MINUTES OF SPECIAL CONVOCATION

Friday, 5th December, 2003
8:30 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.) Alexander, Arnup, Backhouse, Banack, Bourque, Campion, Carpenter-Gunn, Caskey, Cass, Chahbar, Cherniak, Coffey, Copeland, Curtis, Dickson, Dray, Ducharme, Eber, Feinstein, Filion, Finkelstein, Finlayson, Furlong, Gold, Gotlib, Gottlieb, Harris, Heintzman, Hunter, Krishna, Lawrence, MacKenzie, Manes, Millar, Murray, Pattillo, Pawlitza, Porter, Potter, Ross, St. Lewis, Silverstein, Simpson, Swaye, Symes, Topp (by telephone), Wardlaw, Warkentin and Wright.

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Secretary: Katherine Corrick

The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer welcomed Professor Krishna back to Convocation.

December 6th marks the 14th anniversary of the murder of innocent women in Montreal.

REPORT OF THE TASK FORCE ON THE CONTINUUM OF LEGAL EDUCATION

Mr. Hunter presented the Report of the Task Force on the Continuum of Legal Education to Convocation.

Professor Krishna and Dean Harvison-Young also addressed Convocation.

Task Force on the Continuum of Legal Education
October 23, 2003

Report to Convocation

Purpose of Report: Information (October 23, 2003)
Decision (December 5, 2003)

Task Force Members

George Hunter, Chair
Professor Constance Backhouse
Earl Cherniak
Holly Harris
Professor Vern Krishna
Harvey Strosberg

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EXECUTIVE SUMMARY

1. Since April 2001, the Task Force on the Continuum of Legal Education has been studying that part of the continuum of legal education within the Law Society's direct jurisdiction, the period between law school and the call to the bar.[1] Our inquiry has not been confined, however, only to the BAC and articling process. We felt that any thoughtful consideration of the post-law school, pre-call phase would require an understanding of what precedes and follows it. So we began by looking into the history of legal education in Ontario, and along the way observed as well the many different approaches to licensing in other jurisdictions and in other professions. We are now coming to the end.

2. Over the past several months of our work, we have consulted widely in the profession and heard from a number of students, lawyers and educators their views on the best direction to be taken for the education and professional development of new lawyers.[2] All agree that the bar admission process must be relevant to the education and licensing needs of the profession and in the public interest.

3. Just as the Law Society moved ahead in 1957 to recognize the importance of a new approach to legal education, so we ask Convocation to do the same in 2003. We recommend the adoption of a bold new competency-based licensing and education program that:

   a. redefines the traditional classroom model of bar admission to make it relevant to the practice of law in the 21st century;

   b. removes unnecessary barriers to admission and respects the principles of equity to which the Law Society is committed;

   c. significantly reduces costs to students; and

   d. serves the public interest.

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4. Our mandate was approved by Convocation in April 2001 and refined in July 2001 to focus on the bar admission process. We have reviewed:

   a. the previous Law Society reports on bar admission reform;

   b. bar admission programs across the country and in the United States, Australia and Great Britain;

   c. other professions' approaches to licensing;

   d. the 1992 American Bar Association *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (the MacCrate report);

   e. examination formats across various professions;

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[1] The original Task Force members were: Edward Ducharme (Chair), now the Honourable Mr. Justice Ducharme of the Ontario Superior Court of Justice, George Hunter, Barbara Laskin, Greg Mulligan, and Neils Ortved. Current members of the Task Force are George Hunter (Chair), Professor Constance Backhouse, Earl Cherniak, Holly Harris, Professor Vern Krishna, and Harvey Strosberg. Julia Bass, Diana Miles and Sophia Sperdakos assisted the Task Force.

[2] Appendix 1 contains information from the consultation process.

f. the Law Society's 1990 Proposals for Articling Reform and current articling issues; and

g. the Professional Development and Competence Committee's 2001report entitled *Implementing the Law Society's Competence mandate: Report and Recommendations*.

5. In April 2002, the Task Force presented to Convocation an interim report outlining our proposal for the future of the Bar Admission Course (the BAC). It included preliminary recommendations and the premises upon which those recommendations were based. The preliminary recommendations are set out at Appendix 2. Convocation authorized us to consult with lawyers, legal organizations, law schools, BAC section heads and instructors and students on the direction set out in the report.

6. We have completed the consultation process, a process that led us to undertake more research especially in skills and professional responsibility training, licensing examinations and the articling process. While the basic tenets underlying the interim report have been confirmed, we have made additional recommendations and elaborated more fully on some of the recommendations already in the interim report. What we learned has confirmed much of what we outlined in the interim report, but has also resulted in additions to our final recommendations and more in-depth description of some of the recommendations already made to clarify and elaborate upon them.

7. Convocation will recall that the Task Force's recommendations are based on two premises:

a. that the licensing process currently in place at the Law Society of Upper Canada reflects a reality that dates back to (and, in some respects, pre-dates) the model of legal education instituted more than forty-five years ago; and

b. that, since then, changes in the teaching and practice of law have been so many and profound that the bar admission system now requires major reform.

8. In arriving at our recommendations we have taken special note of the following factors:

a. The changes that have taken place in legal education in recent decades and the structure of law school curricula;

b. The changing and expanding legal landscape awaiting newly-called lawyers;

c. The competencies lawyers should have, as set out in the definition of the competent lawyer in the Rules of Professional Conduct, and the methods available to ensure they attain and demonstrate those competencies;

d. The relationship of the Law Society's post-call competence model, approved by Convocation in March 2001, to the bar admission process;

e. The importance of continuing career-long learning;

f. The importance of ensuring access to the profession by providing for an valid, fair and reliable accreditation process; and

g. The direct and indirect costs underlying various approaches to the bar admission process.

9. We recommend the following new model for bar admission:

a. The Law Society will focus on its regulatory obligation to establish a licensing process that ensures candidates demonstrate pre-determined standards of competence in substantive law and an understanding of professionalism, including ethics, as it applies to the substantive law. Although, the traditional classroom model of teaching substantive law is not part of the program, innovative

learning tools will provide relevant, useful educational support to BAC students.

b. The Law Society will provide the Reference Materials for the subjects on which the candidates will be examined. The Reference Materials have a long tradition of excellence and are useful for the licensing examinations and, subsequently, in practice. These invaluable materials are developed by the practising bar and address important issues relevant to the practice of law, including professional responsibility. The current nexus between the Reference Materials and the examinations will continue so that candidates for admission will know what is expected of them in the examinations. Learning tools and the Law Society's Education Support Services will also support students' self-study and preparation for the licensing examinations.

c. Licensing examinations as described in the Performance Assessment Group Inc. Report (Executive Summary set out at Appendix 3) will test legal knowledge and analytical capabilities, based on a predetermined set of competencies.

d. The Law Society will provide instruction in legal skills, including practice management skills, and will continue to teach and assess professional responsibility as part of its many-pronged approach to nurturing the ethical values upon which the honour of the profession depends. The four-week program will address the skills competencies that a newly-called lawyer should have and will include professional responsibility and practice management. The interim report recommended only professional responsibility and practice management skills be taught in the BAC.

e. Students will be assessed on the skills and professional responsibility competencies. In addition, the Reference Materials upon which the licensing examinations will be based will address professional responsibility, which will also be tested in each of those examinations.

f. Articling will continue to be part of the BAC. The Law Society will enhance the nature of the experience by developing additional materials and providing learning support and other opportunities to prepare students for the articling experience and for practice. There will be a review of the educational plans to consider ways to improve them. The Law Society will also explore ways to foster creative innovation, reinforce the mentoring aspect of articling and encourage collaboration among small or rural law firms to provide students with meaningful articling experiences. The skills program will be designed to include links to articling.

g. The new model will continue to reflect the Society's firm commitment to the goal of improved access to, as well as equity and diversity within, the legal profession.

h. The new model will take heed of the financial pressures operating upon students.

The Nature of this Report

10. Our interim report was meant to provide Convocation with the background essential to an understanding of our conclusions and recommendations. This final report builds upon that background, but also upon the information gathered over the months since the interim report was provided to Convocation. The final report sets out in one document the sum of our work over the life of the Task Force.

11. In providing the final report to Convocation in October 2003 for information, we hope to give benchers an opportunity to review it in detail and to provide their views before Convocation considers it formally on December 5, 2003.

12. In December, Convocation will be asked to consider the report and recommendations and, if appropriate, approve them for implementation in the spring of 2006. If Convocation approves the Task Force's proposal, the design process will be undertaken, with consultation continuing with legal organizations and groups on a variety of content-related issues.

Request to Convocation

13. That Convocation approves the Task Force's report and the following model for bar admission:

    a. The bar admission process for admission to the Law Society of Upper Canada will consist of:

        i. a four-week skills and professional responsibility program and assessments;

        ii. 2 licensing examinations: a barrister examination and a solicitor examination, each including a professional responsibility component; and

        iii. a 10-month articling program.

    b. The licensing examinations will be developed in accord with the framework for licensing recommended in the Performance Assessment Group report (Executive Summary at Appendix 3).

    c. The Law Society will provide Reference Materials upon which licensing examinations will be based. The traditional classroom method of teaching substantive law will not continue, but there will be significant, innovative educational and other supports for students.

    d. The two examinations will be scheduled at three times each year (July, October and February). Students will have 1 study week for each examination and 2 days to write each examination (1 free day and 1 writing day). This designated time will be in addition to the articling term, but will comprise part of the articling contract.

    e. The four-week skills and professional responsibility program and assessments will precede articles. The program will be designed along the lines of the "preferred option" included in the interim report of Dr. Julie Macfarlane and Professor John Manwaring (Executive Summary at Appendix 9). The competencies, including those specific to professional responsibility and practice management, will be developed in the coming months.

    f. Articling will continue to be a ten-month program (44 weeks, including 2 weeks' vacation entitlement). The Law Society will develop further learning support for the articling process, will review and assess articling education plans and the professional responsibility assignment, and explore ways to encourage and support more lawyers to become principals, including through joint and non-traditional articles and co-operative programs.

    g. The new program will come into effect in the spring of 2006.

14. If Convocation approves the proposed model, the Task Force will return to Convocation with the design for each component of the model for Convocation's approval.

THE REPORT

INTRODUCTION

15. More than forty-five years ago, in the winter of 1957, the benchers of the Law Society of Upper Canada approved an historic arrangement with the universities, the effect of which was to inaugurate a boldly new and different system of legal education in Ontario. Much of that system, once so fresh, remains with us still. A key feature of the agreement was that each participating university would provide a three-year Bachelor of Laws program containing twenty-three compulsory subjects.

16. By 1969, the number of law schools in Ontario had grown to its present total, six. In the same year, a Committee of Law Deans renegotiated with the Law Society the list of subjects enumerated as compulsory and reduced it from twenty-three to seven. The remaining subjects, augmented by conflict of laws and labour, were to be made available to the students within the three-year LL.B. program but students were no longer compelled to study them. The seven compulsory subjects were these:
    a. Civil Procedure;
    b. Constitutional Law of Canada;
    c. Contracts;
    d. Criminal Law and Procedure;
    e. Personal Property;
    f. Real Property; and
    g. Torts.

17. In 2003, the universities continue to provide three-year law degree programs, the students seeking entry to them must still complete a minimum two years of university undergraduate education, and the same seven courses remain compulsory.

18. Although much of the old system endures, much has changed, too. Over time, the law schools have provided more and more courses, usually as options, within which the emphasis is upon the acquisition of practical skills, rather than upon substantive legal knowledge alone. The law schools have long maintained, of course, that their primary purpose is not to be a technical training school, but to educate students in the law and to demonstrate law's immutable connections to the basic problems confronting society. Still, as the information set out in Appendix 4 discloses,[3] the law schools now provide many opportunities for students to learn the skills essential to the tasks performed by lawyers, skills such as interviewing, negotiating, legal research and writing, and trial advocacy.

19. Career options available to graduates of law schools have also expanded in the last twenty-five years and the course offerings at law school have grown to reflect the larger world within which legally trained professionals may now work. Whereas, historically, almost all law students entered private practice upon call to the bar, current Law Society statistics reveal a more complex portrait.[4] Thus, law school curricula must be broad enough to be relevant to and support the range of career choices law students make.

20. It is trite to say, in 2003, that the profession is different, larger, and more diverse than it was in 1957. In all that time, however, the BAC has changed little in its essential character despite many reviews and reforms. For example, in June 1988, a sub-committee of the Legal Education Committee, chaired by James M. Spence, Q.C.,[5] delivered a report to Convocation entitled, "The Teaching Term of the Bar Admission Course: A Critical Assessment and Proposals for Change". One of the proposals for change was to shift the focus from the teaching of substantive concepts in the core areas of law to the teaching of skills and transactional learning. The BAC was revised to provide for more skills-based instruction, but the teaching of substantive law continued much as in the past. Convocation later authorized several additional reviews, all of which are summarized in Appendix 5 to this report.

21. The Task Force has reviewed the many modifications to the BAC in recent years, and the reasons for them. We have also come to see that other forces are emerging, the long-term implications of which may well be career altering for many in the profession, including those about to enter it.

22. These new developments are many and varied. Computer and information technology have already transformed the way many lawyers practise. They have had and will continue to have an equal effect on how students study and learn. Indeed, technology-enhanced learning has progressed with such spectacular speed that medical students, for example, can now simulate surgical procedures interactively in courses

[3] This information was received from the law schools in 2002.
[4] There are 18,530 members in private practice; 9,624 employed other than in private practice; 6, 138 not employed in Ontario.
[5] Now the Honourable Mr. Justice Spence, of the Ontario Superior Court of Justice.

delivered wholly on-line. At Queen's University a highly acclaimed M.B.A. program uses video-conferencing combined with residential classes and customized Intranet programs.

23. In our own profession, building upon initiatives undertaken first in the Inter-Jurisdictional Practice Protocol and then by the western provinces, a National Task Force on Mobility recommended enhanced mobility, both on a temporary and permanent basis, for all lawyers in the common law provinces and, in the future, in Quebec. To date, eight jurisdictions within the country have signed the National Mobility Agreement and six of them have fully implemented its provisions.

24. Underlying the drive to increased mobility of lawyers is the developing consensus across Canada that it is in the public interest to remove all artificial or unnecessary barriers to practice and to affirm, as a matter of trust and faith, that each province's regulatory process is as good as any other. The passage of the National Mobility Agreement suggests that further steps will likely follow to remove all remaining unnecessary barriers to a lawyer's call to the bar and to harmonize admission processes all across the country wherever appropriate in the public interest.

25. Other law societies and professions are also reviewing the most appropriate ways to license new members, focusing on standards of competency. The accountants developed a licensing program through the Chartered Accountants School of Business (CASB). With the design assistance of the CASB, three of the four western law societies are developing a new bar admission program that eliminates the teaching of substantive law in favour of the development of skills taught in large measure by way of the Internet.

26. The valuable information we have received from other sources, including some outside our profession, has afforded the Task Force a broader context within which to re-evaluate certain recommendations made in the interim report. Again, Appendix 1 describes the scope of the consultative process and summarizes the nature and tenor of the submissions we received. Our final recommendations, set out in the following sections, are informed not only by the shaping premises with which we began, but also by the views and opinions of many others, inside and outside the practising bar, who responded to our call.

