27th November, 2008

MINUTES OF CONVOCATION

Thursday, 27th November, 2008
9:00 a.m.

PRESENT:

The Treasurer (W.A. Derry Millar), Aaron, Anand, Backhouse (by telephone), Banack, Boyd, Braithwaite, Bredt, Campion, Caskey, Chahbar, Chilcott, Conway, Crowe, Daud (by telephone), Dickson, Dray, Elliott, Epstein, Go, Gold, Hainey, Halajian, Hare, Hartman, Heintzman, Henderson, Krishna, Lawrie, Legge, Lewis, McGrath, Marmur, Minor, Murphy, Murray, Pawlitza, Potter, Pustina, Rabinovitch, Robins, Ross, Rothstein, St. Lewis, Sandler, Schabas, Sikand, Silverstein, Simpson, C. Strosberg, Swaye, Symes 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 and benchers extended congratulations to Professor Krishna who was awarded the Inaugural Lifetime Achievement Award by the South Asian Bar Association in recognition of his outstanding contributions to the legal profession.

Congratulations were also extended to Avvy Go and William Simpson. Ms. Go is being awarded the William P. Hubbard Award for Race Relations' at the 2008 Access, Equity and Human Rights Awards on November 27. On December 5, Mr. Simpson will receive the Ontario Bar Association's Award for Distinguished Service.

MOTION

It was moved by Mr. Anand, seconded by Ms. Dickson, –

THAT Glenn Hainey be removed from the Human Rights Monitoring Group at his request.

THAT Mark Sandler be removed from the Equity and Aboriginal Issues Committee at his request.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

To the Benchers of the Law Society of Upper Canada Assembled in Convocation

The Director of Professional Development and Competence reports as follows:

CALL TO THE BAR AND CERTIFICATE OF FITNESS

Licensing Process and Transfer from another Province – By-Law 4

Attached is a list of candidates who have successfully completed the Licensing Process and have met the requirements in accordance with subsection 9.

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on Thursday, November 27, 2008.

ALL OF WHICH is respectfully submitted

DATED this 27th day of November, 2008

CANDIDATES FOR CALL TO THE BAR

November 27th, 2008

Simon Cameron Bieber
Robert Warren Fetterly
Evan Richard Flewelling
Erik Leif Gotfredsen
Farzana Nurez Jiwani
Isabelle Marie Alien Julie Laferrière
Kimberly Anne Miller
Monique Helena Marie Soltysiak Moreau
Ian Gordon James Philp
Sanjukta Shripad Tole
Viktoria Uretsky
Derrick Nathan Ho-Yen Wong

It was moved by Ms. Pawlitza, seconded by Ms. Dickson, that the Report of the Director of Professional Development and Competence listing the names of the deemed Call to the Bar candidates be adopted.

Carried

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of October 30, 2008 were confirmed.

FINANCE COMMITTEE REPORT

Ms. Hartman presented the Report.

Report to Convocation
November 27, 2008

Finance Committee

Committee Members
Carol Hartman, Vice-Chair
Jack Braithwaite
Chris Bredt
Mary Louise Dickson
Jack Ground
Susan Hare
Janet Minor
Ross Murray
Judith Potter
Jack Rabinovitch
Paul Schabas
Gerald Swaye
Brad Wright

Purpose of Report: Decision

Prepared by Wendy Tysall,
Chief Financial Officer – 416-947-3322

TABLE OF CONTENTS

For Decision:

COMMITTEE PROCESS

1. The Finance Committee ("the Committee") met on November 14, 2008. Committee members in attendance were: Carol Hartman, Vice-Chair, Mary Louise Dickson, Jack Ground, Janet Minor, Ross Murray, Judith Potter, Paul Schabas, Gerald Swaye and Brad Wright. Laurie Pawlitza also attended.

2. Staff in attendance were: Malcolm Heins, Wendy Tysall, Fred Grady, and Andrew Cawse.

FOR DECISION

2009 BUDGET

3. Motion
That Convocation approve the 2009 Law Society budget including:

a) for lawyers, the amount of the annual fee of $1,703 comprising:

	2009
General Fee	$1,212
Compensation Fund	226
LibraryCo	220
Capital	45
Total	$1,703

b) for paralegals, the amount of the annual fee of $900 comprising:

	2009
General Fee	$710
Compensation Fund	145
LibraryCo	0
Capital	45
Total	$900

4. The Society's draft 2009 budget is attached separately in two books:

- VOLUME 1 - White Cover - 2009 Draft Budget Summary
- VOLUME 2 – Blue Cover (Confidential) - 2009 Draft Budget Detail

Volume 1

5. VOLUME 1 – 2009 Draft Budget Summary presents high-level financial information on the Society's operations divided into two major categories for lawyers and paralegals:

- 2008 vs 2009 Comparative Summaries

The 2008 vs 2009 Comparative Summaries present summary budget comparisons by function/department between the two years and projected actual for 2008.

- 2009 Budget Summaries
  The 2009 Budget Summaries present summary budgets in major functional categories employing the full cost allocation method. The Society adopted full cost allocation budgeting in 1999 to reflect the true cost of its various programs.

Volume 2

6. VOLUME 2 - 2009 Draft Budget Detail book contains detailed budget information for 2009, the comparable numbers from the 2008 approved budget, projected 2008 operating results and narratives for each department. Separate details are provided for lawyers and paralegals.

Moving between the 2 books

7. In the 2009 Budget Summary (VOLUME 1), beginning at page 23, at the top of each summary column, is a Tab and page reference to the 2008 Draft Budget Detail book (VOLUME 2). Referring to this reference in the Draft Budget Detail book will provide the reader with detail line item budget information. For example, page 23 in the Draft 2009 Budget Summary book presents the full cost allocation for the Society's regulatory functions broken down into their major categories. The tab and page reference for the second column (Investigations) takes the reader to Tab A, page 9 of the Draft Budget Detail book (VOLUME 2)

Paralegal Budget Preparation, Fee Calculation Methodology

8. To produce unique fees for lawyers and paralegals requires distinct fee calculation models for lawyers and paralegals.

9. In most areas of the Society's operations it is difficult to isolate direct expenditures related specifically to paralegals. A few exceptions to this are the paralegal licensing process, the paralegal spot audit program, a project manager in the Client Services Centre and certain components of the Society's regulatory functions, specifically Investigations, Complaints Resolution, Discipline and a lawyer position in the Director's office.

10. Since all operational departments are providing some level of support to the regulation of paralegals, a method of allocating a reasonable portion of expenses for departments without direct paralegal resources was employed. The method used is an allocation based on direct paralegal spending as a percentage of total Law Society spending. At approximately 2% of total spending, this equates to an allocation of $537,000 from the Lawyers Fund to the Paralegal Fund.

11. Not all expenditures have been allocated. No allocation has been made for expenditures such as the Great Library, the Retention of Women initiative, CANLII, the Federation of Law Societies, OLAP or CDLPA. Also no allocation of non-fee revenues has been made to the paralegal fund.

12. The Society adopted a model for the allocation of administrative expenses to its operational functions in 1999. Using this model, expenses are allocated to operational departments.

13. For the purposes of allocating administrative expenses to the Paralegal Fund, direct paralegal spending is treated as a "department" for basis of allocation. Under the existing scenario, this results in a total allocation of $611,000 from the Lawyers Fund to the Paralegal Fund.

FOR DECISION

2009 LIBRARYCO INC. BUDGET

14. Motion:
That Convocation approve the 2009 LibraryCo Inc. budget for incorporation into the 2009 Law Society annual fee for lawyers.

15. LibraryCo Inc.'s budget is to be approved by Convocation as required by the Unanimous Shareholders Agreement. The proposed 2009 Budget, which has been approved by the LibraryCo board, is attached requesting funding of $7,434,591 or $220 per lawyer compared to the 2008 approved funding of $7,691,000 or $235 per lawyer.

16. The draft 2009 budget forecasts expenditures to decrease by 5% or $407,000 from $8.5 million to $8.1 million. The decrease is primarily attributable to the $1.1 million reduction in expenditures on electronic products, as the menu for these products has been rationalized based on the research needs of lawyers. The Law Foundation of Ontario is funding 100% of the cost of the electronic products (2009: $700,000 - in 2008 the LFO funded 47% of the cost of electronic products or $850,000).

17. The reduction in electronic product expenditures has been somewhat offset by the inclusion in the budget of a contingency amount of $500,000 for potential expenses in 2009. These potential expenses have recently been identified and it is too early to assess and quantify the amounts precisely. Administrative and Centralized expenses are also increasing to fund two new positions – an assistant to the Board Manager and a Law Society financial analyst.

18. LibraryCo's budget process was similar to previous years in that initially all counties were requested to submit detailed budget requests. The board requested relevant counties to provide explanations for increases in expenditures in excess of 2%. Materials were reviewed by staff and the LibraryCo board, and consultations were held with CDLPA. Grants to county libraries will increase, compared to 2008, by a total of $94,000, a 2% increase.

19. As in 2008, the budget does not use LibraryCo's Reserve Fund. The Reserve balance at January 1, 2008 was $997,000. According to our projections for the 2008 year, we expect a deficit of approximately $95,000 in 2008. This would be funded out of the Reserve leaving a balance at the beginning of 2009 of $902,000 if no other payments are made from the Reserve for the rest of 2008. This is in excess of the $500,000 balance calculated under LibraryCo's approved Reserve policy.

Attached to the original Report, copies of:

(1) Copy of the 2009 Budget for LibraryCo Inc.
(page 8)

(2) Copy of LibraryCo Inc Draft Budget Analysis by Library 2009.
(page 9)

(3) Copy of LibraryCo Inc Schedule C – Delivery of Administrative and Centralized Services.
(page 11)

(4) Copy of the 2009 Draft Budget Summary (Volume 1 – white cover) – separate cover.

Re: 2009 LibraryCo Inc. Budget

It was moved by Ms. Hartman, seconded by Mr. Conway, that Convocation approve the 2009 LibraryCo Inc. budget for incorporation into the 2009 Law Society annual fee for lawyers.

Carried

Re: 2009 Budget

It was moved by Ms. Hartman, seconded by Mr. Dray, that Convocation approve the 2009 Law Society budget including:

a) for lawyers, the amount of the annual fee of $1,703 comprising:

	2009
General Fee	$1,212
Compensation Fund	226
LibraryCo	220
Capital	45
Total	$1,703

b) for paralegals, the amount of the annual fee of $900 comprising:

	2009
General Fee	$710
Compensation Fund	145
LibraryCo	0
Capital	45
Total	$900

Carried

Re: J. S. Denison Trust Fund Grant Application (in camera)

It was moved by Ms. Hartman, seconded by Mr. Wright that Convocation approve a $2,500 grant from the J.S. Denison Trust Fund to Applicant 2008 - 24, $6,000 to Applicant 2008 - 26 and $l,000 to Applicant 2008 - 27.

Carried

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LICENSING & ACCREDITATION TASK FORCE REPORT

Professor Krishna presented the Report.

Report to Convocation
November 27, 2008

LICENSING & ACCREDITATION TASK FORCE

Task Force Members

Vern Krishna (Chair)
Raj Anand
Constance Backhouse

Larry Banack
Thomas Conway
Susan Hare
Carol Hartman
Janet Minor
Laurie Pawlitza
Bonnie Tough

Purpose of Report: Decision

Policy Secretariat
(416-947-5209)

TASK FORCE PROCESS

1. The Task Force met on October 29, 2008, November 12, 2008 and November 19, 2008 to discuss the Federation of Law Societies of Canada's consultation paper on the approved law degree.

SUBMISSIONS ON THE FEDERATION OF LAW SOCIETIES OF CANADA TASK FORCE ON THE APPROVED LAW DEGREE CONSULTATION PAPER

Motion

2. That Convocation approve providing to the Federation of Law Societies of Canada Task Force on the Approved Law Degree the proposed Law Society submission provided under separate cover.

Background

3. The Federation of Law Societies of Canada established a Task Force on the approved law degree in June 2007. The Task Force issued its consultation paper in September 2008 seeking input on 16 questions by December 15, 2008. The Federation Task Force's consultation paper is set out at TAB 1.

4. The Federation Task Force invited individual law societies to make submissions, leaving it to each of them to determine their own consultation process with their members.

5. The Treasurer provided a letter to accompany the Law Society's invitation for comments by November 3. While inviting comments on all the consultation paper questions the Treasurer emphasized, in particular, questions 1, 3 and 15.

6. The Licensing & Accreditation Task Force coordinated the Law Society's consultation. The Law Society's Task Force was established in early 2007 to consider licensing & accreditation issues and the inter-relationship between law school and professional licensing regimes, the accreditation of internationally trained professionals and criteria for the establishment of new law schools. With the establishment of the national Federation Task Force, the Law Society of Upper Canada agreed to provide its input to that process, rather than proceeding to its own conclusions.

7. The Law Society took the following steps to bring the consultation process to the profession's attention and invite input by November 3, 2008:

   i. Placed a Notice to the Profession in the *Ontario Reports* in English and French on two occasions.
   ii. Highlighted the Report and Notice to the Profession on its website.
   iii. E-mailed over 20,000 lawyers for whom it has an e-mail address.
   iv. Sent the report to over 50 legal organizations, law schools, and law student organizations.

8. Submissions the Law Society received are included at TAB 2. The Licensing & Accreditation Task Force has considered the responses and its own work on the issues being studied at the national level and has developed a proposed submission to the Federation Task Force for Convocation's review. This proposed submission will be provided to Convocation under separate cover.

9. The Task Force is providing Convocation with additional information respecting the Law Society of England and Wales bar vocational courses, at TAB 3.

TAB 1

TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

CONSULTATION PAPER

SEPTEMBER 2008

The views expressed in this consultation paper are presented by the Task Force for consideration and discussion. They have not been endorsed by the governing body of the Federation and do not represent the official position of the Federation or its member law societies.

Executive Summary

Law societies and law schools in Canada lie at an interesting crossroad. Law schools, some of which began in law societies, have become increasingly separated from them, and guard their academic autonomy. Law societies, now clearly focused on regulating entry to the profession in the public interest, and influenced by regulatory regimes that require transparency and objectivity in the standards for entry to the profession, see a need for greater specificity in what constitutes a Canadian common law degree for purposes of entry to the profession.

The Federation of Law Societies of Canada established this Task Force in June 2007 to review the criteria in place for the approved common law degree and, if appropriate, to recommend modifications to achieve a national standard for recognition of an approved common law degree for entry to the profession.

In Canada the 14 provincial and territorial law societies have statutory responsibility for licensing lawyers. For many years law societies in the common law provinces have carried out this

responsibility by requiring candidates for admission to the bar to have earned a Canadian common law degree or its equivalent, to successfully complete a law society bar admission program and to complete a period of apprenticeship known as articles.

In the past two years, a number of events have converged to focus law societies' attention on the lack of an articulated academic requirement for entry into their bar admission programs:

- After more than 25 years in which no new law schools were created in Canada and there was very little increase in law school seats throughout the country, several universities in Ontario indicated an interest in creating law faculties. The immediacy of this issue has receded with the Ontario government's announcement that it will not fund new schools at this time, but there is still the possibility of new law schools emerging in other provinces. Moreover, the importance of articulating a national standard remains. The portability of legal credentials should be based on clear and transparent principles. The absence of an accepted national standard in Canada stands in marked contrast to the approach taken in other common law jurisdictions.
- The number of graduates of international law schools who apply for admission to law society bar admission programs has steadily increased over the past twenty years. The National Committee on Accreditation ("NCA"), a subcommittee of the Federation of Law Societies of Canada, evaluates the legal training and professional experience of persons with international or Canadian non-common law legal credentials who wish to be admitted to common law bars in Canada. The articulation of a national standard for domestic common law degrees would facilitate the assessment of equivalency of international law degrees and improve the transparency of the process.
- Legislation in Ontario and Manitoba, and under discussion in Nova Scotia, requires self-governing professions to develop and maintain requirements for entry to the profession that are transparent, objective, impartial and fair, and will monitor compliance.
- While these challenges have been unfolding, a number of legal educators have proposed innovative approaches to the teaching of law, including greater integration of practical and theoretical instruction, particularly in third year.

Law societies in Canada regulate in the public interest. Among their other responsibilities they must develop standards of competence for members of the profession. They must ensure that candidates for entry into law society bar admission programs meet required standards for the practice of law. They must articulate and implement those standards in ways that are transparent, objective, fair and impartial.

Required Standard

The Task Force has considered how to articulate a required standard. Its preliminary view is that the standard should address competencies in fundamental areas of substantive knowledge, legal skills and professional responsibility. It should refer to the legal education environment in which those competencies have been acquired. Candidates who seek entry into law society bar admission programs should have acquired a comprehensive legal education that provides them with framework competencies, including a heightened awareness of professional ethics and conduct, and an understanding of the operation of those competencies in the Canadian legal system, to prepare them for the practice of law.

No single stage of a lawyer's development can be expected to fill all or even most of the lawyer's educational needs. It is not reasonable to expect that law schools will graduate students who are fully capable of providing competent professional services to clients in all matters. The bar must continue to play a role in bridging the gap between law school and formal licensing of lawyers. However, through the professional legal education students receive in law school, they should acquire foundational competencies necessary for the practice of law. Law school must continue to be that vital component of the lawyer's education that provides the framework knowledge, skills, attitudes and capacity for reflection that enable its graduates to move into myriad lawyering roles.

Framework Competencies

The Task Force seeks comment on its preliminary view (set out in italics below) of framework competencies that graduates seeking to enter law society bar admission programs should have acquired in law school. The Task Force also seeks comment on its preliminary view that law students should be required to take a mandatory standalone course in professional responsibility that addresses both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including in areas such as conflicts, solicitor client privilege, and the lawyer's relationship with the administration of justice.

Graduates seeking entry into law society bar admission programs in common law jurisdictions in Canada should be able to demonstrate education in the following competencies and have an understanding of their operation in the Canadian legal system:

- Foundations of common law, including,
    - *the doctrines, principles and sources of the common law, how it is made and developed and the institutions within which law is administered in Canada;*
    - *Contracts, torts and property law;*
    - *Criminal law; and*
    - *Civil Procedure.*

- *The constitutional law of Canada, including principles of human rights and Charter values.*
- *Equitable principles, including fiduciary obligations, trusts and equitable remedies.*
- *Business organization concepts.*
- *Principles of statutory analysis and of regulatory and administrative law.*
- *Dispute resolution and advocacy skills and knowledge of their evidentiary underpinnings.*
- *Legal research skills.*
- *Oral and written communication skills specific to law.*
- *Professional responsibility.*

Institutional Requirements

Modern Canadian law schools provide an excellent liberal legal and professional education. Law is an intellectual discipline and the practice of law requires rigorous academic training as well as

practice skills. It is important to consider and articulate those institutional requirements that should form part of the required standard for entry into law society bar admission programs. The Task Force has considered and invites comment on four specific institutional requirements related to,

- law school admission requirements;
- length of law school program;
- program delivery; and
- joint degrees.

The issue of comprehensive legal education is also relevant to a discussion of proposals for law society recognition of the law degrees of graduates from new law schools for the purposes of entry into bar admission programs. There are a number of characteristics and underpinnings essential to the development and maintenance of an effective law school environment. The Task Force seeks comment on whether a national body should be established to develop the components for recognition of new law school law degrees.

Compliance Requirements

Once a required standard is articulated, law societies must consider how to monitor compliance. The Task Force has examined three possible compliance options:

- The "status quo" option.
- The examination option.
- The approved law degree option.

Under the “status quo” law societies have not monitored law school curricula. Students with a degree from one of the 16 Canadian common law faculties are automatically eligible for admission into law society bar admission programs. The argument in favor of this option is that under it Canadian law schools have developed into sophisticated institutions that promote innovation and are capable of adapting to changing needs of the legal profession. Multiple internal and external university reviews obviate the need for an additional layer of law society review. One of the arguments against this option is that regardless of how rigorous university evaluation structures are, universities and law societies have different mandates and define their mission differently. The option does not give weight to the responsibility law societies have to determine the academic requirements that are necessary to practice law.

Under the examination option, graduates seeking to enter law society bar admission programs would first be required to successfully complete a national examination designed to test their competence in the areas that regulators designate as essential. A passing grade would be the measurement that the student has met the competence standard.

This option appears to be transparent and objective, easily developed and applied nationally, and entirely within the control of law societies. Potentially it may apply to both domestically and internationally educated candidates seeking entry into a bar admission program.

There is the danger, however, that examinations such as this come to “drive” the legal education process. Examination success may primarily denote the ability to write examinations, rather than proof of the acquisition of the knowledge, skills and abilities that a lawyer requires to

practise law. It is also necessary to consider carefully the prerequisite education necessary to be entitled to write the examination.

