \div 12) \times D$

where

C is fifty percent, or twenty-five percent, of an annual fee, and

D is the number of whole calendar months during which the member is required to pay fifty percent, or twenty-five percent, of an annual fee.

Same
(2) If a member who is required to pay fifty percent, or twenty-five percent, of an annual fee becomes required to pay the full amount, or fifty percent, of an annual fee, the member shall pay, in respect of the period of time during which he or she is required to pay the lesser amount of an annual fee and the period of time during which he or she is required to pay the higher amount of an annual fee,

(a) an amount determined by the formula

$(E \div 12) \times F$

where

E is fifty percent, or twenty-five percent, of an annual fee, and

F is the number of whole calendar months during which the member is required to pay fifty percent, or twenty-five percent, of the annual fee; and

(b) an amount determined by the formula

$(G \div 12) \times H$

where

G is the full amount, or fifty percent, of an annual fee, and

H is the number of part or whole calendar months during which the member is required to pay the full amount, or fifty percent, of an annual fee.

Same
(3) If a member who is required to pay the full amount, fifty percent or twenty-five percent of an annual fee becomes exempt from payment of an annual fee, the member shall pay an amount determined by the formula

$(I \div 12) \times J$

where

I is the full amount, fifty percent or twenty-five percent of an annual fee, and

J is the number of whole or part calendar months during which the member is required to pay the full amount, fifty percent or twenty-five percent of an annual fee

When payment due
(4) If under this section, a member is required to pay, in respect of a year, an amount that is greater than the amount required to be paid under section 2, the difference between the amount that the member is required to pay under this section and the amount that the member is required to be pay under section 2 shall be due on a date to be specified by a Society official.

Application for refund
(5) If under this section, a member is required to pay, in respect of a year, an amount that is less than the amount required to be paid under section 2, subject to subsections (6) and (7), the member is entitled to a refund of the difference between the amount that the member is required to pay under section 2 and the amount that the member is required to be pay under this section.

Application for refund
(6) A member shall apply to the Society to claim an entitlement to a refund under subsection (5).

Time for making application
(7) An application to the Society under subsection (6) shall be made before the end of the year in respect of which the member claims an entitlement to a refund under subsection (5).

No entitlement to refund
(8) A member who does not comply with subsection (7) is not entitled to receive a refund.

Retired and incapacitated members
4. (1) A member may apply to the Society for an exemption from payment of an annual fee if he or she,

(a) is over sixty-five years of age and is permanently retired from the practice of law in Ontario; or

(b) is permanently disabled and, as a result, is unable to practise law.

Application form
(2) An application under subsection (1) shall be in a form provided by the Society.

Consideration of application
(3) A Society official shall consider every application made under subsection (1) and if the official is satisfied that the requirements described in clause (1) (a) or (1) (b) have been met, the official shall approve the application.

Effective date of exemption
(4) A member whose application is approved is exempt from payment of the annual fee beginning on the first day of the first month after the month in which the member submits an application form completed to the satisfaction of a Society official.

Interpretation: practising law
(5) For the purposes of subsection 4 (1), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services

Period of default
5. (1) For the purpose of subsection 46 (1) of the Act, the period of default for failure to pay an annual fee is 120 days after the day on which payment of the annual fee is due.

Payment plan: deemed date of failure to pay
(2) Where the Society arranges or permits a schedule for the payment of an annual fee by instalments or otherwise and a required payment is not made by a scheduled date, failure to pay an annual fee will be deemed to have occurred on January 1.

Reinstatement of rights and privileges
(3) If a member's rights and privileges have been suspended under subsection 46 (1) of the Act for failure to pay an annual fee in a given year, for the purpose of subsection 46 (2) of the Act, the member shall pay an amount equal to the amount of the annual fee which the member is required to pay in respect of that year and a reinstatement fee in an amount determined by Convocation from time to time.

Commencement
6. This By-Law comes into force on February 1, 1999.

APPENDIX 3

FILE MANAGEMENT AND CASELOAD STATISTICS FOR
INVESTIGATIONS AND DISCIPLINE
TO OCTOBER 2001

Investigations Department Management Report

TO:	Gavin MacKenzie, Chair, Professional Regulation Committee
COPY:	Richard Tinsley, Secretary
FROM:	James Yakimovich, Manager, Investigations
DATE:	November 5, 2001
RE:	Management Report - Investigations Department

Summary of Results for the Month:

Change in Total Case Numbers (More than one investigation may be open against a member)	Net Increase of 21 member cases (Sept = 8)
Number of Members Under Investigation	187 (Sept = 191)
Cases Completed/Closed in September	37 (Sept = 18)
Cases Older Than One Year Outstanding	32 (Sept = 41)
New Instructions This Month-s.49.3	59 (Sept = 26)

At October 31, 2001, the department carries an investigation inventory of 278 member cases and 16 Unauthorized Practice cases, for a total of 294 investigation cases. For the month of October , the department accepted for investigation seventy three (73) new cases - most were authorized in October, with the remaining pending authorization in November.

Member Case Inventory

(See Graph in Convocation file)

Cases Older Than One Year

The number of cases older than one year is thirty two (32). (Sept = 41 cases). The following chart provides a summary of action plans associated with the cases:

Planned Result	Total
Awaiting PAC Review	5
Pre-PAC Drafting Agreed Statement of Facts	2
Close or Referred to PAC in November	6
Close or Referred to PAC in December	16
Further Investigation Necessary-Target Beyond December	3
Totals	32

Unauthorized Practice Investigations

The non-member case investigations for unauthorized practice are in addition to the member investigations reported above. The chart that follows depicts the number of cases open.

Unauthorized Practice Investigations

(See Graph in Convocation file)

Cases Instructed - Year to Date

Background: In the calendar year 2000, the department sought "instructions" pursuant to s. 49 *Law Society Act* to commence 490 case investigations (401 member cases + 12 student cases + 77 non-member cases). The case investigations "instructed" during 2001 will be measured against the statistics gathered in 2000 in order to provide a basis of comparison.

The cases instructed by the Secretary in 2001 are depicted in the graph that follows. A total of three hundred and eight (308) new member investigations and six (6) student member investigations, have been approved during the first ten months in 2001. Should this trend for instructing new member cases continue through the course of the year, it can be anticipated that about three hundred seventy (370) new member case investigations will be approved in addition to cases pertaining to unauthorized practice.

