

MINUTES OF SPECIAL CONVOCATION

Friday, 31st May, 1991  
9:30 a.m.

PRESENT:

The Treasurer (James M. Spence, Q.C.), Campbell, Chapnik, Curtis, Elliott, Feinstein, Ferrier, Howie, Kiteley, Lamek, Lamont, Lawrence, McKinnon, Murray, O'Connor, Palmer, Pepper, Peters, Rock, Ruby, Somerville, Thom, Topp, Wardlaw and Yachetti.

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MOTIONS

LEGAL AID RESOLUTION

It was moved by Ms. Kiteley, seconded by Mr. Somerville that the following resolution be adopted.

RESOLUTION OF THE LAW SOCIETY OF UPPER CANADA, DULY  
CONVENED AND HELD ON THE DAY OF  
NINETEEN HUNDRED AND NINETY-ONE (1991)  
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WHEREAS under the terms of a Deed of Collateral Hypothec executed before Joseph Tutino, notary, on the 5th day of November, nineteen hundred and ninety (1990), registered at the Montreal Registry Office under number 4332902, Antonino Zambito and his wife, Paola Zambito, granted a second-ranking hypothec in favour of The Law Society of Upper Canada against the following immovable property.

DESCRIPTION

That certain emplacement fronting on Place Gilles Trottier, in the City of Montreal, Province of Quebec, known and designated on the Official Plan and Book of Reference of the Pariah of Riviere des Prairies as being composed of subdivision TWO THOUSAND FORTY-TWO of lot ONE HUNDRED AND TWENTY-FIVE (125-2042) and subdivision ONE HUNDRED FORTY-FIVE of lot ONE HUNDRED TWENTY-FIVE (125-145) of said cadastre; with the building thereon erected bearing civic number 11797 of said Place Gilles Trottier (the "Property"),

WHEREAS Mr. and Mrs. Zambito wish to refinance their first-ranking mortgage with the National Bank of Canada and increase the existing loan from \$82,000.00 to \$98,000.00,

WHEREAS the said National Bank of Canada has agreed to the said refinancing on condition that The Law Society of Upper Canada intervene in the new Deed of Loan and grant the said National Bank of Canada priority of rank.

RESOLVED:

THAT The Law Society of Upper Canada, acting in its capacity as the Administrator of The Legal Aid Plan, intervene in the Deed of Loan by the National Bank of Canada in favour of Antonino Zambito and his wife, Paola Zambito, to grant the National Bank of Canada priority of hypothec and of all other rights, including those resulting from the Giving-in payment Clause, for the full amount of the new loan, namely the sum of NINETY-EIGHT THOUSAND DOLLARS (\$98,000.00), plus all interest, costs and accessories

31st May, 1991

thereto, The Law Society of Upper Canada thereby ceding to the National Bank of Canada priority of claim for all purposes. Therefore, the National Bank of Canada shall have preference and priority, in any order of collocation of the price of sale of the Property, of the indemnity resulting from any fire insurance, or resulting from the exercise of any clause of assignment of rentals, as the case may be, as well as in the exercise by The Law Society of Upper Canada or the National Bank of Canada of the right to become owner of the property in virtue of the Giving-in-payment Clause, the whole as if the new Deed of Loan had been registered before the above-mentioned Deed of Collateral Hypothec creating the rights of The Law Society of Upper Canada.

THAT Richard Turner, the special representative, be and is hereby authorized and empowered to sign and execute for and on behalf of The Law Society of Upper Canada the notarial Deed of Loan necessary to give effect to the foregoing, prepared by Joseph Tutino, notary, submitted to the meeting and approved thereat and the execution of the said Deed of Loan by the said representative shall constitute conclusive proof that the Deed so signed and executed is the Deed authorized by this Resolution, The Law Society of Upper Canada ratifying and confirming and agreeing to ratify and confirm, on demand, all and whatsoever its said representative shall lawfully do or cause to be done by virtue hereof.

THE LAW SOCIETY OF UPPER  
CANADA

day of  
, 1991

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Secretary

Carried

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LAW SOCIETY MEDAL SUBCOMMITTEE

It was moved by Mr. Lamek, seconded by Mr. Topp THAT Pat Peters be appointed to the Law Society Medal Subcommittee.

Carried

ALTERNATE DISPUTE RESOLUTION SUBCOMMITTEE

It was moved by Mr. Yachetti, seconded by Mr. Thom THAT Allan Lawrence be added as a member of the Alternate Dispute Resolution Subcommittee.

Carried

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SPECIAL COMMITTEE ON REFORMS IMPLEMENTATION

Mr. O'Connor presented the Report of the Special Committee on Reforms Implementation of its meetings on November 1st, 13th, 21st, December 12th, 1990, January 9th and 23rd, February 13th, March 6th, 27th and April 7th, 1991.

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The SPECIAL COMMITTEE ON REFORMS IMPLEMENTATION begs leave to report:

Your Committee was struck by Convocation on September 7, 1990 to monitor and make recommendations on the implementation of Convocation's reports concerning reforms to the discipline, complaints and standards processes.

The following are the members of the Committee: Dennis R. O'Connor (Chair), June Callwood, Paul S. A. Lamek, Colin D. McKinnon, Allan M. Rock, Robert C. Topp and Roger D. Yachetti.

Your Committee is fortunate to have obtained the services of Professor Marilyn Pilkington of Osgoode Hall Law School as a consultant. Professor Pilkington has been assisting the Committee in the formulation of a detailed proposal for the implementation of various portions of the Special Committee on Discipline Procedures Report and advising on the most appropriate structure for integrating the Discipline, Standards and Complaints processes.

Your Committee has met on following dates: November 1, November 13, November 21 and December 12, 1990; January 9, 23, February 13, March 6, 27 and April 7, 1991 and submits this interim report to Convocation on its work.

Appendices

The following materials are appended to this report:

1. Appendix A - Summary of the Recommendations of the Special Committee on Discipline Procedures as approved by Convocation (pages 1 - 11)
2. Appendix B - Summary of the Recommendations of the Special Committee on Complaints Procedures as approved by Convocation. (pages 1 to 4)

Preliminary Matters

Your Committee identified the following preliminary matters to be dealt with before the Committee could proceed further:

1. Should the participation of lay persons in the discipline process be restricted to lay benchers in any or all cases. (Section I of this Report)
2. The recommendations in the Dispositions Section of the Report of the Special Committee on Discipline Procedures were approved in principle by Convocation. Your Committee was asked to review those recommendations in detail in light of the concerns raised during the debate in Convocation and report to Convocation. (Section VII of this Report)
3. Similarly, the recommendations in the Incapacity Section of the Report were approved in principle by Convocation. Benchers were requested to notify your Committee of their specific concerns regarding the procedure set out in the section in order that the Committee might consider them and if necessary, make recommendations to Convocation. (Section IX of this Report)

I. LAY PARTICIPATION

On the issue of lay participation in the discipline process your Committee formulated the following proposal:

A new category of lay benchers called "Discipline Lay Benchers" should be created. Discipline Lay Benchers would be eligible to fulfill all the functions assigned to lay persons in the Complaints and Discipline processes, namely:

- (i) to sit as a lay member of the Discipline Complaints Authorization Committee;
- (ii) to sit as a lay member of a Discipline Hearing Panel; and
- (iii) to sit as a lay member of the Designated Appeal Panel of Convocation.