Under the approved law degree option a required standard would be established (such as along the lines described above) and law faculties would demonstrate how their graduates achieve the required competencies. If the degree is approved, any student with a law degree from that school would be eligible to enter bar admission programs. What would differentiate this option from the current automatic approval of all graduates from the 16 common law faculties would be the establishment of a more modern, articulated standard and a national monitoring process. This approach offers certainty to both law schools and their graduates that the degree will be recognized for the purposes of entrance into bar admission programs. It satisfies law societies' responsibility for admission standards through regular monitoring, but continues to allow for significant flexibility in how law schools meet the standards. From the perspective of law faculties, however, it increases external reviews of their programs. Also, it entails the establishment of a national compliance body, with resource implications.

Consultation Process

With the approval of the Federation Council for consultation, the Task Force is disseminating this consultation paper nationally for comment. It will receive written comments until December 15, 2008. Thereafter it will prepare a final report and recommendations for Federation Council in the spring of 2009.

Comment is invited on some or all of the following questions or on any aspect of the issues raised in this consultation paper:

1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?
2. Is it over or under-inclusive?
3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?
4. Should the existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect the de facto requirement of an undergraduate university degree?
5. If so, should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?
6. Are there other exceptions that should be recognized and accommodated?
7. Should the standard length for the common law degree be expressed in terms of credit hours rather than years of study?
8. If so, is 90 credit hours the appropriate standard?
9. Should in person learning be required for all or part of the law school program?
10. Are there other delivery systems that should be taken into account?
11. How should joint degree programs be treated for the recognition of the common law degree?
12. Should a national body monitor joint degree programs?
13. Should a national body be established to develop the components for recognition of law degrees from new law school programs?

14. Are there alternatives to this approach?
15. The Task Force has identified three possible compliance models. Please provide comments on these models.
16. Are there other models that should be considered and if so, what are they?

TASK FORCE ON THE CANADIAN COMMON LAW DEGREE CONSULTATION PAPER

Introduction

1. Law societies and law schools in Canada lie at an interesting crossroad. Law schools, some of which began in law societies, have become increasingly separated from them, and guard their academic autonomy. Law societies, now clearly focused on regulating entry to the profession in the public interest, and influenced by regulatory regimes that require transparency and objectivity in the standards for entry to the profession, see a need for greater specificity in what constitutes a Canadian common law degree for purposes of entry to law society bar admission programs. Beyond and within Canada, there is much discussion and debate about innovation in the education of lawyers, and the right balance between theory and practice.

2. The Federation of Law Societies of Canada ("the Federation"), through its Task Force on the Canadian Common Law Degree, seeks an approach that ensures that candidates for entry into law society bar admission programs[1] meet required standards for the practice of law, in the public interest.

The Role of Law Societies in Legal Education

3. In Canada, the 14 provincial and territorial law societies have statutory responsibility for licensing lawyers.[2] Law societies in the common law provinces carry out this responsibility by requiring candidates for admission to the bar to have earned a Canadian common law degree or its equivalent, to successfully complete a law society bar admission program and to complete a period of apprenticeship known as articles. Currently, the successful attainment of a Canadian common law degree[3] satisfies the regulators' academic requirement.

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[1] The term "bar admission program" includes what is known as the "licensing process" of the Law Society of Upper Canada.

[2] Law Society of British Columbia, Law Society of Alberta, Law Society of Saskatchewan, Law Society of Manitoba, Law Society of Upper Canada, Barreau du Québec, Chambre des notaires du Québec, Law Society of New Brunswick, Barristers' Society of Nova Scotia, Law Society of Prince Edward Island, Law Society of Newfoundland and Labrador, Law Society of Yukon, Law Society of the Northwest Territories, Law Society of Nunavut.

[3] In some provinces, the academic requirement is expressed simply as "a Canadian common law degree" (e.g. Alberta Law Society of Alberta – Rule 50.2; Law Society of British Columbia, Rule 2-27(4)(a): "successful completion for the requirements for a bachelor of laws or the equivalent degree from a common law faculty of Law in a Canadian university."); in others, the degree must be from a "recognized school of law" (e.g. Saskatchewan – ww.lawsociety.sk.ca/newlook/Programs/admission.htm) or from an "accredited law school" (e.g. Ontario Law Society of Upper Canada By-law, section 9.).

4. To assess the academic qualifications of persons who receive their legal training outside Canada, the Federation has established the National Committee on Accreditation ("NCA") to assess equivalency of legal education. When satisfied that equivalency has been achieved, the NCA issues a Certificate of Qualification that law societies generally use to determine whether an applicant meets the academic requirements for entry into a bar admission program. Appendix 1 contains a summary of the NCA process.

5. The development of the concept of an approved Canadian law degree was in large part the result of the debate in Ontario in the 1940's and 1950's over control of legal education in Ontario. In 1957 the Benchers of the Law Society of Upper Canada agreed that graduates "from an approved law course in an approved University in Ontario" would meet the academic requirements for entry to the bar admission course. This resulted in the relatively quick development of law schools at Queen's, Western, Ottawa and Windsor, the further development of the law faculty at the University of Toronto, and ultimately the relocation of the old Osgoode Hall Law School to York University in 1969. The Law Society of Upper Canada subsequently expanded the scope of acceptable law programs to include law schools throughout Canada and over the next two decades proceeded to grant approval for the law degrees of all 16 Canadian common law faculties for entry into its bar admission program. In 1984, Kenneth Jarvis, while Secretary of the Law Society of Upper Canada, described this process in a letter to the Federation, set out at Appendix 2.

6. The original standard set by the Law Society of Upper Canada prescribed eleven mandatory courses and a number of additional courses that "approved law schools" were required to offer. In 1969, as a result of a request by the Ontario Law Deans for greater flexibility in program development, the Law Society reduced the number of required courses from eleven to seven. A copy of the 1957/69 Law Society of Upper Canada document is set out at Appendix 3.

7. Neither the Law Society of Upper Canada nor any other law society appears to have updated the statement of requirements for "an approved law course in an approved University" since the 1969 modification of the 1957 requirements. There has never been a national standard for the approval of law programs or law schools.

8. In 1976, 1979 and 1980 three new law schools opened their doors at Victoria, Calgary and Moncton, respectively. Because there was no national law program approval body, each provincial law society had to consider whether to recognize law degrees from these institutions as meeting the academic requirements for entry to their respective bar admission programs.

9. For example, the Credentials Committee of the Law Society of British Columbia reviewed the curriculum of the University of Victoria law faculty in February 1975 and passed a resolution to "approve the curriculum" and "recognize the LL.B. degrees" of that institution.[4] It took similar steps in relation to the other new law faculties in Canada.[5]

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[4] Minutes of the Credentials Committee, Law Society of British Columbia, February 17, 1975.

[5] Minutes, ibid., May 17, 1976; Nov. 14, 1978; June 18, 1979. The Law Society of Upper Canada's Legal Education Committee considered the University of Calgary's proposal for a faculty of law in 1976. In June 1976 it advised that it was satisfied with the first year curriculum,

On the other hand, during the same period the Law Society of British Columbia rejected an application for recognition by University College at Buckingham, England on the basis that the courses in that program were not as comprehensive as would be expected in a Canadian program and the course of study was not comparable in duration to a Canadian degree.[6]

10. In 1985, the Federation sponsored a conference on legal education that produced a number of learned papers and an apparent consensus that it was time the Federation established a national body to deal with questions of law school accreditation.[7] Although a national committee was established at that time, in 1994, the Federation assigned to the NCA the responsibility for assessing proposals for new law schools and making recommendations to law societies. The Federation did not, however, designate a standard against which applications for recognition of new law degrees could be measured.

11. In the past two years, a number of events have converged to focus law societies' attention on the lack of an articulated academic requirement for entry into their bar admission programs.

(a) New Law School Applications

12. After more than 25 years in which no new law schools were created in Canada and there was very little increase in law school seats throughout the country, several universities in Ontario have indicated an interest in creating law faculties. Lakehead University applied to the Law Society of Upper Canada and the NCA for recognition of its proposed curriculum. No fewer than three other universities have expressed interest in establishing law schools.

13. These universities naturally want to know what requirements law societies will place on them for recognition of their degrees so that their graduates can gain entry into bar admission programs in Canada. The only requirements available for the NCA's consideration are the 1957/1969 requirements, which are widely felt to be out-of-date and have, in any event, never been formally endorsed by law societies outside Ontario.

14. Furthermore, law societies adopted a National Mobility Agreement ("NMA") in 2002 that allows for inter-jurisdictional mobility based on recognition throughout Canada of

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but wished to see the curriculum for the second and third years. In April 1979 the Committee approved the proposal "with a rider that the Faculty of Law of the University of Calgary be advised that the Law Society has a concern that Personal Property is not included in the curriculum as an area of law that all students are required to study and that the Law Society would like assurance that Personal Property is and will be included as a compulsory subject area in the law school course." As recently as the 1990s the Law Society of Upper Canada approved interdisciplinary degree programs from Queen's University with cooperative placements.

[6] Minutes of the Credentials Committee, Law Society of British Columbia, October 15, 1979.

[7] Federation of Law Societies of Canada, Legal Education in Canada, 1985.

membership in any provincial bar.[8] Thus recognition by any one province of the common law degree of a particular university amounts to de facto recognition by all. It seems timely not only to articulate a standard for the NCA to use when assessing recognition requests by new law schools, but to ensure that the standard is nationally endorsed and applicable to existing law schools as well.

15. In July of 2008, the Ontario Government announced that it would not fund new law schools in Ontario at this time. This announcement appears to remove the immediacy of this issue, but does not of course preclude the possibility of new law schools emerging in other provinces. Moreover, the importance of articulating a national standard remains. The portability of legal credentials should be based on clear and transparent principles. The absence of an accepted national standard in Canada stands in marked contrast to the approach taken in other common law jurisdictions.

(b) Increase in Internationally Trained Lawyers

16. In addition to the challenges arising from applications for new law schools, the number of graduates of international law schools who apply for admission to bar admission programs has steadily increased over the past twenty years. For example, the number of internationally educated applicants seeking Certificates of Qualification from the NCA has increased from 225 in 1999 to 532 in 2007 on a more or less straight-line basis.[9]

17. These students, increasing numbers of who are Canadians who have gone abroad for their legal studies do not by definition have a Canadian law degree. The NCA's role is to evaluate the legal training and professional experience of persons with international or non-common law legal credentials from Québec who wish to be admitted to common law bars in Canada. The process includes an examination of the length of the law program, whether the candidate has undergraduate education prior to law school, the courses taken, the legal system in existence where the law degree was obtained (e.g. common law, civil law, hybrid), the graduate's standing, and the nature and duration of any legal experience.

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[8] All provincial law societies have now signed the National Mobility Agreement. All except Quebec have implemented the Agreements. Regulations recently enacted in Quebec will soon provide mobility provisions adapted to reflect the existence of a different system of law in that province. Territorial law societies have agreed to a separate, somewhat more limited, mobility agreement.

[9] National Committee of Accreditation applications 1999-2007:
1999: 225 applications
2000: 235 applications
2001: 261 applications
2002: 328 applications
2003: 367 applications
2004:340 applications
2005:464 applications
2006: 446 applications
2007:532 applications

18. The NCA determines what additional examinations or schooling an applicant must successfully complete to be issued a Certificate of Qualification that attests that the applicant has the "equivalent to a Canadian common law degree." Because the necessary elements of a Canadian common law degree are not clearly or nationally defined, the question has arisen – equivalent to what?

19. The development of a national standard for domestic common law degrees would facilitate the assessment of equivalency of international law degrees and improve the transparency of the process.

(c) Fair Access Legislation

20. Legislation in Ontario and Manitoba, and under discussion in Nova Scotia, requires self-governing professions to designate requirements for entry to the profession that are transparent, objective, impartial and fair to ensure that candidates do not face unfair or arbitrary barriers, and will monitor regulators' compliance. Some of the relevant provisions of the Ontario legislation (which is similar to Manitoba's) are set out at Appendix 4.

21. Fair access legislation requires a regulatory body using a third party to conduct assessments of international credentials to ensure that that body also conforms to the requirements of the legislation. For the legal profession, the legislative requirements are therefore applicable to NCA processes at least in jurisdictions with fairness legislation and arguably, as a matter of principle, for all common law jurisdictions.

Integrated Education

22. While these challenges have been unfolding, a number of legal educators have been proposing innovative approaches to the teaching of law, including greater integration of practical and theoretical instruction, particularly in third year.

23. Under such programs, academic instruction is more closely integrated with the development of practical skills so that upon call to the bar lawyers are better prepared to advise clients and protect their interests. The benefits of a more integrated program have been set out in a report produced by the Carnegie Foundation for the Advancement of Teaching in 2007 entitled, *Educating Lawyers: Preparation for the Profession of Law*. An excerpt is included at Appendix 5. In 2007 the American Clinical Legal Education Association completed its report entitled, *Best Practices in Legal Education*, chaired by Professor Roy Stuckey, and came to similar conclusions as the Carnegie report. An excerpt is included at Appendix 6.

24. In Canada, unlike the United States, before students can be called to the bar they must article for a period of time, usually from ten to 12 months, and take bar admission programs that include some skills training. The purpose of this period of articles and bar admission programs is to provide practical instruction in the practice of law.

25. While articling affords Canadian law students some direct practical experience before call to the bar, there continues to be variation in the quality of the process. The existence of articling does not eliminate the relevance of the Carnegie and Stuckey studies to the Canadian experience. Law schools have a significant role to play in combining the

doctrinal and theoretical education with the tools necessary for practical application. Law schools increasingly appreciate the role of skills training in education and continue to develop innovative and integrated skills opportunities for students, including clinical training placements.

Creation of the Task Force

26. The Federation established this Task Force in June 2007 to review the criteria currently in place for the approved common law degree and, if appropriate, to recommend modifications to these criteria to achieve a national standard for recognition of an approved common law degree for entry into law society bar admission programs. The precise terms of reference are set out at Appendix 7.[10]

27. The Task Force comprises eight benchers and former benchers and three staff members from law societies across the country.[11] The Task Force has met eleven times. In November 2007 the Task Force Chair met with the Canadian Council of Law Deans ("the Council") and invited input from the Deans.

28. The Council established a working group of three Deans that met with the Task Force on two occasions and was invited to provide the Task Force with its views respecting the nature of the Canadian legal education experience and expectations of students enrolled in a Canadian LL.B./J.D. program. The Council endorsed the working group's overview report ("Deans' Report"), set out at Appendix 8. The Task Force has found both its discussions with the Deans and the report helpful to its deliberations.

29. In addition, in March an ad hoc group of law faculty held a symposium to discuss the Task Force's work. Task Force members were invited to attend a question and answer session. The Task Force found the session informative and useful. Subsequent to the session the ad hoc group provided the Task Force with a paper that reiterated and expanded upon the perspectives and suggestions outlined during the meeting. Its paper is set out at Appendix 9.

30. This consultation paper sets out specific issues the Task Force is considering and invites comment. The Task Force's intention is to receive and consider the comments before preparing its final report for Federation Council in the spring of 2009.

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[10] This Task Force has been mandated to consider those competence-based requirements that should be required for entry into bar admission programs. It may well be, however, that following the completion of this process law societies will want to consider the implications for their own bar admission and licensing programs, with a view to considering the development of a national approach.

[11] John J. L. Hunter, Q.C. (Chair) (British Columbia), Susan Barber (Saskatchewan), Babak Barin (Québec), Vern Krishna, C.M., Q.C.(Ontario), Brenda Lutz (New Brunswick), Douglas A. McGillivray, Q.C.(Alberta), Grant Mitchell, Q.C. (Manitoba), Catherine S. Walker, Q.C. (Nova Scotia), Sophia Sperdakos (Law Society of Upper Canada), Donald F. Thompson, Q.C.(Law Society of Alberta), and Alan D. Treleaven (Law Society of British Columbia).

Law Societies' Goals Respecting Competence

31. Law societies in Canada regulate in the public interest. Among their other responsibilities they must develop standards of competence for members of the profession. As part of this process they must ensure that candidates for entry into law society bar admission programs meet required standards for the practice of law. Further, they must articulate and implement those required standards in ways that are transparent, objective, fair and impartial.

Developing the Required Standard

32. The Task Force's preliminary view is that the required standard should address competencies in fundamental areas of substantive knowledge, legal skills and professional responsibility. It should address the legal education environment in which those competencies have been acquired.

33. Candidates who seek entry into law society bar admission programs should have acquired a comprehensive legal education that provides the candidates with framework competencies, including a heightened awareness of professional ethics and conduct, and an understanding of those competencies in the context of the Canadian legal system, to prepare them for the practice of law.

(a) Required Competencies

34. At the heart of law are relationships in which individuals interact with one another, the state, and societal and business entities. A lawyer's fundamental role is to understand those relationships, to identify the legal issues and problems that arise from them and to craft solutions. The lawyer's role may arise in traditional private practice while serving the needs of a client, as corporate counsel, in government or clinic practice, or in myriad other contexts.

35. Each context and each issue may require the lawyer to bring to bear a wide range of skills and substantive ability. The lawyer's development is never static and must evolve, adapt and expand wherever the lawyer works and in the face of a constantly changing legal landscape.

36. To perform their roles lawyers must know the law, whether common law or statute. This does not mean that lawyers will always know all the law applicable to a particular problem or issue, but does mean they must understand the basic legal concepts that will be applicable, and will guide them in finding the law that is specific to the problem or issue at hand.

37. It is not reasonable to expect that law schools will graduate students who are fully capable of providing competent professional services to clients in all matters. Clearly, the bar must continue to play a role in bridging the gap between law school and formal licensing of lawyers. However, through the professional legal education students receive in law school, they should acquire foundational competencies necessary for the practice of law.

38. The Task Force agrees with the characterization of law schools as "hybrid institutions" with antecedents both in the historic community of practitioners and in the modern research university.[12] Professor Harry Arthurs expressed this duality more than twenty years ago in language that the Task Force believes is still apposite:

> Law faculties are part of the university, but they are not governed solely by the university's statutes and structures. They are subject as well to the regulations of professional governing bodies that partly define their curriculums, teaching terms, and other matters such as minimum admission criteria.[13]

39. In the Task Force's view law school should be that vital component of the lawyer's education that provides the framework knowledge, skills, attitudes and capacity for reflection that enable its graduates to move into the lawyering roles described above.

40. The Carnegie Foundation's study highlights the common goal of professional training across professions:

> Across the otherwise disparate-seeming educational experiences of seminary, medical school, nursing school, engineering school and law school, we identified a common goal: professional education aims to initiate the novice practitioner to think, to perform, and to conduct themselves (that is to act morally and ethically) like professionals. We observed that toward this goal of knowledge, skills, and attitudes, education to prepare professionals involves six tasks:
>
> 1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research
> 2. Providing students with the capacity to engage in complex practice
> 3. Enabling students to learn to make judgments under conditions of uncertainty
> 4. Teaching students how to learn from the experience
> 5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community
> 6. Forming students able and willing to join an enterprise of public service[14]

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[12] William M. Sullivan et al, Educating Lawyers: Preparation for the Profession of Law (The Carnegie Foundation for the Advancement of Teaching), 2007, at p. 4; also referenced in the Deans' Report, p. 3.

[13] Harry W. Arthurs, "The Law School in a University Setting", at Legal Education in Canada, p. 159.

[14] Carnegie, p.22.

41. The Task Force agrees with this description, which recognizes the law school as a beginning point in the learning process, albeit a critically important one. It also speaks to a legal education that embraces both the technical requirements of the profession and the intellectual tradition of a liberal education that creates true professionals.

42. The Task Force has considered what framework competencies should form the essential foundation that graduates seeking entry into law society bar admission programs should have acquired in law school. In developing a proposed framework the Task Force has reviewed competency descriptions employed by regulators in other common law jurisdictions. In addition it has considered the extensive work on lawyering skills and competencies that the Law Society of Upper Canada undertook in the development of its licensing process and the analysis and the survey work that the law societies of Alberta, Saskatchewan and Manitoba undertook in the development of their CPLED bar admission program.

43. Students should acquire these framework competencies with an understanding of their operation in the Canadian legal system. This jurisdiction specific understanding is of fundamental importance to anyone being called to the bar by a law society in a Canadian common law jurisdiction.