THE LICENSING PROCESS

27. A defining feature of self-regulation in the legal and other professions is the licensing process by and through which candidates for admission to the profession demonstrate that they have met pre-determined standards of competence. The admission function is at the core of the Law Society's mandate to regulate the profession in the public interest. It is the middle and briefest component of a continuum of legal education that begins with three years of law school and evolves through a lawyer's lengthy post-call working life.

28. At present, lawyers called to the bar have the unrestricted right to practise in any area of law they choose, on the basis that they:

    a. are of good character;

    b. have demonstrated the knowledge, skills, and attitudes necessary to provide legal services; and

    c. understand and will apply their professional responsibility to provide services only in those areas in which they are competent.

29. Necessarily, then, the unrestricted right to practise granted at the call to the bar carries with it the professional obligation on lawyers to maintain competence throughout their careers. The Law Society addresses post-call competence in several ways, including:

    a. the promulgation to the profession of a definition of the competent lawyer, now encoded in the Rules of Professional Conduct (Appendix 6).

b. the creation and dissemination of professional development programs and materials and tools to help lawyers maintain and enhance their competence and a recently introduced minimum expectation for professional development. The tools include the recently published Practice Management Guidelines, the Guide to Bookkeeping and the soon to be completed Self-Assessment Tool for practitioners;
c. the maintenance of a Specialist Certification program designed to recognize specialists and to provide the tools to less experienced lawyers that will assist them to develop the knowledge, skills and experience required for specialist designation;

d. the provision of Practice Advisory Services to guide and assist lawyers on the Rules of Professional Conduct and issues of practice management; and

e. the enforcement of remedial or disciplinary provisions for those who do not provide competent service.

30. The question of competence in a profession is best understood contextually. No one reasonably expects a law school graduate or a person who has had a few weeks' study at the BAC to be a specialist. The lawyer's competence ought to be presumed to increase with time and experience. And the reality is that almost immediately upon their call to the bar, most lawyers begin to focus their practices upon a limited number of areas of law. Few hold themselves out as competent in all or even many areas.

31. In the career of the practising lawyer, the call to the bar is a single step. The Law Society's role at this moment is to ensure that the lawyer is competent to take that step. But an entire career lies ahead, and the lawyer is obliged to be competent all along the way. The definition of the "competent lawyer" referred to above requires focus on the lawyer at various points in his or her evolution as a professional.

32. The Law Society's regulatory objective for the lawyer's competence at the time of the call to the bar can rightly be premised on the understanding that competence is not static, and that the lawyer's competence on the day of call will change and grow from the moment the lawyer begins to practise. The assessment of competence at call is a snapshot only, to be enhanced by post-call support and regulatory structures and by the lawyer fulfilling the obligation to continue to update his or her skills and knowledge.

33. At the moment of the snapshot, however, the Law Society must be satisfied, in the public interest, that candidates for admission have demonstrated certain competencies and characteristics and been educated in certain principles fundamental to the profession. When the Law Society calls candidates for admission to the bar it should be satisfied that the candidates:
a. are of good character;

b. are educated in specified areas of substantive law and skills, as a result of law-school education;

c. have demonstrated, by examination, requisite levels of comprehension of substantive law, as well as analytical and other professional skills;

d. are appropriately experienced in explicitly defined skill areas by virtue of their overall legal education and articling experiences;

e. are knowledgeable and have been assessed on the ethical rules they must follow and the standards of professionalism they are expected to uphold;

f. are capable of serving the public within self-acknowledged skill limitations in accord with the Rules of Professional Conduct;

g. have acquired the requisite skills to manage a law office so as to properly serve the public and meet their obligations under the *Law Society Act*, as well as the by-laws and the appropriate provisions of the Rules of Professional Conduct on financial and other responsibilities; and

h. are prepared and committed to undertake post-call professional development and study to increase competence over time within their areas of work or practice.

34. Two questions with which the Task Force has grappled are:

    a. Besides *evaluating* pre-call competence, what role, if any, should the Law Society play in *developing* pre-call competence?

    b. Assuming the Law Society should have a role in developing as well as in evaluating pre-call competence how does it best realize that objective?

    Our research has convinced us that the Law Society should play a role in such development, but not in the way it has done so in the past.

35. For nearly half a century, the Law Society has taught substantive law to bar admission candidates as a prelude to testing them, to ensure their competence to practice. Pre-call learning was thought to be virtually the last opportunity for imparting knowledge in a formal setting. Teaching substantive law in the classroom at the bar admission level was a way of ensuring that students had acquired the knowledge that the profession considered essential for them to know. In this way, the Law Society has traditionally defined its role in the development of competence.

36. Despite many changes to the bar admission process in the last 15 years, the emphasis still fell upon the teaching of substantive law, thereby ensuring the perpetuation of the old model. We believe that the time has come for major reform of the BAC, consistent with the Law Society's core mandate as regulator and licensor. In arriving at this perspective, we have considered carefully the long history of legal education in the province (summarized in Appendix 7) and the many reforms to the BAC, especially since 1988.

37. The Law Society's commitment to legal education arose out of the mandate it was given at its creation, when there was no other body to pass on legal knowledge and skills to new members of the profession. The remarkable "New Deal" of 1957 meant that the old system, an apprenticeship system focused primarily upon articles, was about to give way to a new one that placed its emphasis upon formal education in a university setting. The BAC was born of this transition. But while the university-based legal education system has grown and changed considerably over decades, the Law Society has continued to make assumptions about what law schools teach (or do not teach) and about its own capacity to bridge a perceived gap in legal education in the concentrated teaching phase or phases of the BAC.

38. In the well known, highly regarded MacCrate Report, published by the American Bar Association in July 1992, a Task Force on law schools and the profession studied the roles of law schools and the practising bar in educating students to assume their place in the legal profession. It concluded that there was no gap in students' legal education. Instead, the Task Force found, "[t]here is only an arduous road of professional development along which all prospective lawyers should travel."

39. The framework of legal education and the profile of the legal profession and its needs have changed a great deal since the BAC was developed and implemented. Yet the BAC continues to reflect the Law Society's longstanding determination to inculcate students, before their call to the bar, into a pre-determined amount of substantive law knowledge. But this approach is restrictive in the sense that the teaching is offered to the students once only, and under the questionable structure of eight separate examinations. It continues to assume that a program of practitioners teaching substantive law is a necessary prerequisite to the competent development of candidates for admission. We believe that if this in-depth, duplicative teaching model was once necessary, it no longer is so.

40. As we considered the issues raised in Appendix 5 (BAC reforms) we made the following observations, all relevant to the BAC's future:

a. For the Law Society, the 1957 arrangement signalled an end to the primacy of the apprenticeship system. It gave the universities primary responsibility for the students' formal legal education. In 1957, the arrangement was new and untested. Although the Law Society has reformed the BAC since then, particularly in 1990 in response to many of the recommendations in the Spence report, the fundamental rationale for the program has not changed.

b. When the BAC model was introduced, CLE was almost non-existent. A tradition of teaching substantive law grew out of a need to provide as much information as possible at the pre-call stage, because post-call learning was not so pervasive, specialized, and accessible as it is today.

c. By virtue of the particular evolution of formal legal education in Ontario, there exists in the profession an imperfect appreciation of the legal education and training Canadian law schools provide and are capable of providing.

d. The substantive law portion of the BAC is premised upon a pedagogical approach of dubious value: the rapid-fire offering of many subjects and examinations within a very short time.

e. LawPro and Law Society complaints statistics show that the problems lawyers encounter do not stem primarily from substantive law deficiencies, but from practice management issues and poor client relationships. The necessity to re-teach substantive law at the BAC is not proven.

f. The overall legal education process (beginning with law school and continuing through the call to the bar) is still longer and more expensive than necessary.

g. The range of approaches to licensing that now exist make it unrealistic to suggest that there is only one correct way to prepare candidates for the call to the bar and that it is necessary to teach substantive law in the classroom at the licensing stage to ensure competence in practice.

41. As we observed in the interim report, we believe that the time has come for meaningful reform of the BAC, especially its tradition of teaching substantive law in the classroom. Moreover, our research convinces us that licensing examinations on substantive law will more effectively assess candidate competence and at the same time demonstrate that teaching substantive law in the classroom is unnecessary and redundant.

42. The interim report emphasized, however, that the Law Society does have a vital role to play in the *development* of competence at the pre-call stage, through:

a. the maintenance of articles;
b. the provision of Reference Materials and educational and other support; and
c. the teaching of professional responsibility and practice management skills.

43. In the interim report we also proposed to eliminate the skills portion of the BAC, except for the teaching of professional responsibility and practice management. This recommendation generated a good deal of response, mostly negative, and caused the Task Force to study the matter further in light of the criticism. In the result, we have been persuaded that the Law Society should continue to have a role in skills instruction and assessment at the BAC, a role that will be described more fully in subsequent sections. For now, it will suffice to say that skills instruction at the BAC will seek to identify those competencies essential for call to the bar and will emphasize professional responsibility and practice management skills. Overall, we continue to be of the view that post-call professional development is essential to the development of the professional's skills. Realistically, the BAC contribution can only set the foundation for all that follows.

44. Thus, the template for an admission program we propose would:

a. eliminate the traditional classroom model of teaching of substantive law, but provide supportive learning tools, including Reference Materials;

b. streamline the Law Society's licensing role by creating objectively valid, reliable and fair licensing examinations; and

c. contribute to the continuum of legal education through articling and a skills program that focuses on those essential competencies appropriately addressed in the BAC, including professional responsibility and practice management.

A NEW APPROACH

45. In this part of the report we describe each of the four branches of our proposal and address questions and comments raised about them during the consultations. We also include here a schedule and timeline for implementing the new model. The four branches are:

a. Licensing Examinations
b. Skills Training
c. Professional Responsibility
d. Articling

LICENSING EXAMINATIONS

The Substantive Law Teaching Component

46. The Law Society should accept that it is no longer necessary for it to teach substantive law in the BAC in the traditional classroom setting. Most other provinces do not re-engage candidates during the bar admission process in the in-depth learning of general principles and substantive law. They entrust that responsibility to the law schools. Nova Scotia, for example, teaches no substantive law. It gives the candidates for admission the materials upon which they will be tested and sets and administers licensing examinations based upon these materials. The American bar admission process consists entirely of licensing examinations with no materials provided to students. It is left entirely to the students to prepare themselves for the examinations, an approach very different from the one we recommend. Appendix 8 describes the American approach.

47. In 1990, when the Law Society adopted some key aspects of what has come to be known as the Spence model, it mandated attendance in both the skills and substantive law portions of the course. Students initially accepted the need for attendance during the skills portion because much of the learning was interactive and performance-based, but they opposed loudly mandatory attendance in the substantive phase. After years of trying to adapt mandatory attendance to make it more palatable, the Law Society finally abolished it for the substantive courses in 1997.[6] The result has been a precipitous decline in attendance. Students use the opportunity to prepare for the examinations in their own time as they balance familial and other responsibilities. Those who attend do so intermittently, casually dropping in and out on a given day or for a given topic or subject. Many of the students write the examinations without attending some or all of the classes.[7]

48. Response to our proposal to refocus the teaching of substantive law in the BAC has been mixed. Those who favour the change generally support the views we expressed in the interim report. Those who oppose or at least question the changes tend to express one or other of the following:

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[6] Mandatory attendance was eliminated for the skills portion of the course, except for the assessments, in 2002.

[7] Attendance is based on instructors noting the numbers in the classroom at the beginning of a seminar. Staff and instructors note attendance falls after the break. Because attendance is not mandatory there are no statistics per student to know if attendance is topic based, subject based or course based. In 2003 the highest attendance in Toronto was in the morning during the family law course (61%) and the lowest in the afternoon during the public course (27.64%). The attendance range was similar in all locations. Attendance fell in the afternoons wherever there were afternoon sessions.

a. What will be done to help students who may need more assistance than self-study affords?

b. Without the teaching component, students will lose an opportunity to make connections with the profession and to observe role models.

c. Law schools do not teach substantive law adequately enough to equip students for practice, so the BAC must. Alternatively, will law schools teach only what students need to pass the examinations? Will students be less able to take "non-traditional" courses at law school, because they will feel pressure to elect courses examinable in the BAC?

d. What is the likelihood that private providers may establish a foothold in Ontario to provide examination preparatory courses similar to those offered in the United States?

Student Support

49. In 1997, the Law Society considered the steps it could take to address a disproportionately high failure rate among some candidates from groups traditionally under-represented in the legal profession. In the result, it introduced a host of measures to assist candidates in overcoming unreasonable barriers to their call to the bar. The Task Force said in the interim report, and reaffirms here, that it is at once proper and reasonable for the regulator to assume whenever necessary a supportive, ameliorative role. The current infrastructure is sophisticated and valuable to those who use it; it should continue to exist. Services available within the system include the following:

a. tutoring;
b. tutorials on examination writing;
c. mentoring, where available, by lawyers recently called to the bar;
d. extended time to complete examinations;
e. use of special equipment such as personal computers;
f. use of private rooms in which to write examinations;
g. examinations in alternative forms such as audiotape, Braille, and text to speech; and
h. use of readers or scribes in the examination setting.

50. Still other support for students can and should be made available. The Law Society has already gone a long way toward this end by developing an e-learning website in 2002, which has proven to be as useful as it is popular. During the 2003 BAC, 1,424 students accessed the site. Total visits to the BAC e-learning site were 46,096, as compared to 18,147 in 2002. The cumulative hits on all pages within the site were 4,953,358 and the average visits per day this year are 388, as compared to 130 in 2002.

51. Currently the e-learning site offers:

a. live lectures on-line;
b. Reference Materials;
c. supplemental video presentations on examinable topics;
d. supplemental video role plays and situational videos on specific practice topics;
e. precedent forms, checklists, lists of key legislation pertaining to the subject area;
f. full practise examinations and answers; and
g. an information exchange bulletin board and chat-board for students.

52. The Task Force recommends that on-line or videotaped lectures continue to be available. Law Society staff and BAC instructors have expert knowledge of what areas traditionally attract the most questions from students. The lecture content should track this emphasis. It is also feasible for the site to be designed to have an on-line question-and-answer forum for students and willing practitioners during the examination study period, similar to the current chat room for students to communicate and exchange information. The e-learning site is a living tool. As technology changes it too will change and be adjusted to meet student needs.

53. The value of computers for education is that they provide easy, convenient, affordable access to learning tools and tips hitherto available to only an elite few. But some students still have no access to or cannot afford computer equipment or the Internet. The Law Society's Education Support Services must bear that fact in mind to ensure that students without such access are not disadvantaged. So, for example, if time is allotted for on-line question-and-answer periods with practitioners, telephone time must be allotted as well.

54. We trust and expect that as the new BAC program is designed and developed, individuals and groups especially knowledgeable about the needs of students requiring extra encouragement and support will be extensively consulted. As we said in the interim report, the Law Society must demonstrate and must be seen to demonstrate commitment to a reliable, fair, open and equitable accreditation process.

55. The Law Society's Reference Materials are, in and of themselves, a significant learning tool. Unlike in the American system where the Bar Examiners provide no substantive materials, the Law Society's examinations have always flowed from the materials upon which the testing is based. In the approach we recommend, the written materials will continue to form the basis for the examinations. Once the appropriate competencies in each subject area have been determined the Reference Materials will be refined to reflect these and to indicate what is or is not examinable. The materials will provide students with the tools necessary to prepare for the examination. Extra help will be available to any students requiring it.