Your Committee recommends that Discipline Lay Benchers be appointed by the Lieutenant Governor in Council in the same manner as lay benchers are now appointed.

Note: Motion, see page 88

Your Committee reviewed the functions which Discipline Lay Benchers would fulfill with particular attention to the time commitment involved, and recommends that four (4) Discipline Lay Benchers be appointed to serve in addition to the four (4) lay benchers now serving.

Further, in your Committee's view it is extremely important that the nature and extent of the commitment (especially the time element) be fully explained to prospective appointees before they accept the appointment.

Your Committee felt that it did not have the mandate to increase lay participation in general policy matters, hence the recommendation to create a new class of lay benchers instead of merely increasing the number of lay benchers.

Your Committee envisages, therefore, that Discipline Lay Benchers will not participate in the work of the Standing Committees of Convocation nor in the business of Regular Convocation.

Note: Motion, see page 88

II. PARTICIPATION OF EX-OFFICIO BENCHERS IN DISCIPLINE MATTERS

A : EX OFFICIO BENCHERS: TERMINOLOGY AND VOTING RIGHTS

The term "ex officio bencher" can be misleading. It is used in the Law Society Act to describe five different categories of benchers.

1. Federal Law Officers of the Crown

The Minister of Justice and Attorney General for Canada, and the Solicitor General for Canada, are benchers ex officio: Act, s-s. 12(1), paras. 1 & 2. They have no vote, either in Convocation or in committee: Act, s-ss. 12(2) and 12(3).

2. Attorney General for Ontario

The Attorney General for Ontario, for the time being, is a bencher ex officio: Act, s-s. 12(1), para. 3.

The Attorney General may vote in Convocation and in committees: Act, s-ss. 12(2) and 12(3).

3. Former Attorneys General for Ontario

Every person who has held the office of Attorney General for Ontario is defined as a bencher ex officio: Act, s-s. 12(1), para.4. The voting rights of former Attorneys General for Ontario were altered by S.O. 1990, c. 8, s-s. 2(2) which came into force on June 28, 1990. Formerly, they were entitled to vote in Convocation and in a committee. Now, under para. 2 of s-s. 12(3), they may vote only in committees other than committees appointed for disciplinary purposes. They may not vote in Convocation and they may not vote in any of the committees appointed under sections 33, 34, 35, 37, or 38 (the discipline and incapacity provisions).

4. Life Benchers

This term is not used in the Act or in the Regulation although it does appear at least once in the Rules made under s-s. 62(1) of the Act (see subrule 13(4)).

Every person who was elected at three quinquennial elections and served as a bencher for fifteen years, and every person who is elected at four elections and who serves as a bencher for sixteen years, is a bencher ex officio by virtue of paragraphs 7 and 9 of s-s. 12(1) of the Act.

Prior to June 28, 1990, Life Benchers were not entitled to vote either in Convocation or in a committee. Since s-s. 2(2) of S.O. 1990, c. 8, came into force on June 28, 1990, they have been entitled to vote in committees other than committees appointed for disciplinary purposes. They may not vote in Convocation and they may not vote in any of the committees appointed under sections 33, 34, 35, 37, or 38 (the discipline and incapacity provisions).

At its meeting on February 15, 1991, Convocation resolved to recommend that the Law Society Act be amended to provide that benchers be entitled to ex officio status when they have been elected at three quadrennial elections and have served twelve years. (Convocation resolved not to change the voting rights of Life Benchers.)

5. The Treasurer for the time being, and former Treasurers

Every member who has been or is elected to the office of Treasurer is defined as an ex officio bencher with all the rights and privileges of an elected bencher: Act, s. 14.

Since Treasurers and former Treasurers have all the rights and privileges of elected benchers, they may vote in Convocation and in all committees of which they are members.

B. CATEGORIES OF EX OFFICIO BENCHER TO BE  
CONSIDERED IN THIS REPORT

For the purposes of this report, only the following categories of ex officio bencher were considered:

1. Former Treasurers.
2. Former Attorneys General for Ontario.
3. Life Benchers.

The Committee examined the composition of three of the committees or panels recommended in the Report of the Special Committee on Discipline Procedures (September 7, 1990) -- the Yachetti Report and considered where legislative amendments would be needed if any of these categories of ex officio bencher were to be eligible for membership on the committee or panel in question.

C. COMPOSITION OF COMMITTEES AND PANELS

1. DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE

The Yachetti Report (pages 7-11) recommended the creation of a Discipline Complaints Authorization Committee. Membership on the Committee was to be for a one-year term. The Report recommended that the Committee comprise:

One bencher;  
One lay-bencher; and  
One non-bencher lawyer.

It appears to be implicit in the recommendation that the "one bencher" be an elected bencher.

Convocation adopted the recommendation.

The Special Committee is of the view that the "one bencher" should be an elected bencher. Since, by s. 14 of the Law Society Act, former Treasurers have "all the rights and privileges of an elected bencher" it may avoid ambiguity to specify that they are not entitled to serve on the Discipline Complaints Authorization Committee. The Treasurer for the time being also has "all the rights and privileges of an elected bencher" but the Special Committee does not think it appropriate to specify that the Treasurer should not serve on the Authorization Committee.

THE SPECIAL COMMITTEE RECOMMENDS that the Discipline Complaints Authorization Committee comprise:

One elected bencher;  
  
One lay-bencher or one Discipline Lay Bencher; and  
  
One non-bencher lawyer.

THE SPECIAL COMMITTEE FURTHER RECOMMENDS that, notwithstanding s.14 of the Law Society Act, former Treasurers not be entitled to serve on the Discipline Complaints Authorization Committee.

Note: Motion, see page 89

The effect of these recommendations is that no ex officio bencher (other than the Treasurer) would be entitled to serve on the Discipline Complaints Authorization Committee.

In order to implement this change, it will be necessary to amend s-s. 9(2) of Regulation 573.

It may also be necessary to amend s. 14 of the Law Society Act because it is doubtful whether the rights of former Treasurers under s. 14 of the act can be restricted by regulation. Subordinate legislation which purports to change the statute under which it is made, is invalid.

2. DISCIPLINE HEARINGS PANEL

Currently, under s-s. 9(3) of Regulation 573, a panel of the Discipline Committee must comprise at least three members of the Discipline Committee who are not ex officio benchers. (The Society interprets the words "ex officio benchers" in s-s. 9(3) as not applying to former Treasurers. The argument is that, by s. 14 of the Act, a former Treasurer is declared to have "all the rights and privileges of an elected bencher.")

The Yachetti Report (pages 15-18) recommended that each Discipline Hearing Panel comprise:

Two elected benchers; and

One lay-person, bencher or otherwise.

Convocation adopted the recommendation.

THE SPECIAL COMMITTEE RECOMMENDS that each Discipline Hearing Panel be composed of:

One elected bencher;

One person who is either an elected bencher or an ex officio bencher under s. 14 of the Law Society Act (i.e. the Treasurer and former Treasurers); and

One lay-bencher or one Discipline Lay Bencher.

Note: Motion, see page 89

In order to implement this change, it will be necessary to amend s-ss. 9(3), 9(4), 9(4a) and 9(8) of Regulation 573.