44. The rationale behind the Task Force's approach to the framework competencies is set out below:

    a. The foundations of the common law, including knowledge and understanding of the doctrines, principles and sources of the common law, how it is made and has been developed in Canada and the institutions within which law is administered in Canada form the underpinning to most areas of Canadian legal practice. These foundations include contracts, torts, property law, criminal law, and civil procedure.
    b. The constitutional law of Canada, both in its elaboration of the division of legislative powers and in its protection of human rights through the *Charter of Rights and Freedoms* affects the operation of the law in myriad areas. Competency in constitutional and human rights principles and Charter values is fundamental.
    c. Equitable principles including fiduciary obligations, trusts and equitable remedies, as well as business organization concepts affect a multitude of legal relationships in the Canadian legal system. Competency in these principles and concepts is fundamental.
    d. Legislation and regulation play an increasingly central role in the Canadian legal system. Competency in statutory analysis and in regulatory and administrative law is fundamental.
    e. Legal issues and problems (regardless of substantive area) are complex, multi-layered and challenging and require specific skills directed at solving them. Competency in dispute resolution and advocacy and in their evidentiary underpinnings is fundamental.
    f. The law is an intellectual discipline, requiring of members of the profession the capacity to research and analyze the law, to apply findings to solve legal problems, to reason, communicate, adapt and evolve. Competency in legal research skills and written and oral communication

skills specific to law is fundamental.

g. The Canadian legal profession operates within an established ethical framework that circumscribes and defines its members' behavior. Competency in principles of professional responsibility is fundamental.

45. Recognizing that generally speaking there are a number of ways that the competencies described above might be acquired in the law school setting, the Task Force considers that specific curriculum development should be left to law faculties to determine, providing students some flexibility in meeting the required standards. It is not necessary in most instances for law societies to articulate how many credit hours should be spent in any one of the competencies,[15] nor to restrict their attainment through specified courses. Competency in statutory analysis, for example, could be obtained by taking any number of courses in which a statute or statutes play a fundamental role (e.g. administrative law, family law, criminal law, income tax law, business corporations, real estate). The system ultimately put in place to monitor the required standards would address compliance issues.

(b) Professional Responsibility

46. The Task Force considers that professional responsibility should be approached somewhat differently from the other competencies. Both the profession and the legal academy have a responsibility to develop and nurture a sense of professionalism in students and lawyers. The opportunity for early intellectual discourse on this fundamentally important subject area seems ideally suited to a university environment.

47. More than 15 years ago, the Federation funded an important study by W. Brent Cotter, now Dean of the University of Saskatchewan's College of Law, on the importance of professional responsibility instruction as a component of legal education.[16] Today, although a number of law schools require students to take a mandatory professional responsibility course, many do not, preferring what is referred to as the "pervasive" approach in which professional responsibility considerations are referred to where applicable across the curriculum.

48. While generally speaking the Task Force thinks it more appropriate to articulate competencies rather than specific courses, it believes that the need to ensure that students have a solid understanding of professional responsibility argues in favour of a stand-alone course in professional responsibility being required of graduates seeking to enter bar admission programs. Such a course should address both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including in areas such as conflicts, solicitor client privilege, and the lawyer's relationship with the administration of justice.

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[15] Harvard Law School has recently made substantial changes to its first year curriculum, adding a number of courses. It has been able to do so because it has reduced the number of credit hours of some of the foundational courses such as contracts and torts.

[16] W. Brent Cotter, Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education, 1992.

49. Some law schools have taken the view that professional responsibility should be embedded in the substantive law courses offered to the students. The Task Force sees a stand-alone course as complementing rather than replacing such course content.

50. The addition of such a mandatory course should not, however, relieve regulators of the obligation to provide instruction in professional responsibility in bar admission programs and in post-call education, with particular reference to law societies' Rules of Professional Conduct.

51. In summary then, the Task Force is of the preliminary view that the following competencies should constitute the required curriculum standard for a graduate's entry into law society bar admission programs in common law jurisdictions in Canada. As stated above, the teaching and assessment related to these competencies should provide students with an understanding of the operation of the law in the Canadian legal system:

    a. Foundations of common law, including,
        - the doctrines, principles and sources of the common law, how it is made and developed and the institutions within which law is administered in Canada;
        - Contracts, torts and property law;
        - Criminal law; and
        - Civil Procedure.
    b. The constitutional law of Canada, including principles of human rights and Charter values.
    c. Equitable principles, including fiduciary obligations, trusts and equitable remedies.
    d. Business organization concepts.
    e. Principles of statutory analysis and regulatory and administrative law.
    f. Dispute resolution and advocacy skills and knowledge of their evidentiary underpinnings.
    g. Legal research skills.
    h. Oral and written communication skills specific to law.
    i. Professional responsibility.

52. The articulation of competencies in this manner would also provide greater certainty for those seeking to obtain a Certificate of Qualification from the NCA. This is because the competencies to be required of Canadian common law graduates would also form the basis for the equivalency measurement required of internationally educated candidates.

53. The concern has been expressed to the Task Force that a curriculum-based standard puts too much weight on prescribed courses and may constrain innovative developments in legal education if these stand alone in articulating academic requirements for the practice of law. The Task Force is sensitive to this concern, but has a corresponding concern that innovation should not interfere with graduates receiving education in the essential concepts of the law necessary for practice.

Questions for comment:

1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?

2. Is it over- or under-inclusive?

3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?

(c) Comprehensive Legal Education - Institutional Requirements

54. In the Task Force's preliminary discussion paper of November 2007 it concentrated on the questions of required competencies, but had not yet considered the setting within which students acquire those competencies.

55. One of the concerns expressed to the Task Force about the competencies approach was that a "list" does not begin to capture the richness of a law school education - the community in which one begins to think like a lawyer, but also to look at law critically and address deficiencies in legal systems and principles. As the Deans' Report has pointed out, modern law schools provide a liberal legal education as well as a professional education. Law is an intellectual discipline and the practice of law requires rigorous academic training as well as practice skills.

56. If law societies agree with this view of legal education then there is every reason to articulate certain other institutional requirements that should form part of the required standard for entry into law society bar admission programs, as well as developing criteria against which to measure new law school applications.

57. The Task Force has isolated four particular issues on which it seeks comment:

    (i) Law school admission requirements;
    (ii) Length of the law school program;
    (iii) Program delivery; and
    (iv) Joint degrees.

58. In general the institutional issues discussed below require some reflection because of the changes that have occurred in law school education over recent decades. They speak to important issues about the quality of the law school education, and the need for structures that accommodate regulatory requirements, but are flexible and capable of innovation.

(i) Law School Admission Requirements

59. The 1957/1969 Law Society of Upper Canada requirements state that the minimum requirement for admission to a law school course should be "successful completion of two years in an approved course in an approved university after 'senior matriculation'" or

three years after junior matriculation.[17] "Senior matriculation" referred to Grade 13, which no longer exists in Ontario or anywhere else in Canada, while junior matriculation means Grade 12.

60. While the Task Force believes that it is appropriate to clarify the minimum requirement for admission to law schools, it cannot determine what is the current typical law school approach or identify what the best approach would be.

61. In the United States the prerequisite for admission to law school is an undergraduate university degree. As an increasing number of Canadian law schools award J.D. degrees in place of the LL.B. degree questions arise as to whether the prerequisite for law school should mirror that in the United States where the J.D. is awarded.

62. In the United Kingdom the law degree is often taken immediately following secondary school. In an increasing number of Canadian common law schools the *de facto* admission requirement is an undergraduate degree, in part because of the competition for spaces in law faculties. At McGill University, however, students can be, and often are, admitted following completion of the two year CEGEP program (junior college) and this is a long-standing approach.

63. The Task Force is inclined to the view that at least some post-secondary education should continue to be required as a general pre-requisite to law school and that generally speaking it should be university education. Its views are based on a belief that undergraduate university education provides an important foundation for the advanced learning that takes place in law school. At the same time it recognizes McGill's tradition to admit students from CEGEP and considers that it may be appropriate to consider an exception to its general view that the post-secondary education should take place in a university setting to accommodate this tradition. It also believes that special admission programs such as those for mature students and Aboriginal students should continue to exist.

64. The issue, then, is whether the prerequisite for the Canadian common law faculty should continue to be two years post secondary education in a university setting or be changed to another standard. A clear standard will also make the process more transparent and objective for evaluating international degrees for equivalency.

[17] Although never adopted nationally, the 1957/69 requirements respecting admission requirements and length of law degree program were generally implemented across the country.

Questions for comment:

1. Should the existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect the de facto requirement of an undergraduate university degree?

2. If so, should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?

3. Are there other exceptions that should be recognized and accommodated?

(ii) Length of the Law School Program

65. Under the 1957/69 Law Society of Upper Canada requirements, the accepted law degree program was to be "three years in full-time attendance."

66. The Task Force does not see the justification for limiting the length of law school to the language used in the 1957/69 requirements. There may be many innovative and valuable programs that permit students to complete a degree in fewer than three academic years or without a "full-time attendance" requirement *at the home university*. So, for example, students may complete a degree on the semester system that allows them to attend law school in six terms over two years, instead of over three years. Similarly, a student may attend a term at a law school in another jurisdiction such that full-time attendance at the home university during that term is not possible.

67. The Task Force is of the view that it may be more appropriate to articulate the requirement in terms of credit hours, the current Canadian common-law degree norm being 90 credit hours. In the Task Force's view 90 credit hours as a general law degree requirement allows for both the satisfaction of the competencies described in this report and the opportunity to pursue additional study in subject areas of particular interest to individual students.

Questions for comment:

1. Should the standard length for the common law degree be expressed in terms of credit hours rather than years of study?

2. If so is 90 credit hours the appropriate standard?

(iii) Program Delivery

68. Electronic delivery did not exist when the 1957/69 Law Society of Upper Canada requirements were put in place and there is still debate on the role it should play in law school education, which continues to be primarily based on an in-person delivery model. The model is based on the belief that law students benefit from interacting in person with their professors, other students and adjunct faculty made up of practitioners. It assumes that the acquisition of specialized knowledge and professional identity is enhanced by

face-to-face interaction. Moreover it is suggested that the increased attention to skills training makes personal attendance essential.

69. The Task Force is inclined to the view that while innovative delivery systems should not be discouraged, in-person learning should continue to be the primary method of educational delivery for the foreseeable future. It is interested, however, in receiving comments on this issue, particularly from those who have experience with non-traditional delivery methods.

Questions for comment:

1 Should in-person learning be required for all or part of the law school program?

2. Are there other delivery systems that should be taken into account?

(iv) Joint Degrees

70. Combined or joint degrees are not dealt with in the Law Society of Upper Canada 1957/1969 requirements, but have become more prevalent in the fifty years since the original standard was devised. These degrees reflect the increasing sophistication and inter-jurisdictional components of legal education.

71. In some interdisciplinary joint degree programs the number of credit hours devoted specifically to law courses is fewer than ninety. The Task Force's initial response to this is that if these programs are thoughtfully developed to interweave the learning between two disciplines, the reduced number of specific law credits should not undermine the legitimacy of the joint degree.

72. The Task Force would be interested in receiving more information on the development of joint degrees. It may be that the most appropriate way to address the approval of joint degrees for the purposes of entry to bar admission programs is through a national monitoring body that can consider, among other things, new law programs within the established law faculties.

Questions for comment:

1. How should joint degree programs be treated for the recognition of the common law degree?

2. Should a national body monitor joint degree programs?

(d) New Law Schools

73. The issue of comprehensive legal education that the Task Force has identified above is also relevant to a discussion of proposals for law society recognition of the law degrees of graduates from new law schools for the purposes of entry to bar admission programs.

74. The Task Force agrees with the comments in the Deans' Report that there are certain characteristics and underpinnings that are essential to the development and

maintenance of an effective law school environment. These go beyond the institutional issues discussed above. The Deans' Report focuses on faculty, curriculum, fostering intellectual and research communities, library and other facilities, and student support services. Without commenting on whether there are additional components that should be in place, the Task Force is of the view that in determining whether to recognize a new law school's law degree law societies should, at a minimum, consider the presence of these components.

75. The Task Force believes that the most effective way to address the issue of recognition of law degrees from new law schools is to establish a national body that will develop and monitor the appropriate components, including the institutional requirements, characteristics, and underpinnings and application of whatever required standard that may emerge from the Task Force's work. This national approach is in keeping with the recognition that portability of common law degrees is an important principle to uphold.

Questions for comments:

1. Should a national body be established to develop the components for recognition of law degrees from new law school programs?

2. Are there alternatives to this approach?

Ensuring Compliance with a Required Standard

76. Once a required standard for admission into law society bar admission programs is articulated, law societies must consider how to monitor compliance with the standard. This is an issue that regulators in many jurisdictions have addressed in a variety of ways depending upon their own legal regulatory structures and traditions.

77. The Task Force has reviewed a number of models from jurisdictions such as England and Wales, Australia, and the United States. In addition the Task Force reviewed a paper from the Federation's 1986 conference on legal education in which the issue of accreditation of law degree programs was discussed. All of this information has been useful to the Task Force as background and is summarized at Appendix 10.

78. The Task Force has examined three possible compliance options:

a. The "status quo" option.
b. The examination option.
c. The approved law degree option.

(a) The "Status Quo" Option

79. Under the "status quo" law societies have, in effect, not monitored law school curricula. They have accepted that students with a degree from one of the 16 Canadian common law faculties are automatically eligible for admission into law society bar admission programs.

80. In the course of its discussions with the legal academy the Task Force has been told that the status quo has permitted the development of sophisticated Canadian law schools that promote innovation and are capable of adapting to the changing needs of the legal profession.

81. The Task Force has been told that as faculties within established university structures, law schools in Canada are required to report regularly on their mission, values, and performance, are accountable for scholarly results and pedagogical outcomes, are subject to rigorous internal and external peer review, and engage in ongoing curricular reviews and a host of other activities designed to ensure that they are of the highest calibre both as professional schools and scholarly institutions.

82. The suggestion has been made, as well, that the profession already exercises enormous influence over curriculum because of the content of bar admission examinations and the influence of alumni over their universities. In addition, because all law schools in Canada are publicly funded the provincial governments exercise their own control relating to budgetary decisions.

83. In summary the advantages of the status quo have been described as,

a. fostering innovation while at the same time, because of internal checks and balances, ensuring quality legal education;
b. avoiding the danger of choosing a "one size fits all" approach; and
c. avoiding the creation of another layer of regulation that some would say is not necessary.

84. The Task Force sees certain regulatory concerns with the status quo. They may be summarized as follows:

a. Regardless of how rigorous university internal evaluation structures are, universities have a different mandate from law societies and define their mission differently;

b. It does not give weight to the responsibility of law societies to determine the academic requirements that are necessary to practice law and to ensure that those entering bar admission programs are competent to do so; and

c. It does not address increasing external demands on law societies engendered by fair access legislation, increasing interest in new law schools, and a general scrutiny of self-regulation, to demonstrate consistency and transparency in their processes.

(b) The Examination Option

85. Another option to monitor compliance with required standards would be to create a national examination that graduates seeking to enter bar admission programs would first be required to pass. It would be designed to test their competence in the areas that regulators designate as part of the required standard. Law societies would determine the

competencies that they believe to be essential and examine on them, with a passing grade being the measurement that the student has acquired those competencies.

86. This option appears to be transparent and objective, easily developed nationally and entirely within the control of law societies. Potentially it may apply to both domestically and internationally educated candidates. For those who currently question whether students graduating from law schools are adequately prepared to practise law, there may be comfort that an examination system serves as a check and balance.

87. The Task Force is of the view, however, that there are a number of issues that arise with this option that require consideration. Criticisms of the American examination model for example, include the view that the examinations come to "drive" the legal education process. It has been suggested that what examination passage denotes primarily is the ability to pass an examination, rather than proof of the acquisition of the knowledge, skills and abilities that a lawyer requires to practise law.

88. It is important as well to consider the prerequisite necessary to be entitled to write the examination. If one assumes that a law degree should be required does it matter whether the law degree is a Canadian common law degree? Could it be a common law degree from any jurisdiction or indeed a law degree from any legal system? If the examination process is equally applicable to internationally trained candidates it suggests that successful completion of the examination addresses all the differences between Canadian and international law degrees. The content of the international degree would be irrelevant. Only successful completion of the examination would matter.

89. Another possible disadvantage of this approach is that it adds another layer to law students' education. Further, if a Canadian common law degree or its equivalent would be required, then under this option internationally trained candidates would still be required to undergo an equivalency assessment and meet whatever requirements accompany that before being eligible to write the national exam, potentially adding an additional layer to their qualifying process.

90. If the examination option were chosen, a national body would need to be established to set the examinations and monitor that their content continues to be relevant.

(c) Approved Law Degree Option

91. Under this option a required standard would be established, potentially along the lines described earlier in this paper and law faculties would demonstrate what they are doing to ensure that their graduates have achieved the required competencies. If the degree is approved, any student with a law degree from that law faculty would be eligible to enter bar admission programs. What would differentiate this option from the current approach of approving all graduates from the 16 common-law law faculties would be the establishment of a current, articulated standard and a monitoring process to address ongoing program development.

92. The development of a national body for the approval and monitoring of the common law degree seems long overdue. Even in 1985, both educators and regulators were worried

about the prospect of different law societies coming to different conclusions on the acceptability of law schools' degrees. Kenneth Jarvis wrote, in 1984:

> In view of the history of the development of the portable LL.B. degree in Canada it is understandable how Ontario became the approving authority for the Canadian approved LL.B. degree. It is less clear that it should continue to discharge this responsibility…. The anomaly of one province discharging the necessary responsibility of co-ordination should be ended. The time appears to be ripe for the Federation of Law Societies to accept that responsibility…[18]

93. Such a national body, referred to elsewhere in this paper, could address issues related to compliance and ongoing modification of required competencies over time, consideration of criteria for approval of new law school degrees and new programs within faculties, for the purposes of graduates' entry to bar admission programs.

94. To be most effective, any such a national body should include significant participation of law faculty and administrators so that the expertise of legal educators can be brought to bear on the issues.

95. The Task Force does not envision a complex accreditation and monitoring structure such as the American Bar Association uses, but does envision regular monitoring, perhaps every five years, to ensure that the required standard continues to be implemented across the country.

96. Some possible advantages of this approach are,

a. it offers certainty to both the law schools and their graduates that their degrees will be recognized for the purposes of entrance into bar admission programs;
b. through regular monitoring it satisfies law societies' responsibility for admission standards, but continues to allow for significant flexibility in how law schools meet the standards;
c. it is capable of building into the monitoring process the institutional requirements discussed elsewhere in this report;
d. unlike the examination option it does not add an additional layer to legal education.

97. Some possible disadvantages of this approach are,

a. from the perspective of law faculties, it increases external reviews of their structures and approaches;
b. there are those who will say that it will inhibit innovation and promote a "one size fits all" approach to legal education;
c. it may not be as specific in terms of knowledge and skills as some may

[18] Legal Education in Canada, op. cit. "Accreditation of Law Degree Programs", Letter from Kenneth Jarvis, February 20, 1984, p.791also at Appendix 2.

suggest should be the case; and

d. it requires the creation of a new national structure that will have cost implications.

98. If this option were adopted, internationally educated candidates for entry into bar admission programs would continue to be required to obtain a Certificate of Qualification from the NCA. The NCA would play the role of the monitoring body for internationally educated candidates. The criteria the NCA applies would be more directly linked to the competencies and standards required for domestic law graduates.

Questions for comment:

1. The Task Force has identified three possible compliance models. Please provide comments on these models.

2. Are there other models that should be considered and if so, what are they?

The Consultation Stage

99. With the approval of the Federation Council for consultation, the Task Force is disseminating this paper nationally. It is anticipated that upon receipt individual law societies will distribute the paper within their jurisdictions to those groups with whom they regularly consult.

100. The Task Force invites written comments until December 15, 2008. Thereafter, it will prepare a final report and recommendations for Federation Council in the spring of 2009.

101. Comments are invited on some or all of the questions set out in this paper and repeated below, or on any aspect of the issues under consideration.

1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?
2. Is it over or under-inclusive?
3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?
4. Should the existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect the de facto requirement of an undergraduate university degree?
5. If so, should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?
6. Are there other exceptions that should be recognized and accommodated?
7. Should the standard length for the common law degree be expressed in terms of credit hours rather than years of study?
8. If so, is 90 credit hours the appropriate standard?
9. Should in person learning be required for all or part of the law school program?
10. Are there other delivery systems that should be taken into account?
11. How should joint degree programs be treated for the recognition of the

common law degree?
12. Should a national body monitor joint degree programs?
13. Should a national body be established to develop the components for recognition of law degrees from new law school programs?
14. Are there alternatives to this approach?
15. The Task Force has identified three possible compliance models. Please provide comments on these models.
16. Are there other models that should be considered and if so, what are they?

Please send your comments by December 15, 2008 to,

Federation of Law Societies of Canada
Task Force on the Common Law Degree
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Appendix 1

NATIONAL COMMITTEE ON ACCREDITATION OVERVIEW

A. Mandate

The National Committee on Accreditation ("NCA") is a standing Committee of the Federation of Law Societies of Canada and is made up of representatives from the Council of Canadian Law Deans, members of the practising bar, and members involved with the administration of provincial law societies.