Connection with the Bar

56. Students' connection to the bar and to mentors ought to be sedulously fostered. The abolition of the traditional classroom model of teaching substantive law at the BAC, however, has little or nothing to do with that important objective. To the contrary, the proposed new approach will strengthen the students' connection to the profession. It will do so in the following ways:

    i. Experienced practitioners, all mentoring models, will teach skills, including professional responsibility in the four-week skills phase.

    ii. The Law Society's Education Support Services will link students with practitioners. The proposal envisions an active quest for mentors, particularly for students from groups traditionally under-represented in the profession or who do not have articling positions;

    iii. An on-line/telephone question and answer forum will also link students to practitioners; and

    iv. Articling will afford students opportunities to observe practice styles and approaches of not only their principal, but many other lawyers as well, and spend 10 months intensively with a lawyer or lawyers.

57. Many students actually make their first connections with practitioners during law school where many practitioners serve as adjunct faculty. Moreover, given the sharp decline in attendance at substantive law courses in the BAC, the Task Force is not convinced that today's students view the bar admission course in the way the comments suggest. Finally, we repeat our belief that the bar admission process is but a snapshot in a long career, during which connections to other lawyers will be numerous and enduring.

The Nature of Law School Courses

58. During the consultation process the Task Force heard the occasional criticism that in the substantive law courses, law schools have failed to prepare students for practice. According to the argument, only the bar admission teaching term does that, because it teaches problem-solving in substantive law areas. Others have suggested that without the BAC teaching term students may have no room to take from the broad array of courses available at law school because they will feel pressure to elect the courses that will form the content of the licensing examinations.

59. We understand the anxiety that these comments demonstrate, but we consider that the anxiety is not well-founded. Uniformly, the lawyers who teach in the bar admission program are committed, talented people, knowledgeable and passionate about their area of law. They perceive that some or many of the students

know nothing about their area of law, so they consider that the bar admission teaching term is essential. The BAC instructors have made important contributions to the professional development of the students entrusted to them over the years. But is the method of classroom lecture instruction necessarily the best method to prepare students for the profession they are about to enter?

60. No creditable evidence exists to suggest that newly-called practitioners in Ontario are deficient either in understanding or applying substantive law. In fact, as LawPro statistics make clear, in a typical lawyer's career the weakness, if any, is to be found in client service-related areas. Law Society complaints underscore this truth. Nor is there any evidence to suggest that 4 or 5 hours of BAC lectures and 10 to15 hours of substantive law seminars could remedy whatever deficiency is perceived to remain after three years of law school. Even now, students report that their primary concern is to pass the three-hour examination written at the end of a course, not to delve into the intricacies of a discrete area of law. The falling attendance rates are a sign that the teaching term is no longer as central to the licensing process as the Law Society once believed.

61. Problem-solving is of course a critical lawyering skill. To the extent that the BAC makes a contribution to this skill it provides a valuable service linked to competence. We believe that this skill can be taught and learned through the skills program we recommend. We also believe that most students engage in problem-solving in law school, so they do not come to the BAC without any awareness of that critical skill. In addition, the articling term and process contribute significantly to the development of this skill.

62. As to whether students will be able to take a broad array of courses in law school or will feel compelled to take only those subjects that will form the content of licensing examinations, we believe that students' course selections among available electives will continue to reflect the same diversity of interest they do today. The Task Force's proposal is premised on the Law Society continuing to provide students with the written materials necessary to allow them to confidently write their licensing examinations, whether they have taken a course in the subject matter of the examination at law school or not. The BAC's Reference Materials have long enjoyed a reputation for excellence. Those materials and other supports will constitute a solid foundation for the licensing program.

63. It is essential that the Law Society regularly communicate with law schools and law students so that they will understand the requirements and the materials that will be available to them. This communication should minimize student concerns that their choice of courses must be restricted to the BAC examination subjects.

Private Providers

64. A number of those with whom we consulted, including law students and groups speaking for those traditionally underrepresented in the legal profession, raised concerns over the likelihood of private providers emerging to play a role in the new admission process. We have considered this matter carefully.

65. Private providers are for-profit entities. They are unlikely to operate in any jurisdiction unless the market available to them is large and unless there is a perceived and obvious need they can fill. In the United States, where students are told the subject areas of examinations, but given no study materials, the multi-state examinations offer just such an opportunity for private providers. According to the National Conference of Bar Examiners, 73,065 students wrote the bar examinations in 2002. In Ontario, the total student body was approximately 1,250.[8] In the United States, conditions are ideal for private entrepreneurs. One provider's web site affirms that over 750,000 bar examination takers nationally have trusted it to help them pass the examination.[9]

66. In our view, there is no need for private providers to fill in Ontario. The reason is that under our proposal excellent study materials fully canvassing the subject matter on which students will be examined will be provided to them. The Law Society will also make available an array of other resources and materials at no

[8] The total number of students enrolled in bar admission courses in Canada annually is approximately 2,900 students.

[9] See BAR-BRI at 333.barbri.com

additional cost to those who choose to use them.

67. Even if there were students interested in taking a course offered by a private provider, we believe that they would constitute too small a group to interest private providers. If costs for the program were comparable to the average U.S. costs (i.e., US $1,250 or CDN $2,000), at least 500 students would have to enroll in the program to generate total revenue of $1 million.

68. We acknowledge, of course, the possibility that private organizations currently providing instruction for LSAT preparation could expand their processes to include legal examination preparation. So, too, the law schools could see an opportunity to establish an ancillary revenue source. However, we are confident that in providing the materials and additional support necessary to complete the bar admission examinations, in providing examination preparation sessions, in affording students several opportunities to pass the examinations, and in communicating the BAC requirements and information to students, the Law Society will leave precious little room for private providers.

The Nature of the Proposed Substantive Law Examinations

69. The current approach of requiring students to write eight examinations illustrates the Law Society's traditional belief that it must re-teach substantive law in-depth. We recommend, instead, that there be two licensing examinations, each containing questions on professional responsibility in addition to substantive law subjects:
    a. A barrister examination focusing on advocacy-related areas; and
    b. A solicitor examination focusing on solicitor-related areas.

70. These examinations should not be designed to test the same volume of material in two examinations as is tested in the current eight examinations. The goal of the licensing process is not to force-feed content, but to identify those critical competencies that a newly-called lawyer should have, provide students with materials that address those competencies and test them. The goal is to create a licensing system to assure the public that those called to the bar meet appropriate standards for admission.

71. Reference Materials will contain examinable material designed to reflect the competencies, but they will also contain *non-examinable* information for reference after call to the bar.

72. The Performance Assessment Group Inc. (PAG) was retained to provide a report on a proposed licensing model. PAG's report, an Executive Summary of which is set out at Appendix 3, is entitled "Establishing a Standardized, Reliable, Valid, Fair and Defensible Licensure Program".

73. PAG's report identifies the following steps to create reliable, valid and fair licensing examinations, in the public interest:

    a. Identify the competencies that meet the requirements of the profession in the areas subject to examination;[10]

    b. Develop a blueprint document that sets out the purpose and scope of the examination, the decision-making process, the content, the structure of examinations, and the scoring methods; [11]

    c. Develop the examinations in accordance with the blueprint;[12]

    d. Develop fair and transparent administration;[13]

[10] The Law Society will determine what substantive law competencies a newly-called lawyer should have. This profile provides consistency and a valid, fair and defensible supporting structure to the entire assessment process.
[11] This is the most essential component of any licensing examination. It provides a detailed account of how and why the examination should be structured in the way recommended.
[12] Examination development includes question development and validation, test fairness assessment, pilot testing, examination approval, standard setting and pass mark, language or translation issues, item banking and examination security.

e. Use effective, standardized scoring methods; and

f. Review the examination regularly to ensure relevance and appropriateness.

74. This proposed approach to examination development reflects the principles that should underlie a licensing process:

a. competency-based underpinnings;
b. consistency;
c. reliability;
d. validity:
e. fairness; and
f. collaborative development.

The PAG report recommends that content specialists be part of the design and that there be piloting and testing of each phase of development to ensure that it is valid, reliable and fair and that it contains the required competencies.

75. We heard a range of views on the PAG report and on the current examination system and its weaknesses. The most common questions asked about the PAG report were:

a. Will the examinations test appropriate competencies?

b. Who will be included in the development of the competencies, blueprint, examination and administrative development and testing process?

c. How will a licensing system accommodate equity, Francophone and Aboriginal student concerns?

Competencies

76. The Task Force's interim report, the PAG report and the Macfarlane-Manwaring report on skills training, discussed below, all emphasize that a licensing program must address the competencies that lawyers should have upon call to the bar. We agree and consider that identifying those competencies is best undertaken once a model is approved.

77. In 1997 Convocation approved a definition of the competent lawyer. That definition, set out at Appendix 6, now forms part of the Rules of Professional Conduct. A number of other law societies in Canada also use it as the basis for their rules on competence. The Law Society uses that definition as the beginning point for developing all competence-related policies.

78. If Convocation approves our recommended model, the program designers will identify the appropriate skills and substantive law competencies that should form part of the BAC. Each component of the definition of the competent lawyer will be considered to determine what should realistically be included in the skills and professional responsibility training.

79. The western provinces recently adopted a "competency profile" for use in their new bar admission program. This profile contains many of the same components that are in the Law Society's definition of the competent lawyer, but elaborates on each component.

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[13] Developing the administration process includes (a) determining what information students should receive about the examinations before the test date; (b) determining examination security; and (c) developing accommodation policies.

80. The designers will also consider which competencies should be assessed in the licensing examinations. This will involve determining the subject matter to be examined and then choosing appropriate content subject-by-subject. The PAG report contains a plan for ensuring that the competencies tested are those that the profession regards as relevant.

81. The foundation of the BAC design will be agreed-upon lawyer competencies. This will result in a significantly improved BAC.

The Licensing Examinations and Equity, Francophone and Aboriginal Student Concerns

82. Consultation is a cornerstone of the proposed licensing examinations, the object being to ensure that the competencies chosen are valid and that groups that have experienced a disproportionately higher failure rate on examinations are involved in development.

83. Given the concerns raised over the years about the disproportionately high failure rate of students from visible minority, Aboriginal and Francophone groups, we emphasize the importance of involving representatives of these groups in the design of the licensing examinations. Many of these groups' comments have been directed specifically at ensuring this involvement, an involvement we consider to be essential to the success of the new model. A licensing process developed in this way cannot be compared to the current approach.

84. Such involvement will go a long way to alleviating concerns about the licensing process. The designers will be alert to cultural issues that affect examination fairness and address them directly.

85. The Task Force has described elsewhere the role it envisions for the Law Society's Education Support Services in this new program. Aboriginal, equity and francophone representatives as well as law school student representatives focused on the importance of this support system. Education Support Services must be flexible to adapt to identifiable needs.

86. Two issues raised by specific groups and individuals require additional comment:

a. French language examinations; and
b. item banking and re-grades of the Examinations.

French Language Examinations

87. The issue relating to French language examinations is whether they should be translations of the English examinations or created independently. The PAG report discusses both approaches, focusing on perceptions of fairness. In the past, delays in completing the English version of the examination meant inadequate time for translation. This is not acceptable. In our view this problem illustrates the weakness in a system in which there are no "banked" questions and in which volunteer instructors must develop several completely new examinations each year. The result is actual or apparent unfairness to the Francophone students.

88. The PAG report notes that there is no evidence that a separate licensing examination designed in French is more valid than a properly translated examination, made available to translators in a timely fashion. We believe that if examination design is done as recommended above, a system of translation is appropriate and cost efficient. However, the design should address the issue and representatives of the Francophone bar should be part of the discussion.

Item Banking and Re-grades

89. Two important features of the examination model we recommend are item banking and a re-grade system for failed examinations, rather than an appeal. Creating a blueprint and examination questions involves substantial work, time, care, and pilot testing to ensure that the blueprint and the questions are valid, reliable and fair. The process is expensive, but worthwhile if it is properly developed and well-maintained. Two fundamental features of the process are the creation of a growing bank of questions that can be re-used and a re-grade system rather than an appeal to ensure the security of the examination questions. Those

presently involved in BAC examination drafting have told us about the weaknesses of the current system, which does not have these features.

90. Some people, however, were concerned that in the past flawed marking guides or incorrect grading have only been revealed through appeals. Precisely because of these problems we recommend approval of the new approach to licensing, with a proper design that is collaborative and pilot-tested for validity, reliability and fairness.

91. The Task Force strongly cautions against compromising the very basis of the proposed system by ignoring or varying these two components. Without them the design will be fundamentally compromised. They are pre-conditions for the rigorous development of a licensing system.

SKILLS TRAINING

92. Our recommendation to include skills training is the most marked change to the recommendations we made in the interim report. The change reflects recognition of the comments we received and the additional research we undertook on the issue. Dr. Macfarlane and Professor Manwaring have prepared an interim report on skills training and professional responsibility, the Executive Summary of which is set out at Appendix 9 (the Macfarlane-Manwaring report).

93. Three consideration persuaded us to change our recommendation:

a. Despite a significant increase in available skills courses and programs in law schools, there are still insufficient offerings to ensure that every law student will be exposed to the fundamental skills areas before graduation. This is because teaching skills is a staff-intensive, expensive exercise and because students must balance skills courses against other important second and third-year courses that reflect their interest.[14]

b. The Law Society has an important role to play in the development of competence by ensuring that all candidates receive exposure to certain fundamental skills prior to call to the bar. This is particularly important for those who will enter sole or small firm practice. Candidates from groups traditionally under-represented in the profession tend to be over-represented in this group and a number of representative groups told us the skills program would be valuable for them.

c. It would be difficult and unfair to transfer responsibility for skills training entirely to articling principals.

94. Most of those we consulted on the Macfarlane-Manwaring report agree with its recommendations. Some directors of articling in large firms believe that teaching skills in the BAC is unnecessary because they provide training during articling. Others prefer that students have some training before they article. Law students who commented supported the inclusion of skills in the BAC. Groups traditionally under-represented in the legal profession strongly favoured skills training in the BAC.

95. Skills training is not new to the Law Society, which has placed emphasis on it since it introduced the Spence model in 1990. It has taught professional responsibility, interviewing, advocacy, negotiation, legal writing and drafting, and legal research. Currently students receive approximately 35 hours of skills training instruction, excluding assessment time.

96. Most skills programs identify these skills as the ones lawyers should develop and enhance throughout their careers. The Macfarlane-Manwaring report discusses essential competencies and expands upon this list of skills.

97. The designers of the new skills program will recommend which skills a new lawyer should have and which of those are best addressed in the BAC. They should not assume that the traditional list is necessarily the most relevant. We believe that the competencies chosen should reflect a balance between litigation and

[14] The 1992 ABA "MacCrate Report" on lawyering skills recommended that American law schools drastically increase the skills training courses offered. To date this would appear not to have happened.

non-litigation skills. This is particularly important because law careers and the focus of legal practice continue to change and traditional skills may give way to others. The BAC program can only be an overview and should focus on those areas most useful to articling students and newly-called lawyers. Lawyers will continue to develop their skills through post-call professional development and experience.

98. The skills program will also focus on practice management issues. LawPro statistics and Law Society complaints information are clear that lawyers encounter a disproportionate percentage of their problems in this area. The skills program can be invaluable to address the critical skills that every lawyer should know.