### 3. APPEAL PANEL

Under current provisions, the nearest equivalent to the proposed Appeal Panel is a meeting of Convocation under ss. 34, 35, 38, or 39 of the Act.

The Yachetti Report (pages 24-33) recommended the establishment of a Designated Appeal Panel of Convocation. Membership on the Appeal Panel was to be for a one-year term. The Report recommended that the Appeal Panel be composed of fifteen benchers who were to include at least two lay-benchers: a quorum was to be any nine members of the Appeal Panel.

In adopting the recommendation, Convocation amended the membership provisions. As the proposed change now stands, the Appeal Panel will be composed of seven benchers. The quorum is to be five benchers. At least one lay-bencher is to sit on the panel at all times.

The wording of the recommendation, as adopted by Convocation, would allow former Treasurers, former Attorneys General and Life Benchers, to be members of the Appeal Panel. The Special Committee is of the view that Life Benchers and former Attorneys General should not sit on the Appeal Panel. It is further of the view that the number of former Treasurers on the Appeal Panel should not exceed one.

THE SPECIAL COMMITTEE RECOMMENDS that:

- The Appeal Panel be composed of seven benchers;
- That at least one of the seven benchers be a lay-bencher or a Discipline Lay Bencher;
- That ex officio benchers, other than those appointed under s. 14 of the Law Society Act, not be entitled to serve on the Appeal Panel;
- That no more than one of the seven benchers be a person who is a former Treasurer and who is an ex officio bencher under s. 14 of the Law Society Act;

- That a quorum of the Appeal Panel be five benchers of whom one shall be a lay-bencher or a Discipline Lay Bencher.

Note: Amendment, see page 89

Amended Motion, see page 89

In order to implement this change, it will be necessary to amend ss. 34, 35, 38, and 39 of the Act. It will also be necessary to amend s-ss. 9(6) and 9(7) of Regulation 573.

### III. DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE

Your Committee reviewed this section of the Yachetti report with particular attention to the recommendation dealing with the requirement to provide reasons. The text of that recommendation was:

"Reasons should be given by the Discipline Complaints Authorization Committee in all instances where it refuses to authorize a formal complaint, or refuses the formal complaint sought but substitutes a lesser formal complaint. Care should be taken in the reasons not to prejudice a fair hearing of any formal complaint."

After some discussion your Committee concluded that reasons ought to be required only where no complaint is authorized. This will avoid any difficulty either in differentiating between less serious and more serious complaints where a different complaint is authorized from that requested or in drafting reasons which do not prejudice a fair hearing of any formal complaint.

Your Committee also considered how many members should be appointed to the Discipline Complaints Authorization Committee and whether or not the decisions made by it should be unanimous. Your Committee was mindful of the need to balance a desire for consistency which would favour appointing fewer members with the ability to assemble a quorum on short notice which would favour appointing more members. Your Committee concluded that an appropriate balance would be achieved by appointing three members together with an alternate for each.

Finally, your Committee was of the view that decisions of the Discipline Complaints Authorization Committee need not be unanimous but rather could be made by a majority of the quorum.

Note: Motion, see page 89

### IV. PUBLICATION OF COMPLAINTS

The recommendations of the Yachetti Committee in this regard were, inter alia, that information regarding authorized discipline complaints should be made available to the public upon request (including a copy of the authorized discipline complaint) at any stage after authorization.

Your Committee considered two questions:

1. whether this policy ought to be implemented before the Discipline Complaints Authorization Committee had been put in place, and,
2. whether the appropriate time for releasing information concerning authorized discipline complaints is after authorization.

With respect to the first question it was concluded that there ought not to be any delay in the implementation of this policy and accordingly your Committee recommends that it be implemented immediately.



On the second question, it was felt that information ought not to be released until after the authorized discipline complaint has been served upon the solicitor and filed together with proof of service in the office of the Secretary and your Committee so recommends.

Note: Motions, see page 89

V. PRE-HEARING CONFERENCES

In reviewing the Special Committee's report your Committee reached the conclusion that some clarification was necessary on the subject of the purpose and format of pre-hearing conferences.

The recommendation in the Special Committee's report was as follows:

"A pre-hearing conference shall be held at the request of either party or at the direction of the Chair or Vice-Chair of Discipline".

Your Committee recommends that in addition to this recommendation the following rules should apply to the conduct of pre-hearing conferences.

- (i) A pre-hearing conference may be held for the purpose of considering:
  - (a) the possibility of settlement of any or all of the issues in the proceeding;
  - (b) the simplification of the issues;
  - (c) the possibility of obtaining admissions that may facilitate the hearing;
  - (d) the estimated duration of the hearing;
  - (e) any particular requirements in connection with the scheduling of the hearing;
  - (f) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.
- (ii) A pre-hearing conference shall be held before a single elected bench.
- (iii) A bench who conducts a pre-hearing conference in respect of a particular matter shall not participate at the discipline hearing of such matter or any appeal arising therefrom.

Note: Amendment, see page 90  
Motion, see page 90

VI. SINGLE MEMBER PANELS

There are a number of instances contemplated by the Report of the Special Committee on Discipline Procedures where a function will be fulfilled by a single bench, eg. pre-hearing conferences, applications for change of counsel, and hearings with respect to certain offences. Your Committee is of the view that these situations require an individual who is legally trained and therefore recommends that in every such case, the single bench so sitting should be an elected bench.

Note: Motion, see page 90

## VII. DISPOSITIONS

The Dispositions section of the Report was considered by your Committee with particular attention being given to Part B, entitled Mandatory Orders. Given the remedial nature of the provisions outlined in Part B, your Committee concluded that they ought not be characterized as mandatory orders. Rather, it is recommended that these provisions be made terms or conditions of a member's right to practise continuing or being restored, as the case may be.

Note: Motions, see page 90

The Dispositions section of the Special Committee report also contained the following recommendation:

"Your Committee recommends that a solicitor involved in a disciplinary proceeding should not be asked to waive a right of appeal. This practice of requesting a waiver is currently in place with regard to solicitors who are reprimanded in committee; however, your Committee feels that the practice is unfair and unnecessary".

The Reforms Implementation Committee reviewed this recommendation and felt that a different approach would be more appropriate. Convocation should note that this represents a departure from the Yachetti Committee's report. Your Committee's proposal is:

(i) Where a Discipline Hearing Panel decides that an admonition or reprimand, with or without any other penalty, term or condition being imposed, is the appropriate penalty, the admonition or reprimand will not be administered until;

(a) the appeal period has expired and no notice of appeal has been filed or;

(b) a waiver of the right of appeal has been executed by all parties;

whichever first occurs.

(ii) In the event that a notice of appeal is filed, the imposition of the admonition or reprimand shall be stayed until the conclusion of all proceedings arising from such appeal;

(iii) An admonition or reprimand may be administered by any one member of the Discipline Hearing Panel or Designated Appeal Panel, as the case may be.

Note: Motion, see page 90  
Amended Motion, see page 90

## VIII. APPEAL PANEL

In addition to the recommendations made with respect to the participation of lay persons and ex-officio benchers on the appeal panel which are referred to earlier in this report, your Committee also considered how best to achieve consistency in the panel's decisions. Two recommendations are made in this regard, namely;

(i) that members of the appeal panel be appointed for staggered two-year terms to ensure some continuity in the membership;

and

(ii) that all decisions, together with reasons, be collected, bound and made available to the profession.