The NCA evaluates the legal training and professional experience of persons with foreign or non-common law legal credentials (including Québec) who wish to be admitted to a common law bar in Canada. Upon completion of its review, the NCA issues a recommendation describing the scope and extent of any further legal education that in its opinion the applicant needs to complete to equal the standard of those who have earned a Canadian LL.B. degree.

The Certificate of Qualification does not duplicate the LL.B. degree. Applicants who wish to obtain an LL.B. degree should apply to a law school. The NCA evaluates all applicants, whether Canadians with foreign legal education, foreign nationals with foreign legal education and Quebec civil law degrees, on their academic and professional profile.

The National Committee on Accreditation does not evaluate credentials for lawyers who want to apply to and become members of the Barreau du Québec or the Chambre des notaires du Québec, which have their own evaluation procedures.

The NCA applies a uniform standard on a national basis so that applicants with foreign law qualifications can apply to the Committee regardless of the common law province in which they

wish to practise in Canada. Thus, applicants do not need to satisfy disparate entrance standards to practise law in Canada.

B. Method of Evaluation

1. Method

The nature of the Committee's mandate is captured in the words used in the Certificate of Qualification. The Certificate states as follows:

> *"Having passed the prescribed course of studies required by the National Committee, it is hereby certified that the National Committee on Accreditation considers (name of applicant) to have education and training equivalent to a graduate of an approved Canadian law school."*

Thus, the Committee certifies that an applicant has:

- an understanding and knowledge of Canadian law, and
- knowledge equivalent to that of a graduate of a Canadian common law LL.B. program.

"Equivalence to an approved Canadian LL.B. degree" serves as the Committee's benchmark when it evaluates applicants with foreign legal education or training. The Certificate of Qualification does not, however, duplicate the LL.B. degree, which varies between law schools. NCA applicants may be asked to challenge examinations in subjects that all law schools may not require for the LL.B. degree.

The NCA bases its recommendation on the applicant's legal background, both academic and professional. It takes into account the source country of legal education (common law, non-common law, "hybrid"), subject matter studied, academic marks and standing, nature of the degree granting institution, professional qualifications and length and nature of professional legal experience.

The NCA reviews each applicant's file individually. Upon completion of its review, the NCA issues a recommendation that the applicant:

1. pass examinations in specified areas of Canadian law;
2. take further education at a Canadian law school with a specified program of studies; or
3. complete a Canadian LL.B. program.

2. Prescribed Subjects/Courses

The NCA expects applicants to proceed to a bar admission program. Substantive law is not generally taught in Canadian bar admission programs. Rather, the emphasis in most Bar courses is on practical skills and procedure.

Thus, applicants are expected to have sufficient knowledge of Canadian substantive law and procedure before they enter the program.

NCA applicants are expected to demonstrate competence in at least the following basic practice areas:

- Administrative Law
- Business Law (Corporate and Commercial)
- Civil Litigation
- Constitutional Law
- Contracts
- Criminal Law
- Criminal Procedure
- Estate Planning and Administration
- Evidence
- Family Law
- Professional Responsibility
- Property
- Real Estate
- Taxation
- Torts
- Trusts, Equity, Remedies.

3. Nature of Recommendations

The NCA may require applicants to complete successfully a stipulated number of "credit hours" of law studies at a Canadian common law school or write examinations in specific subjects. The number of hours stipulated depends upon the applicant's individual background of legal education and professional experience.

C. Evaluation Guidelines

The Committee is authorized to issue a Certificate of Qualification to any candidate who has attained education and training equivalent to graduates from a Canadian LL.B. program.

The Committee directs applicants with foreign legal credentials into the appropriate level of legal education in Canada so that they may proceed to admission into a Canadian common law bar on the same basis as domestic law graduates.

Each application is evaluated on an individual basis taking into account the particular circumstances of that individual's educational and professional background.

Factors to be taken into account include: age of degree, academic standing in all years of the LL.B. program, the content of courses, subject matter studied, relevant graduate legal education, law teaching experience and the quality of undergraduate education or training. First, Second, Third and Pass Class standings are grade classifications/rankings. However, some institutions use alphabetic or numeric grading systems.

D. Québec

The NCA evaluates applicants who have Quebec law degrees (LL.B or LL.L) including graduates of the Diplôme d’études supérieures spécialisées en Common Law nordaméricaine

(DESS) program of the University of Montreal or the Diplôme de deuxième cycle de common law et droit transnational (DDCCLDT) program of the University of Sherbrooke. Applicants are evaluated according to their particular educational background and relevant professional experience.

Applicants who graduate from a law school in the Province of Québec are evaluated by the Committee according to their particular educational background and relevant professional experience.

Québec graduates receive full credit for successfully completed courses in federal law.

Applicants who have not been admitted to the Bar of Québec are asked to complete the entire spectrum of common law courses through attendance for one year (approximately 32 credit hours) at a common law faculty in Canada.

Applicants who graduate with a "pure" civilian degree and are admitted to the Barreau du Québec are usually asked to write examinations in some or all of the following subjects:

- Contracts
- Civil Procedure
- Trusts/Equity
- Torts
- Real Property
- Commercial Law
- Family Law.

Applicants who have substantial (10 years) professional experience in common law areas of practice are considered on a case-by-case basis and evaluated upon the basis of their education, areas of practice and legal experience.

Graduates from civil law programs that also have some common law component typically receive credit for the common law portion of their studies. For example, a graduate with a civil law degree who has successfully completed common law Contracts, Torts or Real Property would receive credit for those subjects and be asked to complete a reduced common law program.

E. Status of Certificate of Qualification

The Certificate of Qualification entitles one to enter the Bar Admission Course in Ontario and is officially recognized by the Law Societies of Saskatchewan, British Columbia, Prince Edward Island. and Alberta as equivalent to graduation from an approved Canadian law school. Other law societies and law schools use the NCA's recommendation on a more informal basis.

Appendix 4

Highlights of the Fair Access to Regulated Professions Act, 2006

- purpose of Act stated as helping to ensure that regulated professions and individuals applying for registration are governed by registration practices that are transparent, objective, impartial and fair

- positive duty on regulated professions to provide registration practices that are transparent, objective, impartial and fair; includes responsibility to ensure that practices of third party assessors of qualifications (NCA) meet the test

- requires regulated professions provide detailed information to applicants relevant to their registration practices

- all decisions and responses to applicants relevant to registration must be made within reasonable time; there must be an internal review or appeal from a registration decision within a reasonable time and the applicant is entitled to make submissions

- regulated professions must ensure training for assessors, adjudicators and others making registration decisions

- applicants are entitled to access to records relevant to their application, but access may be refused in certain circumstances, including that the record is subject to legal privilege

- the Fair Registration Practices Commissioner (FRPC) has broad powers under the Act to assess registration practices, specify audits, require reports and information from regulated professions, advise ministries and organizations on the Act, create different classes of regulated professions; the FRPC reports annually to the Minister of Citizenship and Immigration and the report will be tabled in the Ontario Legislature

- establishes an Access Centre for Internationally Trained Individuals to assist ITIs with information and assist professions and others with advice on implementation of the Act

- imposes reporting obligations on professions, including a review of their registration practices, a requirement to be audited, preparation of an annual fair registration practices report, provision of any information related to compliance with the Act.

- FRPC has authority to order that a profession has failed to comply with the Act. The FRPC cannot order a profession to make, amend or revoke any regulation it has authority to make under its governing Act, but can recommend that the profession make, amend or revoke or can recommend to the profession's Minister that he or she recommend or require the profession to so act; an appeal from an FRPC order is to the Divisional Court with leave and only on a question of law.

- The Act sets out offences under the Act and penalties. In any conflict between the Act and any other legislation, the Act prevails to the extent of the conflict.

- The regulations may create different classes of regulated professions and impose different requirements in respect of a class.

Appendix 5

Excerpt Carnegie Foundation for the Advancement of Teaching *Educating Lawyers: Preparation for the Profession of Law* (2007)

The Foundation's two-year study of legal education involved a reassessment of teaching and learning in American and Canadian law schools today. Intensive fieldwork was conducted at a cross section of 16 law schools during the 1999-2000 academic year. The study re-examines "thinking like a lawyer" – the paramount educational construct currently in use. The report shows how law school teaching affords students powerful intellectual tools while also shaping education and professional practice in subsequent years in significant, yet often unrecognized ways.

What sets [law school] courses apart from the arts and sciences experience is precisely their context–law school as apprenticeship to the profession of law. But there is room for improvement. The dramatic results of the first year of laws school's emphasis on wellhoned skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding. If legal education were serious about such a goal, it would require a bolder, more integrated approach that would build on its strengths and address its most serious limitations. In pursuing such a goal, law schools could also benefit from the approaches used in education of physicians, teachers, nurses, engineers and clergy, as well as from research on learning.

Two Major Limitations of Legal Education

1. Most law schools give casual attention to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice.

2. Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals.

Assessment of Student Learning Remains Underdeveloped

Assessment of what students have learned–what they know and are able to do–is important in all forms of professional education.

Summative assessments are useful devices to protect the public, for they can ensure basic levels of competence. But there is another form of assessment, formative assessment, which focuses on supporting students in learning rather than ranking, sorting and filtering them.

Legal Education Approaches Improvement Incrementally, Not Comprehensively

To a significant degree, both supporters and opponents of increased attention to "lawyering" and professionalism have treated the major components of legal education in an *additive* way, not an integrative way.

Moreover, efforts to add new requirements are almost universally resisted, not only in legal education, but in professional education generally, because there is always too much to accomplish in too little time.

Toward a More Integrated Model: A Historic Opportunity to Advance Legal Education

Law school provides the beginning, not the full development, of students' professional competence and identity. At present, what most students get as a beginning is insufficient.

In particular, legal education should use more effectively the second two years of law school and more fully complement the teaching and learning of legal doctrine with the teaching and learning of practice. Legal education should also give more focused attention to the actual and potential effects of the law school experience on the formation of future legal professionals.

Recommendations

Offer an Integrated Curriculum

To build on their strengths and address their shortcomings, law schools should offer an integrated, three-part curriculum: (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth; (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession. Integrating the three parts of legal education would better prepare students for the varied demands of professional legal work.

Join "Lawyering," Professionalism and Legal Analysis from the Start

The existing common core of legal education needs to be expanded to provide students substantial experience with practice as well as opportunities to wrestle with the issues of professionalism. Further, and building on the work already underway in several law schools, the teaching of legal analysis, while remaining central, should not stand alone as it does in so many schools. The teaching of legal doctrine needs to be fully integrated into the curriculum. It should extend beyond case-dialogue courses to become part of learning to "think like a lawyer" in practice settings.

Make Better Use of the Second and Third Years of Law School

[Law school] graduates mostly see their experiences with law-related summer employment after the first and second years of law school as having the greatest influence on their selection of career paths. Law schools could give new emphasis to the third year by designing it as a kind of "capstone" opportunity for students to develop specialized knowledge, engage in advanced clinical training, and work with faculty and peers in serious, comprehensive reflection on their educational experience and their strategies for career and future professional growth.

Recognize a Common Purpose

Amid the useful varieties of mission and emphasis among American law schools, the formation of competent and committed professionals deserves and needs to be the common, unifying

purpose. A focus on the formation of professionals would give renewed prominence to the ideals and commitments that have historically defined the legal profession in America.

Examples from the Field
Some law schools are already addressing the need for a more dynamic, integrated curriculum.

The law schools of New York University (NYU) and the City University of New York (CUNY) each exemplify, in different ways, ongoing efforts to bring the three aspects of legal apprenticeship into active relation. CUNY cultivates close interrelations between doctrinal and lawyering courses, including a resource-intensive investment in small sections in both doctrinal and lawyering seminars in the first year and a heavy use of simulation throughout the curriculum. The school also provides extensive clinical experience linked to the lawyering sequence. At NYU, doctrinal, lawyering and clinical courses are linked in a variety of intentional ways. There, the lawyering curriculum also serves as a connecting point for faculty discussion and theoretical work, as well as a way to encourage students to consider their educational experience as a unified effort.

Yale Law School has restructured its first-year curriculum by reducing the number of required doctrinal courses and encouraging students to elect an introductory clinical course in their second semester. This is not full-scale integration of the sort necessary to legal education, but it and other efforts like it point toward an intermediate strategy: a course of study that encourages students to shift their focus between doctrine and practical experience not once but several times, so as to gradually develop more competence in each area while making more linkages between them.

Southwestern Law School has instituted a new first-year curriculum, in which students take four doctrinal courses in their first semester rather than five, allowing for an intensified two-semester, integrated lawyering course plus an elective course in their second semester. The lawyering course expands a legal writing and research experience to include detailed work in legal methods and reasoning, as well as interviewing and advocacy.

The Rewards of Innovation

As desirable–and necessary–as developing a more balanced and integrated legal education might be, change does not come without effort and cost. Forward-thinking faculty and schools will have to overcome significant obstacles. A trade-off between higher costs and greater educational effectiveness is one. Resistance to change in a largely successful and comfortable academic enterprise is another.

It is well worth the effort. The calling of legal educators is a high one–to prepare future professionals with enough understanding, skill and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizens' loyalty.

Appendix 7

TASK FORCE MANDATE
To,

- review the criteria currently in place establishing the approved LL.B/ J.D. law

degree for the purposes of entrance to law societies' bar admission/ licensing programs ("the approved LL.B./J.D. degree") and determine whether modifications are recommended;

- if modifications are recommended, propose a national standard for the approved LL.B./J.D. degree; and
- consider the matters in (a) and (b) in relation to the National Committee on Accreditation requirements for granting a certificate of qualification and determine what changes if any should be made to those requirements. By articulating standards for the approved LL.B./J.D. law degree the Federation can more clearly identify for foreign trained candidates and those with civil law degrees from Quebec the meaning of "equivalent to a Canadian LL.B./J.D. degree."

Appendix 8

An Overview of Canadian Common Law Legal Education (LL.B./J.D. Degrees)
Council of Canadian Law Deans
May 2008

INTRODUCTION

Over the past number of decades, Canada has established an outstanding system of legal education. In contrast to many other jurisdictions, law schools in Canada today are generally all of very high quality, with their graduates being highly sought after by both public and private employers, not only in Canada but internationally. Canadian legal education is a model that is both widely envied and emulated.

Despite these successes, Canada's law schools are constantly striving to improve the quality of the education they provide. The Council of Canadian Law Deans (CCLD) welcomes the opportunity to present this Working Paper outlining the overall goals and mission of Canadian legal education; a discussion of the necessary skills, competencies and knowledge necessary to accomplish these goals; and an identification of some of the institutional requirements required in order to impart these skills and competencies to our graduates. Our hope is that this Working Paper can contribute to a dialogue that will lead to further enhancements in the quality of the education we provide.

It should be noted that this Working Paper does not attempt to address the full range of issues impacting the legal profession that are presently being considered by the *National Task Force on Accreditation of Canadian Common Law Degrees* (the "National Task Force") or the *Licensing and Accreditation Task Force* of the Law Society of Upper Canada. Nevertheless the CCLD is prepared to engage with both of these Task Forces on other issues of mutual interest, beyond those discussed in this Working Paper.

The Emergence of University-based Common-Law Legal Education in Canada[1]

Historically, Canadian lawyers were trained almost exclusively under an apprenticeship model. In 1883, Dalhousie Law School was founded in Halifax, and the Law Society of Nova Scotia accepted graduates from its program for admission to practice. In Ontario, since the creation of the Law Society of Upper Canada (LSUC) in 1797, admission to the bar requires a combination of apprenticeship and attendance at lectures (intermittently compulsory or voluntary) and examinations. In 1889, the LSUC established a permanent law school, later known as Osgoode Hall Law School. While several law faculties at Ontario universities were established during that era, admission to practice required attendance at Osgoode Hall. During this time, Ontario debated the issue of legal education and whether it should be aimed primarily at "intellectual development or at vocational preparation".[2]

University law faculties or schools of law were established in each of the western provinces between 1912 and 1915, either under the control of the provincial law society or in affiliation with it. The development of legal education in Quebec followed that of the other provinces, though permanent law faculties were established at McGill in 1853 and Laval in 1857.

The shift to university-based legal education developed primarily post World War II. During this period there was a dramatic growth in post-secondary education generally, fuelled by returning veterans and government policies designed to foster much broader participation in higher education in Canada. In addition to this general trend in higher education, the Canadian legal education landscape was influenced by developments in the American legal education system at that time. Specifically, the American legal profession emphasized law schools for legal training; many early Canadian legal scholars studied in the U.S. and were thus exposed to this trend. In 1957 the LSUC agreed that it would require a university law degree for admission to practice and law faculties were, thereafter, established across Ontario. By 1960, the mandatory requirement of a university law degree for admission to practice was in place in all provinces.[3]

During subsequent decades, law schools were created in Calgary, Moncton, Victoria and Windsor. A seminal development was the 1983 publication of Law and Learning, the Report of the Consultative Group on Research and Education in Law, headed by Harry Arthurs.[4] Law and Learning criticized what was then the dominant approach in law schools, focusing largely on a doctrinal approach to legal education. While doctrinal legal education remains important and

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[1] While recognizing Canada's two legal systems, for the purposes of this Report, our review of the development and current status of legal education is restricted to Common Law (LL.B. and J.D.) programs, and does not consider Civil Law programs.

[2] David A.A. Stager with Harry W. Arthurs, *Lawyers in Canada*, (Toronto: University of Toronto Press, 1990), (Chapter 4: The Law Schools) 86.

[3] Theresa Shanahan, *"A Discussion of Autonomy in the Relationship Between the Law Society of Upper Canada and the University-Based Law Schools"* (2000) The Canadian Journal of Higher Education, Volume XXX, No 1, 27 at 38; and Stager, ibid, 86.

[4] Social Sciences and Humanities Research Council of Canada, *Law and Learning / Le droit et le savoir: Report of the Consultative Group on Research and Education in Law* (Ottawa: The Council, 1983).

central to legal education in Canada, Law and Learning fostered the emergence of scholarly, research-oriented and interdisciplinary approaches to legal education.

At present, all provincial law societies in Canada require candidates for admission to have a three-year Bachelor of Laws (LL.B., or more recently, J.D.) degree from an approved Canadian university, or its equivalent. Law schools, now playing a significant role in the development of Canada's legal professionals, are today "rooted in the university system of each province and formally independent of the law societies."[5]

As indicated in the 2007 Carnegie Foundation report, similar to other professional schools, "law schools are hybrid institutions. One parent is the historic community of practitioners, for centuries deeply immersed in the common law and carrying on traditions of craft, judgement and public responsibility. The other heritage is that of the modern research university".[6]

I: MISSION, GOALS AND VALUES OF CANADIAN LEGAL EDUCATION

This section identifies the mission, goals and values of law schools in Canada today.[7] As discussed above, becoming a legal professional in Canada requires a universitybased legal education. A legal education is thus most obviously an education of interest to those who wish to become lawyers, as well as others. Providing a quality legal education is a multifaceted endeavor, since the legal system is more than the current understanding of legislation and common law: it is a "human process that cannot be understood apart from its social, economic, political, historical and practical context."[8] Insofar as a professional must attempt to understand the law in order to begin to work effectively in the legal system, a legal education entails a liberal education, as well as a professional education.

Professional Education

Legal professionals must be sufficiently expert in legislation and common law to ably provide legal services to clients who cannot, for a variety of reasons, analyze the worth of that service. A professional education, however, must go beyond imparting a detailed understanding of the law as it stands.

Professionals, owing to the importance of their abstruse knowledge to their clients, as well as the importance of the legal system working well for society at large, must: maintain the highest of ethics in personal practice; be responsive to changes in the legal system; and be champions

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[5] Stager, *ibid*, 89.

[6] William M. Sullivan et al. *Educating Lawyers: Preparation for the Profession of Law* (The Carnegie Foundation for the Advancement of Teaching) (2007) 4.

[7] In broad outline this section draws upon materials, including Strategic Plans, Curricular Reform Reports, Degree Level Expectation Reports, Internal and External Reviews, from McGill University Faculty of Law, Osgoode Hall Law School, Queen's University Faculty of Law, University of New Brunswick School of Law, University of Ottawa Faculty of Law (Common Law Section), Université de Sherbrooke Faculty of Law, University of Saskatchewan College of Law, University of Toronto Faculty of Law, University of Victoria Faculty of Law, University of Western Ontario Faculty of Law and University of Windsor Faculty of Law.

[8] *External Review Process Self-Study Document: Faculty of Law University of Victoria*, 2005, p. 3.

of the future of the legal system. A professional education must provide lawyers the tools to do so.

Liberal Education

A liberal education in law goes beyond a simple understanding of the 'legal facts' as they are, and attempts to situate the facts in a broader context: to view the bald facts through a variety of lenses, to examine paths not taken, to evaluate the *status quo*, to predict future developments in the law, and evaluate alternatives.

A liberal education is committed to the development of a reasoned examination of the world at large as well as a reasoned examination of alternative points of view, both for the intrinsic value of being exposed to those alternative points of view, as well as the respect for others that can be fostered in a respectful environment.