Cases Investigations Instructed by The Secretary

(See Graph in Convocation file)

Planned Case Completions

Background: Each month, the investigation teams identify case investigations that will be completed in the following two months. These plans are often subject to revision because of the necessity to cease investigation activity to dedicate time to support a discipline hearing, or, because existing investigations must be deferred in order to respond to a newly received matter that requires an urgent response.

Several cases have been completed and await the decision of PAC on November 15.

The projected completions for the next two months are depicted on the graph that follows

Member Case Completion Projections for Next 2 Months

(See Graph in Convocation file)

Outstanding Discipline Department Requests

A monitoring system is in place with respect to requests made of investigators for disclosure materials and for additional investigation work. The following information pertains to October 2001.

Requests Outstanding at End of October = 3

DISCIPLINE DEPARTMENT

MEMORANDUM

TO: Professional Regulation Committee

FROM: Lesley Cameron
Senior Counsel - Discipline

DATE: November 1, 2001

RE: Discipline Department Information

The purpose of this memorandum is to provide information about matters in the discipline process for the month of October, 2001.

Total Matters in Discipline Process

Attached as Chart 1 is a list of the number of each type of file carried by the Discipline Department at October 26, 2001. As can be seen from Chart 1:

1. 136 matters are pending hearing or appeal;

2. 34 conduct applications have been authorised for prosecution by the Proceedings Authorisation Committee, but have not yet been issued;

3. 71 conduct applications have been issued and are in the discipline process: 43 are before the Hearings Management Tribunal with no hearing date set; 24 have hearing dates set or the hearing is underway; 4 are adjourned sine die;

4. 4 non compliance prosecutions have been issued;

5. 5 appeals are pending before the Law Society Appeal Panel;

6. 1 appeal and 2 judicial reviews are pending before the Divisional Court (one of which was heard on October 31, 2001).

Aging of Matters Authorised but not Issued

Of the 34 files authorised for prosecution but in which the conduct application had not yet been issued as of October 26, 2001, 8 were authorised more than 3 months ago.

Attached as Chart 2 is a summary of the age and carriage of these 8 files. As can be seen from Chart 2, of these 8 files:

(i) 2 are between 3 and 6 months old, meaning that between 3 and 6 months has elapsed since authorisation;

(ii) 3 are between 6 and 12 months old; and

(iii) 3 are over 1 year old.

All but 1 of these 8 files required further disclosure or investigation after authorisation for prosecution. The 1 file which did not require further investigation is just over 4 months old and the conduct application will be issued by November 5, 2001.

Of the 3 files over 1 year old, 1 required an application for search and seizure under section 49.10 to be brought and once the order was complied with at the end of September, 2001, a return to the October meeting of the Proceedings Authorisation Committee for an amendment to reflect the new information obtained. The second file has been authorised for non disciplinary resolution but remains on the list pending the successful completion of this resolution. The third file required further information to be obtained from a complainant who was not particularly cooperative and the application will be issued by November 5, 2001.

The Chair of the Professional Regulation Committee and the Secretary have been provided with the names of the files, a description of the nature of the allegations in each file and a brief status report on each file in this category as of October 26, 2001.

Historical Comparison

Attached as Chart 3 is a summary of the age and carriage of matters which were authorised for prosecution by the Proceedings Authorisation Committee, but in which the conduct application had not yet been issued as of the end of various months beginning in August of 2000. Chart 3 includes the information summarised in Chart 2, but adds figures from previous months for comparison purposes.

Appeals

On October 31, 2001, the Divisional Court dismissed the appeal of Michael Angelo Spensieri from Convocation's order of November 25, 2001, with costs to the Law Society. Convocation's order had dismissed Mr. Spensieri's readmission application and directed him to file a new readmission application under the current legislative scheme.

Other Matters

On October 17, 2001, the Superior Court of Justice of Ontario released a decision in the context of an application by the Law Society for search and seizure under section 49.10 of the *Law Society Act.* The Law Society had moved for an order that the application record be received *in camera* given the provisions of section 49.12 of the *Act.* The court ordered that the record be sealed only to the extent that it contained confidential client information or other information that is properly the subject of solicitor client privilege and that submissions which referred to this material should be conducted in the absence of the public.

Chart 1

Matters in Discipline Process as of October 26, 2001	
Discipline Providing Assistance to Investigations	17
Conduct Applications Authorized But Not Issued	34
Conduct Applications Issued Hearing Date Not Set	43
Conduct Applications Issued Hearing Date Set or Hearing Started	24
Conduct Applications Issued Adjourned Sine Die	4
Non-Compliance Applications Issued Hearing Date Not Set	4
Capacity Applications Authorized But Not Issued	0
Capacity Applications Issued Hearing Date Not Set	1
Admission Hearings	10
Readmission Hearings	4
Reinstatement Hearings	4
Appeals to Law Society Appeal Panel	5
Appeals/Judicial Reviews Divisional Court	3
Total Matters	153

Chart 2

Conduct Applications Authorized For Prosecution but not Issued as Conduct Applications as of October 26, 2001			
	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
Law Society Counsel	2	3	1
Outside Counsel	0	0	2
Total	2	3	3

Chart 3

CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
36768	Law Society Counsel	14	5	15
	Outside Counsel	0	0	1
	Total	14	5	16
36829	Law Society Counsel	14	3	5
	Outside Counsel	9	1	5
	Total	23	4	10
36859	Law Society Counsel	12	2	2
	Outside Counsel	9	1	5
	Total	21	3	7
36874	Law Society Counsel	9	2	2
	Outside Counsel	4	3	4
	Total	13	5	6
36921	Law Society Counsel	11	4	1
	Outside Counsel	2	6	4
	Total	13	10	5
36949	Law Society Counsel	7	2	1
	Outside Counsel	0	5	4
	Total	7	7	5
36979	Law Society Counsel	6	1	0
	Outside Counsel	0	4	3
	Total	6	5	3
37004	Law Society Counsel	6	2	0
	Outside Counsel	0	3	3
	Total	6	5	3
37041	Law Society Counsel	6	3	0

CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
	Outside Counsel	0	1	5
	Total	6	4	5
37071	Law Society Counsel	5	3	1
	Outside Counsel	0	0	5
	Total	5	3	6
37102	Law Society Counsel	5	5	1
	Outside Counsel	0	0	3
	Total	5	5	4
37132	Law Society Counsel	4	5	0
	Outside Counsel	0	0	2
	Total	4	5	2
37163	Law Society Counsel	6	4	0
	Outside Counsel	0	0	2
	Total	6	4	2
37189	Law Society Counsel	2	3	1
	Outside Counsel	0	0	2
	Total	2	3	3

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

(1) Copy of a letter to the Law Society of Upper Canada from Donald Carr, Goodman and Carr, dated April 12, 2001. (Appendix "A", pages 24 - 25)

(2) Copy of a letter to the Law Society of Upper Canada from Glenn Davis, Sun Life Financial, dated May 3, 2001. (Appendix "B", pages 26 - 27)

(3) Copy of a Draft Notice to the Profession, Law Society of Manitoba. (Appendix "C")

Mr. MacKenzie accepted an amendment by Ms. Potter that the word "forthwith" be added after the word "inform" in the first paragraph of the proposed commentary on page 5 of the Report.

"At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to inform forthwith the other spouse or partner of the contact and to decline to act unless both spouses or partners agree."

REPORT FOR INFORMATION ONLY

Equity & Aboriginal Issues Committee Report

Equity and Aboriginal Issues Committee/Comite Sur L'Equite Et Les Affaires Autochtones

Report to Convocation

Purpose of Report: Information

Prepared by the Equity Initiatives Department

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* *The full report prepared by Charles Novogradsky and Associates is available from the Equity Initiatives Department.*

+ *The full research proposal by Professor Fiona Kay, Queen's University, is available from the Equity Initiatives Department.*

TERMS OF REFERENCE/COMMITTEE PROCESS

The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (EAIC) met on Wednesday, November 7, 2001, 4 - 6:30 p.m.. In attendance were:

Paul Copeland (Chair)
Helene Puccini (Vice-Chair)
Janet Minor
Tom Carey
Judith Potter
Brad Wright
Stephen Bindman

Staff present: Charles Smith, Josée Bouchard, Jewel Amoah, Margaret Froh, Rachel Osborne, Geneva Yee

Guests: Charles Novogradsky, Laura Heller and Professor Fiona Kay

The Committee reports the following items for Convocation's information:

- Recommendation from the Equity Advisory Group
- Public Education Events for 2002
- Projects Concerning Women in the Legal Profession

RECOMMENDATION FROM THE EQUITY ADVISORY GROUP

1. The Equity Advisory Group requested that the Ottawa members of the Committee work with them and the Equity Advisor to promote in Ottawa both the *Law Firm Equity and Diversity Mentorship Program* as well as efforts to promote non-discrimination and equity in articling.

2. Efforts on both of these initiatives have been underway in the Toronto area and need to extend to other parts of Ontario. In particular, the Justice Department in Ottawa has indicated an interest in partnering with the Law Society on the items noted above.

3. Helene Puccini and Brad Wright have offered to assist this in this effort. The Committee is also requesting the support of other benchers in the Ottawa area.

PUBLIC EDUCATION EVENTS FOR 2002

4. The Equity Initiatives Department coordinates public education events approved by Convocation in January 1999 and further as part of the Department's five-year plan approved by Convocation in November / December 1999 and November r 2000. These events are a means to improve relations between the Law Society and members of Aboriginal, Francophone and equity-seeking groups within the profession and the broader community. Essentially, these events celebrate/commemorate days of significance to these communities and provide opportunities for members within the profession to address issues related to law that are a concern to Aboriginal, Francophone, and equity-seeking groups. All events are planned in partnership with members of the profession and relevant educational and promotional materials are prepared to identify law-related issues and concerns.

5. The Equity Initiatives Department operates two public education programs: one targeted at youth, primarily high school students, and the other program targeting the profession. In regard to the public education program targeting youth, we are working with seven school boards from across Metropolitan Toronto and can accommodate approximately 80 -100 students at each of the events. Contact has also been made with a number of community agencies that operate youth programs to encourage their participation in our public education events.

6. With respect to the public education program for the legal profession, we are continuing to work in partnership with a number of legal associations to promote critical discussion of issues of concern to Francophone, Aboriginal, and other equity-seeking communities in the legal profession. Our confirmed partners for our 2001 - 2002 public education program for the profession include the Canadian Association of Black Lawyers (CABL), the African Canadian Legal Clinic (ACLC), the Black Law Students Association of Canada (BLSAC), the Women's Law Association of Ontario (WLAO), the OBA's Feminist Legal Analysis Committee (FLAC), Aboriginal Legal Services of Toronto (ALST), Rotiio taties, the City of Toronto, the Métis Nation of Ontario, the OBA's Sexual Orientation and Gender Identity Committee (SOGIC), and the Association des juristes d'expression francaise de l'Ontario (AJEFO).

PROJECTS CONCERNING DIVERSITY AND WOMEN IN THE LEGAL PROFESSION

7. The Committee received two presentations on this matter: the first by Charles Novogradsky and Associates; the second by Professor Fiona Kay, Queen's University.

8. In the past year, Charles Novogradsky and Associates undertook a bibliographic research project to identify materials addressing equity and diversity in the legal profession, particularly to source materials concerning women, Aboriginal peoples, Francophones, immigrants and refugees, racialized groups, persons with disabilities as well as gays, lesbians, bisexuals and transgenders. Part I of this research project is complete and is included under separate cover. Tab 6 contains the draft of narratives on best practices in promoting equity and diversity in the legal profession which are being compiled for uploading onto the Law Society's website both through the Great Library and through the Equity Initiatives Department.

9. Part II of the research conducted by Charles Novogradsky and Associates will be completed toward the end of this year and will contain completed summaries now drafted in Tab 6 as well as best practices concerning the advancement of women in the legal profession. Further, based on the latter, the final report will also contain an assessment of best practice standards for the advancement of women in the legal profession. These standards will be brought to Committee for consideration.