Note: Motion, see page 90

IX. INCAPACITY

The Yachetti Committee's recommendations concerning Incapacity were adopted in principle on the understanding that the Reform Implementation Committee would consider any concerns raised and, if necessary, report to Convocation. The Reform Implementation Committee reported on November 23, 1990 that further study was required of this matter.

The Committee submits the following proposal to Convocation. It is predicated on the assumption that the Law Society's interest in a member's capacity is limited to protecting the member's clients and the public, and that intervention on the basis of incapacity should be narrowly designed to achieve those purposes.

Definition of Incapacity

1. A member is incapacitated from practising law of where for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness or other infirmity, the member has become incapable of meeting obligations as a member of the Society or of devoting the time and attention to, and providing the quality of service required in the conduct of the member's law practice. Where a member has been found pursuant to any act to be mentally incompetent or mentally ill, the finding shall constitute prima facie evidence of the member's incapacity.

Investigation and appointment of panel

2. (1) The Chair or Vice-Chair of the Professional Standards Committee, if reasonably satisfied that a member's capacity to practise law is in issue,

(a) shall direct that an investigation be conducted into the member's capacity to practise law and that a report of the results of the investigation be submitted in writing; or

(b) if reasonably satisfied

(i) that no further investigation is required or

(ii) that the case is one of urgency and that the delay required for further investigation would involve substantial risk to the member's clients or to the public, shall forthwith direct that a panel of three benchers be appointed to conduct a hearing into the member's capacity to practise law and shall prepare a statement in writing of the reasons for so doing; and

may make such other direction incidental thereto as is appropriate in all the circumstances.

(2) Where, upon receipt of the report prepared in accordance with paragraph 2(1)(a), the Chair or Vice-Chair of the Professional Standards Committee remains reasonably satisfied that the member's capacity to practise law is in issue, the Chair or Vice-Chair shall direct that a panel of three benchers be appointed to conduct a hearing into the member's capacity to practise law.

Notice

3. (1) The Secretary shall forthwith notify the member affected of the appointment of a panel of benchers pursuant to s.2, and shall give not less than seven days' notice of the date set for hearing. If a committee has been appointed for the member, notice shall also be served upon the committee. The notice shall be accompanied by a copy of the report submitted pursuant to paragraph 2(1)(a) or a statement of the grounds upon which a panel of benchers has been appointed pursuant to paragraph 2(1)(b).

(2) If the panel is reasonably satisfied that the case is one of urgency and that delay would involve substantial risk to the member's clients or to the public, it may, on motion by the Society, abridge the notice period provided for in subsection (1).

In Camera  
or public  
hearing

4. (1) Notwithstanding section 9 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, a hearing held with respect to the capacity of the member to practise law shall be held in camera, but if the member requests that the hearing be public, it shall be open to the public, except as provided in subsection (2).

(2) Where the panel is of the opinion that intimate financial or personal matters pertaining to the member's clients may be disclosed at the hearing, and that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of disclosure, the panel may hold the hearing concerning any such matter in camera.

Note: Motion, see page 91

Member  
absent

5. If the member does not appear at the time and place appointed for hearing, but proof of notice in accordance with section \*\* is filed, the panel may proceed to hear evidence of the member's capacity to practise law.

Appointment  
of  
counsel

6. In any appropriate case, if the panel of benchers is reasonably satisfied that the member is unable, by reason of incapacity or otherwise, to instruct counsel, it may appoint another member to represent the interests of the member affected.

Interim  
Suspension

7. (1) Where the panel of benchers has determined that there is a prima facie case that the member is incapable of practising law and is of the opinion that the case is one of urgency in that the member poses a substantial risk to the interests of the member's clients or the public as it might be affected by the member's practice, it may make an interim order suspending the member from the Law Society, pending final determination of the issue of incapacity. An application to remove or vary the terms of the interim suspension based on new evidence may be made at any time so that the member is restricted as little as is necessary to protect clients or the public.

(2) Where the panel of benchers, acting pursuant to s. 5, has proceeded in the absence of the member and has determined that there is a prima facie case that the member is incapable of practising law, it may make an interim order suspending the member from the Law Society. Such an interim order will become final after the expiration of 30 days following notice to the member, unless the member moves before the panel within that time period to have the interim suspension set aside and the issue of incapacity determined, in which case the provisions of subsection (1) apply.

Medical  
Examination

8. (1) Where a panel of benchers appointed pursuant to section 2 determines that there is a prima facie case that the member is incapable of practising law, it may order that the member undergo a physical or mental examination by one or more medical doctors or psychologists, directed to assessing whether the member is incapacitated and, if so, the extent of the incapacity and the prognosis for recovery.

(2) In this section "medical doctor or psychologist" means a person licensed to practise medicine in Ontario or any other jurisdiction, a psychologist registered under the Psychologists Registration Act or a person certified or registered as a psychologist by another jurisdiction.

(3) The panel may, on motion, order further physical or mental examinations.

(4) Where an order is made under this section, the member examined shall answer the questions of the examining medical doctor or psychologist relevant to the examination and the answers given are admissible in evidence before the panel of benchers.

(5) Where the member declines to undergo a medical examination ordered pursuant to subsection (1), and the panel is reasonably satisfied that the member poses a risk to his or her clients or to the public if the member engages in the practice of law, the panel may suspend the member from the Law Society.

Finding

9. At the conclusion of a hearing, the panel of benchers appointed pursuant to section 2 shall make a finding either

(a) that the member is not incapacitated from practising law, or

(b) that the member is or has been incapacitated from practising law, which may include a finding that the member is subject to a continuing condition which, but for compliance with a continuing course of treatment, would incapacitate the member from practising law,

and shall provide reasons for its finding in writing.

Order

10. Where a panel of benchers appointed pursuant to section 2 has found that the member is or has been incapacitated from practising law, it may by order, as it considers necessary in order to protect the member's clients and the public as it might be affected by the member's practice,

(a) suspend the member's rights and privileges, until and unless the member is reinstated pursuant to section 14, or

(b) limit the member's rights and privileges by prohibiting the member from practising law except in accordance with terms and conditions to which the member consents, which may include, but are not restricted to, the following:

(i) that the member restrict the nature and/or the scope of the member's practice;

(ii) that the member practise only under the supervision of another member appointed by the panel of benchers;

(iii) that the member undergo medical treatment, including testing and treatment for drug or alcohol abuse;

(iv) that the member undergo psychiatric treatment or psychological testing and/or counselling;

(v) that the member participate in continuing legal education programs;

(vi) that the member participate in programs of the Professional Standards Committee or the Practice Advisory Service;

(vii) that the member report as directed on compliance with any term or condition by which the member's practice is limited and authorize others involved with the member's treatment or the conduct of the member's practice to report thereon as directed; and

(vi) any other term or condition that to the panel of benchers seems just and appropriate,

and shall provide reasons for its order in writing.