Lifelong Learning

The law constantly evolves, and lawyers must be in a position to assess and understanding emerging trends in the law. Moreover, professionals have to be aware of the limits of their knowledge: a more nuanced understanding of an old area of the law is always possible. Law schools have an obligation to do what they can to give students the tools they will need to be engaged in self-directed study, and the desire to do so.

Multiple Perspectives

A significant component of successful legal practice is anticipating what others want, or what others see as a just result, and responding appropriately. Insofar as exposure to different points of view aids in this, a law school should provide future practitioners as much exposure to other points of view as possible.

A deep understanding of other world-views requires respectful critical engagement: it is too easy to end up with a caricature of a view that you do not hold. Moreover, a key tenet of a liberal education is that you never really understand someone until you know not just what they think, but why they think it.

Exposure to a multiplicity of critical alternative perspectives also reinforces and refines one's own perspective, insofar as one is forced to defend a position or modify it in face of a fatal criticism. Exposure to alternative points of view is a necessary component of an adequate liberal and professional education.

Diversity

A commitment to the presentation of multiple perspectives entails a commitment to those perspectives being embodied both in their faculty and in their student body. This diversity is also independently required by the normative commitments of a liberal education.

Realism

It is a trite observation that lawyers are engaged in the practice of law: a legal education must aim to provide a variety of situations in which law students can 'get a feel' for the practice of a lawyer.

Innovation

Striving to keep on top of a changing legal system requires a commitment to ensuring that novel perspectives on law are available to students, as well as the newest methods whereby the law can be researched.

Excellence

Insofar as the lawyers graduating from a law school need to be as professional as they can over the course of their careers, then law schools would fail their students if they did not constantly strive to provide the best education that they can.

II: COMPETENCIES, KNOWLEDGE, SKILLS AND EXPECTATIONS

Given this mission, along with these goals and values, what are the competencies, knowledge, skills that law schools attempt to impart to their graduates? This section identifies the relevant competencies, knowledge and skills expected of law graduates in Canada today including, where appropriate, the competencies described in the National Task Force's November 2007 draft discussion paper (the "Discussion Paper"). [9] In our view the Ontario Council of Academic Vice Presidents' *Guidelines for University Undergraduate Degree Level Expectations* provides an appropriate framework in which to discuss these competencies, knowledge, and skills.

Depth and Breadth of Knowledge

Depth and breadth of knowledge compete against one another when aiming to produce a lawyer well-versed in the law. A student who has been well-versed only in a particular area of law has likely sacrificed becoming well-versed in the law as an entire system of rules, doctrines, principles and precepts.

Canadian law graduates are expected to acquire in-depth knowledge as well as knowledge spanning the breadth of law and legal doctrine. All undergraduate common law degree programs in Canada (LL.B. or J.D.) require instruction in Constitutional Law Contract Law, Property Law, Criminal Law, and Tort Law, thereby requiring knowledge of these significant areas of the Canadian Law. This provides understanding of the foundations of the common law, including doctrines, principles and sources of common law; how it is made and developed; the institutions within which it is administered in Canada; contracts, torts, property law, Canadian criminal law, civil procedure, Canadian constitutional law (both division of legislative powers and human rights, including Charter values) and equitable principles of fiduciary obligations, trusts and equitable remedies. Students are also expected to undertake a wide range of both generalist and specialist courses, thereby providing them with an

[9] *National Task Force on Accreditation of Canadian Common Law Degrees, Discussion Paper* (November 2007), 14 and 40-41.

understanding of the complexity of law and the interrelationship between different areas of legal knowledge.

Professionals are held to ethical standards, and need to not simply know the rules, but develop skills applying them. Many law schools require the study of ethics in a separate course or program as a way to incorporate such skills, while others incorporate such ethical reasoning while studying substantive course materials.

Knowledge of Methodologies

There must be a commitment to teaching not only the subject matter of a course, but also teaching students to 'think like a lawyer', including a multiplicity of critical alternative perspectives and exposure to alternative views. This is achieved, though not exclusively, by use of the case study method during substantive courses, by an awareness of argument by analogy, by inviting practicing lawyers to give talks or teach courses, and by encouraging classroom debate about the merits and demerits of legal decisions, doctrines, or evolutions.

Students are expected to acquire knowledge and understanding of principles of statutory analysis and regulatory and administrative law, as well as of legal research skills and oral and written communication skills specific to law. Students are taught to 'research like a lawyer': to efficiently navigate common electronic and print legal sources. This is achieved by legal research and writing, clinical work, moot court competitions, essay options for seminars or lectures, and by way of directed research, which results in a scholarly paper.

Application of Knowledge

Lawyers must be able to competently apply the knowledge gained in law school in a variety of situations: providing clients with advice in the face of a particular fact pattern, drafting documents designed to safeguard the client in the future, drafting documents required by the courts, interpreting legal documents, to present their client's position in arbitrations, and courts, etc.

Lawyers must, therefore, not only be able to objectively analyze and synthesize information, but also to present the law in a way that emphasizes the strengths and weaknesses of their client's situation.

Communication Skills

Communication skills are particularly important in a profession that depends on effective drafting, persuasion, and the giving of clear legal advice. Students are expected to acquire knowledge and understanding of oral and written communication skills specific to law and dispute resolution and advocacy skills (with knowledge of their evidentiary underpinnings). Students, in short, need to be competently persuasive, as well as competent at objectively assessing costs and benefits. This includes an awareness and understanding of multiple perspectives and a commitment to diversity. These competencies or skills are developed via small group seminars, clinical experience, mooting programs, research papers, exams, volunteering opportunities, as well as by close interaction with practitioners and faculty members and critical discussions in the classroom.

Awareness of Limits of Knowledge

Effective advice and risk management requires an understanding of the inherent uncertainties in the legal system. Students must become skilled in recognizing and assessing situations where courts might make surprising decisions, or where the law is simply unclear, or under-developed. Analysis of the historic developments in the law, and an emphasis on the quite reasonable paths not taken by courts, or legislatures, are one way in which students begin to recognize the limits of knowledge of the legal system.

Professionals must also be constantly aware that however much law is learned, there is still more to know. Law students must be aware not only that knowing the law will only take one so far, but also that one never knows the entire law. This humility is inculcated not only by the very position of being a student, but also through interaction with expert faculty and practitioners all of whom profess the same humility.

Autonomy and Professional Capacity

A student's ability to choose the particulars of his or her own education is one of the most significant autonomous choices in his or her budding legal career. In light of the ever-changing face of legal practice, and a legal education's need to be responsive to such changes, this is a significant feature of a legal education.

Skillfully navigating though the ethical dilemmas in which lawyers find themselves is aided by the voluntary adherence to a Faculty code of conduct, courses on ethics, ethical dimensions of courses in substantive law, clinical programs, pro bono opportunities, and interaction with practitioners and faculty members. A commitment to public service is inculcated through courses in ethics, clinical work, pro bono opportunities, and interaction with practitioners and faculty members.

III: INSTITUTIONAL REQUIREMENTS AND CHARACTERISTICS

To successfully meet the overall goals of delivering a legal education, and providing students with the skills, competencies and knowledge required of future legal professionals, emphasis at Canadian law schools is given to a variety of institutional features or requirements, including:

- Faculty;
- Curriculum;
- Fostering Intellectual and Research Communities;
- Library and Other Facilities; and
- Student Support Services.

To monitor many of these activities, and the level of student engagement within law schools, several Canadian law schools now participate in the Law School Survey of Student Engagement (LSSSE).[10]

[10] Canadian law schools began participating in the LSSSE in 2005. In 2007, eleven law schools participated in the annual survey: UBC, Dalhousie, Manitoba, New Brunswick, Osgoode, Ottawa (Common Law), Saskatchewan, Toronto, Victoria, Western and Windsor.

Faculty

The single most important element underpinning the quality of Canadian legal education is the strength of the faculty at Canadian law schools. Virtually all faculty hired in the past decade at Canadian law schools hold advanced level law degrees (at least an LL.M., and increasingly a Ph.D in law.) Faculty members often hold advanced degrees in other disciplines, in addition to advanced degrees in law. Members of Canadian law faculties are all legal scholars, with the capacity and expectation that they will significantly contribute to the creation and dissemination of legal knowledge, both to the benefit of the legal profession, as well as society at large. All faculty members are expected to publish regularly in peer-reviewed academic journals.

To constantly strive for excellence, and ensure that law school courses offered reflect the ever-changing landscape of law, active recruitment of the best legal scholars is required. Moreover, to facilitate meaningful interaction with students, the faculty/student ratio must be as low as practicable. As well, flexibility to develop new course offerings is important to both individual faculty members and law schools as this enables new areas of knowledge to open up and become part of the law school and professional learning process.

In order to provide an education sufficiently versed in alternative points of view, faculty, as a whole, should be versed in social science and humanities and should be interdisciplinary.

Attracting top-notch faculty members, and honing the skills of contemporary faculty members, requires a commitment to professional development. Funding available for conference participation and research assistance are but two of the most obvious ways in which this need may be filled. Active speaker programs and an effective method of becoming aware of opportunities in the wider university community also valuably assist in this regard. Faculty members today regularly apply for and receive funding from peerreviewed councils and agencies.

Canadian law schools recognize the wealth of knowledge and skills of members of the legal profession and regularly include adjunct professors from the local bench and bar as part of the Faculty complement.

Curriculum

Any legal education that does not provide an introduction to the basic areas of the law in Canada would do a disservice to its students. All undergraduate common law degree programs in Canada (LL.B. or J.D.) require instruction in Constitutional Law, Contract Law, Property Law, Criminal Law, Civil Procedure and Tort Law.

A law school curriculum should, as far as practicable, offer a variety of courses, allowing as diverse a number of law programs to develop as there are different careers in the legal system. Depth of knowledge in a particular area of law is also achieved by the offering of courses which build on one another, in which interested students can devote themselves to particular areas of the law.

Law school curriculums best serve their mandates when they include:

- Small group work, in which students are encouraged to interact with each other and the professor.

- Perspectives options, in which non-legal perspectives inform a more nuanced appreciation of the law.
- Written work, both traditionally legal versions (memos, etc.) and academic papers.
- Directed research papers
- Moots
- Visiting faculty program
- Combined degrees
- Perspectives on law
- Professional ethics
- Courses on legal research and writing
- Elective courses.

Fostering Intellectual and Research Communities:

In accordance with the goal of providing a liberal education as well as a professional education in law, all Canadian law schools strive to foster intellectual and research communities. In part this is accomplished through the development of seminars, conferences, and workshops on legal and other topics. But increasingly, law schools have created organized research units, institutes or centres (ORUs) organized around subject areas or themes. These ORUs provide a focus for intellectual activity within the institution, and foster the development of legal scholarship and critical inquiry amongst both faculty and students.

Related to this is the growth of graduate legal education in Canada. A decade ago there were relatively few graduate law programs in Canada. Today the majority of Canadian law schools offer graduate education in law, often at the doctoral level. The emergence of distinct Canadian graduate education in law complements and reinforces the development of a research culture at Canadian law schools.

A third, related development is the emergence of joint degree programs with other disciplines. Most Canadian law schools now offer the opportunity for law students to earn a graduate degree in another discipline while completing their law studies, thereby contributing to the intellectual community within the law school.

Library and Other Facilities

The quality of the law library directly affects the quality of a legal education: well organized superior collections, able support, and physical space in which to research, reflect, and write, are essential for a successful legal education. Professional librarians support teaching and research within the law faculty, and have established criteria and standards within which to perform their responsibilities.

A law school needs more than books and the space to research: casual, but learned conversations, the community necessary to foster a sense of professional allegiance, and spaces in which to produce group projects are as important in coming to an understanding of the legal system as having reference materials in a central location. A law school should aspire to provide space in which students and faculty members can gather and discuss legal issues: providing the forum for a scholarly community to flourish. In addition, law schools further advance an intellectual environment and serve as gathering places. Specifically, law schools regularly offer the opportunity for leading members of the profession to meet and gather with

faculty and students, through speakers programs, information sessions and other related lectures.

Student Support Services:

It almost goes without saying that computer technology is becoming a central component of legal practice, as well as a more effective teaching aid. Making these technologies available, and effectively training both students and faculty members in their use, is a necessary part of a contemporary legal education, in such an everchanging technical landscape.

Law students are, for the most part, aspiring professionals. To attract the best and the brightest, more than mere academia is necessary. Career services are an essential component of a law school bent on producing lawyers well-equipped to enter the profession.
Given the unfortunate reality that many voices are marginalized, an adequate representation of the voices should be encouraged both financially, as necessary, as well as though institutional supports which make each law school a welcoming and attractive environment. Canadian law schools strive for accessibility with strong financial assistance and other support programs for admitted students.

Appendix 9

Submission to the FLSC Task Force on Accreditation – April 22, 2008

Dear members of the Federation of Law Societies of Canada Task Force on Accreditation of Canadian Common Law Degrees,

Thank you once again for giving us the opportunity to discuss your November 2007 Draft Discussion Paper with you in person. We look forward to continued discussions on the nature and content of that report, and the consultation report that you expect to issue in June.

As we noted at our meeting, our ad hoc working group is not a formal representative group of law faculty members in Canada. We hope that a broader range of legal academics will continue this discussion at the meetings of both the Canadian Association of Law Teachers and the Canadian Law and Society Association in Montreal at the end of May and in early June.

In this letter, we aim to do three modest things. First, we sketch the context which regulates and constrains university legal education. The purpose of this section is to counter any perception that the law faculties design our curricula and pedagogical approaches in a regulatory vacuum. Second, we outline a few suggestions for possible ways in which your task force might consider proceeding under your mandate. This section advocates for a shift from “courses and competencies” to a responsive, creative, publicly exposed process for the accreditation of law faculties and foreign trained lawyers. Third, we set our suggestions into the broader context of legal education. To that end, we urge the task force to consider its recommendations within the frame of legal education as a life-long pursuit – supported at the outset with university education at a law faculty, but developed significantly by the practicing bar, as reflected through the Federation and the provincial law societies.

The Regulatory Context

The Ontario proposals to establish two new law schools and the recent increase in applications from lawyers trained outside of common law Canada for admission to law practice in common law provinces has posed a regulatory challenge. What are the grounds on which new law schools should be approved and how should an informed assessment of credentials earned outside a Canadian common law province be conducted? The fact that it has been roughly forty years since the last articulation by a law society of the "requirements pertaining to the approval of Law Faculties for the purpose of the admission of their graduates to [a] Bar Admission course"[1] might lead one to think these questions are being raised in the face of a slender and possibly outdated regulatory framework. However, it is important to emphasize that law faculties are subject to a complex array of both formal and informal systems of ordering. Universities, federal ministries with higher education policies, provincial education ministries, and private and public research agencies are some of the entities that have a formal role in structuring legal education. These bodies impose systems of accountability with their own measures of excellence and productivity. As well, there are a host of informal norms and practices ranging from market and competitive pressures in both the legal services and higher education markets to globalization and technological developments that have and will continue to shape legal education. Finally, and perhaps most importantly, the questions posed about legal education by these recent demands occur under the rubric of the public interest. While the law societies appropriately are the designated regulatory body with respect to candidates for bar admission, concerns about professional competency and responsibility must be placed alongside a complex and evolving set of public expectations and norms. We elaborate on some of these factors below.

Federal Higher Education Policy. The federal government has played a direct role in shaping higher education in Canada through its setting and monitoring of equity goals under the Federal Contractors Program, funding of research through bodies such as SSHRC and NSERC, institution of programs such as the Canada Research Chair program, and contributions to bursary and scholarship programs such as the Millennium scholarship program. Law schools, like other academic units, have reconfigured their priorities in response to these programs, which increasingly emphasize international competitiveness in higher education markets and the generation of research outputs.

Provincial education ministry regulations – provincial ministries governing postsecondary education provide a process for approval of new degree granting programs. In Ontario, for example, ministerial consent is required to establish a new degree program. This process is governed by the Postsecondary Education Quality Assessment Board, an arm's-length advisory agency which governs the application and assessment process for proposed new University programs and makes recommendations for ministerial consent.

University regulations, guidelines, and expectations. As a consequence of university regulatory structures, Canadian law faculties are regularly required to report on their teaching, research and service activities, to meet stringent standards of peer review, and to achieve measured scholarly and pedagogical results. Indeed, reporting requirements have, if anything, increased over the past two decades. The deans of law faculties are, of course, accountable to the senior university administration. As well, at most law faculties, faculty members are required to submit

[1] April 15, 1969 amendments by Legal Education Committee of Law Society of Upper Canada.

annual reports in which they itemize their teaching and supervisory responsibilities relating to LL.B., LL.M., and Ph.D. streams, their research grants, publications and public presentations, their service contributions to both the university and the wider communities, including the legal profession, and any distinctions, honours or awards. This information will typically appear in the Faculty's Annual Report and in other presentations to the Faculty Council, the University, and the public. The information will usually be used in the salary review process and allocation of merit pay.

In addition, prior to appointing a new dean, most law faculties undergo an external review, including assessment of their LL.B. and graduate programs and their governance regimes. This review is typically conducted by a committee of senior law professors, often including deans or former deans from other law schools.[2] Additionally, most (if not all) universities provide for an outside external review of all undergraduate programs at specified periods (for example, once every seven years).

In addition to these review processes within law faculties, individual faculty members must meet certain requirements in order to obtain a tenured position and/or promotion at their university. Again, these requirements have become more rigorous over recent decades. In fact, at many Canadian law schools, a Ph.D., or at least an LL.M., is increasingly required in addition to an LL.B./J.D. for appointment into a tenure track position. University regulations vary, of course, and are often the subject of collective bargaining. At the University of British Columbia, for instance, for promotion from the rank of Assistant Professor to that of Associate Professor, law professors must show evidence of "successful teaching" and "sustained and productive scholarly activity".

Pressures arising from within the legal profession. All law faculties have rich relationships with the legal profession. Graduates of the school often have strong ties to their law faculties, and contribute to the faculties through the donation of their time and financial resources. They watch the curricular and pedagogical changes at their alma mater with interest, provide feedback and guidance both formally (through advisory committees of various sorts) and informally (through their connections at the schools). Indeed, a "law faculty" is not a distinct, completely identifiable group of people – rather, it is a cluster of relationships. Many practicing lawyers teach at our law faculties (making them directly members of the law faculty), sit in a representative capacity on our faculty councils, supervise student activities (including clinics and moots), and regularly advise current law students on the directions their legal education might take. Moreover, many tenure-track and tenured law professors are themselves members of one or more provincial law societies. Provincially designed bar examinations naturally influence strongly the form and shape of law faculty curricula and student choice about course selection.[3] To that end, private legal practitioners have quite a strong influence on, and are indeed an integral part of, legal education at the law faculties.

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[2] For an example, the 2006 review of the University of Toronto Faculty of Law is available at (http://www.law.utoronto.ca/documents/general/ExternalReview2006.pdf).

[3] Annie Rochette and W. Wesley Pue found in their study of UBC law students' course selection that they increasingly chose "core" law courses during the 1990s: "Back to Basics: University Legal Education and 21st Century Professionalism" (2001) 20 Windsor Yearbook of Access to Justice 167.

Pressures arising from outside the legal profession. Many law faculty graduates pursue careers outside private legal practice. Some of them serve as policy makers in governments domestically and internationally. Others, to name just a few examples among many, become politicians, journalists, social activists, doctors, or businesspeople. These graduates too continue to have a strong interest in law faculties and, through formal or informal routes, provide input into the design of curricular or pedagogical innovation.

Pressures from other law faculties. No law faculty operates in a vacuum. Students, faculty, and alumni are keenly aware of the innovations taking place at other Canadian (and non-Canadian) law faculties, and faculties are constantly assessing their curricular and pedagogical development against the legal education offered elsewhere. If interesting developments are taking place in one faculty, undoubtedly students report those initiatives to their law teachers and seek to have similar innovations undertaken at their faculty. Faculty members regularly meet to talk about legal education, and we transfer ideas among ourselves. Faculties that move too far outside the "canon" of legal education as it is evolving are regularly called upon to justify their curricular and pedagogical choices.

Public pressures. In many ways, our most important job as legal educators is to educate graduates who will become sensitive, thoughtful, creative, generous, ethical, professional, and bright members of civil society, regardless of what career path they choose. The general public puts a significant degree of trust into law faculties – that we will graduate students who take their public commitments seriously, who are willing to use their talents in the pursuit of the public good, and who behave at all times with integrity. Not surprisingly, although the general public is the most important group to whom law faculties are accountable, it is the group with the least direct mechanisms for influencing the development of legal education. Fortunately, trends over the last twenty years (including the significant diversification of law students and law faculty members) have made law faculties acutely aware of their obligation to expose students to a wide range of ideas that will assist them in understanding the complex and changing dynamic of Canadian society, the influence of transnational and global forces on the evolution of the Canadian legal, social, and economic landscape, and the importance of ensuring access to justice for the most marginalized members of Canadian society.