10. The author of numerous articles addressing women in the legal profession, notably *Transitions*, and, *Barriers and Opportunities*, Professor Kay is undertaking further research examining women in the legal profession and has agreed to work with the Equity Initiatives Department to follow-up on the aforementioned reports as well as to address issues concerning gender and other personal characteristics, eg., race, ethnicity, sexual orientation, national identity (Francophone or Aboriginal status).

11. Through Queen's University, Professor Kay has submitted a grant request to the Social Sciences and Humanities Research Council for the funding of the project. The Law Society is able to support Professor Kay's research through funding and in-kind support provided by the Equity Initiatives Department which has $25,000 approved in the 2002 budget for demographic analysis.

12. At the completion of Professor Kay's research, it is anticipated that a report will be submitted to the Committee for consideration. This report will likely address the comparative status of women and other groups in the legal profession and contain recommendations for the Law Society to consider in terms of promoting gender equality as well as equality for Aboriginal peoples, Francophones and racialized groups in the practice of law.

Re.: Request from the Equity Advisory Group to Develop Law Society Equity Programs in the Ottawa Area

13 The Law Society currently operates a number of equity and diversity programs which are predominantly based in the Toronto area. On October 22, 2001, Charles Smith and Ian Mackenzie met in Ottawa to discuss the feasibility of operating some of these programs in the Ottawa area, particularly the *Law Firm Equity and Diversity Mentorship Program* and the Law Society's efforts to promote non-discrimination and equity in articling for BAC students currently under-represented in the legal profession (i.e., Aboriginal peoples, Francophones, persons with disabilities, NCA students, people of colour). In this regard, Ian has identified that the Department of Justice through its Employment Equity Steering Committee is very interested in working with the Equity Initiatives Department.

14. To further develop this opportunity, it would be beneficial to organize a meeting in the Ottawa area involving Ottawa benchers, particularly members of the EAIC, representatives of the Ottawa University Faculty of Law as well as local English and French school boards, staff from the Justice Department and from the Law Society's Bar Admission Course as well as Equity Initiatives Department.

15. The purpose of such a meeting would be to explore what is needed to promote the *Mentorship Program* and to address some of the issues regarding non-discrimination and equity in articling. The Justice Department is interested in supporting positive outcomes in both of these areas and is interested in an active partnership with the Equity Initiatives Department to do so. The Ottawa meeting would provide an opportunity to discuss this at a local level and to ensure the supports and resources are there to put this into place.

Re: Public Education Events 2001 - 2002

16. The following schedule identifies the public education events planned for the remainder of 2001 and for 2002.

November 2001

Monday November 12 1:00 - 3:30 PM	Louis Riel Day Public Education Event for High School Students Partners: Métis Nation of Ontario
Friday November 16 4:30 - 6:30 PM	Louis Riel Day Panel Discussion *"Re-Awakening the Nation"* Partners: Métis Nation of Ontario; City of Toronto; Rotiio[7] taties
Wednesday November 21 4:30 - 6:30 PM	*"Changing Face of the Legal Profession"* Event Partners: Osgoode Hall Law School; Chinese Canadian National Council; Multicultural History Society of Ontario; Equity Advisory Group

December 2001

Thursday December 6 1:00 - 3:30 PM	Women's Remembrance Day Public Education Event for High School Students Partners: Barbra Schlifer Clinic
Monday December 10 1:00 - 4:30 PM	United Nations Human Rights Day Seminar Partners: Urban Alliance on Race Relations

Monday December 10 5:00 PM	United Nations Human Rights Keynote Lecture Partners: Urban Alliance on Race Relations
February 2002	
Tuesday February 12	Black History Month Event for High School Students Partners: Black Law Students' Association of Canada; Canadian Association of Black Lawyers
Thursday February 21	Black History Month Event Partners: Black Law Students' Association of Canada; Canadian Association of Black Lawyers; African Canadian Legal Clinic
Thursday February 21 - Sunday February 24	Black Law Students' Association of Canada 11th Annual Conference *Balancing our Future: Building Partnerships, Maintaining Ties*
March 2002	
Wednesday March 6 5:00 PM	International Women's Day Event / Launch of *In the Face of Justice* Video Partners: General Motors; Feminist Legal Analysis Committee (OBA); Women's Law Association of Ontario
Friday March 8 1:00 - 3:30 PM	International Women's Day Public Education Event for High School Students Partners: Feminist Legal Analysis Committee (OBA); Women's Law Association of Ontario
Wednesday March 20- Friday March 22	*Equity and Diversity in the Legal Profession: Promoting Dialogue, Creating Change* Meetings Partners: Department of Canadian Heritage
April 2002	
Monday April 29 1:00 - 3:30 PM	Francophone Public Education Event for High School Students Partners: Association des juristes d'expression francaise de l'Ontario (AJEFO).
May 2002	
Tuesday May 14 (to be confirmed)	National Access Awareness Week Public Education Event Partners: City of Toronto; ARCH

Monday May 20 1:00 - 3:30 PM	National Aboriginal Day Public Education Event for High School Students Partners: Rotiio[7] taties; Aboriginal Legal Services of Toronto
June 2002	
Monday June 17 (to be confirmed)	National Aboriginal Day Public Education Event Partners: Rotiio[7] taties; Aboriginal Legal Services of Toronto; City of Toronto
Thursday June 20	Lesbian and Gay Pride Public Education Event Partners: Sexual Orientation and Gender Identity Committee (OBA)
Thursday June 20 - Saturday June 22	Les complices de la justice (AJEFO National Conference)
October 2002	
Thursday October 17 - Sunday October 20	Indigenous Bar Association Annual Conference

Projects Concerning Diversity and Women in the Legal Profession

EQUITY AND DIVERSITY FOR LAW FIRMS: A LITERATURE REVIEW AND BIBLIOGRAPHIC ESSAY

Acknowledgements

This was a large and complex project. It was accomplished in a relatively short time frame with the assistance of many thoughtful and helpful individuals. Everyone in the Equity Initiatives Department of the Law Society of Upper Canada played a major part in the development of this project: Charles C. Smith, Josée Bouchard, Rachel Osborne, Jewel Amoah, Andrea Burke, and Geneva Lee. Andrea Burke played an additional role in assisting us with French language searching and writing.