99. We recommend that attendance at the skills program be mandatory. Some may disagree with this recommendation. The argument against it is that BAC students are adults and should be allowed to make their own decisions about attendance. We have been told about declining attendance in the current skills program, which is not mandatory except on assessment days. If, as many people have told us, it is essential for the BAC to include skills training to ensure that candidates called to the bar are competent, provide them with mentoring opportunities and focus on professional responsibility and practice management issues critical to ethical and efficient lawyering, then it is also essential they attend. We are persuaded that the best way to ensure attendance is to make it mandatory.

100. The four-week skills program we recommend would include approximately 96 hours of instruction, more than double the number currently offered.

PROFESSIONAL RESPONSIBILITY

101. The commitment to ethical action and professional responsibility in the public interest is the very foundation from which the legal profession draws its authority and strength. Without the constant nurturing of these values it would not be possible to continue to affirm the principles that justify self-regulation. Our interim report emphasized the importance of the Law Society's role in providing instruction and guidance to students at the bar admission level on the fundamental underpinnings of the profession.

102. The teaching of professionalism and ethics is an important component within the three-year law degree program. Regardless, however, of how the law schools approach the teaching of professional responsibility, it remains essential for the Law Society to provide its own additional instruction as part of the post-law school licensing process. This is so because professionalism and ethics are the soul and centre of our profession, because every lawyer is accountable for and responsible to abide by the Rules of Professional Conduct, and because a breach of this obligation may result in the imposition of sanctions.

103. All those with whom we consulted agree that the Law Society should continue to teach professional responsibility. Law Society instruction should continue to emphasize those features of professional responsibility that are of particular concern to the Society, including:

a. principles of self-governance;
b. a lawyer's duty to the public;
c. civility and professionalism;
d. identification and application of the Rules of Professional Conduct, with particular emphasis upon conflicts, confidentiality, ethical advocacy, and avoidance of discrimination and harassment; and
e. service to clients, including practice management.

104. Professional responsibility will be taught during the four-week skills program. It will address the professional responsibility competencies a newly-called lawyer should be able to apply. There will be a professional responsibility skills assessment. In addition, however, each of the two licensing examinations will include professional responsibility questions. Students will have had the benefit of the skills program when they write their examinations. There will also be professional responsibility material included in the Reference Materials.

ARTICLING

105. Many of the comments we received on the role of articling in the proposed model followed the interim report, which did not contain a skills training recommendation. The inclusion of skills training has

addressed many of those earlier comments, but three areas of discussion require elaboration:

a. the nature of articling and its contribution to the development of competence;
b. possible expectations on articling under the new model;
c. length of the articling term.

Nature of Articling

106. Before beginning our consideration of the articling component of the BAC, the Task Force obtained information on the location and firm size of those offering articling positions. There are 1,063 reported articling positions for the 2002-2003 year.[15] Of these students,

a. 69.7% (741) article in Toronto; it is estimated that 75% (556) of these students are being paid a combination of salary and or tuition fees [60% of the students who reported were being paid their full salary during the entire licensing process and 75% are being paid all or a portion of their tuition fees];

b. 13.4% (143) article in Ottawa; it is estimated that approximately 40% (57) of these students are articling at the Ottawa offices of national firms and therefore receiving similar benefits of salary and tuition fees as are the Toronto students;

c. 3.3% (35) of the students article in the Greater Toronto Area (including Brampton, Vaughan, Mississauga, Oakville, Thornhill, Richmond Hill, Burlington and Woodbridge);

d. 3.1% (33) of the students article in London;

e. 2.1% (22) of the students article in Hamilton;

f. 1.8% (19) of the students article in Windsor; and

g. the remaining 6.6% (70) students article throughout the rest of the province, usually in small firms where there are only one or two articling students at most.

107. Of 1,124 students who filed articles of clerkship in 2001, approximately 525 articled in firms of more than 25 lawyers and another 115 articled in a government office or agency, typically with numerous lawyers. Approximately 279 articled for firms with between 5 and 25 lawyers, and approximately 127 articled for firms with between 1 and 4 lawyers. These statistics are relatively stable from year to year.

108. Articling has been the subject of discussion for decades. In 1990 the Law Society introduced reforms, the most significant of which was the creation of education plans to be completed by principals and students during and at the end of articling. Until then, there had been no systemic monitoring of students' articling experiences. While there have been other changes to the program since 1990, the most noteworthy was the decision Convocation made in 2001 to reduce the length of articling from 12 to 10 months.

109. The 1990 reforms took the middle ground between a system that leaves the governing of the process entirely to the individual relationship between principal and student and one that accredits placement offices after a lengthy inspection and requires principals to formally assess student performance. Ontario's, like the majority of other law societies', is a monitoring system that provides principals with a guide to those skills to which students should be exposed. It catches only egregious problems that the education plans reveal.

110. The Task Force's interim report recommended the continuation of articling. Articling provides a critical opportunity for candidates for admission to the bar to observe and participate in the practical application of skills, ethics and professional values, in a relatively low-risk environment. Because the candidate is under

[15] The actual number of students articling was greater than this, but complete data is not yet available.

supervision, the public interest is protected while the learning process is advanced. This is in sharp contrast to the American model in which no such apprenticeship exists, and in which many lawyers are admitted to the bar without ever having worked in a legal environment.

111. In articling there is a direct, practical and perceivable relationship between skills and their application. A well-run and supervised articling experience will effectively guide the candidate from theory to practice. Articling students build upon and begin to apply the substantive law knowledge and skills to which they are introduced in law school and the BAC.

112. Despite admitted problems with the quality of some articles, articling students reveal time and again in surveys an appreciation of this feature of their pre-call experience. The acquisition and application of skills are essential components of a legal education and, in our view, should continue to be part of students' education prior to call. Once called to the bar, lawyers are then expected to build upon this foundation, honing and expanding their knowledge and skills over time.

113. Articling today is a different experience from that of decades ago. It now has characteristics of both an apprenticeship system and a work-experience model. The former is based on the one-on-one relationship between articling student and principal with no outside supervision. The other involves the imposition of structures by the Law Society designed to ensure that students are afforded the opportunity to learn and apply certain specified activities.

114. Although the Task Force received some feedback that articling should be eliminated, this view is not held by most. Given the overwhelming opposition the Task Force heard to its suggestion that the skills component be eliminated, any suggestion that articling be abolished is unrealistic. Moreover, we are convinced that articling continues to play an important competence-related function in the admission process.

Expectations for Articling under the New Model

115. Following the interim report, a number of those consulted said the new model would place greater expectations upon the articling process, because without a skills program in the BAC principals would be expected to do more skills training. We did not consider that our recommendation would entail substantial change to articling. In any event, however, our recommendation in this report to include skills training in the BAC has reduced many of the concerns expressed about articling.

116. There was little appetite among those we consulted for a restructuring of articling. The current process can, however, be improved. There should be certain expectations on the Law Society, students and principals to ensure that the process remains relevant and helpful to the development of competent lawyers.

117. At the same time, we are aware that the articling system is voluntary. Lawyers are not required to become principals. The articling system cannot demand more from prospective principals than they are willing to undertake. Articling must reflect a balance. It must ensure that the experience for students is valuable and that demands upon principals are reasonable.

118. The Law Society can make better use of the student and principal education plans than is currently the case. We recommend that the purpose and content of articling education plans be examined to:

a. ensure that the plans are relevant educational tools that can guide principals and students;

b. ensure that in considering the competencies to be reflected in the licensing and skills phase of the BAC, the competencies for articling are included;

c. use data from the education plans more effectively to recognize trends, gaps, and problems with the plans and report on the issues these trends reveal (based not on individual plans, but on the system as a whole);

d. consider better ways, if applicable, to use the plans for monitoring the quality of articles;

e. create the plans in electronic form to make them easier to use.

119. The Law Society should also develop education plans that reflect the realities of a principal's practice and highlight gaps in the learning that can be filled using Law Society supports and systems. These plans would make it possible for the placement to go ahead despite those gaps.

120. We also recommend that the Law Society review the professional responsibility assignment students are required to complete and discuss with principals to determine whether it should be revised or expanded to include other assignments or discussions.

121. We have also consulted on ways in which the Law Society can improve articling. The Law Society should provide support in core practice areas for students who are unable to obtain a full rotation in different practice areas during their articling term, for example, providing corporate/commercial documents, precedents, file checklists, and writings for those whose articling placements focus on litigation only (Appendix 10).

122. CLE programs for training and information in core practice areas should be developed that are accredited for the articling student learning level (basic). These are already in development.

123. The Law Society should continue to facilitate mentoring opportunities for students and lawyers. Currently, the Law Society has three different mentoring initiatives:

a. an equity and diversity initiative to match high school and university students with mentors who can encourage them to consider law as a career;

b. a practice advisory initiative to connect lawyers with experienced practitioners to assist with complex substantive or procedural questions outside the Law Society's advisory mandate;

c. an articling and placement initiative to assist those looking for articling jobs.

124. The Law Society also plans to establish a mentoring database to connect students with mentors in practice areas not covered in their articles.

125. Mentoring has a long tradition in the profession and is an invaluable way to pass on values and knowledge from one generation to the next. The Law Society should foster mentoring opportunities. The profession should be encouraged to continue to recognize mentoring as a responsibility that experienced lawyers have to those who follow.

126. The Law Society should also take a more direct role in negotiating arrangements for joint or non-traditional articles and encourage lawyers to become principals in these flexible and alternative placements. Small firm lawyers and sole practitioners who feel unable to absorb the cost of an articling student for an entire year or whose practice may not provide as varied an experience as students might want could share a student with other firms. This might allow for an increase in articling positions in smaller communities.

127. In the past, the Law Society has approved two co-operative law programs at Queen's University law school. Issues arose as to whether the job placements could properly be considered as articling because they occur during law school. We believe that the flexibility offered by these programs is laudable and that the Law Society should consider how to address any difficulties posed by our current definition of the articling term.

128. The Law Society should develop a bank of supplementary learning modules, both online and in videotape format, including precedents, checklists and other information that can be used to supplement the articling experience and principals can share with students. This initiative would be particularly helpful for sole practice or small firm principals who cannot develop their own materials.

Length of Articling Term

129. During the consultation process we consulted with articling principals on at least two occasions. We discussed the length of the articling term. In 2001 the Law Society shortened the term from 12 to 10 months. As a result, there is a two-month period in the year when there is no overlap between one year's articling students and the next year's. This creates challenges to the smooth transfer of files, although the fact remains that the profession has been operating under the system since 2001. Although the employment of summer students is an option during this period, some of the affected firms do not hire the students.

130. To the extent that differences could be discerned among principals, we found that more of those from outside Toronto and in smaller firms were in favour of returning to a 12-month articling period. The representatives of the larger firms, particularly in Toronto and Ottawa, who employ most of the articling students, strongly oppose a return to longer articles. They have adapted their systems to the new length and are reluctant to change them once again.

131. Few of the principals, whether inside or outside Toronto, raised any educational reasons for extending the term to 12 months. We are not aware of any evidence that demonstrates that either length affects the educational value of the program. By reducing the articling term to 10 months the Law Society was making an effort to reduce the overall length of the BAC, which was at the time longer than most programs in the rest of the country.

132. We are not satisfied that the views expressed are based upon educational factors. While we understand the concern about file transfer, we recommend that the current length of articles at 10 months be maintained under the new program.

PROPOSED TIMELINE FOR THE COURSE

133. To assist Convocation in understanding how the proposed model will be scheduled we have included a tentative timetable. The BAC will begin immediately after third year law school (as is currently the case) with the four-week skills and professional responsibility training and assessment program. This timing is critical to enable students to continue to be eligible for OSAP during the skills program. Instructional days would typically run from 9:00 a.m. – 4:30 p.m. four days a week, with the fifth day being available for assessments.

134. Licensing examinations will be held three times a year: July, October and February. Reference materials upon which the examinations will be based will be provided to students in April or May just before the skills program begins. The two examinations may be written at the same time or may be split over examination periods. Students will receive one (1) uninterrupted week (5 business days) of study time prior to writing each examination. Students will also receive at least two (2) business days to write each examination, one free day and one writing day. In total students will receive two (2) weeks (10 business days) of study time and four (4 business days) to write examinations.

135. The study time and examination writing time would be in addition to the articling term, but would form part of the articling term. Principals will be entitled to specify in which session a student will write, as part of the articling contract.

136. Students can re-write examinations for up to three years. Students studying for and re-writing examinations will do so on their own time, as is currently the case, unless otherwise agreed with the principal.

137. The recommended articling contract term is 44 weeks (10 months), which includes 2 weeks for vacation entitlement and is exclusive of the time set aside for examination preparation and writing.

138. The following chart sets out a timetable based on the 2003-2004 year.

Scheduled Activity	Approximate Dates (Using 2003-04)
Law school completed	April 30
Skills program	May 19-June 13
Available to begin articling	June 23
Examinations (offered three times a year)	July 7-11; October 27-31; February 23-27
47 week articling period ends (44 weeks plus 2 study weeks plus 4 days for writing examinations)	May 15
Call to the bar	June 1-10

EQUITY IMPLICATIONS OF THE PROPOSED MODEL

139. In the interim report the Task Force included a section on the equity considerations that have affected our study of the BAC. We made it clear that as the licensing authority for the province's lawyers, the Law Society must be committed to an admission process that is both reliable as a measure of entry-level competence and free of unreasonable barriers to admission for all groups, especially those candidates from groups currently under-represented in the legal profession. In other words, the Law Society must demonstrate and be seen to demonstrate commitment to a reliable, fair, open, and equitable accreditation process.

140. The extent to which an accreditation process is open and accessible depends upon a number of factors, among the most important of which are,

a. the nature of the course content and examination system; and
b. the cost and length of the admission process.

Nature of the Course and Examinations

141. Throughout this report we have canvassed equity issues and concerns, because we are acutely aware of occasions in the past when there have been factors in the BAC that have had a disproportionate impact on students from groups traditionally under-represented in the legal profession. It is essential that the new program be designed on different footing than has been done in the past. As described elsewhere in this report, we believe the program can be valid, reliable and fair if representatives of such groups are involved in the design of the competencies to be tested, the examination questions and the administrative process and if the Law Society maintains and enhances the Education Support Services.

Cost and Length of the Current BAC

142. In our view, the cost and the length of the current BAC can only be seen as an impediment to admission for a large number of candidates, particularly those from groups under-represented in the legal profession. BAC costs to students are substantial. Traditionally and currently, students who have secured jobs at large and even mid-size firms have their BAC tuition paid and are often paid a salary while taking the course. For these students, the length of the course and its cost are irrelevant. The opposite is true, however, for those who are employed by small firms or who have not yet secured employment. In the Law Society's experience, candidates from groups traditionally under-represented in the profession tend to make up a disproportionately high percentage of this group. Moreover, the cost burden to candidates for admission is exacerbated by the spiralling costs of undergraduate and law school tuition. The average debt load of BAC students is over $40,000. This represents an increase of approximately $7,000 since 2000.

143. Although the number of locations in which the BAC is offered has increased, there are still students who must take jobs away from their homes and families, finding or maintaining accommodations away from their permanent residences. For those with family responsibilities and debt loads from law school this geographic reality adds a further burden. In addition, given that students now take the BAC during the summer months, there are further implications for those with children who are out of school during this period. Given that the average age of BAC students is now 31, familial responsibilities have become far more prevalent than in the past.