Indeed, this latter value, access to justice, lies at the heart of the public interest dimension of legal education. It is not adequate to simply provide an approach to legal education that instills an ethic of public service and professionalism. It is crucially important to "walk the walk" as well as "talk the talk" by actively and continually doing the work of creating a professional legal community that reflects the diverse and complex nature of the "public" in public interest. The "public," when viewed through the lens of access to justice, by definition encompasses a continually evolving and socially diverse set of interests, communities, perspectives, and voices. Thus, at the very least, we would argue that the current stakeholders in the content of legal education, as well as its manner of delivery, include indigenous communities, economically disadvantaged persons, the anti-violence movement, racialized communities, recent immigrants and refugees, lone parents and their children, rural populations, northern communities, and others whose lack of access to justice is part of a broader picture of systemic injustice.

It is within these multi-faceted contexts that legal educators design and provide legal education. Indeed, at any given law faculty, a range of broad overarching objectives for legal education might be articulated, but at most, if not all faculties, the following overarching objectives would be important:

- Legal education should be responsive to, and reflect, a diverse and complex conception of the public interest and law faculties should be accountable to the public;
- Law faculties should be focused on inquiry that sets law in its broad and evolving social, political, and economic contexts;
- Law faculties should provide fertile ground for conversation that will enable students to develop the capacity to contribute to society in a broad range of legal settings, with the ability to move within and between those settings;
- Law faculties should provide a place where students and faculty are able constantly to interrogate the value of the legal education being produced – both substantively and pedagogically;
- Legal education should be responsive to the local communities within which it is situated, and mindful of the broader domestic and international contexts.

Recommendations for the Task Force

We understand that two dominant concerns gave rise to the formation of this Task Force:

1. concerns about the accreditation of new law schools; and
2. concerns about the requirements for granting a certificate of qualification for internationally trained candidates and those with civil law degrees from Quebec.

The Task Force's Draft Discussion Paper proposes to address those concerns by providing a list of required foundations/competencies, contained in Appendix 8. There are serious pedagogical and design concerns with the promulgation of "one size fits all" lists of courses and competencies for the design of legal education, including the following:

- they fail to respect the local environment of any given law faculty;
- they stifle innovation;
- they result in an unnecessary and dangerous narrowing of the curriculum;
- they suggest to students that if they take the courses/have the competencies set out on the list, they are prepared for the practice of law;
- despite best intentions to revisit the list regularly, inevitably lists become ossified (the 1969 list is a good example);
- important items are inevitably left off the list, suggesting (wrongly) they are not important.

There are, of course, other possible approaches to address the concerns raised by the Federation, and tasked to this Task Force.

We recommend bifurcating the response to these two concerns – accreditation of new law schools and recognition of credentials from outside common law Canada – and developing a response that addresses each meaningfully on its own terms. While we recognize that the two issues are interconnected, we feel that significant differences between the two justify a bifurcated response. We outline the contours of our recommendations below.

Accreditation of new law schools

We welcome the formation of new law faculties. We understand that the law societies seek some way of determining whether new law faculties ought to be accredited, such that their graduates would be able to proceed to law society bar admission/licensing processes required

for entry to the practice of law. The design of an accreditation process requires a response to two inquiries:

1. who will adjudicate what is an accredited school?
2. which criteria will apply?

On the first question, given that legal education should be responsive to a diverse and complex understanding of the public interest, one sensible response is to constitute a broadly representative committee to process and adjudicate proposals to establish a new law faculty. That committee should be made up of persons drawn from the various constituencies affected by the configuration of legal education, including in particular those who are affected by the access to justice dimension of legal education. Those constituent groups will vary from time to time and thus composition of the committee should be periodically reviewed. The committee's composition might include, in addition to members of the practicing bar, representatives of law deans, legal academics, judges, public interest advocacy groups, legal clinics, indigenous communities, and groups whose geographical location poses barriers to access to justice. There is some precedent for collaborative committees involving law society and law faculty representation in some jurisdictions (Ontario had such a committee in the 1990s), and for law societies nominating individuals to boards with public interest mandates (Legal Aid Ontario would be one example). The committee, once constituted, would need to disseminate the criteria to be applied, as well as to determine the form in which proposals would be submitted and the process by which it would vet proposed programs . While it may be that law societies would need to formally accept or reject such proposals on recommendation from the committee, it should be made clear that the committee would be the decision-making body.

The second question pertains to the criteria that such a committee should apply in its deliberations. It is of critical importance that the design of current law schools should not unduly constrain the design of new ones. As outlined above, all law faculties operate in a heavily regulated context. Those constraints already put enormous pressures on law faculties and impede innovation. Emerging law faculties should be encouraged to embrace innovative curriculum and pedagogical approaches. Indeed, if, as we believe, there are pressing access to justice issues and the status quo is not serving the public interest to the fullest extent possible — a statutory imperative for every law society, as well as a commitment of every university law faculty — it would be wrongheaded to assume that new law schools should fully reproduce existing programs. Given the failure of current legal education and licensing structures to provide adequate numbers of legal practitioners to communities that remain underserved – rural regions and aboriginal communities come to mind – it appears to us that a greater specialization and diversification would serve the public interest much more than would a centralized standardization. A regulatory model that stipulates a set of skills, competencies and course requirements too easily stifles such growth and does so unnecessarily, given the impressive array of formal and informal rules, norms and pressures holding traditional law school curricula in place.

We recommend an alternative regulatory model that puts in place an aspirational framework to guide the work of the committee. While much work needs to be done to articulate this framework, we provide as a starting point the following list of questions. We view these questions as key to eliciting the kind of information that should form the basis of an approval of a new law faculty. In other words, thoughtful, researched responses to these questions would, in our view, substantially indicate the readiness to begin a new accreditable law program suitable for accreditation.

- What is the underlying theory of your curriculum?
- What particular goals with respect to access to justice do you view as part of the mandate of your proposed institution?
- How will you provide students with access to, and an understanding of, career options?
- How will you build on students' prior knowledge?
- How will you promote facility with all forms of technology?
- How will you promote good practices in teaching?
- How will you support innovative, creative, high quality faculty research?
- How do you plan to foster a sense of community among students and encourage working collaboratively with others?
- How will you build connections with community groups, other university departments, other legal scholars, the practicing profession, alumni, and marginalized communities (including potential students)?
- How will you foster a commitment to life-long learning?
- How does your curriculum build connections between law and its social/economic/political/cultural contexts, and situate law within those contexts?
- How do you plan to provide adequate physical or electronic resources, including library facilities and resources, for your program?
- How does your curriculum reveal law as a dynamic, constantly evolving process?
- How do you develop professionalism and ethics?
- How do you teach good writing and the ability to argue persuasively?
- How do you teach students to read and interpret cases and statutes?
- How does your curriculum promote the development of strong problem solving skills and creative and critical thinking?
- How will you ensure access to legal education, and ongoing support for law students at your faculty?

Not all new law faculties may plan to promote or develop in all of the areas suggested by the questions. However, where that is the case, they should be invited to provide a justification for why they do not plan to develop in that area.

During our discussions, the question was raised about the extent to which existing law schools are currently monitored and reviewed. In terms of ongoing monitoring, law faculties have a peer review process. As mentioned above, law faculties will typically be required to have a comprehensive External Review late in the term of a law dean. All aspects of the Faculty's operations will be reported on and reviewed, including the LL.B. program and curricular changes. The overall objective of the review, which usually includes an on-site visit for two or more days, is to identify strengths and weaknesses and to advise on improvements that might achieve greater strength.[4] The relationship between the law faculty and external communities such as the legal profession will also be assessed.

[4] The Terms of Reference of the 2002 External Review of UBC's Faculty of Law were as follows:
Purpose: To review the academic strength and balance of the Faculty in teaching, scholarly activity and service; to assess the Faculty's stature; and to advise on future development of the Faculty.
Terms of Reference
1. To review and evaluate the structure and organization of the Faculty and to advise on how it might be improved to achieve greater academic strength.

Our thought is that this external review process could be used to ensure that law faculties continue to have robust answers to the questions listed above .

Certificates of qualification

Certificates of qualification raise entirely different issues from the accreditation of new law schools. Here, rather than applications from new institutions, we are dealing with applications from individuals who have already acquired credentials outside the Canadian common law provinces. We have explained above how concerns about innovation and the constantly evolving and complex nature of the public interest point in the direction of an aspirational regulatory framework for processing applications for proposals to set up new law faculties. The impetus for our recommendations in this regard is directly tied to our concern about creating a framework that is forward looking and that can respond in a nuanced way to the changes and challenges of the future. The processing of applications from individuals who have already acquired credentials outside the Canadian common law provinces who are seeking to enter the practice of law in a common law provinces raises different concerns. Indeed, here the intuition that we should look at the "precedents," so to speak, and at the existing nature of LL.B./J.D. programs in Canada is entirely warranted. The determination to be made in such situations is whether the individual has a legal education which is "equivalent" to the Canadian LL.B./J.D. degree. Broadly speaking, Appendix 8 is rooted in this approach. However, we do not think that the specificity of "Appendix 8" is workable as a response to this particular issue. First, it fails to capture the existing variety of LL.B./J.D. programs. Second, it risks undermining the objective of ensuring innovation, complexity and responsiveness to social change in the accreditation process via the indirect effect of "ossifying" existing programs in the name of even-handed treatment of candidates with Canadian common law degrees and and those with civil law or non-Canadian common law degrees. Nevertheless, as suggested above, we do think that it makes sense, in terms of logic, common sense and fairness, to measure applications by individuals with civil law or non-Canadian credentials against benchmarks that capture the current state of legal education in Canada.

One approach that we would recommend attempts to articulate, in terms that are more inclusive and flexible than those in Appendix 8, the nature and characteristics of current Canadian legal education. We think the draft paper by the Working Group of the Council of Canadian Law Deans, which provides a descriptive overview of the institutional requirements and characteristics of Canadian law schools, might usefully serve as a starting point for this approach. In particular, Part I of the paper ("Competencies, Knowledge, Skills and Expectations") and Part II ("Institutional Requirements and Characteristics") offer a good foundation for developing benchmarks that are sufficiently flexible to represent the variety of programs currently in existence while at the same time ensuring that civil law and non-Canadian trained candidates for admission to law practice in a common law province are treated fairly in

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2. To review and evaluate the scholarly accomplishments of the Faculty and identify areas that are strong and those that require development.
3. To review and evaluate the organization, and strengths and weaknesses of the LL.B. and graduate programs of the Faculty.
4. To review and evaluate the linkages between the Faculty of Law and other units of the University.
5. To review and evaluate the relationships between the Faculty of Law and other universities, the legal profession, the judiciary, government and the community.

comparison to their Canadian common law trained counterparts. No doubt, as new law schools and programs are developed and accredited in Canada, these benchmarks will have to be updated to reflect those changes and innovations. Thus a mechanism ensuring periodic review will also have to be incorporated into any redesigned regime.

A key aspect of reforms to the "Certificate of Qualification" decision-making process will be enhancing the transparency, consistency, and predictability of the decision-making process.

We would be happy to work with you on the development of further details on how the articulation of these requirements might be drafted.

Concluding Comments: Looking Forward

In an effort to engage productively with the Task Force's Draft Discussion Paper, this submission has responded to what we see to be the two dominant underlying concerns: accreditation of new law schools and certificates of qualification.

In concluding, however, we would like to urge the task force to see its mandate in the light of the broader legal education context. Lifelong learning has always been a critical component of the practice of law. No one graduates from a law faculty full formed and ready to do any legal work, in any Canadian common law jurisdiction, over the next forty years. Instead, we seek to graduate students who will spend their lives developing their skills and competencies.
Given the importance of the issue of legal education (and in this context, we mean not only in the law faculty setting, but legal education as a pursuit undertaken through a lawyer's life), it seems an opportune time for the Federation to consider how to involve its members in a nationally-oriented review of the education provided to practicing lawyers.
One possibility is that the Federation initiate research, which needs to be conducted on the ways in which factors such as globalization, the technological revolution, and an increasingly diverse society have shifted the ground upon which law is practiced and legal education is delivered. We have almost no research addressing these points in Canada. By relying only on anecdotal evidence about the practice of law and legal education, we run the risk of proposing changes that are backward-looking rather than looking to the future. At the very least, it would be useful to conduct research on:

a. emerging trends amongst the practicing bar
b. the needs of the public for legal services, and
c. the changing nature of legal pedagogy, including the importance of moving away from single evaluation, 100 per cent exams, as a measure of success.

One of the trends of the last fifteen years has been the increasing pressure on law faculties to "do it all". As law faculty members, we are constantly engaged in a process of reconsidering what we do in our classrooms, and interrogating the underlying aims of our curricula and pedagogical approaches. Despite the large number of institutional constraints on law faculties' abilities to be responsive to changing social, economic, political, and cultural climates, many faculties have undertaken innovative and interesting reforms. Given the fast pace of social, economic and legal change, innovation and forward-looking reforms are essential to the delivery of high quality legal education.

We would also like to highlight two important differences between Canadian and American legal education. The Carnegie Foundation report is useful in Canada, but it does not reflect our uniquely designed system for legal education.

First, in Canada we have long integrated analytical analysis, practical skill, and professional identity in legal education. We have done this in partnership with the legal profession. The articling process, not present in the U.S. context, has served as the capstone to a Canadian legal education and has provided support for the transition into the full practice of law. That is not to say that students do not receive important skills/practical training while enrolled in Canadian law faculties – in fact, law faculties have increasingly offered skills-based courses in the past couple of decades, and we are engaged in an ongoing process of reviewing the effectiveness of these courses. It is only to say that in Canada we have this intensive period of integration into the practice of law.

To the extent that law societies believe that they can no longer offer meaningful 'on the job' training of practitioners, it is curious that anyone would think that law faculties could better execute that task. Instead, it seems incumbent on the law societies to consider how they can continue to play their partnership role in considering how to provide lawyers with the additional practical skills and substantive knowledge they need to be effective advocates and solicitors. In today's changing legal climate, there are presumably creative ways that practical skills can continue to be developed after students graduate from law faculties. Indeed, it seems antiquated to imagine that one would try to "front load" legal training, cramming it all into three years at a law faculty.

Second, Canadian law faculties face resource constraints not faced by many of our American counterparts. All law faculties have important skills components, but everyone recognizes that many pedagogical methods – including ones emphasizing problem solving, communication skills, collaborative work, significant feedback, and oral advocacy– are expensive to implement. They require lots of time, small classes, high faculty/student ratios and so on. Even assuming that one could teach all of the required analytical and practical skills in law faculties, most Canadian law faculties lack the faculty resources necessary to implement robust programs. Indeed, one only needs to look at the challenges some of the law societies have encountered in mounting skills-based training for lawyers to sense how difficult it is to support this kind of education adequately.

All of this is not to suggest that Canadian law faculties are not taking innovations in higher education seriously, and do not understand our missions within the context of the legal practice (among other contexts). Rather, it is to urge the Task Force to see its mandate within a much broader question of how to educate Canadian lawyers. Legal education has historically been situated as an important partnership of law faculties and the practicing bar. Any efforts that diminish the role of the practicing bar as an important player in the continued education of practicing lawyers should be resisted; as should any inclination to see the law faculties as the sole site for the training and development of legal practitioners.

We thank you once again for the opportunity to participate in this process and hope that this input is helpful.

Ad Hoc Law Professor's Working Group on Law School Accreditation

Appendix 10

ENTRY INTO THE LEGAL PROFESSION – A COMPARATIVE SNAPSHOT

APPROACHES TO STANDARDS IN OTHER JURISDICTIONS

A number of other common law jurisdictions have developed much more defined and "regulatory" statements for determining whether law school graduates will be determined to be qualified to move forward into the licensing stream than has been the case in Canada.

THE UNITED STATES

There are hundreds of law schools in the United States and a wide range of quality from superlative to those that operate entirely on-line and are not associated with any university. To address this wide range of quality the American Bar Association ("ABA") developed a rigorous law school accreditation process that spans a number of years, including a period under provisional accreditation.[1] There are currently 196 ABA accredited law schools in the United States. This is in contrast to Canada's 16 law faculties that offer a common law degree and six who offer a civil law degree, the quality of whose degrees all fall within a much narrower spectrum than in the United States.

There are U.S. law schools that do not have ABA accreditation. In most jurisdictions a graduate may only write the state bar examination if they have graduated from an ABA accredited school. A few jurisdictions, such as California, have a separate accreditation system for non-ABA school graduates who may be entitled to write the bar examination. Thus, generally speaking the ABA requirements dictate minimum standards to which the "approved" American law school must conform.

The preamble to the ABA Standards for Approval of Law Schools states that they are founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum standards, designed, developed and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. The preamble goes on to state that an approved law school must provide an opportunity for its students to study in a diverse educational environment, and in order to protect the interests of the public, law students and the profession, it must provide an education program that ensures that its graduates:

(1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
(2) receive basic education through a curriculum that develops:
    (i) understanding of the theory, philosophy, role and ramifications of the law and its institutions;
    .

[1] The American Association of Law Schools also maintains an accreditation system, which operates with a slightly different perspective from the ABA. Member schools must meet its accreditation requirements for membership, but it is not recognized by the Department of Education as an accrediting agency and no jurisdiction requires that a student have graduated from an AALS school in order to gain admission to the bar.

(ii) skills of legal analysis, reasoning and problem solving; oral and written communications; legal research; and other fundamental skills necessary to participate effectively in the legal profession;
(iii) understanding of the basic principles of public and private law; and

(3) understand the law as a public profession calling for performance of pro bono legal services.

The ABA standards then go on for eight chapters setting out the minimum requirements for the organization and administration of a school, the program of legal education, the qualifications, size, instructional role, responsibilities of and professional environment for its faculty, admissions and student services, its library and information resources including personnel and the collection, and its minimum physical facilities.

In addressing the program of legal education the ABA standards state:

> Standard 301. *OBJECTIVES*
>
> (a) A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.
>
> (b) A law school shall ensure that all students have reasonably comparable opportunities to take advantage of the school's educational program, cocurricular programs, and other educational benefits.
>
> Standard 302. CURRICULUM
>
> (a) A law school shall require that each student receive substantial instruction in:
> (1) The substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
> (2) Legal analysis and reasoning, legal research, problem solving, and oral communication;
> (3) Writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after first year;
> (4) Other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
> (5) The history, goals, structure, values, rules and responsibilities of the legal profession and its members.
>
> (b) A law school shall offer substantial opportunities for:
> (1) Live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
> (2) Student participation in pro bono activities; and
> (3) Small group work through seminars, directed research, small classes, or collaborative work.

In the American context, this approach provides a consistent template against which to measure schools. In an environment of hundreds of schools it provides a highly structured measurement tool to ensure minimum quality. It provides law schools with arguments for funding within their university environments to meet the standards. It recognizes that quality education is about both program content and learning environment.

In the Canadian context, this approach may be significantly more onerous and intrusive than is necessary given a much more limited number of schools, all located in university settings, all government-approved and all relatively similar in quality. It could be expensive to set up and administer.

COMMONWEALTH JURISDICTIONS

Australia, England and Wales, and New Zealand focus their attention on curriculum based requirements.

In both Australia and England and Wales the law degree can be a true undergraduate degree, namely that students may enter it right out of high school. Often the law degree is taken at the same time as another liberal arts or science degree. In some schools it may also be taken following completion of an undergraduate degree.

AUSTRALIA

Typically the Australian jurisdictions provide that a degree will be accredited if it requires completion of the equivalent of at least three years full-time study of law and a satisfactory level of understanding and competence in the following areas of knowledge:

Criminal Law & Procedure
Torts
Contracts
Property
Equity
Company Law
Administrative Law
Federal & State Constitutional Law
Civil Procedure
Evidence
Professional Conduct.[2]

In respect of each of these areas of knowledge, the rules in each jurisdiction include a synopsis of the subject area in a schedule, which specifies a range of topics for each area or, as an alternative, requires that topics, of such breadth to satisfy a more general guideline, are taught. So, for example, under criminal law and procedure the academic requirements might be stated as follows:

[2] These are commonly known as the Priestley 11, named for the Chairman of the Committee that drafted them.