A great deal of time was spent in various libraries and the staff of all were most helpful. In particular the resources of the Bora Laskin Law Library, University of Toronto and the Great Library of the Law Society of Upper Canada were extremely useful.

On a more general note, we would like to acknowledge the many citizens who through their advocacy and other efforts have helped to move Canadian society toward greater social and legal justice. Constance Backhouse's book, Colour-coded: A Legal History of Racism in Canada, 1900-1950 describes cases of ordinary Canadians struggling in the first part of the twentieth century to win rights for their communities from a justice system and society failing to acknowledge and grant legal equality.

Many legal professionals have also helped to open the doors of their profession to members of minority communities. The Law Society of Upper Canada itself has signaled its commitment to greater inclusiveness with the establishment of the Equity Initiatives Department. We are pleased to be contributing through this research project to such important developments.

Laura Heller and Charles Novogrodsky

1. Introduction

Johan Galtung, honorary winner of 1987 Right Livelihood Award, and consultant on equality issues to eleven United Nations agencies in the past 40 years, has written that in order to eradicate racial, ethnic and other forms of discrimination societies must engage in three major activities: education/research, advocacy and legal development.

Achieving equality before the law is easier said than done. In the United States a civil war was fought in the middle of the nineteenth century to permit the establishment of this legal principle as it applies to African-Americans. In Canada the recent NFB film "Journey to Justice" catalogues the struggle of African-Canadians to win social and legal equality in the last half of the twentieth century. The Canadian Charter of Rights and Freedoms is less than twenty years old. Recent Charter decisions by the Canadian Supreme Court along with major rulings by provincial human rights codes are continuing to advance legal equality rights as Canada moves into the new century.

The Conference Board of Canada, one of the nation's leading business research bodies, has reported that natural population increase in Canada will cease by the year 2030. Canada is within a generation of immigration becoming the *sole* source of Canadian population growth. The domination of our social and institutional life by a male, white Anglo-Celtic majority is ending. Many Canadian businesses deeply understand the implications of this fact for their workforces, markets and public reputation.

The legal profession is particularly affected by the profound changes in the makeup of Canadian society. These changes include, of course, major issues related to gender roles that affect the entire population. The legal profession faces a substantial challenge to ensure that the face of the profession reflects the people it serves and that it does so in socially and politically relevant ways.

In Canada there have been significant political developments in Aboriginal peoples' rights and struggles for self-determination. Much of the state-of-the-art overview on this issue is presented in the Report of the Royal Commission on Aboriginal Peoples (rn 1056)[1]. These developments, along with population growth, major land claim issues, and the focus on legal inequalities brought about by the Donald Marshall case and subsequent commission, are having the additional effect of putting the long-standing inequalities of Aboriginal peoples high on the agenda of public policy and legal initiatives throughout the country.

Law firms are at the forefront of efforts in the legal profession to catch up and contribute to advancing the cause of diversity and equality in Canada. Leading Canadian legal professional organizations have produced significant research documenting the inequities facing ethno-racial minorities, women and other equity seeking groups who wish to contribute to the legal profession.

The *translation* of this research into on-the-ground change in the composition and nature of law firm practice has been slow. Progress has been slow despite the efforts of many advocates, much research and new legal decisions advancing equity issues in many spheres of life. In Galtung's terms, the time has arrived for law firms to harness existing research, advocacy and laws, to change the actually-lived equity experience of legal practice.

Luckily there is a great deal of organization and business research that may be applied to the work of bringing needed equity change to the business and composition of Canadian law firms.

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[1] rn indicates the record number assigned to a given item in the database developed for the project. The record numbers are also given as part of the full bibliographical reference for each item mentioned in the essay and listed in section 6.

In particular, Marilyn Loden's book, Implementing Diversity (rn1019) emphasizes how to implement diversity in business and professional firm settings. Loden and Ann Morrison in The New Leaders: Diversity Leadership in America (rn1020) both note the differences between shallow recruitment efforts (which might add a few diverse individuals) versus substantive work to change who is in leadership of an organization and how to change organizational culture so as to make it more inclusive.

Morrison describes 52 organizational diversity *practices* that include accountability, development and recruitment. Morrison concludes that organizations that most effectively develop diverse leadership engage in "Three E's": enforcement, education and exposure. And, writes Morrison, firms are more likely to achieve diversity goals when they modify human resources systems so that they are inclusive of human differences.

Gardenswartz et al.'s Managing Diversity (rn 1017) is a compilation of practical instruments (checklists, etc.) for assessing the degree of diversity competence of individuals, teams and organizations. Its chapter headings cover virtually every aspect of managing an organization: performance management, recruitment, evaluation, climate of the workplace, etc. This book is complemented by an extensive bibliography.

Advancing equity in law firms is not just a matter of particular ethno-racial or sex or gender identity. All people engaged in the legal profession experience stresses between home and work life. This is a very major challenge in companies offering professional services. The accounting firm, Deloitte and Touche, has a special company program called "ART", the Attraction and Retention of Talented People", a program which seeks to make D and T an 'employer of choice'.

Balancing family and career is a part of what business considers when it seeks to win the 'talent war' of attracting, selecting, developing and retaining top performers. This 'war' takes place in a context where many studies show that younger professionals want more than just money- they wish to balance work and home life and many of them are in a position (for example those with high level IT skills) to 'hire their employer'.

Deloitte and Touche is just one example of a professional firm whose experiences bear on the prospects for greater equity in the legal profession.

Newer theories of knowledge management and learning organizations are also making their presence felt in some of the research related to equity and diversity. Such theories, as put forward by Reuben R. McDaniel Jr. in Diversity in Organizations (rn 1061), suggest that in addition to the moral, legal, and broader social rationales for equity, there is a business case to be made that diverse and equitable organizations are more able to become learning organizations and thus be more successful in an era of rapid technological and social change.

The reasons for diversity and equity in the legal profession are compelling. The following bibliographical essay and indexed printout of the database of bibliographical references, created for this project, provide links to thinking and experience underway in Canada and elsewhere. It is the hope of the authors that by compiling and reflecting on this body of knowledge this bibliographical essay and literature review helps to advance such efforts even further.

2. Objectives of the Literature Review

The objectives of the literature review and subsequent bibliographical essay are two-fold:

- To identify and analyze major written and audio-visual documentation on the issues of diversity and equality in law firms;
- To share the findings in a variety of formats with others who are interested in these same issues.