144. The BAC's length also creates lost opportunity costs. For each month that a self-supporting candidate is not called to the bar and not working, the burden increases. Economic burdens create additional personal and family pressures that may have an impact on candidates' ability to complete the licensing requirements successfully. The current BAC, including articling, lasts 62 weeks. The proposed BAC, including articling, will last 51 weeks. A first-year lawyer, earning approximately $65,000 could earn $13,750 in the 11-week period freed up under the proposed model. Whatever a first year lawyer's income, reducing the BAC's length will reduce financial burdens.

145. The Law Society has recognized the economic pressures that some students face and has had a long history of bursaries and loans to assist. In 2001, Convocation created a fund of approximately $615,000 and paid $171,000 in grants to students. For the fiscal year 2002, Convocation approved the addition of $100,000 to the balance remaining in the fund and will budget that amount in each year. In 2002. the Law Society paid out $213,000.

146. The Law Society now encourages those who wish to donate prizes for BAC students to give bursaries instead and is investigating options to do the same with currently existing prizes.

147. While it is to the Law Society's credit that it assists as it does, the degree of need has persuaded us of how important it is to assess whether the length of the course, with its cost implications, is actually necessary to ensure that those called to the bar demonstrate entry-level competence. We believe that the financial burdens the BAC imposes must be alleviated. As will be seen in the budget section that follows the Task Force's proposal is projected to result in savings to students in the range of $1,800.

FINANCIAL IMPLICATIONS OF THE PROPOSED MODEL

148. The Task Force has considered with staff the financial implications of its proposal. Based upon conservative estimates for the operational requirements of the new program, the savings to students will be in the range of $1,800 from the current fee of $4,400. This savings is coupled with a reduction in the length of the course by about three months, which permits students to be called to the bar and be eligible for employment or to open their practices sooner.

149. If Convocation accepts the Task Force's proposal that the skills program be offered immediately after law school, students will also be eligible for OSAP for at least half of the tuition and during the four-week program.

150. Finally, the Law Society will continue to offer bursaries, as discussed above.

Operational Costs and Projections

151. Appendix 11 provides information on the current and projected costs for the BAC. The costs outlined reflect the new licensing program *if it were established in 2003*. A number of variables will affect the final calculation of the student tuition. These include factors such as member contribution levels, indirect expense allocations for the organization, the number of students enrolled and grant contributions.

Licensing Process Developmental Costs

152. Appendix 12 contains the projected costs for developing the model. These include costs for:

a. establishing the substantive competencies to be tested;
b. examination item/test question writing;

c. developing the competencies and design for the skills program;
d. developing the examination bank; and
e. consulting on and developing examination security.

153. If the proposal is approved by Convocation, major funding and staff time will be assigned to develop a standardized and validated skills training and licensing examination process. Staff will come from within the current PD&C complement. A budgeted expenditure will be used to retain various skilled consultants to assist in training and testing under the new system and to cover the direct expenses of hundreds of lawyers who will be involved in the development phase. In 2004, the amount of $300,000 has been included in the Professional Development and Competence Budget for this development. A similar amount will be requested for 2005.

REQUEST TO CONVOCATION

154. That Convocation approves the Task Force's report and the following model for bar admission:

a. The bar admission process for admission to the Law Society of Upper Canada will consist of:

i. a four-week skills and professional responsibility program and assessments;
ii. 2 licensing examinations: a barrister examination and a solicitor examination, each including a professional responsibility component; and
iii. a 10-month articling program.

b. The licensing examinations will be developed in accord with the framework for licensing recommended in the Performance Assessment Group report (Executive Summary at Appendix 3).

c. The Law Society will provide Reference Materials upon which licensing examinations will be based. The traditional classroom method of teaching substantive law will not continue, but there will be significant, innovative educational and other support for students.

d. The two examinations will be scheduled three times each year (July, October and February). Students will have 1 study week for each examination and 2 days to write each examination (1 free day and 1 writing day). This designated time will be in addition to the articling term, but will comprise part of the articling contract.

e. The four-week skills and professional responsibility program and assessments will precede articles. The program will be designed along the lines of the "preferred option" included in the interim report of Dr. Julie Macfarlane and Professor John Manwaring (Executive Summary at Appendix 9). The competencies, including those specific to professional responsibility and practice management, will be developed in the coming months.

f. Articling will continue to be a ten-month program (44 weeks, including 2 weeks' vacation entitlement). The Law Society will develop further learning support for the articling process, will review and assess articling education plans and the professional responsibility assignment, and explore ways to encourage and support more lawyers to become principals, including through joint and non-traditional articles and co-operative programs.

g. The new program will come into effect in the spring of 2006.

155. If Convocation approves the proposed model, the Task Force will return to Convocation with the design for each component of the model for Convocation's approval.

APPENDIX 1

CONTINUUM OF LEGAL EDUCATION TASK FORCE

CONSULTATION PROCESS
SUMMARY

In April 2002, Convocation directed the Task Force to consult on the proposed direction for admission to the bar it had outlined in its interim report dated April 25, 2002. The Task Force conducted preliminary consultations over the summer and early autumn of 2002. As a result of those consultations, the Task Force advised Convocation in November 2002 that it would continue to consult and undertake further research. Consultants were retained to report on a proposed licensing examination system and on skills training. The consultants provided reports to the Task Force, which then consulted on them.

The Task Force has sought to answer the major points raised in the consultation process within the body of our final report. We do not do so again in this summary.

SCOPE OF THE CONSULTATION PROCESS

The consultation process lasted from May 2002 to September 2003. To bring the consultation process to the attention of the profession and obtain their views the following steps were taken:

- A Notice was placed in the *Ontario Reports* at two different stages, the first in the summer of 2002 respecting the Interim Report and the second in the summer of 2003 respecting the consultants' reports;

- The Notices were also printed in the *Ontario Lawyers Gazette* and posted on the Law Society's website. Eight requests were received for copies of the reports. During the first phase of the consultation, comments were received from 18 individuals;

- In the first part of the consultation process the profession was also advised of the location of an on-line bulletin board for comments. One comment was received;

- Letters and copies of the relevant reports were sent to the legal organizations with which the Law Society regularly consults, including groups representing equity, Aboriginal and Francophone lawyers. Over the period of the consultation the Task Force met with representatives of the following groups:
    - The Advocates Society,
    - l'AJEFO,
    - the Association of Law Officers of the Crown,
    - the Canadian Association of Black Lawyers (CABL),
    - the County of Carleton Law Association,
    - the Equity Advisory Group,
    - Metropolitan Toronto Lawyers' Association (MTLA),
    - Osgoode Hall Law School Student Caucus;
    - Rotiio'taties; and
    - Women's Law Association

- To ensure that lawyers throughout the province were provided with the opportunity to comment on the report, Diana Miles, Director of Professional Development and Competence spoke with David Sherman, Chair, County & District Law Presidents' Association and then wrote to each of the County and District Law Presidents inviting their written comments;

- The Task Force consulted with BAC Section Heads in the initial phase of the consultation, meeting with five of them;

- All Section Heads, Associate Heads of Section were notified of the consultants' reports and invited to discuss their comments with the Task Force. The Task Force met with five Section Heads and Associate Heads of Section to discuss the reports;

- BAC instructors were notified of the consultants' reports and their written comments sought;

- Letters were written to approximately 900 articling principals in July 2002 seeking their views. During the first part of the consultation process the Task Force met with a group of articling principals representing firms from around the province and of varying sizes, including government;

- Letters were written to 28 Directors of law firm student programs respecting the consultants' reports and inviting their participation. The Task Force met with 10 Directors to discuss the reports and articling;

- Former Treasurer Vern Krishna and Diana Miles, the Director of Professional Development and Competence, visited law schools to meet with interested students to discuss the interim report. Two student groups provided submissions;

- The Task Force consulted with Law Deans; and

- The Director of Professional Development and Competence had discussions with Sheila Redel, in charge of the Western Law Societies Bar Admission project.

The Task Force also held an information session with benchers in April 2002 and will hold a second information session on October 22, 2003.

The Task Force received written submissions from the following legal organizations:

After call for input in 2002

- The Advocates' Society
- EAIC/EAG
- Medico-Legal Society
- Refugee Lawyers Association
- Queen's University Law Students' Society
- Osgoode Hall Law School Student Caucus

After call for input in 2003

- The Advocates' Society
- L'AJEFO
- County of Carleton Law Association
- Metropolitan Toronto Lawyers
- Ontario Bar Association
- Osgoode Hall Law School Student Caucus

MAIN POINTS RAISED DURING THE CONSULTATION PROCESS

Meetings and submissions following the call for input in 2002

(Following the interim report there were many comments on the recommendation that skills not be taught in the BAC)

- Positive comments fell into the following categories:
    - Law schools can be trusted to teach substantive law;
    - The current system has outlived its usefulness;
    - The current approach is expensive and creates a "pressure-cooker" environment; and

- The chosen direction of new lawyers is so diverse as to render it difficult to make the BAC relevant.

- Concerns and opposition fell into the following categories:
  - The recommendation not to teach substantive law is an abdication of a fundamental Law Society role to act as a liaison between the law schools and the profession.
  - The Law Society will give up its the role as "equalizer" for students with different experiences.
  - Teaching provides the opportunity for students to make connections with the profession.
  - Law schools don't teach the right things; BAC teaches problem-solving in substantive law areas.
  - The Law Society's core mandate includes education.
  - Student support is important to assist those who need more help than self-study affords.
  - The French language program must survive and be properly included in the design.
  - Equity and Aboriginal issues must be addressed.
  - Private providers might enter the education field.
  - Too much will be expected of articling if skills are not taught in the BAC.

Meetings and submissions following the call for input in 2003
(focused on consultants' reports)

- Positive comments noted:
  - approval of the proposal for skills training; and
  - approval of the licensing examination proposal.

- Concerns and opposition reflected a number of themes as follows:
  - Abolition of substantive law classroom teaching is not warranted (See comments above).
  - How will weaker students survive? (student support issue)
  - Will failure rates for students from certain groups be higher than for other students?
  - What is the potential impact of studying for examinations on articling performance?
  - Will Equity, Aboriginal and Francophone groups have input into the design?
  - Skills should not be taught. (comments from those who supported original recommendations)

APPENDIX 2

Summary of Recommendations from the Task Force's Interim Report, dated April 25, 2002

The principal features of the reformed system we recommend are as follows:

a. The Law Society will no longer teach substantive law in the BAC. Instead, it will focus on its regulatory obligation to establish a licensing process that ensures candidates demonstrate pre-determined standards of competence and an understanding of professionalism, including ethics, in the practice of law.

b. Although the Law Society will no longer teach substantive law, it will continue to prepare and provide the Reference Materials for the subjects on which the candidates will be examined. The Reference Materials have a long tradition of excellence and are useful both for the purposes of the licensing examinations and, subsequently, in practice. These invaluable materials are developed with the cooperation of the bar and address important issues relevant to the practice of law. The current nexus between the Reference Materials and the examinations will continue so that candidates for admission will know what is expected of them in the examinations.

c. Licensing examinations, developed for the Law Society by professional educators, will test legal knowledge and analytical capabilities.

d. The Law Society will continue to teach professional responsibility as part of its many-pronged approach to nurturing the ethical values upon which the honour of the profession depends.

e. There will be greater flexibility built into the system, with licensing examinations and the professional responsibility course offered three times a year.

f. The Law Society will renew its commitment to the articling process and will seek ways to foster creative innovation, reinforce the mentorship aspect of articling and encourage collaboration among small or rural law firms to provide students with the opportunity for a meaningful articling experience.

g. The redesigned licensing process will continue to reflect the Society's firm commitment to the goal of improved access to, as well as equity and diversity within, the legal profession.

APPENDIX 3

Report on Establishing a
Standardized, Reliable, Valid, Fair and Defensible Licensure Program

Report prepared for the Law Society of Upper Canada
Task Force on the Continuum of Legal Education

Prepared by:
The PERFORMANCE ASSESSMENT GROUP INC.

May 2003

EXECUTIVE SUMMARY

(as prepared by The Law Society)

Background

1. The Performance Assessment Group Inc. (PAG) has been contracted by the Law Society of Upper Canada (LSUC) to review the current Bar Admission Course and, in the context of establishing a licensing examination system, report back on a sound testing methodology for a new system.

2. The PAG presents a step-by-step approach to the development of reliable, valid and defensible competency-based licensure examinations.

3. The PAG's analysis and recommendations rely on the most important source of test development requirements, *The Standards for Educational and Psychological Testing* (1999) (hereafter referred to as *The Standards*), published by the American Educational Research Association (AERA), the American Psychological Association (APA) and the National Council for Measurement in Education (NCME).

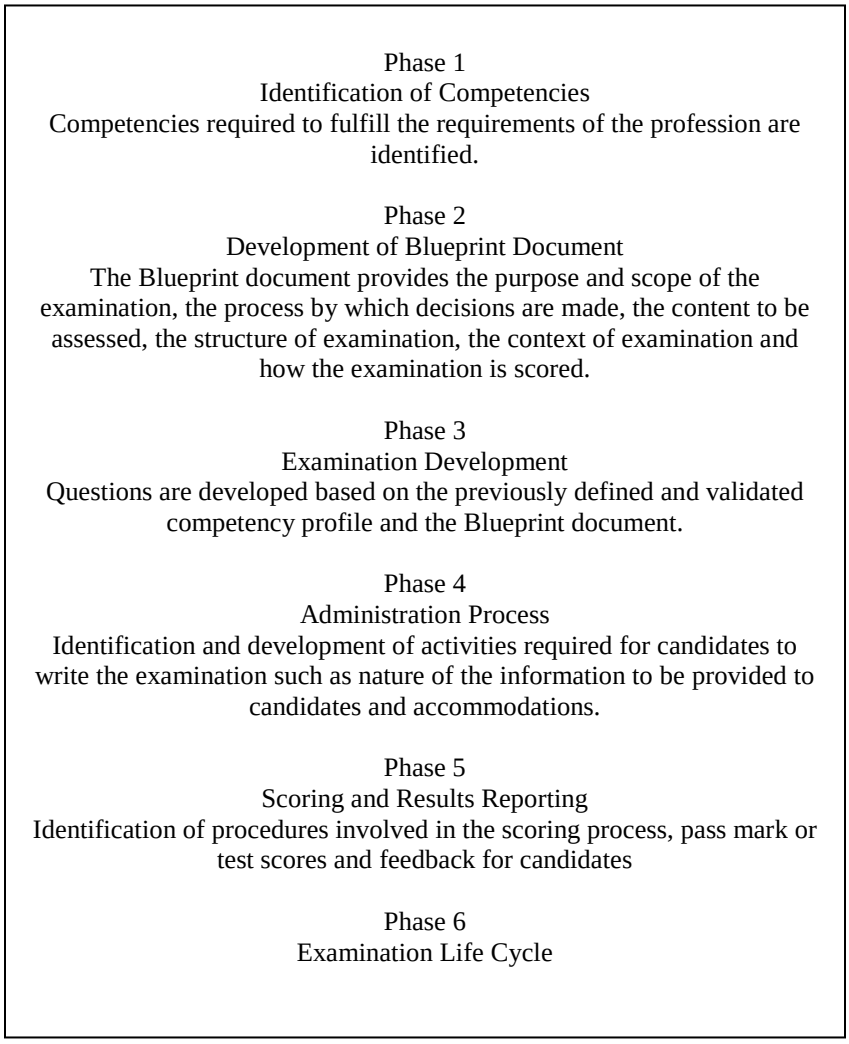
4. The PAG outlines six *key phases* (see Process Map on following page) in the development of reliable, valid and defensible licensure examinations:

   Phase 1: Identification and Validation of Competencies
   Phase 2: Blueprint/Test Specifications
   Phase 3: Examination Development
   Phase 4: Administration Process
   Phase 5: Scoring and Results Reporting

Phase 6: Examination Life Cycle

5. In its report, the PAG:
    a. outlines the requirements, based on *The Standards*, to develop each phase of the process; and
    b. makes recommendations to the LSUC on establishing a licensure examination system.