Criminal Law and Procedure

1. The definition of crime
2. Elements of crime
3. Aims of the criminal law
4. Homicide and defences
5. Non-fatal offences against the person and defences
6. Offences against property
7. General doctrines
8. Selected topics chosen from:
    - attempts
    - participation in crime
    - drunkenness
    - mistake
    - strict responsibility.
9. Elements of criminal procedure. Selected topics chosen from:
    - classification of offences
    - process to compel appearance
    - bail
    - preliminary examination
    - trial of indictable offences.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

> The topics should provide knowledge of the general doctrines of the criminal law and in particular examination of both offences against the person and against property. Selective treatment should also be given to various defences and to elements of criminal procedure.[3]

England and Wales

The Law Society and the General Council of the Bar are authorised to prescribe qualification regulations for those seeking to qualify as solicitors or barristers. They have indicated that they will "recognise a course of study leading to the award of an undergraduate degree" if it satisfies the requirements as set out in their 2002 *Joint Statement issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining of an Undergraduate Degree* (Joint Statement).

The statement includes both resource and program of instruction components, addressing learning resources (includes human resources, physical resources, and student supports), the requirement that the institution granting the degree has such authority granted by the Privy

[3] Christopher Roper, (with input from the CALD Standing Committee on Standards and Accreditation), Standards for Australian Law Schools: Final Report (Council of Australian Law Deans, March 2008) p.78.

Council, the length and structure of the course of study, standards of achievement expected of students (knowledge and skills), the knowledge and general transferable skills (there is significant overlap between the standards and the knowledge and transferable skills) and the content or coverage of the course of study.

The content or coverage, referred to as the Foundations of Legal Knowledge, is

a. Public law, including Constitutional Law, Administrative Law and Human Rights
b. Law of the European Union
c. Criminal Law
d. Obligations, including Contracts, Restitution and Tort
e. Property Law
f. Equity and the Law of Trusts
g. In addition, training in legal research.
h. The remaining half-year in law must be achieved by the study of legal subjects. A legal subject means the study of law broadly interpreted.

The required knowledge and general transferable skills are articulated as

Knowledge

Students should have acquired –

1 Knowledge and understanding of the fundamental doctrines and principles which underpin the law of England and Wales particularly in the Foundations of Legal Knowledge.

2 A basic knowledge of the sources of that law, and how it is made and developed; of the institutions within which that law is administered and the personnel who practise law.

3 The ability to demonstrate knowledge and understanding of a wide range of legal concepts, values, principles and rules of English law and to explain the relationship between them in a number of particular areas.

4 The intellectual and practical skills needed to research and analyse the law from primary resources on specific matters; and to apply the findings of such work to the solution of legal problems.

5 The ability to communicate these, both orally and in writing, appropriately to the needs of a variety of audiences.

General Transferable *Skills*

Students should be able –

1 To apply knowledge to complex situations.
2 To recognise potential alternative conclusions for particular situations, and provide supporting reasons for them.
3 To select key relevant issues for research and to formulate them with clarity.
4 To use standard paper and electronic resources to produce up-to-date information.

5 To make a personal and reasoned judgement based on an informed understanding of standard arguments in the area of law in question.
6 To use the English language and legal terminology with care and accuracy.
7 To conduct efficient searches of websites to local relevant information; to exchange documents by email and manage information exchanges by email.
8 To produce work-processed text and to present it in an appropriate form.

New Zealand

In New Zealand the only requirements state that as a part of a law degree a candidate for admission as a barrister and solicitor must have passed the following subjects, with the content very generally prescribed:

The Legal System
Contracts
Torts
Criminal Law
Public Law
Property Law
Legal Ethics.

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

(1) Copy of a letter from Kenneth Jarvis, Secretary of the Law Society of Upper Canada to David H. Jenkins dated February 20, 1984 re: Approved Canadian LL.B. Degrees.
(Appendix 2, pages 45 – 50)

(2) Copy of a letter from Kenneth Jarvis, Secretary to Professor Thomas G. Feeney, Dean, University of Ottawa dated April 15, 1969 together with a copy of the admissions requirements.
(Appendix 3, pages 51 – 56)

(3) Copy of an excerpt from a report produced by Carnegie Foundation for the Advancement of Teaching 2007 re: Best Practices for Legal Education (2007).
(Appendix 6, pages 63 – 71)

(4) Copies of submissions from individuals and institutions.
(Tab 2)

(5) Copy of the Law Society of England and Wales bar vocational courses.
(Tab 3)

PROPOSED

LAW SOCIETY OF UPPER CANADA

SUBMISSION

TO

THE FEDERATION OF LAW SOCIETIES OF CANADA

TASK FORCE ON THE APPROVED COMMON LAW DEGREE

November 2008

INTRODUCTION

The Law Society of Upper Canada thanks the Federation of Law Societies of Canada for inviting it to make submissions on the Task Force on the Approved Common Law Degree's ("the Federation Task Force") consultation paper.

One of the Law Society of Upper Canada's ("the Law Society") most important functions is to ensure the entry level competence of newly called lawyers. Since early 2007, through its own Task Force, the Law Society has considered licensing and accreditation issues, the relationship between law school and professional licensing regimes, the accreditation of internationally trained professionals and criteria for the establishment of new law schools.

The factors identified as influencing the decision to establish the Federation Task Force are all at play in Ontario, perhaps more so than at any other law society. Ontario has the largest bar in the country, an increasingly diverse legal profession and citizenry, growing numbers of international lawyers and Canadian students with law degrees from outside Canada seeking admission to the bar, and challenging market place factors. It has six law schools and the highest number of law students and articling students in the country. Recent proposals for new law schools have all been made in Ontario. The Law Society is subject to the *Fair Access to Regulated Professions Act* requirements for transparent, objective, impartial and fair licensing processes. Its firsthand experience with all these issues has illustrated that they are complex and interwoven, requiring careful analysis and sensitive treatment.

The Law Society's submission reflects its Task Force's work as well as its relationship with the profession and legal academy in Ontario. It also reflects the Law Society of Upper Canada's unique position as the only law society that already has a formal statement, dating back to 1957 and amended in 1969, (1957/1969 document) of "requirements pertaining to the approval of Law Faculties for the purpose of admission of their graduates to the bar admission course."

The Law Society sought the views of lawyers, legal organizations and law schools in Ontario. It received a number of comments, which it is providing to the Federation Task Force under separate cover with this submission.

The Federation Task Force's consultation period has been short. A number of the issues the consultation paper raises are touched upon only briefly. The Law Society believes it is necessary to hear the views of others before it can properly comment on some of these.

Accordingly, the Law Society's submission provides its preliminary views on some issues and defers comment on others. It looks forward to further opportunities to discuss the issues once the Federation Task Force reports on the results of the consultation process. It reserves its final views on any Federation Task Force recommendations to a later date.

TASK FORCE QUESTIONS

1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?

2. Is it over or under-inclusive?

3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?

The Law Society's by-laws require a candidate seeking entry into the licensing process to have graduated from an accredited law school in Canada or obtained a certificate of accreditation from the National Committee on Accreditation.

The 1957/1969 document defined a number of components for the "approved law school." In 2006, having received an application from Lakehead University respecting a proposed new law school, the Law Society recognized the need to revisit the 1957/1969 document, particularly because of significant changes that have taken place in the legal profession and law schools since 1969.

The Law Society has the responsibility for admission of lawyers to the bar and it has authority to articulate required competencies for those seeking to be licensed. The 1957/1969 document is evidence of this authority. Although outdated, it has had an important influence on the general structure of Ontario, as well as other Canadian, common law schools respecting prerequisites for admission to law school, compulsory courses and the duration of the law school program. At the same time, because the Law Society only specified a limited number of required components, law schools were able develop innovative and flexible programs. The 1957/1969 document reflects a balance between the regulator's and the academy's priorities.

The Federation Task Force has recommended, as one option, that this document be updated, with the Federation and individual law societies articulating "foundational competencies" that law graduates seeking admission to provincial bar admission/licensing programs must have acquired in law schools. The LSUC Task Force on Licensing and Accreditation devoted considerable time to discussing the advantages and disadvantages of this approach. A majority of the LSUC Task Force decided to recommend this model.

There were alternate views expressed by a minority of the LSUC Task Force members. The basis for the minority view is explained in the "Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree," submitted by Professor Harry W. Arthurs, former Dean of Osgoode Hall Law School, former President of York University, a leading Canadian expert on legal education and the legal profession. His full paper can be found as an Appendix, along with the other submissions received during the consultation process. See "Minority View" on page 11.

The majority of the LSUC Task force decided that the "foundational competencies" approach was the preferable option of those offered by the Federation Task Force Report. The next question, which the Federation Task Force has recognized, is what should be included as a foundational competency? A connected question is at what point in the legal education continuum is a competency best acquired?

The comments the Law Society received illustrate the range of views on foundational competencies. While most individuals and legal organizations agreed with stating competencies they differed somewhat on what should be included. They suggested changes to the list and additions such as family law, operation of a law practice, trans-systemic legal competency, taxation, and labour. In contrast, those in legal education raised concerns that any attempt to list competencies, with no evidence justifying one over another, or even explaining why such a list is necessary in the Canadian law school context, would damage quality and innovation in law schools.

The majority of the LSUC Task force does not agree that a statement of competencies would undermine law school innovation or that such a statement would mark a significant shift in the relationship between law societies and law schools. The 1957/1969 document's statement of required courses, although not officially adopted as a national statement, has resulted in beneficial consistency across all common law schools; arguably one of the reasons law societies could so readily adopt national mobility for lawyers in 2002.

The LSUC Task Force has received submissions that suggest that the Federation Task Force's competencies list is both over and under-inclusive. It is over-inclusive because it goes beyond foundational competencies and it is under-inclusive because having done so it ignores other equally or more important competencies. Moreover, even if all the competencies are foundational, it may not be necessary for them to be acquired in law school. The key is that they be acquired before call to the bar.

The Law Society suggests the following as the competencies that should be required for entry to law society bar admission/licensing programs in common law jurisdictions in Canada:

a. Foundations of Canadian common law, including,
   - ☐ the doctrines, principles and sources of the common law, how it is made and developed and the institutions within which law is administered in Canada;
   - ☐ Contracts, torts and property law; and
   - ☐ Criminal law

b. The constitutional law of Canada, including principles of human rights and *Charter* values and Canadian law as it applies to Aboriginal peoples.
c. Principles of statutory analysis.
d. Principles of Canadian administrative law.
e. Legal research skills.
f. Oral and written communication skills specific to law.
g. Professionalism and ethical principles.

In listing these competencies the Law Society,

- supports the Federation Task Force's views that these are *competencies*, not *courses*, and that law students should be able to satisfy them in a number of ways that may differ from competency to competency and law school to law school;

- has deleted civil procedure as a required competency. It is important for law students to understand the principles that govern the resolution of disputes in the Canadian common law system; it is not essential for them to learn specific practice rules in law school. Students should be exposed to the principles while learning the foundations of common law;

- has specified which competencies should be acquired in the Canadian legal context, rather than requiring this of every competency;

- has expanded the competency related to constitutional law principles to include specific mention of Canadian law as it is applied to Aboriginal peoples;

- emphasizes "principles" of administrative law to ensure that there is no confusion that a course is being required. It also suggests that the word "regulatory" is unnecessary;

- has substituted the term "professionalism and ethical principles" for the Federation Task Force's "professional responsibility" for reasons discussed below.

The Law Society disagrees that,

a. equitable principles, including fiduciary obligations, trusts and equitable remedies;
b. business organization concepts; and
c. dispute resolution and advocacy skills and knowledge of their evidentiary underpinnings;

should form part of the competencies that *must* be acquired in law school.

These are all important competencies, but they open up a potentially endless debate of what else should be included, with proponents of different components each advocating strongly for their particular area of law. This could result in law school curricula being largely mandated, a development that is neither necessary nor in the interests of quality legal education.

Prior to revising its licensing examinations in 2006, the Law Society spent over 12 months in extensive consultation with practitioners determining, assessing and validating the competencies that barristers and solicitors require in the early years of practice. It spent a further 18 months developing the licensing examinations that test those competencies. Among many others, the examinable competencies include the three that the Law Society suggests be removed from the Federation's list. These are examples of important competencies that should be acquired before call to the bar, but not necessarily in law school. Law societies should also ensure that they continue to be emphasized in post-call education and requirements.

The Law Society suggests that in narrowing the competencies list, the Federation would accomplish its goal of articulating the fundamentals that law societies should expect of students *entering* their licensing programs, while avoiding an admittedly controversial debate that arises as soon as the additional competencies are suggested. Law societies can address any additional competencies they believe important in their bar admission/ licensing programs and examinations.

The Law Society notes as well, that this approach could enhance the process for accrediting internationally trained lawyers. The equivalency assessment could be more directly linked to the stated competencies, while law society examinations could address the remaining competencies required for call to the bar.

Professional Responsibility as a Required Competency or Stand-Alone Course

A key competency for all law students, articling students and lawyers is identifying and applying the ethical principles that underlie the legal profession. This includes understanding the legal profession's unique role in society and the individual lawyer's role and responsibilities as a member of that profession. In addition to the broad ethical principles, lawyers must learn and apply the specific provincial and territorial law society rules of professional conduct that govern them.

In recent years, as concerns about declining professionalism and civility have increased and rules of professional conduct have become more complex all law schools and law societies have placed more emphasis on this area.

In Ontario, there are significant collaborative initiatives among the bench, bar and the Law Society to enhance the teaching of professionalism at various levels, including law school. The Chief Justice of Ontario's Advisory Committee on Professionalism was established in September 2000 "to maintain and encourage those aspects of the practice of law that make it a learned and proud profession." Composed of representatives of the judiciary, the Law Society, the legal academy and various legal and county law organizations, it is a steering committee to generate ideas and to make recommendations to other organizations and individuals within the legal community about voluntary initiatives to enhance professionalism.

The Law Society believes that the Federation Task Force's use of "professional responsibility" as a suggested competency may be restrictively interpreted to refer specifically to the *Rules of Professional Conduct.* Law school may not be the most effective stage of the legal education continuum to teach the professional responsibility issues that flow specifically from the rules of professional conduct. There is little context for this learning, leaving students likely uninterested or confused.

The Law Society recently revised its licensing process to better situate professional responsibility training where it could be most effective. It has integrated it into the articling program, so that students are better able to directly relate what they learn to the "real world" articling environment. In addition, newly called lawyers will be required to complete 24 hours of accredited professional development during the first 24 months of their entry into practice. The objective is to ensure that early in their careers candidates receive the practical training they need to serve their clients in accordance with the expectations of lawyers prescribed in the *Rules of Professional Conduct.*

The post-call instruction is designed to create a tighter nexus between learning and day-to-day practice requirements, permitting lawyers to relate their educational materials directly to the events and issues that confront them in their own law practice. Moving some of the key professional responsibility competencies to the post-call venue allows the intended recipients to obtain this essential education as lawyers, amongst other professional lawyers.

Law school is, however, an appropriate stage at which to begin the process of identifying and applying ethical principles. The Law Society is satisfied that in Ontario law students currently learn these principles in a variety of ways across the law school curriculum, as well as in optional stand-alone courses, and within some of the other competencies the Law Society has suggested should be required. It believes that to emphasize the importance of these ethical principles it is appropriate to list this as a foundational competency.

The Law Society suggests, however, that it is not necessary to mandate a stand-alone course in ethical principles or professional responsibility at law school. The Federation Task Force has made a point in specifying competencies, not courses in its list, except for professional responsibility. It states that "the need to ensure that students have a solid understanding" in this area justifies the exception. However, this argument could be made of any of the competencies and there is little else in the Federation Task Force's paper to bolster the argument in favour of the exception.

The Law Society also suggests that the danger of a stand-alone course in ethical principles or professional responsibility is that it segregates the topic and renders it less likely to be addressed across the curriculum and in context. Ontario's experience with the Chief Justice of Ontario's Advisory Committee on Professionalism is that the academy, bench and bar are working well together in enhancing the profession's exposure to the ethical issues at all stages of the legal education continuum. Listing "ethical principles" as one of the required competencies complements such a collaborative approach.

Minority View

One LSUC Task Force member, Professor Constance Backhouse, had a dissenting opinion with respect to the Federation Task Force's "foundational competencies" approach. This minority view can be summarized as follows:

1) This is a "static" approach that fails to recognize that the practice of law is multi-directional, fluid, and that the pace of change has never been so fast.

2) The Federation Task Force failed to conduct sufficient or detailed research into the current educational offerings of law school or to consult fully with experts in legal education prior to making its recommendations.

3) The proposed list of "foundational competencies" is not based upon historical or current evidence of what lawyers actually know or do, nor is the list defended by evidence-based speculation about what they will have to know or do in the future.

4) This approach fails to recognize the important distinctions between pre-entry foundations needed to register for a bar admission/licensing process, and foundations that will be acquired during the opportunities presented throughout the articling period, the bar admission/licensing process, the professional licensing exams, and the life-long continuing legal education that we know is necessary in today's changing world.

5) The approach has the potential to stifle innovation, experimentation, and diversity amongst Canadian law schools.

6) The Federation Task Force failed to consider the resource implications of mandating new "foundational competencies." It also failed to consider the diverse objectives of legal education, or to develop reliable measures to test the present or proposed education practices.

4. Should be existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect that the factor requirement of an undergraduate university degree?

5. If so, should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?

6. Are there other exceptions that should be recognized and accommodated?

Like the Federation Task Force, the Law Society does not have information on whether all common law schools in Canada (with McGill having a unique admission requirement) accept applications from students with only two years of post-secondary education in a university. It understands that although law schools may permit this, in recent years, the competition for admission has been such that those without a university degree are at a disadvantage.

The Law Society has not heard any significant argument for formally changing the prerequisite, and would be interested in hearing other comments on this issue. Without some clear reason for doing so it suggests that the option to apply to law school after two years of post-secondary education in a university, be left open. It does not have enough information about McGill's CEGEP admissions to be able to comment.

The Law Society does note that in considering this issue the Federation Task Force should pay attention to fair access to regulated professions legislation in Ontario and Manitoba. However the prerequisite for the Canadian common law school is expressed, particularly if the prerequisite is increased, the reasons should be clear to all applicants, domestic and international.
Whatever the decision on the general prerequisite for admission to law school there should also continue to be special admission categories, such as Aboriginal or mature students, to meet unique needs.

7. Should the standard length of the common law degree be expressed in terms of credit hours rather than years of study?

8. If so, is 90 credit hours the appropriate standard?

9. Should in person learning be required for all or part of the law school program?

10. Are there other delivery systems that should be taken into account?

11. How should joint degree programs be treated for the recognition of the common law degree?

12. Should a national body monitor joint degree programs?

The Federation Task Force has asked for comment on a number of "institutional requirements," pointing out that these issues require reflection because of the changes that have taken place in law school education over recent decades. In particular, the Federation Task Force's consultation paper includes a report from the Canadian Council of Law Deans describing the educational experience in the modern law school. The Federation Task Force has emphasized "the need for structures that accommodate regulatory requirements, but are flexible and capable of innovation."

The Law Society is very interested in the issues raised in Questions 7 – 12, but it does not feel it has sufficient information to provide input at this time. In particular, it would appreciate learning more from law schools about,

- in person versus distance learning;
- whether expressing the law degree in terms of credit hours permits more flexible delivery methods and approaches; and
- the importance of joint degrees in the modern law school and how they are developed.

13. Should a national body be established to develop the components for recognition of law degrees from new law school programs?

14. Are there alternatives to this approach?

The Federation Task Force has identified a very important issue with which the Law Society has had both historic and recent experience in the form of the 1957/1969 document and the recent applications in Ontario for new law schools. Although, as the Federation Task Force points out, the Ontario government has announced that it will not be funding law schools at this time, there may well be applications in the future. Applicants will want to know what criteria they are expected to satisfy.

The Law Society believes it is important to discuss an approach to new law school applications, but it is premature to answer the question the Federation Task Force has asked without more information on the proposed structure and operation of such a body. There are many questions to be considered, including,

- How broad would the body's mandate be?
    - Would it address curriculum, infrastructure, admission standards or something more limited?
    - How would it interact with government?
    - What recourse would an unsuccessful applicant have for further consideration of its application?
- Who would be represented on the body?
    - law societies
    - law schools
    - judiciary

o community groups
o law students
o government

- Would those represented on the body determine the standards?

- Who would fund the body?
  - o If the funding were unequal would those with a greater financial stake have greater control?

- If the body were a Federation body would all law societies be represented on it?

  - o If not, how would this accord with the Federation's requirements for unanimity in decision-making?

  - o If not all law societies were represented, how would representation be determined? Given its experience on this issue, for example, the Law Society would have concerns about not being directly involved. Others might feel the same way.

15. The Task Force has identified three possible compliance models. Please provide comments on these models.

16. Are there other models that should be considered and if so, what are they?

Under Question 1 the Law Society suggested modified foundational competencies. It agrees that if there is an articulated competency standard it is appropriate to consider how regulators can best monitor compliance.

Any compliance model should be only as intrusive as is necessary to satisfy regulators that the standard is being met. It should be cost efficient and flexible enough to reflect evolving priorities. In the Canadian context it should recognize that the profession is regulated provincially and that the more complex the compliance model the more difficult it will be to obtain agreement or accomplish change.