The immediate, practical application of this project is to inform the development of a training manual on implementing diversity initiatives in law firms that is being developed by the Equity Initiatives Department of the Law Society of Upper Canada. Its purpose is to identify what exists already, particularly 'best practices' information so that the best knowledge can be incorporated into the manual under development. Another related purpose is to deduce what is missing from the literature, again with the intent to have the manual begin to fill gaps rather than duplicate existing material.

The legal profession obviously includes such areas as legal education, the courts, and law making. These were outside the scope of this project which focussed its search on developments of the profession as they pertain to law firms.

3. Search Strategy & Scope

The search strategy combined a variety of techniques including manual searching, database searching of a variety of electronic products and library catalogues, and searching the websites of key associations and organizations such as national bar associations. References and bibliographies of key documents were also used to identify additional sources.

In terms of scope, information was limited to items published between 1990 and 2000. The languages searched were English and French, and the geographic coverage was Canada, United States, Australia, New Zealand, France, and the United Kingdom. The principal formats were journal articles, books, and newspaper articles from both mass media and professional news sources. No unpublished material or ephemera was included, with the exception of certain key internet documents that might not otherwise fit the definition of published materials. Some audiovisual materials, primarily training videos were also identified if they appeared in the bibliographical indexes or websites, but no special effort was made to search audiovisual catalogues or indices *per se.*

Concepts searched included:

- any general information on the social justice or ethics case for equity in the legal profession;
- background information on the changing context for work in the legal profession;
- the business case for equity as it relates specifically to the profession;
- general information on equity in law firms, including all the employment processes of recruitment, retention, promotion, evaluation of minority lawyers.

Each of the equity-seeking groups - women, racialized peoples, people with disabilities, Aboriginal peoples, Francophones, immigrants and refugees, and lesbians, gays, bisexuals, and transgenders were also searched for specifically by whatever terminology or subject headings most closely described the group in the tool being used.

The terminology for this topic varies considerably over time and from country to country. It is also quite inconsistent across indexing and other bibliographical tools. Whenever practical all variations of the terms or names for various communities were searched, for example Native Peoples, Aboriginals, Indian, Inuit, First Nations, Metis (likewise with other groups) depending on the indexing style of the tool being used.

As mentioned in the section covering objectives, legal education was excluded from the terms of this search, even though there are clear connections between broadening the scope of legal education and equity improvements in the profession overall. This topic could easily be the subject of a complementary bibliographical essay. The Law Society of Upper Canada has initiated some work in this direction with its publication Equity and Diversity in Bar Admission Course Reform: A Review of the Literature (rn 798).

Please see Appendix A for a list of the key tools and websites included in the search described above.

4. Findings

The findings are presented starting with a section on the profession as a whole followed by the equity seeking groups in order of the number of references found in the search. The references found on each of the groups have been further classified, when numbers warrant, according to five main themes:

- Overview - of the entire literature found on the particular equity seeking group
- Descriptive Information - surveys and general descriptions of the situation of that particular group within the profession
- Programs and Models - examples of practical policies and programs from law firms or legal organizations
- 'Calls to Action' - material that denounces the current state of affairs and urges change, usually shorter pieces, often taken from media coverage.
- People Involved - news reports on appointments of minorities or females to noteworthy or important positions; testimonials of people's experiences in the profession, interviews with leaders about their aspirations and commitments to improve the situation of people from their community in the profession.

Overview of Findings

Roughly 1,100 relevant references were identified and included in the database created for this project. Once it was decided the item was relevant, it was then classified using as many of the following categories as were appropriate:

- Equity in the legal profession and in law firms in general
- Women
- Racialized peoples
- Lesbians, gays, bisexuals, transgenders
- Aboriginal peoples
- People with disabilities
- Immigrants and refugees
- Francophones

The references breakdown according to topic in roughly the following percentages, keeping in mind that an item can be assigned more than one classification or topic and about 5.5% could not be classified for lack of information:

19.1%	Equity in the legal profession and in law firms in general
47.5%	Women
32.1%	Racialized peoples
2.5%	Lesbians, gays, bisexuals, transgenders
1.5%	Aboriginal peoples
1.0%	People with disabilities
0.7%	Immigrants and refugees
0.3%	Francophones

Regarding geographic coverage, the vast majority of materials are American. Of all the items that we could assign to a country, 45.5% are clearly about the US experience and an additional 12.3% seem to be but cannot be confirmed with the information in the record. This would mean that the American material is between 45 and 57% of the total. Canadian materials make up 24.6%; British represent 2.6%; Australian 1.9%; and materials published in or about France another 0.2%. About 12.5% of the items could not be classified by geographic region, in addition to the 12.3% that we suspect are American.

These numbers, while they reflect a reality that is not unfamiliar in this or other fields, are also a product of the fact that the majority of bibliographical tools used were predominantly US publications, in particular LegalTrac which netted about 64% of the total references found. Local sources, were they more accessible, might have changed these figures in minor ways. Please refer to Appendix A which specifies the breadth of tools used in the search for further details.

4.1 Overview of Equity in the Legal Profession

This overview section has actually been divided into two parts. The first looks at the general rationale for equity in the legal profession - the historical, social, ethical, business, and professional factors creating momentum for equity change. As such, it covers the policy initiatives of the profession as a whole. The second section highlights practical materials on law firms in general, including policies that cover most or all of the equity seeking groups and more general overviews of developments within law firms themselves. Materials on specific equity-seeking groups are discussed in the sections directly related to that group.

4.1.1 General Rationale

The response of the profession to changes in the social and demographic factors of modern society is the subject of this section. It refers to some materials in related professions, although the search was in no way meant to be exhaustive of organizational development and diversity
literature. There are also some historical overviews of the profession, positioning some of the recent developments within that historical context. And finally, the major publications on diversity by the leading bar associations and law societies are included here.

The American Bar Associations' two most relevant commissions are the Commission on Racial and Ethnic Diversity in the Profession and the Commission on Women. Both produce on-line, quarterly newsletters, Goal IX (rn 1091) and Perspectives (rn 1104) respectively that document the developments with the Association on both these initiatives, as well as many reports that will be highlighted under their specific topics later in this essay. A 1999 colloquium of the ABA on diversity is summarized in Breaking Out of the Mold (rn 238).