Process Map



Requirements and Recommendations

Phase 1: Identification and Validation of Competencies

Requirements based on The Standards

The first requirement to develop reliable and valid licensure examinations is to create a competency profile that will form the foundation of all subsequent examination development activities. The competency profile provides consistency and a valid, fair, and defensible supporting structure to the entire assessment program.

Competencies are defined by experts and refer to the knowledge, skills, abilities, attitudes and judgments required to fulfill the requirements of a profession.

The competency profile will be used as the basis for test specifications (Blueprints), to provide direction to test content developers of the competency profile, as a way of verifying that the items comprising an examination are valid and representative of practice.

Once the competency statements have been developed, they are validated by a cross section of lawyers from across Ontario. Typically, surveys and focus groups are used for competency validation purposes.

Recommendations to the LSUC

The PAG makes the following recommendations to the LSUC:

In adopting the recommendations of the Task Force Review, the LSUC will be required to develop a comprehensive competency profile for each of the two new LSUC licensure examinations. The development of a competency profile will involve meetings of a competency development committee to review existing guidelines and standards for the profession, determine curriculum learning objectives, identify assumptions underlying the population to be assessed, develop a framework for organizing the competency profile and generate an initial draft of the competencies.

The competency development committee should include subject-matter experts who are academics, experienced practitioners representing different legal specialties, sizes of practices, and some exceptional, but relatively newer members of the profession.

The competency profile must be validated. A combination of approaches is recommended, including a series of focus groups and a membership survey.

Phase 2: Development of Blueprint Document

Requirements based on The Standards

The next requirement in the development of valid, reliable and defensible licensure examinations is the creation of a Blueprint document that will be the foundation of all examination development.

The Blueprint document identifies the types of assessment tools and examination item formats to be developed.

The development of the Blueprint document is made by subject matter experts based on an analysis of the competencies and the feasibility of different formats of examinations.

A comprehensive Blueprint document contains five types of information:

a. *Purpose/process*: The purpose of the assessment program and the methodology used to develop the contents of the Blueprint document.
b. *Content:* The competencies to be assessed and the relative importance of each competency to ensure the examinations measure the competencies that have the greatest impact on public protection and the effectiveness of lawyers.
c. *Structure:* The format and presentation of the examination questions, the length and duration of the examination and how often the examination is to be administered. The examinations format may include multiple-choice items, open-ended machine scorable items and performance-based items.
d. *Context:* The legal contexts in which the assessment questions will be set (e.g., types of clients, client culture, client legal requirements and the occupational environment of the lawyer).
e. *Scoring:* A description of the methods used for scoring items and for deriving reported scores. The mechanisms for obtaining raw scores, scaled scores and diagnostic scores should also be documented along with the method used to determine the passing score.

Recommendations to the LSUC

A comprehensive Blueprint document is the most essential component of any licensure examination. A structured Blueprint document provides a detailed, step-by-step, account of why the examination(s) should be deemed standardized, reliable, valid, fair, and defensible.

The PAG recommends the establishment of a Blueprint development committee for each of the two proposed LSUC licensure examinations. These committees should comprise subject matter experts with intimate knowledge of the area of law to be addressed by the examination(s) in question and should include academic, practitioner (different types and sizes) and bilingual representation. Each committee will meet with a test development expert for five days to define each Blueprint document.

Phase 3: Examination Development

Requirements based on The Standards

The examination development phase is based on the defined and validated competency profile using the parameters specified in the Blueprint document. In this way, examination content developers are directed to write only those questions that will measure the established and validated competencies and other parameters to be assessed.

The Examination Development phase includes:

a. *Question development:* The questions are developed following criteria based on the format chosen during Blueprint development.
b. *Question validation:* The questions are validated. The question validation process begins with rigorous question development procedures involving subject matter experts. A second validation phase typically involves external subject matter experts who are asked to respond to the newly developed questions and provide detailed feedback on their experience with the new test questions.
c. *Test fairness assessment*: An external review process is undertaken to ensure the test is fair. Fairness is defined as lack of bias, equitable treatment in the testing process, equality of outcomes and opportunity to learn.
d. *Pilot testing:* All new examination content is experimentally tested.
e. *Examination approval:* An oversight committee approves the examination.
f. *Standard setting and pass mark*: A procedure is used to set the standard and provide an indication of whether or not candidates have achieved a sufficient level of mastery to be considered minimally competent to practice. The standard is the level of ability required by candidates in order to be judged minimally competent. The pass mark reflects the numerical score that candidates must achieve on a particular form of a test in order to pass. The standard method and pass mark are set and implemented.

g. *Language/translation:* The examinations are translated and validated. This generally involves having the major development activities carried out in English with translation and validation occurring once the English version of an examination has been approved and the pass mark set. The PAG is aware of no persuasive evidence to conclude that professionally translated and validated examinations are more or less valid than those arising from a fully parallel examination development process.

h. *Item banking:* Item banking ensures that examination data is maintained and protected from improper disclosure. Software is essential for tracking the contents of the item bank, providing feedback to examination content developers on the Blueprint parameters, and in determining the match between the Blueprint specifications and the examination that must be approved by the examination review committee. There are a number of reliable electronic item banking systems available that offer the security and flexibility required for licensure examinations.

i. *Examination security:* The integrity of a licensure program depends upon the fair and impartial assessment of candidates. Maintaining the security of an examination is necessary to support the program's integrity.

Recommendations to the LSUC

The PAG recommends the following examination development process:

a. *Question development*: Groups of subject matter experts meet with measurement experts and receive professional training on question development. The training is followed by question development sessions and group review sessions of the developed questions.

b. *Question validation*: Following a comprehensive editorial review, practising lawyers and educators (item appraisers) from across Ontario representing all areas of practice ensure the appropriateness of each question for the entry-level lawyer, approve the identified correct response, and provide recommendations.

c. *Test fairness assessment*: All examination questions undergo a test fairness/sensitivity review by individuals representing various minority interests. The purpose of this review is to ensure the items do not include negative stereotypes and do not disadvantage candidates from under-represented communities.

d. *Pilot testing*: New questions are pilot-tested with a cross sample of entry-level lawyers.

e. *Examination approval*: An examination review committee considers and approves each operational and experimental question and sets the pass mark.

f. *Standard setting and pass mark*: The Angoff method should be used to set standards. The Angoff method is based on the concept of the minimally competent candidate (the candidate possessing the minimum level of knowledge and skills necessary to perform at a licensure level).

g. *Language/translation*: Every committee used to develop or validate examination content or competencies should include at least one bilingual Francophone member. Also, the English version of each examination is sent to a professional accredited translator familiar with legal terminology for translation. A translation review committee consisting of fluently bilingual lawyers conducts a final review of the translation and validates the examinations.

h. *Item banking:* The Performance Evaluation Technologies (PET) system plus the Logic Extension Resources (LXR-TEST) may be used for item banking. The Law Society currently utilizes the PET system.

i. *Examination security:* Candidates who have failed can, for a fee, request that their exam be scored again. To protect the security of the examination, the candidate would not be permitted to observe the scoring process.

Phase 4: Administration Process

Requirements based on The Standards

Examination administration includes all the activities required for candidates to write the examination.

The Administration Process phase includes:

a. *Nature of the information provided to candidates*: Candidates are presented with information about licensure assessments well in advance of writing an examination to enable them to maximize their performance and demonstrate their true ability. All candidates receive the same information. Candidate information includes descriptions of the examinations, the administration process, the scoring and score reporting process, any appeal processes, information about the confidentiality of results and the uses of results.
b. *Test administration security:* All the provisions to protect examination security during development need to be exercised during the administration process. Examinations must be shipped by secure traceable means and every copy of the examination must be accounted for at all times. On administration day, efforts must be taken to ensure candidates are not given the opportunity to obtain results by illegitimate means.
c. *Test accommodation and fairness:* Credentialing bodies must offer reasonable accommodations for students with special needs. Such accommodations do not relieve the credentialing organization from the obligations to ensure a reliable and valid assessment of competence. *The Standards* provide directions related to testing accommodations and fairness, including a validation process.

Recommendations to the LSUC

Standards related to all the above-noted administration issues have been set out to provide the Law Society with clear and considerable direction for moving forward in this area.

Phase 5: Scoring and Results Reporting

Requirements based on The Standards

Ultimately, the purpose of licensure is to make decisions regarding whether or not to award a credential to candidates. All the work that has gone into developing competencies, drafting a Blueprint document, developing and validating items, approving examinations, setting standards and pass marks and producing examinations in both official languages eventually comes down to scoring examinations, using the results to make decisions and communicating those decisions to candidates.

Key activities include:

a. *The scoring process:* One of the greatest threats to the standardization, reliability, validity, fairness and defensibility of any performance-based item format is the potential for bias and error in the scoring process. There are two prominent strategies for reducing the threat of bias and error: the scoring key must be comprehensive and clear and the examinations must be scored by a group of subject matter experts that can share their rating experience. Following the scoring process, an item analysis must be conducted and poorly performing questions removed from the examination. Finally, borderline scores should be examined for accuracy and perhaps rescored by an independent rater.
b. *Rater analyses:* While scoring for multiple-choice questions is very straightforward, there are some significant challenges involved in ensuring the scoring for performance-based assessments (e.g., short answer, essay) is reliable and valid. It is imperative to continuously assess the quality of the raters and,

where necessary, retrain or terminate those raters whose performance has been determined to be substandard.

c. *Adjustments to the pass mark or test scores:* The issue of adjusting the pass mark or a candidate's score following the administration of an examination is an extremely serious one for a licensing program. An examination developed in good faith by attempting to adhere to *The Standards* should result in a standardized, reliable, valid, fair and defensible examination that does not require post hoc adjustments to the pass mark.

d. *Feedback for Candidates:* There is no single prescription for the most appropriate type of feedback to provide to candidates. With respect to licensure, there is a strong argument to be made for simply providing the pass/fail decision. Beyond pass/fail status, there is the potential issue of providing diagnostic feedback to unsuccessful candidates. Whether feedback to candidates involves a simple pass/fail decision or a more comprehensive diagnostic approach, four important caveats must be observed. First, feedback must be accurate. Second, feedback must be timely. Third, feedback must be standardized. Finally, results must only be reported to the candidate.

Recommendations to the LSUC

Without knowing the structure and content of the future LSUC licensure examinations, it is impossible to advise the LSUC regarding the nature of the feedback to be provided to candidates (pass/fail versus diagnostic information). Lengthy multiple-choice examinations may well provide the opportunity for reliable diagnostic feedback; however, narrative response items generally will not. To protect the security of the examination, candidates cannot be provided with details regarding their answers to specific questions. Valid examination questions are difficult and expensive to develop and contribute greatly to the LSUC's mandate of public protection. Equally important, feedback must be based on a reliable sample of questions. Incorrect answers to one or two questions will not be reliable and valid indicators of performance on a competency.

The PAG urges the LSUC to exercise caution when communicating results turnaround times to candidates or committing itself to an ambitious timeframe. Unforeseen complications can arise in testing (e.g., results being withheld due to technical problems or investigations of testing irregularities). Such complications can affect the scoring of even the most objective of item formats (e.g., multiple-choice). When examination formats requiring the judgment of subject matter experts are used (e.g., narrative response formats) reliable and valid scoring will require a considerable time commitment. Candidates' need for timely results reporting must always be tempered by the LSUC's absolute imperative of ensuring those results are accurate.

Phase 6: Examination Life Cycle

Requirements based on The Standards

The activities in the life of a licensure process repeat on a continuous cycle. Once the program is well established, most of the activities are repeated for maintenance and to ensure security. In addition, licensure programs typically need to come under periodic review on a regular cycle.

With respect to the extent to which the legal profession changes over time, the LSUC and its members are in the best position to address this question. A profession that undergoes rapid change will require more new content compared to one that remains relatively stable over time.

Recommendations to the LSUC

The PAG strongly recommends yearly maintenance of all licensure examinations as well as a predetermined cycle for review of the competencies and blueprint. The exact life cycle of the LSUC examinations can only be determined based on the judgment of the subject matter experts comprising either the Blueprint Development Committee and/or the Examination Review Committee.

APPENDIX 6: DEFINITION OF THE COMPETENT LAWYER (RULE 2.01(1)

In this rule

"Competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate course of action,

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,

(i) legal research
(ii) analysis
(iii) application of the law to the relevant facts,
(iv) writing and drafting,
(v) negotiation,
(vi) alternative dispute resolution,
(vii) advocacy, and
(viii) problem-solving ability,

(d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,

(g) complying in letter and spirit with the *Rules of Professional Conduct,*

(h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,

(i) managing one's practice effectively,

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and

(k) adapting to changing professional requirements, standards, techniques, and practices.

APPENDIX 7: A BRIEF HISTORY OF LEGAL EDUCATION IN ONTARIO

1. The current Bar Admission Course has its roots in the complex history of legal education in the province of Ontario. The long and sometimes difficult transition from a preparatory system focused primarily on reading law and articling in law offices to one that placed emphasis on professional education in a university setting continues to have repercussions today. The BAC evolved out of that transition and the fundamental assumptions underpinning it remain largely the same today.

2. Since its establishment in 1797 the Law Society of Upper Canada has been involved in the qualification process for those wanting to become lawyers. Although initially the sole elements of training were reading law and apprenticeship, examinations were soon added. After examinations were introduced as an element of the training regime, some lectures followed, but for many years they were provided intermittently and without any settled curriculum or coherent approach. Whereas other provinces in Canada had, by the 1880s, established a legal education system through their universities, the Law Society declined to follow that path.

3. In 1889, the Law Society founded a law school at Osgoode Hall under the direction of Convocation. Those holding a university degree attended a three-year program at Osgoode Hall involving a few hours of classes, with most of the day spent reading law and apprenticing in a law office. Those without a university degree were required to apprentice for two years before attending the three-year program at Osgoode. This approach remained unchanged for many years despite the emergence of innovative approaches to legal education in the United States, including, for example, the "case" method of instruction and despite the endorsement of this approach by the Canadian Bar Association and western Canadian Law Societies. Although the University of Toronto established a law school, the Law Society did not give credit toward the admission process to graduates of that program.

4. The first serious challenges to Convocation's authority over education occurred in the 1920s and 1930s. These challenges were based on the increasingly-held view that the education of the professions should be done in universities. Critics charged that the notion of law as a "trade" that could best be taught by those already in it was limited and limiting. Legal education, they insisted, must not be simply about learning existing rules of practice, but about the principles, context, and science of the law. Over time, these views gained increasing favour, not only outside the Law Society, but also within it where, for example, Cecil (Caesar) Wright, Dean of Osgoode Hall Law School, became a strong proponent of reform.