Note: Motion, see page 91

Non-compliance

11. Where it is alleged that a member has failed to comply with an order made pursuant to paragraph (b) of section 10, the Chair or Vice-Chair of the Professional Standards Committee shall direct that a panel of three benchers be appointed to conduct a hearing into the matter. The provisions of sections 3 to 8 apply, mutatis mutandis, to such a hearing. If, after holding a hearing, the panel of benchers finds that the member has failed to comply with an order made pursuant to paragraph (b) of section 10, the panel may modify the terms of the order or suspend the member in accordance with paragraph (a) of section 10.

Note: Amendments, see page 91

12. The fact that a member is the subject of an inquiry pursuant to this part shall not be made public by the Society, except to the extent provided in section 4. Where a hearing into a member's capacity has been open to the public, the findings, order and reasons of the panel shall be made public. Where a hearing has been held in camera, and a member's rights and privileges have been suspended or limited, the Society shall make public the order of the panel of benchers, but not the findings or reasons with respect thereto.

Appointment  
trustee

13. Where a member's rights and privileges are of suspended pursuant to section 7, subsection 8(5), section 10 or section 11 the Society may apply for the appointment of a Trustee pursuant to s.\*\*.

Reinstatement

14. Where a member's rights and privileges have been suspended or limited pursuant to section 7, subsection 8(5), section 10, or section 11, an application to remove or vary the suspension or limitation based on new evidence may be made at any time.

Appeal

15. The finding of a panel of benchers made pursuant to section 9 or the order of a panel of benchers made pursuant to subsection 7(1), subsection 8(5), section 10, section 11, or section 14 may be appealed by the member or the Society to the designated appeal panel of Convocation. The provisions of sections 4 and 12 apply to the hearing on appeal.

Idem

16. The decision of the designated appeal panel of Convocation is final and is not subject to further appeal.

Referral  
from  
Discipline  
Committee

17. Where a discipline hearing panel seized of a complaint against a member is reasonably satisfied that the capacity of the member to practise law is in issue, it may refer the matter to the Chair or Vice-Chair of the Professional Standards Committee, and may adjourn the discipline hearing pending a determination in accordance with the provisions of this part.

Note: Amended Motion, see page 91

X. INVESTIGATIVE POWERS  
CONFIDENTIALITY AND DISCLOSURE

The Special Committee on Reforms Implementation, while not specifically charged with the responsibility for making recommendations with respect to the Law Society's investigative powers, considered that it would be both appropriate and desirable to do so at this time. In its discussions, your Committee focused on the following objectives:

1. to comply with the guarantees of sections 7 and 8 of Canadian Charter of Rights and Freedoms;
2. to protect privileged communications and the confidentiality of the solicitor-client relationship; and

3. to enable effective investigation of the various types of disciplinary matters, including
- (i) failure to meet accounting and reporting obligations of the member's practice,
  - (ii) failure to meet standards of professional conduct, including standards of professional competence,
  - (iii) failure to otherwise comply with the Act, regulations and rules, and
  - (iv) conduct unbecoming a barrister and solicitor.

Your Committee formulated the following draft provisions for Convocation's consideration:

- Definitions (1) For the purposes of this section,
- (a) "document" includes a letter, book of account, invoice, statement, sound recording, videotape, film, photograph, chart, map, plan, survey, and information recorded or stored by computer or by means of any other device;
  - (b) a document shall be deemed to be in a person's possession or power if that person is entitled to obtain the original document or a copy of it.
- Investigation (2) Where information comes to the notice of the Society that indicates that a member, or a former member or a student may be guilty of professional misconduct, conduct unbecoming a barrister and solicitor, or failure to comply with a provision of this Act or the regulations or rules made under it, the Secretary may by order appoint one or more persons to make an investigation to ascertain whether the alleged conduct has occurred, and the person appointed shall report the result of the investigation to the Secretary.
- Note: Amendments, see page 91
- Production of Documents (3) Subject to subsection (11), the Secretary may by registered letter or by a demand served personally, require from a person under investigation pursuant to this section production, or production on oath, of any documents relating to the matters under investigation that are within the person's possession or power, within such reasonable time as may be stipulated therein.
- Powers of Investigator (4) The person appointed to make the investigation may inquire into and examine the practice of the member or student member relating to the matters under investigation and may for that purpose, upon production of the appointment, enter between the hours of 9:00 in the morning and 5:00 in the afternoon the business premises of such person. Subject to subsection (11), the person under investigation, or an individual acting on the person's behalf, shall produce forthwith all documents, including documents from clients' files, relating to the matters under investigation and provide such explanations of the matters under investigation as the investigator may reasonably require. The investigator may make copies of any documents inspected.



Spot Audit

(5) (a) The Secretary may on a random basis require an investigation and audit to be made by a designated person or persons of the books and accounts of any member for the purpose of ascertaining and reporting whether requirements of the regulations concerning books, records and accounts have been and are being complied with by such member.

(b) Subject to subsection (7), the member shall produce forthwith, for the purposes of the investigation referred to in paragraph (a), all documents relating to the said requirements, including such documents in clients' files as are necessary to understand or substantiate entries in books and records, and provide such explanations as may reasonably be required by the investigator to understand the nature and effect of all such documents and the transactions recorded therein.

(c) The person or persons designated to conduct the investigation pursuant to paragraph (a) may make copies of any materials inspected pursuant to paragraph (b).

(d) A list of the investigations and audits conducted under this subsection shall be reported to the Treasurer each month.

Dispute of  
relevance

(6) In any case where a person objects to produce documents or classes of documents or to provide explanations as required in subsections (3), (4) or (5) on the grounds that they do not relate to the matters under investigation, the Secretary or the person making the objection may apply to the Chair or Vice-Chair of the Discipline Committee for a determination of their relevance. Where the documents are sought pursuant to subsection (4) or (5), they shall be sealed without inspection and placed in the custody of any member acceptable to both the person under investigation and the Secretary or, in the alternative, the custody of the local registrar pending application to the Chair or Vice-Chair of the Discipline Committee.

Note: Amendment, see page 91

Search and  
Seizure

(7) (a) Where the Chair or Vice-Chair of the Discipline Committee has reasonable grounds to believe that

(i) a member, former member or student member has contravened this Act or a regulation or rule made under it or is guilty of professional misconduct, and

(ii) either that

a. the person under investigation will not, cannot or has not complied with a request to produce documents pursuant to subs. (3), or

b. the circumstances are urgent, or

c. utilization of the procedures pursuant to subsection (3) or (4) or (5) would be ineffective,

the Chair or Vice-Chair may apply to a judge of the Ontario Court (General Division) for an order that

(iii) the books and accounts of the member be audited and/or

(iv) the files or other records of or relating to the member or student member insofar as they are relevant to the conduct alleged to come within clause (i) be seized from the person or persons named in the order.

(b) An application under paragraph (a) shall be on notice to the person under investigation unless urgency or other compelling grounds requires that the application be made ex parte.

(c) Where the application under paragraph (a) is in relation to the conduct of a student member, the order may be made in respect of the books, accounts, files or other records of the member or firm to whom the student is articulated.

(d) In an application under paragraph (a), the person making the application shall state on oath,

(i) the grounds for believing the matter referred to in paragraph (a), clause (i), and

(ii) where the application is for an order under clause (iv), the grounds for believing that the seizure will produce evidence relevant to a matter referred to in paragraph (i), and

(iii) where the application is made ex parte pursuant to paragraph (b), the grounds for believing that urgency or other compelling grounds require it.