As part of its CLE program, the ABA has produced a 42 minute audiotape Valuing Diversity: Law Firms and Leadership in the 21st Century (rn 1143) which takes as its starting point the changing demographics and the need for law firms to respond to an increasingly heterogenous client pool. It also goes on to provide some practical advice to overcoming existing barriers.

One of the key documents from the ABA with respect to racialized women in the profession is The Burdens of Both the Privileges of Neither (rn 1093) which documents the status of racialized and women lawyers from non-dominant ethnic groups. This document forms a starting point for exploring the publications and programs of the two aforementioned commissions and Multicultural Women's Attorneys Network of the ABA.

Other American bar associations have significant equity initiatives such as the Bar Association of San Francisco, summarized in BASF Diversity Initiatives in 2000 (rn 230). There are also a number of special interest bar associations for women under the umbrella of the National Conference of Women's Bar Associations, the Native American Bar Association, National Asian Pacific Bar Association, among others. While the special interest bar associations did not net large numbers of bibliographical references for this project, their web sites, listed in Appendix A, will most surely develop into major sources of information on activities of the respective organizations.

In Canada, the Canadian Bar Association (CBA), the Law Society of Upper Canada (LSUC), and to some extent the Law Society of British Columbia are the major sources of literature in this field. In the case of the CBA, several initiatives have resulted in major reports such as Touchstones for Change: Equality, Diversity and Accountability: The Report on Gender Equality in the Legal Profession (rn 784) and Racial Equality in the Canadian Legal Profession (rn 1037), as well as the continuing education document, Roads to Equality (rn 1041). Wherever possible, submissions to or reports prepared for these projects were also indexed in the database. The Law Society of British Columbia produced its Report to the Planning Committee on Multicultural Issues and the Legal Profession (rn 756) in 1992 as well as other documents listed later in this paper under more specific topics.

The Law Society of Upper Canada has contributed substantially to the overall debate in the literature on addressing equity issues. A key document summarizing this contribution is the Bicentennial Report and Recommendations on Equity Issues in the Legal Profession (rn 796). This is complemented by other useful resources including Equity and Diversity Action Plans (rn 833).

Several organizations have an overall mandate to look at issues of diversity in the profession, as opposed to being concerned with any particular equity seeking group. Most often, the major thrust is on women and racialized peoples, and in the case of the United States, this most often refers to African-Americans.

The American Corporate Counsel Association (ACCA) is one such group which has a number of online publications that cover racialized peoples and women together. The ACCA is the leading source of material on the issue of corporate counsel and together with some of the articles on the business case for equity, such as Room for Minorities: Firms Advised that a Diverse Work Force Is Good for Business (rn 329) or Diversity Helps Law Firms 'Know' their Business (rn 951) provide some compelling arguments for diversity from a business perspective. The ACCA produces a substantial amount of material on policies and theory in general. Their Policy Statement on Diversity (rn 1058) is a good place to start.

The issue of corporate counsel is primarily, but not entirely, covered by the Americans. Corporate Counsel : The Corporate Counsel's Survival Guide to Equity in the Workplace (rn 869) is the Canadian Bar's 1995 contribution to this issue.

It is not only the ACCA that argues the business case for diversity. Many other authors recognize these arguments as well, including some of the legal press in such articles as When Diversity Is Good for Business (rn 515).

Much recent corporate theory assumes the need for knowlege-based decision making in an era of continual change. In Diversity in Organizations (rn 1061) Reuben R. McDaniel Jr. posits that diversity is a prerequisite for organizational survival, as it allows the organization to detect and take advantage of changes in the environment. While the author does not disagree with the moral approaches to diversity, he primarily argues its practicality.

A major contextual issue for the equity in legal firms is the overall question of equity in the judicial system in general. In the U.S. there has been considerable writing on this issue, as well as the sub-topic of law clerks and the lack of diversity among them. Items found include Law Clerks Should Reflect Diversity and Be Examples of Fairness (rn 505) among others. This topic is picked up again in the section on racialized peoples.

There are a number of Canadian contributions on racism and sexism in the judicial system worthy of note: Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms (rn 736); Race Rights and Law in the Supreme Court of Canada (rn 1014), Brief to the Ontario Commission on Systemic Racism in the Criminal Justice System (rn 738), Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892-1961 (rn 1003), Creating Diversity on the Bench (rn 968), Ethnocultural Groups and the Justice System in Canada: A Review of the Issues (rn 1085), Diversity and Justice in Canada (rn 970), Racial Discrimination: Law and Practice (rn 975). Charles C. Smith's paper Addressing Racism and Equity in Canada Today: The Challenge for our Time (rn 994) looks at the roots of racism in Canadian society, including that practised against Aboriginal peoples, to position the challenges to the judiciary and in the courtroom within an historical panorama that must inform our analysis and suggestions for action. The Equal Treatment Bench Book (rn 1113) is a very recent British contribution to the realities of the judiciary in a multi-racial society.

In particular the issue of equality in law and the legal system for women has been the subject of several provincial studies and some independent papers, for example On Judicial Appointments: Does Gender Make a Difference? (rn 1005). The Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System produced a number of reports in the early 1990's (see rn 1035 and 782). Provincial bar associations and law societies also contributed general studies on overall bias based on gender in Canada's legal system (see rn 1075, 788, 838, 769). The 1993 study Investigating Gender Bias: Law, Courts, and Legal Profession (rn 1047) complements the provincial studies.