5. Still, a majority of benchers continued to believe that university education would be too theoretical and research-oriented to be of use to most candidates seeking to practise law. During this period, however, the increasingly uneven nature of students' articles weakened the argument that practical education made for the best lawyers. The Law Society's response was to cut back on the class lecture component of the program so as to enhance articling, rather than opt to approve university-based legal education. Nonetheless, the push for fundamental reform, including the abolition of articling, continued unabated.

6. Following the Second World War, the issue of who should control legal education and what that education should involve came to crisis, intensified by the significant increase in numbers of those seeking admission to the bar and the attendant pressures on the capacity of the Law Society to accommodate them.

7. In 1949, a Law Society Committee examining legal education acknowledged that the system was troubled, but controversy arose out of the nature of the Committee's recommendations. In response to recommendations with which the faculty of Osgoode disagreed, Dean Wright and most of the faculty resigned. Wright became the Dean of the law school at the University of Toronto and sought to have the provincial government remove authority for legal education from the Law Society.

8. The legal education issue had become a serious problem for the Law Society and the profession. After the faculty resigned, Convocation approved a new approach by introducing a four-year program consisting of

two years of full-time study, followed by one year of office work, and one year combining lectures and articling.

9. When the University of Toronto asked that its three-year degree be counted as the equivalent of the two-year study program at Osgoode, the Law Society accepted. The resulting shorter route to call through Osgoode (four years instead of five) worked against the University of Toronto program, because candidates wanted to be called to the bar as quickly as possible. The University's subsequent requests for its graduates to be exempted from three of the four required years were rejected, reflecting the Law Society's continuing concern that the university's degree did not adequately prepare candidates to practise law.

10. By the mid 1950s, however, the Law Society's rationale for exercising control over legal education and its will to do so in the face of over-burdened resources had dissipated. Over several years, discussions took place with the universities. In 1957, the Law Society and the universities negotiated a "New Deal" in legal education.

11. Pursuant to the agreement, any university could develop a three-year LL.B. program. The pre-requisite for admission to the LL.B. program would be two years of undergraduate education. The Law Society would recognize these degrees, provided the LL.B. program followed certain criteria for curriculum, staff and libraries. Graduates wishing to practice law would serve a twelve-month period of articles. To supplement articles there would be a post-LL.B. training program in substantive law, at Osgoode Hall, supervised by law school faculty and practising members of the profession.

APPENDIX 8

APPENDIX 8: UNITED STATES LICENSING REQUIREMENTS

Generally

1. In the United States, law students usually complete a three-year law degree, then are required to pass licensing examinations in the state or states in which they wish to be called to the bar. There is no articling requirement and no further mandatory pre-call legal education. Licensing examination preparation courses exist in many states, but their primary goal is to facilitate the candidates' passage of the licensing examinations, not educate those about to be called to the bar.

2. Legal education in the United States has had a long history of being taught in a university setting. The legal profession is not governed by self-regulating regulatory bodies, but by the courts. Thus the bar has never "directed" legal education as has been the case in Ontario. Articling and bar admission programs have not played a role in the education of American lawyers and there is no suggestion that they will in the future.

3. Generally, speaking, candidates for admission to the various state bars write examinations that consist of some or all of the following[16]: the multi-state bar examination (MBE), the multi-state essay examination (MEE), the multi-state professional responsibility examination (MPRE) and the multi-state performance test (MPT)[17]:

    1. The MBE consists of 200 objective multiple choice questions to be answered over a six hour period. The areas tested include constitutional law, contracts, criminal law and procedure,

[16] Washington state is one of the few jurisdictions that does not use any of the multi-state examinations, but administers its own tests and covers more substantive law, local to Washington state. For more information see www.wsba.org

[17] A number of states have developed their own essay and performance test examinations. Passing scores vary with each state.

evidence, real property and torts. All states and jurisdictions use the MBE, except Louisiana, Washington and Puerto Rico.

2. The MEE consists of three one hour essay questions. The questions are designed to measure the applicant's ability to analyze legal issues arising from fact situations. The areas of law covered are agency and partnership, commercial paper, conflict of laws, corporations, decedents' estates, family law, federal civil procedure, sales, secured transactions and trusts and future estates. Fifteen states use the MEE. A number of states, such as California, have their own essay examinations.

3. The MPRE consists of 50 multiple choice test items covering a wide range of professional responsibility principles, often relying on the ABA Model Rules of Professional Conduct. All states and districts except Maryland, Puerto Rico, and Washington state use the MPRE.

4. MPT questions are designed to test an applicant's ability to understand and apply a select number of legal authorities in the context of a factual problem. Each question consists of a file and library, with instructions advising the applicant what task(s) should be performed. Twenty-nine states use the MPT. Others have developed their own tests.

California

4. Eligibility to take the bar examination in California is not limited to J.D. or LLB graduates of American Bar Association-approved law schools, but is open as well to those whose legal study is through:

1.non-ABA approved in-state
2.unapproved in-state schools;
3.law office study; and
4.correspondence course.

5. Applicants who obtain their legal education by attending unaccredited schools, correspondence courses or law office study must take an examination after their first year.

6. The California Bar Examination consists of the General Bar Examination (GBE) and the Attorney's Examination (AE). The GBE has three parts: six essay questions, the MBE and two performance tests (PTs), written over three days. The AE consists of six essay questions and two PTs from the GBE. California also administers the MPRE.

7. The subjects covered in the MBE are: Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, and Torts. The subjects covered in the essay examination are: Civil Procedure, Corporations, California Community Property, California Professional Responsibility, Remedies, Trusts, California Wills & Succession, plus all MBE subjects.

8. The examinations typically result in a relatively high failure rate for those writing for the first and even subsequent times. The pass/fail statistics for the February 2001 sitting, indicating an overall pass rate on the GBE for first-time takers of 52.5%, 29.4% for repeaters, and 37.3% overall. The total number writing the February 2001 GBE was 4,488.

9. California is a mandatory CLE state. Lawyers are required to take 25 hours per 3-year period including 4 hours ethics, 1 hour substance abuse/emotional distress, and 1 hour of elimination of bias.

Illinois

10. Eligibility to take the bar examination in Illinois is limited to J.D. or LL.B graduates of American Bar Association-approved law schools.

11. The Illinois Bar Examination consists of a 12 hour two-day examination. Day One covers the Illinois Essay Exam (three 30-minute essay questions, one 90-minute MPT and the MEE. Day Two is the 6-hour 200 question MBE. Candidates must also pass the MPRE, which can be taken during law school.

12. Subjects covered on the MBE examination are constitutional, contracts/sales, criminal law and procedure, evidence, real property, and torts. Subjects covered on the essay exam are agency, commercial paper, conflicts, corporations, equity, family, federal jurisdiction and procedure, civil procedure, partnerships, personal property, sales, secured transactions, suretyship, trusts and future interests, and wills.

13. In 2001 the pass rate for first time takers of the Examination was 83% and all takers 79%. The higher first and second time high pass rate may reflect the fact that Illinois only permits graduates from ABA accredited schools to take the examination.

14. Illinois is not an MCLE states.

Massachusetts

15. Eligibility to take the bar examination in Massachusetts is not limited to J.D. or LL.B graduates of American Bar Association-approved law schools. Graduates from non-ABA approved in-state schools are eligible.

16. The Massachusetts Bar Exam is a two-day exam. Day 1: Multi-state Bar Exam (MBE). Day 2: ten essay questions. Candidates are also required to take the MPRE.

17. Subjects covered on the MBE are: Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, and Torts.

18. Subjects covered on the essay examination are: Agency, Commercial Paper, Consumer Protection, Corporations, Domestic Relations, Federal Jurisdiction, Mortgages, Massachusetts Practice & Procedure, Partnerships, Professional Responsibility, Secured Transactions, Trusts, Wills, plus all MBE subjects.

19. In winter, 2001 the pass rate for first time takers was 68% and for all takers was 52%.

20. In summer, 2000 the pass rate for first time takers was 79% and for all takers 73%.

21. In summer, 1999 the pass rate for first time takers was 80% and for all takers was 74%.

New York

22. Eligibility to take the bar examination in New York is not limited to J.D. or LL.B. graduates of American Bar Association-approved law schools. Law office study is permitted after successful completion of one year at an ABA-approved law school. Graduates of non-ABA approved law schools can write the examination if they have at least five years active and continuous practice within the last seven years in some other state or states.

23. The New York Bar Exam is a 2 day exam. Day 1: One MPT question (worth 10%), five New York essay questions (worth 40%) and 50 New York multiple-choice questions (worth 10%). Day 2: MBE (worth 40%). Candidates must also pass the MPRE.

24. The MBE covers the following subjects: Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, Torts. New York portions of the examination cover Agency, Commercial Paper, Conflict of Laws, Corporations, Domestic Relations, Equity, Estate Taxation, Federal Jurisdiction, Future Interests, Insurance (No Fault), Mortgages, New York Practice & Procedure, New York Professional Responsibility, Partnership, Personal Property, Secured Transactions, Trusts, Wills, Workers' Compensation, plus New York distinctions for all MBE subjects.

25. In the July 2001 sitting of the examination, of the 9194 applicants examined, 6475 or 70.4% passed the examination. Of the 5136 applicants taking the examination for the first time, 4089 or 79.6% passed.

26. In the July 2000 sitting of the examination, of the 8,896 applicants examined, 6,006 or 67.5% passed the examination. Of the 7,356 applicants taking the examination for the first time, 5,516 or 74.9% passed.

27. New York has recently become a mandatory CLE state. During each of the first two years after call, newly admitted attorneys must complete 16 CLE hours including three in ethics, six in skills, and seven in practice management. Thereafter, all New York attorneys must complete 24 CLE hours every two years.

APPENDIX 9

Interim Report on Skills Training and Professional Responsibility

Report prepared for the Law Society of Upper Canada Task Force on the Continuum of Legal Education

Prepared by:
Dr. Julie Macfarlane and Prof. John Manwaring

May, 2003

EXECUTIVE SUMMARY

Background

1. The *Report of the Task Force on the Continuum of Legal Education (March 2002)* proposes a new licensing system to replace the current Bar Admission Course (BAC) program. The proposed licensing system focuses primarily on developing and administering licensure examinations while limiting or eliminating the current teaching component of the BAC.

2. The proposed licensing system is a component of a continuum of professional development activities seen in relation to both earlier (for example, graduation from law school) and later (for example, seeking specialist certification several years into practice) stages of competency development.

The Issues

3. In their Report, Dr. Macfarlane and Professor Manwaring address the following issues:
    a. Assuming the Law Society adopts the Task Force's recommendations, should skills training continue to form a part of the Law Society's licensing requirements?
    b. Assuming the Law Society adopts the Task Force's recommendations, should Professional Responsibility teaching and learning continue to form a part of the Law Society's licensing requirements?

Law Society's Competence Mandate

4. The Law Society is obligated to ensure the competency of licensed practitioners. This includes elements of knowledge, skills and attitudes. The Law Society also wishes to achieve the highest possible professional and ethical standards. For a self-governing profession such as law, issues of professional ethics and the responsibilities of its members of the profession to their clients, to the legal system and to the public at large are vital to its reputation for integrity and competence.

5. Dr. Macfarlane and Professor Manwaring believe that course-based instruction is the best way to attain the goal of training members of the profession who strive to achieve the highest possible professional and ethical standards and to ensure that students called to the Bar are appropriately experienced in explicitly defined skills areas.

6. Dr. Macfarlane and Professor Manwaring propose two course-design options which appear to carry forward the goals of the Law Society in relation to skills, professional responsibility and practice management training.

Proposed Options

Preferred Option

7. The preferred option has three components:

    a. *An orientation meeting* between Articling Principal and student to consider what tasks the student may be asked to do and what she should ideally be able to do during the course of articling. The Articling Education Plan would assume that the student has opportunities to learn and practice office management skills, time management, organizational skills and practice management, and to work collegially as part of a team.

    b. *A skills-focused course of four weeks,* undertaken after law school and prior to the articling period, would aim to prepare students to undertake the tasks that might typically be required during articles. Ethical issues would be integrated into each skills and transaction-based exercise.

    The course could be structured as follows:

Week One:	Interviewing, counselling and client communication
Week Two:	Writing (opinion letters, memos) and drafting (contracts, litigation documents)
Week Three:	Negotiating and ADR representation
Week Four:	Advocacy including trial preparation and management strategies

    A Problem-Based Learning (PBL) teaching approach is recommended. PBL enables the constant integration of substantive and ethical issues into simulations and practice exercises and is interactive and participatory. Students would work together in small groups or "firms" and be required to handle files from the first meeting with the client to the end of the trial.

    Assessment would be via pass/fail criterion-based exercises that would determine if the student member has achieved the defined level of competency in each of the four skill areas

    c. *Skills development during articling:* During articles, students would be expected to continue to work on enhancing their skills in the enumerated areas and in particular on those functions and tasks most important n their own articling experience.

Alternate Option

8. This model would follow the same plan set out in the "preferred" option but would include a fourth element which enables some assessment of students post-articling and prior to their Call to the Bar. The preferred approach to this fourth element would be to bring students together at the end of the articling process for an intensive training program. This would be structured as a 72 hour PBL exercise. Instructors should be recruited widely to observe students and provide on-going feedback and supervision.

APPENDIX 10

Enhancing the Articling Experience - Potential Supports for Students

Tool/Product	Electronic Delivery	Other Delivery
Skills Development		
Provide easily accessible role-plays of skills program tasks (interviewing, negotiating, etc.) as a refresher on the e-Learning site and by video tape	X	X
Connect student with a skills mentor (skills instructors) designated as ongoing support		X
Maintain an online forum (discussions, Questions & Answers, et.)	X	
Make available precedents and supplemental materials related to skills development	X	X
Partner with local and regional law associations to host Q & A days		X
Provide useful links	X	
Provide task-specific tutoring		X
Tape skills programs and make available on e-Learning site and by video tape	X	X
Substantive/Procedural Development		
Continue to supplement the e-Learning site to provide self-study on demand web casts, supplementary documents, precedents, checklists, etc.	X	X
Establish, identify, ad make known to students throughout the province the liaisons for registry offices, court registrars, etc.	X	X
Facilitate the establishment of a mentor database and assist students to connect with mentors		X
Create CLE programming suitable for articling and early practice stages	X	X
Create and provide precedents and checklists	X	
Work with Principals and firms to assist in facilitating practical training experiences (e.g., arrange for a corporate student to go to Court)		X
Professional and Personal Development		
Provide learning sessions, quick access information and links to mental health and stress relief sites such s OBAP	X	
Provide materials and./or seminars on expectations in the work force, dealing with difficult people, taking direction, eliciting quality feedback, etc.	X	X
Offer CLE programs on the business aspects of law firms targeted to articling students and new lawyers	X	X
Provide placement support for new calls	X	X
Facilitate mentoring relationships to assist with professional and personal management issues		X

APPENDIX 12

Licensing Process Development Costs

1. Establishing the competencies to be tested
    a. Two examinations
    b. Includes consulting fees and potential payments to practitioners forming the Design Team and Focus Groups
    c. Approximate cost of $150,000 to $200,000 per examination
    d. Total suggested development budget = $300,000 to $400,000.