(e) In an order under paragraph (a), the court may

(i) designate the person who will conduct the audit, inspection or seizure and authorize the person to conduct it, with the assistance of such police officer or officers as the person calls upon, to enter and search, if necessary by force, the premises designated;

(ii) designate the building, dwelling, receptacle or place where the audit or seizure will take place;

(iii) specify the hours during which the entry and search may take place, in the absence of which the entry and search shall be made between sunrise and sunset;

(iii) give any other directions that are necessary to carry out the audit or seizure, and protect the interests of third persons.

(f) The provisions of subsection (11) apply to materials and documents inspected or seized pursuant to this section.

Not  
Compellable  
Hearing

(8) A person who is the subject of a discipline hearing panel is competent to testify before the discipline hearing but is not compellable. No evidence of explanations provided by the person pursuant to subsections (4) or (5) shall be admissible before the panel.

Note: Amendment, see page 92

Production  
of  
Documents  
at  
Hearing

(9) A discipline hearing panel may order the person who is the subject of the discipline hearing to produce all files and records that are in the person's possession or power that are relevant to the matters alleged in the complaint.

Self-  
incrimina-  
tion

(10) (a) A person whose conduct is being investigated shall not be excused from producing documents pursuant to subsections (3), (4), (5) or (9) or providing explanations pursuant to subsections (4) or (5), on the ground that the documents or explanations required may tend to criminate the person, or may tend to establish the person's liability to civil proceedings, or may tend to subject the person to any proceeding or penalty, but explanations so required or evidence derived therefrom

(i) shall not be communicated to other public authorities, and

(ii) shall not be used or receivable against such person in any trial or other proceedings against the person thereafter taking place.

Note: Amendment, see page 92

(b) A witness at a hearing before a discipline hearing panel shall be deemed to have objected to answer any question asked upon the ground that the answer may tend to criminate the witness or may tend to establish the witness's liability to civil proceedings, or may tend to subject the witness to any proceeding or penalty, and no answer given by a witness at a hearing before a discipline hearing panel shall be used or be receivable in evidence against the witness in any trial or other proceedings against the witness thereafter taking place, other than a prosecution for perjury or for the giving of contradictory evidence.

Privilege

(11) (a) Where a person is obliged to produce documents pursuant to subsections (3), (4), (5), or (9), or documents are seized pursuant to subsection (6), and the person objects to the production or seizure of a document on the grounds that the document is privileged, the document shall be sealed without inspection and placed into the custody of any member acceptable to both the person whose conduct is being investigated or who is the subject of a discipline hearing, as the case may be, and the Secretary, or, in the alternative, the custody of the local registrar of the Ontario Court (General Division) at Toronto.

(b) Where a document is sealed under paragraph (a), the member shall provide the Secretary with the name, address and telephone numbers of the client or former client whose document it is.

Note: Amendment, see page 92

(c) The Secretary shall forthwith notify the client or former client that the document in question may be material to the investigation, or the hearing, as the case may be, that the client is entitled to inspect the document, that the client may consent to the use of the document in disciplinary proceedings in an edited or unedited form.

(d) On notice to the person whose conduct is being investigated or is the subject of a discipline hearing, as the case may be, and the client or former client on whose behalf privilege is asserted, the Secretary may apply to a judge of the Ontario Court (General Division) who may inspect a document for which privilege is claimed and determine the validity of the claim.

(e) The person having custody of a document sealed under paragraph (a) shall return the document unless the Secretary delivers to the person within thirty days.

(i) the written consent of the client or former client that the document be released to the Law Society; or

(ii) an order pursuant to paragraph (d) that the document is not privileged; or

(iii) where the client or former client cannot be located, an order of a Master of the Ontario Court (General Division) extending the time.

Note: Amendment, see page 92

(f) The fact that an otherwise privileged document or communication has been disclosed in discipline proceedings does not vitiate its privilege for any other purpose, nor constitute a waiver of privilege.

(g) In order to maintain the confidentiality of a privileged document or communication, a discipline hearing panel may hold part of a hearing in camera.

Note: Amended Motion, see page 92

Con-  
fidentiality (12) (a) The Society, its employees, agents and representatives are under a duty to protect the confidentiality of client affairs disclosed to the Society pursuant to this Act and the regulations and rules under it, except to the extent that such disclosure is required for the purpose of enforcing provisions of the Act, regulations and rules, or is authorized pursuant to paragraph (b).

Note: Amended Motion, see page 92

Disclosure to  
Public  
Authorities (b) Subject to paragraphs (10)(a) and (11)(f), the Chair or Vice-Chair of the Discipline Committee may apply to a judge of the Ontario Court (General Division) for an order authorizing the Chair or Vice-Chair to disclose to specified public authorities evidence obtained by the Society in the course of any investigation or hearing.

(c) On an application under paragraph (b), the onus is on the Chair or Vice Chair of the Discipline Committee to establish, on a balance of probabilities, that disclosure of the evidence is necessary in the furtherance of the administration of justice.

(d) An application under paragraph (b) shall be on notice to any person whose interests would be affected by the order unless the applicant establishes that urgency or other compelling grounds requires that the application be made ex parte.

(e) An order made under paragraph (b) is not subject to appeal.

(f) Notwithstanding paragraphs (10)(a) or 12(a) through (12)(e), the Chair or Vice-Chair of the Discipline Committee may disclose information to specified public authorities with the consent in writing of all persons whose interests would be affected by the disclosure.

Offence (13) (a) No person shall obstruct a person appointed to make an investigation under this section or withhold from the investigator or conceal or destroy any documents or things relevant to the subject-matter of the investigation.

(b) Any member or student member who fails to comply with the requirements of this section is guilty of professional misconduct and, in addition to any penalty otherwise provided, is subject to the penalties provided for in s.\* \* .

Note: Amended Motion, see page 92

#### X. COMPLAINTS PROCEDURES

The Committee reviewed the three reports prepared by the Callwood Committee.

The Committee is of the view that some of the recommendations contained in the first and third reports of the Callwood Committee require amplification before they can be implemented but that this exercise can be completed by staff. No changes to the Society's legislation or Rules are required to implement these recommendations.

#### Unsatisfactory Professional Practice

Your Committee focussed considerable attention upon the second report of the Special Committee on Complaints Procedures which contained a series of recommendations aimed at enhancing the Society's ability to deal with complaints of Unsatisfactory Professional Practice (See Appendix B, pages 1 - 3).

Your Committee considered two major aspects of the recommendations relating to Unsatisfactory Professional Practice, namely;

- (i) how Unsatisfactory Professional Practice should be defined or characterized; and
- (ii) what would be the most effective procedural format to provide the kind of relief or remedy envisioned by the Callwood Committee.