History provides an excellent vantage point from which to understand and contextualize recent developments. An excellent overview to the changes in the province of Ontario from its origins to the present day is given in From Empire Ontario to California North: Law and Legal Institutions in Twentieth Century Ontario (rn 739). Looking to the future, some of the material coming out of law schools and young lawyers associations points the way to change, such as the report on the Young Lawyers' Conference of 2000, The Future of the Legal Profession: The Challenge of Change (rn 1078)

b) Descriptive Information

The Fall 1998 issue of *Law Library Journal* is a special issue entitled "Focus on Diversity". It covers many issues related to this topic, and the articles have been indexed individually in the database. These are all substantial contributions to the field and include such titles as Diversity Deferred (rn 510), Diversity in Conflict (rn 513), R-E-S-P-E-C-T (rn 512)

One of the most common methods of 'describing' the problems with under-representation of equity-seeking groups is through statistical surveys of the membership of the profession. The Law Society of Upper Canada has produced several useful statistical analyses including Lawyers in Ontario: Evidence from the 1996 Census (rn 795) which correlates representation of equity-seeking groups in the population at large with representation in the legal profession. Transitions in the Ontario Legal Profession (rn 807) surveys lawyers called to the Bar between 1975 and 1990; and finally the analysis from various sources has been put together in the summer 2000 document A Demographic Analysis of the Legal Profession in Ontario (rn 794). The American Bar Association produced The Lawyer Statistical Report (rn 820) which covers the decade of the 90s. Common Bonds, Common Challenges: Women Minority and Younger Lawyers in the 21st Century Law Firm (rn 1145) is a 3 hour CLE video that examines the changes within the profession overall and its specific effects on equity seeking groups.

c) Programs and Models

The Public Service Commission of Canada is engaged in an enterprise to create an inclusive public service. While not specific to the legal profession, it covers legal personnel hired by the public service. This initiative also represents a model for organizational change in the Canadian context. The documentation is comprised of two major reports, both available full text on the Internet, Chapter 1: Task Force on an Inclusive Public Service 2000 (rn 1055) and an earlier Diversity Training Review (rn 1054). The latter is supported by an extensive bibliography.

The ACCC has published an article summarizing the U.S. Department of Labor's initiative called the "Glass Ceiling Review" (rn 1064) documenting the essential elements of a glass ceiling audit and the experience of the Department in implementing it. Many ACCA documents include practical models for implementation within the profession overall.

The British experience is highlighted in Law Soc[iety] Adopts Practice Rule on Anti-Discrimination (rn 138).

d) 'Calls to Action'

Denouncing the current situation with the profession overall and advocacy for change is documented for the most part in the legal and mass media articles. In the November - December issue of the Washington Lawyer, the President's page is used to highlight the issue of diversity in the profession, Achieving the Goal of Diversity in the Legal Profession (rn 492). Many similar press clippings attest to the need for change, such as Bar Lacks Sufficient Diversity (rn 544) in the Los Angeles Daily Journal, a consistent source of information about developments around diversity.

The special issue on diversity of the Law Library Journal mentioned above includes an article on the issue of advocacy titled Diversity and Professional Activism: "Both And" not "Either Or" (rn 511).

4.1.2 Initiatives to Implement Equity and Diversity in Law Firms

a) Overview

This section refers primarily to practical tools and approaches developed for use in law firms that are not specific to any given equity seeking group. There are a few items that report on developments, or lack thereof, in the field, and some shorter news pieces that call on the profession for more action.

b) Descriptive Information

Legal Times published a special issue on diversity on November 18, 1996 that includes articles of interest, including Changing the Face of D.C. Law (rn 74) and Diversity - Why Worry? (rn 75). The May 1999 issue of *CBA Record* is a special issue on diversity and one of the articles gives Five Reasons Why Law Firms Are Not Making Progress on Diversity (rn 498).

The ABA had a colloquium in 2000, Goals for the Bar in the New Millennium (rn 545) which is summarized in *The National Law Journal* of July 10, 2000.

c) Programs and Models

Much of the literature in this area focuses on creating model policies for law firms. Lawyers for One America has produced Diversity Model Programs and Practices - Law Firms (rn 1070) that are available full text on the website. Likewise, the Bar Association of San Francisco has compiled its model policies under the title Manual of Model Policies and Programs to Achieve Equality of Opportunity in the Legal Profession (rn 1127). "The Manual contains a selection of model policies and programs adopted by the Board of Directors of BASF between 1989 and 1994, and subsequently disseminated for adoption, endorsement or participation by its 400 sponsoring law firms, corporate law departments and law schools."

On the Canadian front, the Law Society of Upper Canada is in the forefront of developing practical tools for the profession, among them Guide to Developing a Policy Regarding Workplace Equity in Law Firms (rn 805).

The Law Society of Alberta has published a number of its policies on line: Equality in Employment Interviews (rn 1129); Model Harassment Policy (rn 1132) as well as an article on the extension of the organization's equity ombudsperson program (rn 1136). The Manitoba Law Society also has developed its Guidelines and Model Policy on Alternative Work Schedules (rn 1139).

Elimination of Bias: Recognition and Remedies (rn 1128) is a CLE video tape by the Los Angeles County Bar Association on recognizing gender, ethnic, and disability bias in the legal profession that also provides some solutions to these problems.

The issue of private clubs comes up throughout the literature and the Bar Association of San Francisco has produced policies around this published under the title BASF Policies in Opposition to Discriminatory Private Clubs (rn 1126).

While part-time and flexible work arrangements is primarily reported under the following section on women, there is a document by the Alberta Law Society, Alternative Work Schedules (rn 1131) which is more general.

d) 'Calls to Action'

Efforts to increase diversity among Washington D.C. lawyers are the subject of several articles including a short piece in the *Legal Times* that claims from its headline D.C. Law Firms: More Diversity Needed (rn 429). The Texas Bar Association's journal featured diversity in its cover story of October 1994 with its headline Diversity as a Management Issue: A Call to Action (rn 542). In a somewhat longer piece, author Daniel G. Lugo says Don't Believe the Hype (rn 96). The Chicago Bar Association has also been active in a number of diversity initiatives and in its publication *Chicago Daily Law Bulletin* it published a 1998 article Law Firms Need Long-Term Approach to Opening Doors (rn 417) among others on this topic.

RESEARCH PROPOSAL ON WOMEN AND THE LEGAL PROFESSION

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.

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.

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.

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.

CORRESPONDENCE

The following correspondence was before Convocation:

- A letter to the Treasurer from Mr. Steven C. Krane dated October 29th, 2001.
- A letter to the Treasurer from Ms. Sanda Rodgers dated October 18th, 2001.
- A letter to the Treasurer from Mr. Melville O'Donohue, Q.C. dated October 25th, 2001.

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CONVOCATION ROSE AT 12:45 P.M.

Confirmed in Convocation this 24th day of January, 2002

Treasurer