2. Item writing/test question writing
    a. Costs include consultant facilitation, hourly payments to practitioners
    b. Anticipated that we will require 200 items
    c. Can complete 10 items per session = 20 sessions
    d. Assumes a cost of $35 per hour for practitioners time (slightly higher than we currently pay instructors)
    e. Assumes 5 practitioners per session
    f. Total suggested development budget = $50,000 to $75,000.

3. Skills training unit
    a. Practice based learning environment using files to move a student through applications of skills and professional responsibility
    b. Includes assessments of approximately 10 component skills and professional responsibility either within each unit, or separately (to be determined)
    c. Total suggested development budget = $100,000.

4. Examination Bank development
    a. Requires updates to current configuration and some new software, but overall the current PET system is already configured for this usage
    b. Total suggested development budget = $25,000.

5. Examination security consultation and establishment of security requirements
    a. Critical that the system be secure and that processes are put into place to ensure that it is secure
    b. Consultant will be required to assist in establishing security benchmarks and processes in keeping with standards in the industry
    c. Total suggested development budget = $25,000.

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

(1) Copy of the Examples of Practical Legal Skills Taught at Ontario Law Schools, in Relation to Current BAC Courses.

(Appendix 4)

(2) Copy of Reforms to the BAC since 1988 with Summary Table.

(Appendix 5)

(3) Copy of Bar Admission Course Financial Summary – Current Program as at 2003.

(Appendix 11)

Continuum of Legal Education Task Force
December 5, 2003

Supplemental Report to Task Force's Final Report

The Task Force's provided its Final Report to Convocation in October 2003, under separate cover with the Convocation material. Please bring your copy with you to Convocation on December 5, 2003. Additional copies will not be sent to you. The Report is also available on the Law Society's web site at www.lsuc.on.ca.

Purpose of Report: Information

Task Force Members

George Hunter, Chair
Professor Constance Backhouse
Earl Cherniak
Holly Harris
Professor Vern Krishna
Harvey Strosberg

SUPPLEMENTAL REPORT
FOLLOWING INFORMATION SESSION – OCTOBER 22, 2003

On October 22, 2003 the Task Force on the Continuum of Legal Education held an information session for benchers, to answer questions about its final report to Convocation. The Treasurer and thirty-two benchers attended the information session.

On December 5, 2003, Convocation will consider the Task Force's report.

To further inform benchers, this supplemental report sets out the questions benchers asked at the information session in *bolded italics* and responds to those questions.

Competencies

1. There are holes in what the universities teach. Core competencies could be increased at law school to include corporate and estates law. Will the examinable materials include core competencies?

Law schools have long maintained that they are not technical training facilities. Their primary goal is to educate students in fundamental legal principles and in the law's connection to the basic problems confronting society. At the same time, they do offer many courses in substantive law and, increasingly, in legal skills.

The proposed new BAC model will identify and assess competencies that newly called lawyers should have, both in substantive law and in skills, including professional responsibility and practice management. Whether or not students take courses in law schools that advance those competencies, the Law Society must do its own assessment of which competencies it should address in its admission program. The proposed barrister and solicitor examinations will address substantive law topics in areas of core competencies, such as civil procedure, corporate or estates law. Convocation will have the opportunity to approve the proposed competencies as part of the course design.

2. Core courses that students must take at law school have not been redefined since 1969. Shouldn't they be?

This is a national issue that goes beyond the Task Force's mandate and requires that law societies across the country be interested in raising the issue. Currently, there does not appear to be such interest. The Task Force report addresses this issue, however, by recommending that the Law Society determine what it considers to be the competencies necessary for call to the bar and create a bar admission program that evaluates whether candidates have demonstrated those competencies.

3. Have you considered making it a rule that students must have taken certain subjects at law school to be accepted into the Law Society as student members?

The Task Force considers such an approach to be both impractical and unnecessary. Ontario accepts law students from law schools across the country into its BAC. Even if it mandated certain courses, it could not and should not control the content in individual courses. Law students are intelligent and highly motivated. The Law Society will inform students of the competencies it will address and evaluate in the BAC and leave it to students to determine whether they should take law school courses in those areas or rely upon the materials and skills instruction they will receive in the BAC to prepare for examinations.

Skills Program

4. Will Convocation be advised of the proposed skills to be taught and have an opportunity to comment on them?

If Convocation approves the Task Force's proposed model, the Task Force will return at each stage of the design to seek Convocation's approval. The determination of appropriate skills will be part of the design that Convocation approves.

5. If the law schools were to offer the equivalent of the four-week skills program would students be excused from taking the Law Society program?

The Law Society will develop the skills and professional responsibility program based on its determination of the competencies a newly called lawyer should demonstrate. It will develop the standards, training, materials and the assessments. Practitioners will teach the program and evaluate the students based on those Law Society standards. This is not a law school course. It is a BAC course that reflects the Law Society's mandate. The Task Force does not envision that, currently, law schools would be willing to substitute a BAC course for one of their law school courses.

6. If we proceed with mandatory attendance in the skills program, will we obtain feedback from students on an ongoing basis? Will we then review the program in 3-5 years?

The Law Society will evaluate the entire model's effectiveness and obtain participants' feedback regularly. An evaluation mechanism will be part of the design.

Articling

7. The model makes articling more important than it was. Issues of consistency of articling and the role of the BAC as "leveler" arise. Does the report address this fully?

Under the proposed model articling *continues* to be an important part of the admission program, but does not assume a new or more central role. The components of the admission program (skills, examinations, articling) are pieces of a whole, designed to ensure that newly called lawyers demonstrate certain competencies. Benchers and others raised the issue of the BAC as "leveler" when the Task Force recommended in its interim report that skills not be taught. Some benchers felt that without a skills component in the BAC articling would take on greater importance. The Task Force has now changed its interim recommendation.

In addition to recommending a skills program, it also recommends a variety of "enhancements" to the articling program to address concerns that may exist about consistency of articles. These enhancements will provide more support to students and principals and incentives to lawyers to become articling principals, keeping the expectations on principals at a reasonable level.

Examinations

8. Why is an examination bank necessary? Give students model questions and answers from which to study and they will pass.

An examination process, in which students are given a long list of possible questions and model answers and then tested on some of those, is more about memorization than it is about demonstrating competencies in certain areas. The Task Force does not recommend such an approach.

A standardized, reliable, fair and defensible examination system is vitally important. Between 1100 and 1250 students write the BAC examinations each year. Currently, they are eligible to write the original examination and 2 supplemental examinations in any subject they fail. If they still do not pass after writing the examination 3 times they may, under certain circumstances, re-register for the course and take it again. All examinations are translated into French. Volunteer practitioners set the examinations and the supplemental examinations. Students are entitled to take away copies of their examinations. Students who fail and appeal receive a copy of the marking guide. Examination questions cannot be used again because many students from year to year have copies of them. This means that every year instructors must design dozens of questions and must avoid duplicating a question from an earlier year. The process overburdens volunteer help and is rushed. The quality of examinations is inconsistent.

Currently, each examination is completed only 4 weeks prior to the examination date. There is no BAC-wide discussion of which competencies should be tested. There are no benchmarks against which to measure whether an examination tests appropriate competencies. So, although the examinations are currently pre-tested to determine whether the questions are clear, they are not systematically measured to ensure they are reliable, fair and in keeping with any blueprint or pre-established competencies. The process is inevitably rushed. This leaves little time for the French translators. Marking guides are prepared at the last minute and are often corrected at the beginning of the examination marking session. They are often criticised.

The Task Force recommends a licensing system that follows an effective design, maintains standards, and ensures that examinations are fair, valid and reliable. An examination bank is integral to the examination system the Task Force recommends. It will allow the Law Society to build up an archive of questions that have been proven to be valid, fair and reliable and can be re-used. Over the years the bank will continue to grow. Questions will be gradually and carefully developed and periodically replaced to ensure the ongoing relevance and validity of the process. The questions must be "protected" through the examination bank to ensure the examinations accomplish what they are designed to do. British Columbia uses an examination bank. The multi-state bar examinations in the United States, which are used by most state bar examiners, have relied on examination banks for many years to ensure the questions they use are valid and reliable.

Without the bank, the Law Society will continue to be burdened by a system in which dozens of questions are designed at the last minute each year and their reliability and fairness are disputed. Moreover, the burden on instructors of developing new questions for each examination is significant.

The examination design process the Task Force recommends cannot be carved up into pieces with some parts accepted and some rejected. To do that would be a waste of the human and financial resources the process involves.

9. Eight years ago, the Law Society had an examination bank designed by professionals. The process failed. How do we know this will be better?

The examination bank is one piece of an examination model. The examination bank did not fail. Other issues arose that made Convocation abandon the examination marking system.

The previous examination system used *norm referencing* to assess students. The proposed model uses *criterion referencing*.

The norm referencing approach makes pass/fail decisions by evaluating the *relative* performance of candidates. In this system, some candidates will pass or fail at every examination regardless of their demonstrated ability. Standards change from year to year.

Convocation became concerned about the impact of this approach and abandoned it. Convocation was also concerned because the Law Society did not have sufficient support in place to assist students to pass examinations.

The proposed model recommends that criterion referencing be used. The pass standards are directly linked to acceptable professional practice. They take into account the appropriate subject matter as determined by content experts and any other information relevant to setting a valid and fair standard. There is no pre-determined failure rate.

Moreover, there is a strong student support system already in place to assist students. This is already described in the Task Force's final report.

The design process will also include consultation and extensive pilot testing.

10. Under the new model will the failure rate go up? How will the cut-off point be determined?

As discussed above, criterion referencing is based on standards of acceptable professional practice. Content experts will determine the cut-off point. They will also take into account any other pertinent information, such as performance of candidates on previously administered examinations. Moreover, the design process and examination pilot testing will include consultation and pilot testing to ensure the examinations are reliable, valid, fair and defensible. Whether the failure rate goes up will depend upon whether students in higher numbers are unable to meet standards of acceptable professional practice.

Under the Task Force's proposal, even if a student fails, he or she will have three opportunities in any year to write the examinations and will be able to attempt the examinations over three years. The end result is nine (9) potential opportunities to pass each of the barrister and solicitor examinations.

11. Will the examinations be open book or closed book?

This will be determined during the examination design process. There are advantages and disadvantages to either approach. The Task Force has not attempted to design the examination process. Experts will be retained to do this and Convocation will consider examination administration as part of the design proposal.

12. Clarify how students will write the examinations.

They will attend at an approved examination location and write the examination in a supervised setting. Students may under certain circumstances write in locations other than the usual examination setting. This is already done in the current BAC and will continue under the proposed system.
In the future, it might become possible for students to write examinations on-line, should they wish, if reliable tools for examination security and student identification can be developed. Given concerns about security and identity, however, it may be many years before this possibility is seriously considered.

13. Be sure to formulate the examinations in a way that the public understands. What does the general public understand as competence?

If the Task Force's proposed model is approved, the specific competencies a lawyer needs to serve the public effectively will be determined and proposed to Convocation.

These are generally described under the headings of knowledge, skills and attitudes. In the coming months the designers will determine which specific competencies should be addressed at the admission phase of a lawyer's

education. To the general public, competence includes quality service and effective communication, both of which will be part of the admission phase.

Competencies must continue to be developed throughout a lawyer's career. The public must be made aware of the role of post-call education in a lawyer's career.

14. In the discussion of study time for the examinations, what is meant by a "free day"?

Free day means that students may use it as another study day or for whatever they choose.

Miscellaneous

15. Was research done on the efficacy of classroom learning?

To be effective, classroom learning requires a willing audience. While the Task Force did not specifically research the issue, it did consider the impact of falling attendance rates in the BAC. Whatever the effectiveness of classroom learning, it is lost if students choose not to attend, as has increasingly been the case in the BAC. The Task Force accepted this reality as a strong indication that students do not rely on classroom learning during the BAC.

16. Are the written submissions from legal organizations available?

Yes. For copies contact Sophia Sperdakos at 416-947-5209 or by e-mail at ssperdak@lsuc.on.ca.

17. Did you speak with students who went through the course recently?

Recent graduates were invited to comment along with the rest of the profession. In addition, the Law Society established an electronic bulletin board and advised the profession of its existence. Only one person used it.

18. Be sure to have a communications strategy, so the public understands the program is better not just cheaper.

The new program will ensure that newly called lawyers demonstrate competencies necessary to provide effective service to clients. The cost savings are a by-product of a more efficient approach, not the reason for changing the program.

The Law Society's Communication department, in conjunction with the Professional Development and Competence department, will inform the profession and the public about the new program.

19. Will there be measures to determine the impact of the program? To measure how it changes things? For example, will it result in different trends in discipline?

As set out in the answer to question 6 above, the Law Society will evaluate the entire model's effectiveness and regularly obtain participants' feedback. An evaluation mechanism will be part of the design.

20. Should lawyers be entitled to enter private practice without first having worked for someone else?

The Task Force has not considered whether the Law Society should create limited or restricted licenses. The Professional Development and Competence Committee discussed this issue when it was studying possible models to implement the Law Society's competence mandate. It did not recommend such an approach.

One potential implication of denying lawyers the right to open their own practices until another lawyer employs them for a period of years is a reduction in client access to lawyers. This is because individual, rather than corporate, clients often rely upon sole or small firm lawyers, many of whom are self-employed, to address their needs. Newly called lawyers often provide legal services to clients of limited means or on legal aid. If these lawyers cannot work on their own for a period of years certain communities of citizens or areas of the province may have difficulty obtaining legal representation.

There is also the possibility that significant numbers of newly called lawyers could be unemployed if insufficient numbers of practitioners are willing to hire those looking for work.

A great deal of study of this issue would be necessary to determine whether it has any positive impact on competence or merely interferes with the delivery of legal services to certain areas of the province and communities of its citizens.

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It was moved by Mr. Hunter, seconded by Mr. Cherniak that Convocation approve the Task Force's report as amended and the model for bar admission set out at page 54 of the Report at paragraph 154 subject to the removal of the following words:

paragraph 154 a) i."four-week"

a) iii. "10-month"

e) "four-week"

f) "to be a ten-month" program (44 weeks)"

Carried

ROLL-CALL VOTE

Alexander	For	Gotlib	For
Arnup	For	Gottlieb	Against
Backhouse	For	Harris	For
Banack	For	Heintzman	For
Bourque	For	Hunter	For
Campion	For	Krishna	For
Carpenter-Gunn	For	MacKenzie	Against
Caskey	For	Manes	For
Chahabar	For	Millar	For
Cherniak	For	Murray	For
Coffey	For	Pattillo	For
Copeland	For	Pawlitza	For
Curtis	For	Porter	For
Dickson	For	Potter	For
Dray	For	Ross	For
Ducharme	For	St. Lewis	For
Eber	For	Silverstein	Against
Feinstein	For	Simpson	For
Filion	For	Swaye	Against
Finkelstein	For	Symes	For
Finlayson	For	Topp	For
Gold	For	Warkentin	For
		Wright	For

Vote: 41 For, 4 Against

MOTION – APPOINTMENT TO JUDICIAL APPOINTMENTS ADVISORY COMMITTEE

It was moved by Mr. Pattillo, seconded by Ms. Carpenter-Gunn that Todd Ducharme be appointed to the Judicial Appointments Advisory Committee as the Law Society's representative to complete the term of William Trudell, who has resigned.

Carried

CONVOCATION ROSE AT 12:40 P.M.

Confirmed in Convocation this 22nd day of January, 2004

Treasurer