A. Definition of Unsatisfactory Professional Practice

Your Committee considered whether Unsatisfactory Professional Practice ought to be explicitly defined in the statute in one of two ways: either as a species of professional misconduct or as a separate type of improper conduct distinct from both professional misconduct and conduct unbecoming. After careful deliberation, your Committee rejected the latter suggestion and concluded that Unsatisfactory Professional Practice ought to be defined substantially in the manner proposed by the Callwood Committee in recommendation 3 of the Second Report (see Appendix B, Page 3) with certain minor revisions. Convocation should note however that your Committee also concluded that Unsatisfactory Professional Practice ought not to be explicitly defined in the statute, which is consistent with the approach taken to both professional misconduct and conduct unbecoming. Essentially, your Committee decided that Unsatisfactory Professional Practice should be viewed as a form of professional misconduct arising from a single instance of substandard legal services and recommends that the following amendments to Rule 2 and commentaries be effected:

Professional Misconduct

Commentary 9

Gross neglect in a particular matter, a pattern of neglect, mistakes or unsatisfactory professional practice in different matters or a single instance of unsatisfactory professional practice which has not been resolved through other procedures constitutes professional misconduct.

Note: Motion, see page 92

Consequences of Incompetence

Commentary 10

It will be noted that the Rule does not require a standard of perfection. A mistake, even though it might be actionable for damages in negligence, would not necessarily constitute a failure to maintain the standard set by the Rule. Similarly, such a failure may be established regardless of tort liability. Where both negligence and a breach of the Rule are established, the former may give rise to an award of damages while the latter can give rise to additional sanctions for professional misconduct.

Note: Amended Motion, see page 92

B. Procedural Format

Your Committee reviewed various alternatives to the one proposed by the Callwood Committee, and after much deliberation, recommends that the following model be adopted. The advantages of it are that it creates a more streamlined process without dispensing with any of the "appeal" provisions envisaged by the Callwood Committee.

1. The Law Society will create the office of Complaints Resolution Commissioner who will independently review cases when either the complainant or the lawyer disagrees with the staff suggestion for the resolution of a matter. The Commissioner's decisions shall be binding in the sense that compliance by the lawyer with the Commissioner's decision will conclude the matter.

2. Non-compliance by a lawyer with the resolution proposed by the Commissioner shall result in the matter being referred to the Discipline Complaints Authorization Committee. This Committee shall consider the matter on the basis of the original alleged misconduct and not on the basis of the lawyer's failure to comply with the Commissioner's decision. It was envisaged that matters authorized in these circumstances would be heard by a single Benchers Panel.
3. This procedure shall operate for a two year trial period after which its overall effectiveness will be evaluated.
4. The Commissioner shall be appointed by the Law Society on the recommendation of a selection committee comprised of a Lay Benchers, the Treasurer (or designate), the Attorney General of Ontario (or designate), and the Ombudsman (or designate). The recommendation of the selection committee need not be unanimous but must be made on the basis of a majority vote.
5. The initial term of the Commissioner shall be for a period of two years to correspond with the trial period. Thereafter, the Commissioner shall serve for a period of three years if this procedure is continued. Although the Committee did not deem it necessary to prohibit the reappointment of a serving Commissioner at the conclusion of a term, it is recommended that Commissioners generally ought not be reappointed.
6. The Commissioner shall be an individual who is qualified as a lawyer but is not a Benchers.

Note: Motion, see page 92

7. The existing function of Lay Benchers as Complaints Review Commissioners be incorporated into the responsibilities of the Complaints Resolution Commissioner.

Note: Amended Motion, see page 93

#### COMMENT

In essence, the Committee recommends a non-binding, "single track" procedure capable of dealing with a variety of disputes effectively and expeditiously.

A non-binding procedure dispenses with the need for legislative provisions which would, in all likelihood, attract the application of the Statutory Powers Procedure Act (SPPA). The Committee was of the view that, in many cases, a "hearing" in the formal sense was not required and would only delay the prompt resolution of complaints. In the proposed procedure, the Commissioner can deal with a dispute in the manner which is deemed most appropriate, whether that means meeting with complainant and lawyer together or separately or devising some other method of resolving a matter.

The amendments to Rule 2 are intended to enable the Commissioner to refer instances of non-compliance to the Discipline Complaints Authorization Committee with the knowledge that the Committee has the authority to recommend disciplinary action in cases of U.P.P.. At the same time, the provision for single Benchers Discipline panels will permit such matters to be dealt with quickly and without unduly imposing on Benchers' time.

The Committee also recognized that the role to be performed by the Commissioner makes it essential that that individual be perceived by both public and profession as credible, unbiased and possessing authority. It was for this reason that the Committee recommends a selection committee consisting of the parties referred to above. The recommendation provides for significant input from parties other than the Law Society while, at the same time, it leaves the ultimate choice of a Commissioner to the Society.

Finally, the Committee concluded that the Commissioner should assume the responsibilities now performed by the Lay Benchers in reviewing complaints. While the Committee recognized the benefits of preserving the existing procedure for Complaints Review, concern was expressed about a mechanism which called for different "tracks" depending on whether it was the complainant or the lawyer who expressed dissatisfaction with a staff decision. Such a procedure could create conflicting results and delay as complaint matters were passed from one "track" to another. The Committee is of the view that the Commissioner, as an independent reviewer of complaints, will have the necessary credibility to deal effectively with dissatisfied parties, whether they be complainants or lawyers.

ALL of which is respectfully submitted

DATED this 31st day of May, 1991

"D. O'Connor"  
Chair

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

- Appendix A - Summary of the Recommendations of the Special Committee on Discipline Procedures as approved by Convocation. (Pages 1 - 11)
- Appendix B - Summary of the Recommendations of the Special Committee on Complaints Procedures as approved by Convocation. (Pages 1 - 4)

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that 4 Lay Benchers be appointed by the Lieutenant Governor in Council for discipline purposes only.

It was moved by Mr. Wardlaw, seconded by Mr. Somerville that if the government should fail to make the appointments that are required then the Law Society have the power to appoint discipline Lay Benchers.

Tabled

It was moved by Mr. Somerville, seconded by Mr. Wardlaw that the legislation provide for continuance in office of discipline Lay Benchers until such time as new discipline Lay Benchers are appointed by the Lieutenant Governor in Council.

Mr. Somerville's motion was accepted by the Chair.

It was moved by Ms. Peters, seconded by Mr. Howie that Mr. Wardlaw's motion be tabled for consideration by the Finance and Administration Committee.

Carried

The O'Connor/McKinnon motion as amended by the Somerville/Wardlaw motion was adopted.



It was moved by Mr. O'Connor, seconded by Mr. Yachetti that the Discipline Complaints Authorization Committee (page 4 of the Report) be composed as recommended and that former Treasurers not serve.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that each discipline hearing panel be composed as recommended on page 4 of the Report.

Carried

It was moved by Mr. Wardlaw, seconded by Ms. Peters that life Benchers be allowed to sit and vote on discipline hearing panels.

Lost

It was moved by Ms. Peters, seconded by Mr. Topp that non-Bencher lawyers be qualified to sit on discipline panels.

The Treasurer ruled Ms Peters' motion out of order and not properly before Convocation. Ms. Peters then requested that it be treated as a Notice of Motion for consideration at the next Convocation.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the composition of the Appeal Panel (page 5 of the Report) be adopted as recommended.

It was moved by Mr. Topp, seconded by Mr. Wardlaw that the Appeal Panel recommendation be tabled.

Lost

It was moved by Mr. Yachetti that the majority of the Appeal Panel be composed of elected Benchers excluding ex-Treasurers.

Mr. Yachetti's motion was accepted by the Chair.

The O'Connor/McKinnon motion as amended was adopted.

#### NOTICE OF MOTION

It was moved by Mr. Topp, seconded by Mr. Thom that Convocation delete Section 3 of the recommendations of the Special Committee on Reforms Implementation and that Convocation reconsider the entire issue of Discipline Procedures, more specifically:

- (i) penalty being imposed by Committee;
- (ii) an appeal panel being created by statute.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that (on pages 5 and 6) (a) reasons only where no complaint is authorized; (b) a quorum would be composed of three members with three alternates; and (c) that decisions of Discipline Complaints Authorization Committee need not be unanimous but can be made by majority.

Carried

Mr. Wardlaw voted against the motion.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that information regarding authorized discipline complaints (page 6 of the Report) be made available to the public upon request and that this policy be implemented immediately.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the time of publication (page 6 of the Report) not be until the Complaint is served on the member.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the recommendation of the Special Committee (pages 6 and 7 of the Report) be adopted as well as the Committee's recommendations (i), (ii) and (iii).

It was moved by Mr. McKinnon, seconded by Mr. Yachetti that on page 7 of the Report, Section V, paragraph (iii) the words "unless parties otherwise agree" be inserted after the word "therefrom".

Not Put

The Chair accepted an amendment to Mr. McKinnon's motion that under Section V, paragraph (iii) the words "which is not resolved by agreement in all respects" be inserted after the word "matter" so that the sentence now reads:

(iii) A benchner who conducts a pre-hearing conference in respect of a particular matter which is not resolved by agreement in all respects shall not participate at the discipline hearing of such matter or any appeal arising therefrom.

The O'Connor/McKinnon motion as amended was adopted.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that (page 7 of the Report) on single member panels the Benchner should be an elected Benchner.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that Mandatory Orders (page 7 of the Report) be turned into Conditions.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the waiver of appeal procedure be adopted.

It was moved by Ms. Kiteley, seconded by Mr. Yachetti that the Report of the Special Committee be reinstated.

Withdrawn

It was moved by Mr. Campbell, seconded by Mr. Thom that the discipline hearing panel (page 7 of the Report) be given the discretion to reprimand in person or in writing.

The Campbell/Thom motion was accepted by the Chair.

The O'Connor/McKinnon motion as amended was adopted.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the power to fine not be included in the range of dispositions.

Not Put

It was moved by Ms. Kiteley, seconded by Mr. Ruby that the issue of fines (section B of the Yachetti Report) be referred back to the Committee for review of the Charter implications.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that members of the appeal panel (pages 7 and 8 of the Report) be appointed for a 2 year term and that decisions together with reasons be collected and bound.

Carried

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:30 P.M.

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The Treasurers and Benchers had as their guests for luncheon, Ms. June Callwood and Ms. Netty Graham (former Lay Benchers) and Professor Marilyn Pilkington of the Osgoode Hall Law School.

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CONVOCATION RECONVENED AT 1:30 P.M.

.....

PRESENT:

The Treasurer (James M. Spence, Q.C.), Chapnik, Curtis, Elliott, Feinstein, Kiteley, Lamek, Lawrence, McKinnon, Murray, O'Connor, Palmer, Peters, Rock, Ruby, Thom and Topp.

.....

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that on page 8 of the Report, the sections on Definition and Investigation be adopted.

The Chair accepted an amendment to the section on Investigation that in paragraph 2 (2) after the word "benchers" the words "eligible to serve on a discipline hearing panel" be inserted so that the sentence now reads:

(2).....the Chair or Vice-Chair shall direct that a panel of three benchers eligible to serve on a discipline hearing panel be appointed to conduct a hearing into the member's capacity to practise law.

The O'Connor/McKinnon motion as amended was adopted.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that paragraphs 3 and 4 on page 9 of the Report be adopted.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that paragraphs 5 to 10 on pages 9 to 11 of the Report be adopted.

Carried

The Chair accepted an amendment in paragraph 11 on page 11 of the Report that the following sentence be inserted after the first sentence of paragraph 11 - "Three benchers should consist of three benchers who are entitled to sit on discipline panels."

The Chair also accepted Ms. Curtis' amendment in paragraph 11 that the words "mutatis mutandis" be replaced throughout the Report with its English equivalent - "with the necessary changes".

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that on pages 11 to 12 of the Report, paragraphs 11 to 17 be adopted as amended.

Carried

It was moved by Ms. Kiteley, seconded by Ms. Chapnik that the section on Investigative Powers on page 12 of the Report be deferred pending resolution of an earlier request to Committee re: fines and application of the Charter.

Lost

The following amendments were accepted by the Chair (page 12, section on Investigation):

that the words "a former member" be deleted in the second line of paragraph (2); and

that the word "may" at the beginning of line 6 be replaced with the word "shall".

The Chair accepted an amendment on page 13 of the Report, section on Dispute of relevance, that the words "of the Ontario Court (General Division) at Toronto" be deleted from the last sentence of the paragraph.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the draft provisions under the section on Investigative Powers (1) to (7) on pages 12 to 14 of the Report be adopted as amended.

Carried

The Chair accepted an amendment to paragraph (8) on page 15 of the Report, section Not Compellable at Hearing, to delete the word "panel" in the third line after the word "hearing" and delete the words "If the person does not testify" and add the words "in evidence" after the word "admissible".

The Chair accepted the following amendments on pages 15 and 16 of the Report, section - Self-incrimination:

that in paragraph (10) (a) (ii) the words "including discipline hearings and inquiries into the person's capacity to practice" be added at the end of the sentence.

Section - Privilege

that the words "whose document it is" be deleted from paragraph (11)(b) last line and the words "on whose behalf the claim of privilege is made" be inserted; and

that the words "of a Master" be deleted from subparagraph (11)(e)(iii) of paragraph 11.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that paragraphs 8 to 11 on pages 15 and 16 of the Report be adopted as amended.

Carried

The Chair accepted an amendment to the section on Confidentiality on page 16 of the Report, paragraph (12) that the words "Benchers, officers" be inserted after the word "Society" in the first line.

Paragraph 12 as amended was adopted.

It was accepted by the Chair that on page 16 of the Report, the section on Offence be deleted and dealt with separately in the Rules.

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that paragraph 13 be adopted as amended.

Carried

It was moved by Ms. Chapnik, seconded by Mr. Feinstein that on page 17 of the Report, the section on Complaints Procedures be referred back to the Committee for further consideration.

Lost

It was moved by Mr. McKinnon, seconded by Mr. Rock that in Commentary 9 under Professional Misconduct that the word "may" be inserted after the word "procedures" in the last line of the paragraph.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that amendments to Rules and Commentaries be adopted as amended.

Carried

It was moved by Ms. Palmer, seconded by Ms. Chapnik that under the section on Procedural Format on page 18 of the Report, paragraph 6, the words "is qualified as" be deleted and the words "may not be" be inserted.

Carried

It was moved by Mr. O'Connor, seconded by Mr. McKinnon that the section on Procedural Format be adopted as amended.

Carried

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SPECIAL COMMITTEE ON REQUALIFICATION

The Report on the Special Committee on Requalification was deferred to the June Convocation.

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CONVOCATION ADJOURNED AT 5:00 P.M.

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Confirmed in Convocation this *27th* day of *September*, 1991.



Treasurer