One of the Task Force models is described as "the approved law degree." In some ways, this model reflects the approach under Ontario's 1957/1969 document, with the main difference being the proposal for a national monitoring body. Whereas the 1957/1969 document assumed compliance, the Federation Task Force suggests that it is time for something more formal to address ongoing issues and changes to the standard, and to ensure, perhaps every five years, that schools are complying. As described, it could also be the body to consider criteria for new law schools and new programs such as joint degrees.

The implication of this model is that regulators must have an objective way of assessing that those entering bar admission/licensing programs have met the standard. Rather than requiring graduates to prove this individually, which would result in uncertainty and a highly complex monitoring bureaucracy, the onus would be on law schools.

While this approach makes sense in the American context, the Law Society is less convinced that it is necessary in Canada. The United States has hundreds of law schools of vastly different quality. As mentioned above, in Canada the 16 Canadian common law schools provide high quality education, which in 2002 enabled law societies to easily agree that lawyer mobility was in the public interest.

The creation of a national monitoring body would be expensive, time consuming, and controversial with no clear rationale for why this approach is actually necessary in Canada. Given that the Federation of Law Societies of Canada requires unanimity for approving national initiatives, this model would be difficult to implement. Since viable alternatives to this approach exist, the Law Society suggests that this model not be pursued. Moreover, if it is to be given further serious consideration it must first be fully described, including its composition, infrastructure and cost.

The examination option is another proposed model. This would test law school compliance by requiring graduates to write a national examination as a prerequisite to entering law society bar admission/licensing programs. It is not clear what would happen to a student who fails the examination or how, except indirectly, law schools would be held accountable. Given that there are any number of reasons why students fail examinations it is not clear that this approach would accomplish its intended goal.

The Law Society supports licensing examinations that test competencies, as its extensive work in this area demonstrates. It shares, however, the concerns the Federation Task Force expresses about an *entrance* examination that purports to monitor compliance with regulators' standards. In addition, this model would require establishing a national body to set the examinations and monitor that their content remains relevant. The Law Society is not satisfied that the expense of this approach is warranted. Moreover, an entrance examination runs the risk of becoming a wall between law schools and law societies that makes dialogue between them more difficult.

The Task Force's third model is described as "the status quo." By this the Federation Task Force would appear to mean that there is no articulated regulators' national standard of competencies. Instead, a number of non-regulatory influences, described in the consultation paper, create the framework for quality law schools.
The Law Society disagrees with the status quo option. Like the Federation Task Force it considers that however rigorous university internal evaluation structures are, they have different mandates from law societies and define their missions differently.

At the same time, however, there are components of the current approach to law schools with which the Law Society agrees, namely that costly, intrusive compliance regimes are unwarranted for the reasons described above.

The Law Society suggests a compliance model that combines aspects of the approved law degree and status quo models. As is suggested in the approved law degree model the Federation of Law Societies of Canada and individual law societies should articulate those foundational competencies that law graduates seeking to enter bar admission/licensing programs must have acquired in law school. This would make it clear that regulators expect law schools to ensure that their students are taught these competencies. Articulating a national standard would be an important step forward from the status quo.

The Law Society is satisfied that having articulated the competency standard it is unnecessary at this time to specify a monitoring regime. Nothing in law societies' relationships with the current 16 common law schools suggests that this is warranted. Further, without the input on all the questions the Federation Task Force has posed it is not clear what the monitoring regime would be intended to address or what its scope would be.

The Federation and individual law societies should ensure that the profession, judiciary and law students are aware of the foundational competencies, so that they can identify gaps in the curriculum and address them with law schools. The Law Society suggests that its experience with the seven required courses set out in the 1957/1969 document is that Ontario law schools have conformed to the requirement without monitoring. Indeed, even without a nationally articulated standard there has been a high degree of compliance across the country. Moreover, none of the competencies in the Law Society's suggested list are new to the curriculum or would necessitate a substantial restructuring of law schools programs.

It was moved by Professor Krishna, seconded by Ms. Pawlitza, that Convocation approve providing to the Federation of Law Societies of Canada Task Force on the Approved Law Degree the proposed Law Society submission provided under separate cover.

Carried

ROLL-CALL VOTE

Aaron	Against	Krishna	For
Anand	For	Lawrie	Abstain
Backhouse	Against	Legge	Abstain
Boyd	For	Lewis	For
Braithwaite	Against	McGrath	For
Bredt	For	Marmur	For
Campion	Abstain	Minor	For
Caskey	For	Pawlitza	For
Chahbar	For	Potter	For
Chilcott	For	Pustina	For
Conway	For	Rabinovitch	For
Crowe	For	Robins	For
Daud	For	Ross	For
Dickson	For	Rothstein	For
Dray	For	St. Lewis	For
Elliott	For	Sandler	For
Epstein	For	Schabas	For
Go	For	Sikand	For
Hainey	For	Silverstein	Against
Halajian	For	Simpson	For
Hare	For	C. Strosberg	For
Hartman	For	Swaye	For
Heintzman	For	Symes	For
Henderson	For	Wright	Abstain

Vote: 40 For; 4 Against; 4 Abstentions

PARALEGAL STANDING COMMITTEE REPORT

Mr. Dray presented the Report.

Report to Convocation
November 27th, 2008

Paralegal Standing Committee

Committee Members
Paul Dray, Chair
Susan McGrath, Vice-Chair
Marion Boyd
James R. Caskey
Seymour Epstein
Michelle L. Haigh
Glenn Hainey
Paul Henderson
Brian Lawrie
Douglas Lewis
Margaret Louter
Stephen Parker
Cathy Strosberg

Purpose of Report: Decision
Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

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COMMITTEE PROCESS

1. The Committee met on November 13th, 2008. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-chair), Marion Boyd, James Caskey, Seymour Epstein, Michelle Haigh, Glenn Hainey (by telephone), Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter and Stephen Parker. Staff members in attendance were Terry Knott, Zeynep Onen, Elliot Spears, Roy Thomas, Katherine Corrick, Michael Elliott, Naomi Bussin, Sybila Valdivieso, Arwen Tillman, Fred Grady, Sheena Weir, Lisa Mallia, and Julia Bass.

FOR DECISION

DELEGATION OF MEDIATIONS AT FSCO

Motion

2. That By-law 7.1 be amended to provide that lawyers handling claims that involve catastrophic impairment at the Financial Services Commission of Ontario ('FSCO') be permitted to delegate the mediation of subsidiary issues to licensed paralegals employed by their firm.

Background

3. A number of lawyers and paralegals have raised the issue of the change in the rules governing who may handle mediations of subsidiary issues on catastrophic files at FSCO, arising from the introduction of paralegal licensing. A letter on this topic from a licensed paralegal is attached at Appendix 1. Prior to paralegal licensing, although only lawyers could handle claims involving a 'catastrophic impairment', lawyers were permitted to delegate the mediation of subsidiary items on these files, such as payment for a specific prosthetic device, to staff at their firm.

History

4. Prior to the introduction of paralegal licensing under the *Law Society Act*, there was a limited form of licensing operated by FSCO. This took the form of a list of approved 'Statutory Accident Benefit Representatives,' known as 'SAB's Representatives.' Approved SAB's Representatives were permitted to handle all auto insurance files except those where the injured person was alleged to have suffered a 'catastrophic impairment', a defined term in the *Insurance Act* regulations.

5. Catastrophic cases are the most serious automobile accident cases and involve injuries such as paraplegia and quadriplegia. The determination of whether a person's injuries can be categorized as catastrophic is complex and has profound legal and financial consequences.

6. During the 2004 public consultations into the proposals for paralegal regulation, the Law Society received strong representations from both lawyers and paralegals concerning the scope of practice at FSCO. Lawyers argued that the paralegal scope should be further restricted, while paralegals argued that it should be broadened. In keeping with the general approach that the Task Force developed, the Task Force recommended that the scope of practice for all independent paralegals remain unchanged.

7. While the SAB's regulations provided that catastrophic files could only be handled by lawyers, lawyers could delegate certain parts of the work on a catastrophic case to a non-lawyer employed by their firm. This typically involved assisting with mediation of entitlement to items not central to the determination of the extent of the injury. For example, this might involve an issue of $1,000 to $2,000 for travel costs or specific assistive devices.

8. Since the introduction of paralegal regulation, licensed paralegals have been excluded from work on catastrophic files, even where they work under the supervision of a lawyer. This is based on the concept that a licensed paralegal is an independent advocate with a specific scope of practice, together with the policy decision to leave the paralegal scope of practice as it was – in the case of the Financial Services Commission, this meant that catastrophic cases were excluded.

9. This restriction seems to affect a relatively small number of law firms that primarily handle catastrophic cases, a specialized area of practice. These firms have a number of licensed paralegals who handle cases at FSCO and would like to handle mediations of subsidiary items on catastrophic files, where the issue does not involve the determination of the nature of the injury.

The Committee's Deliberations

10. The Committee was of the view that it would be in the interests of reduced costs and convenience to the client for lawyers handling catastrophic files to be able to delegate mediation of subsidiary items to licensed paralegals employed by their firm and that this does not undermine the concept of a licensed paralegal as an independent advocate. The Committee did not favour permitting lawyers to delegate files to unlicensed staff members, nor to independent paralegals, in order to protect the integrity of the process and avoid creating an enforcement loophole.

11. The Financial Services Commission of Ontario was consulted about the proposed change and agrees with this approach.

Appendix 1

Sent: Wednesday, August 20, 2008 11:20 AM
Law Society of Upper Canada
Paralegal Standing Committee
Osgoode Hall
130 Queen St. West
Toronto, Ontario
M5H 2N6

Attn. Mr. Paul Dray, Committee Chair

Dear Paul,
Thank you for taking the time to speak to me in July regarding the above subject. I enclose a copy of a letter from our firm's managing partner, Alan Farrer dated December 13, 2007 addressing this issue.
Here is a summary of the outstanding problem:

* Prior to paralegal licensing, law clerks/paralegals *in the employ of law firms were permitted* to work on Catastrophic injury claim at FSCO, however independent paralegals were not. This exemption existed within FSCO's own Paralegal Code of Conduct. The exemption reflected the existence of lawyer supervision.
* Since licensing, FSCO has rescinded the Paralegal Code of Conduct and now defers to the LSUC to regulate licensed paralegals, both independent and employed in law firms.
* The LSUC regulations prohibit any paralegal from representing catastrophically impaired claimants at FSCO, regardless if the paralegal is in the employ of a law firm.
* *We submit that the LSUC regulations should mirror the FSCO Paralegal Code of Conduct in allowing licensed paralegals in the employ and under the supervision of a lawyer to represent catastrophic claimants before FSCO.*

Many of the issues at FSCO are disputes that do not go to the issue whether a claimant is deemed Catastrophic or not (and therefore entitled to a higher level of benefits). Here's an extreme example of how the current regulation impacts paralegals, lawyers and clients....We have a case where a young man suffered severe injuries in a car accident. He is deemed Catastrophic and therefore all FSCO work, Mediation etc.. must be conducted by a lawyer. The latest dispute is over a therapeutic bed mattress at a cost of $2,154.56. The auto insurer is refusing reimbursement despite it being prescribed by the claimant's doctors. Our firm has filed for Mediation at FSCO on the issue. The dispute is as much about principal as money. Previously, this mediation would have been conducted by a law clerk / paralegal in the employ of Thomson, Rogers, now it must be handled by a lawyer.

In the future I expect our firm and others will be interested in employing graduates of paralegal programs. The graduates will leave the programs trained in the Statutory Accident Benefits and the FSCO Dispute Resolution Code, which makes them very attractive in our area of law. However, since our clients are primarily catastrophic, future graduates will substantially be unable to utilize their license. Paralegal employment in a law firm will be less attractive to graduates. That outcome would be detrimental to paralegals, lawyers, clients and the mandate of affordable legal services.

The details of our firm's submission and proposed amendment is outlined in Mr. Farrer's correspondence below. If you wish to discuss this issue please call or email me. I ask that you acknowledge receipt of this email and advise if this topic can appear on the September agenda of the Paralegal Standing Committee. I would be happy to attend at that meeting to explain the issue.

Thank you.
Mike Holden
Michael G. Holden
Licensed Paralegal
Thomson, Rogers
Barristers & Solicitors
Ste. 3100, 390 Bay Street, Toronto, Ontario, M5H 1W2
Firm: http://www.thomsonrogers.com

REVISED WORDING OF AMENDMENT TO RULE 8

Motion

12. That Convocation approve the revised version of Rule 8 shown at Appendix 2.

Background

13. On October 30, Convocation approved the Committee's recommendation to amend Rule 8 (marketing and advertising), subject to final wording being prepared by the Law Society's Rules drafter, Don Revell. Mr. Revell has now provided the attached draft.

14. The draft is being submitted for Convocation's approval, together with the corresponding amendments to Rule 3 of the lawyers' *Rules of Professional Conduct* submitted by the Professional Regulation Committee.

The Committee's Deliberations

15. The Committee was of the view that the revised version should be approved.

Appendix 2

PROPOSED NEW WORDING OF RULE 8 – REVISED BY DON REVELL

Rule 8 – Practice Management

Making Legal Services Available

8.02 (1) A paralegal shall make legal services available to the public in an efficient and convenient way.

Restrictions

(2) In offering legal services, a paralegal shall not use means

(a) that are false or misleading,

(b) that amount to coercion, duress or harassment,

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) that are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or

(e) that otherwise bring the paralegal profession or the administration of justice into disrepute.

(3) A paralegal shall not advertise services that are beyond the permissible scope of practice of a paralegal.

Marketing

8.03 (1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

(2) A paralegal may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

(3) A paralegal may advertise fees charged by the paralegal for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted,

(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and

(c) the paralegal adheres to the advertised fee.

FOR INFORMATION

PARALEGAL BUDGET AND FEES FOR 2009

16. The Committee approved the paralegal budget, which is being presented to Convocation by the Finance Committee as part of the overall budget for 2009.

Attached to the original Report in Convocation, copies of:

Copy of a letter from Alan A. Farrer, Managing Partner, Thomson, Rogers to Paul Dray dated December 13, 2007.

(Appendix 1, pages 8 – 9)

Re: Delegation of Mediations at FSCO (Amendment to By-Law 7.1)

It was moved by Mr. Dray, seconded by Ms. McGrath, that By-Law 7.1 be amended to provide that lawyers handling claims that involve catastrophic impairment at the Financial Services Commission of Ontario ('FSCO') be permitted to delegate the mediation of subsidiary issues to licensed paralegals employed by their firm.

Carried

Re: Revised Wording of Rule 8 of *Paralegal Rules of Conduct* (Advertising and Marketing)

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the revised version of Rule 8 at Appendix 2.

Carried

Rule 8 (Advertising and Marketing)

Rule 8 – Practice Management

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Items for Information

- 2009 Paralegal Budget

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PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE REPORT

Ms. Pawlitza presented the Report.

Report to Convocation
November 27, 2008

Professional Development & Competence Committee

Committee Members

Laurie Pawlitza (Chair)
Constance Backhouse (Vice-Chair)
Mary Louise Dickson (Vice-Chair)
Alan Silverstein (Vice-Chair)
Larry Banack
Jack Braithwaite
Thomas Conway
Marshall Crowe
Aslam Daud
Jennifer Halajian
Susan Hare
Paul Henderson
Laura Legge
Dow Marmur
Daniel Murphy
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Heather Ross
Catherine Strosberg
Gerald Swaye

Purpose of Report: Decision
Information

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

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COMMITTEE PROCESS

1. The Committee met on November 13, 2008. Committee members Laurie Pawlitza (Chair), Mary Louise Dickson (Vice Chair), Thomas Conway, Marshall Crowe, Aslam Daud, Jennifer Halajian, Susan Hare, Paul Henderson, Laura Legge, Daniel Murphy, Judith Potter, Nicholas Pustina, Heather Ross, and Gerald Swaye attended. Staff members Leslie Greenfield, Lisa Mallia, Diana Miles, Elliot Spears and Sophia Sperdakos also attended.

DECISION

PRACTICE MANAGEMENT REVIEW PROGRAM
SELECTION CRITERIA

Motion

2. That Convocation approve the use of enhanced risk-based selection criteria for the practice management review program as follows:
   a. One to eight years from call to the bar.
   b. In private practice (category A).
   c. In approximate proportion to the percentage of law firms represented in Law Society conduct matters and LawPRO negligence claims for the entire profession determined annually.

Background

3. Convocation approved the practice management review program in September 2006 to begin in 2007. The program goal is to prevent practice management competence deficiencies.

4. The program's indicia for selection are lawyers in private practice one to eight years from call to the bar, regardless of size of practice. In selecting this component of the practising bar Convocation considered statistics that suggest that it is after the eighth year that both Law Society complaints and LawPRO negligence claims against lawyers begin to increase. Convocation chose not address whether some types of practices within the selection group are higher risk than others.

5. Lawyers to be reviewed are chosen randomly, but allocated in the same proportion as the number of practising lawyers in each of the major areas of practice. So, for example, if 15% of practising lawyers in the selection group practise primarily family law, 15% of the lawyers selected will be family lawyers. Convocation directed that a formal report on the program be presented in the autumn of 2009.

6. The number of practice reviews to be conducted was set at 250 in 2007, 400 in 2008 and 500 in 2009 and thereafter.[1] This includes approximately 80 to 100 focused reviews that are mandated either as a result of complaints history and other risk indicators or upon return to private practice after an absence of more than five years.

7. When Convocation set its priorities in the fall of 2007 it included "maintaining high standards of competence." The Professional Development and Competence Department was requested to consider how to meet this priority. Among its other considerations it looked at the effectiveness of the practice management review program selection criteria. The department and the Committee are satisfied that there is sufficient information and experience with the program to see trends in the results and consider adjustments to enhance it now, rather than waiting until 2009.

Lawyer Attitude to Program

[1] Lawyers with practice experience conduct the reviews. In a practice management review the reviewer spends two to three days on the engagement; one day of field work at the law firm examining client files and reviewing practice management systems, the other one to two days planning the engagement and writing the report. Focused practice reviews require additional time.

8. Two hundred and sixty-two practice management reviews were completed and closed between January 2007 and June 2008.[2] As with the Spot Audit program those reviewed are asked to evaluate the experience. Comments so far suggest that those who undergo reviews have found them helpful and educational and have had positive views of the competence and attitude of the reviewers. To date the practice management reviews have received a 58% response rate to evaluations. Of those responding,

   a. 98% found the reviewer's report useful for making improvements;
   b. 94% found the program to be very constructive; and
   c. 100% found the reviewer and his or her assistant to be helpful and professional.

Reviews to Date

9. While the reviews address the goals Convocation established, the Committee believes the selection criteria should be adjusted so that the program can better reach the lawyers who can benefit the most from it.

10. In the reviews completed between January 2007 and June 2008 reviewers found that lawyers in firms of five or fewer fell below minimum standards significantly more often than lawyers in firms of 6 or more, as set out in the table below.

Size of Firm	Number of Reviews Conducted	Failed Minimum Standards
Sole Practitioner	61	16 lawyers (26.2% of reviews conducted)
2 – 5 lawyers	37	4 lawyers (10.8%)
6 – 10	29	1 lawyer (3.4%)
11 – 25	51	1 lawyer (2.0%)
26 – 100	31	1 lawyer (3.2%)
>100	53	0

11. These statistics illustrate what the Soles and Small Firm Task Force's survey revealed. It can be a challenge for those in sole and small firm practice to have sufficient supports, checks and balances, resources, and time to create the necessary systems for their practices. Lawyers in large firms have practice management controls. The larger the firm the more likely individual lawyers are to be relieved of day to day management responsibilities. Yet, because of program's random selection criteria, more reviews were conducted of lawyers in the latter group.

[2] Additional focused reviews were also conducted.

12. At 400 reviews per year and using the current selection criteria only 57% of the designated group will be reviewed before they move out of the 1-8 year category. Moreover, if through random selection a disproportionate number of those selected are from firms of six or more lawyers, the program may be reaching even fewer of those lawyers who could best use the assistance.

13. Up to June 30, 2008 direct expenses for the program were $681,000. Sixty-three percent or $429,000 was spent reviewing individual practices in larger firms with practice management controls and almost no deficiencies in the standards of practice under review.

Selection Criteria

14. The Committee has considered whether the current selection criteria result in the most effective use of limited resources and assistance to those who can benefit most.

15. While it is of the view that the program should maintain its focus on the first eight years after call to the bar, the Committee recommends that the selection process within the category should mirror the proportion of overall law firm representation in the Law Society investigatory and discipline stream and the LawPRO negligence claim stream, thereby addressing high risk categories.

16. The Committee examined Law Society 2007 statistics of firm representation in the conduct stream generally (including complaints) and in active investigation/discipline. Given that many complaints do not advance beyond the initial stage focusing on the percentages for those in investigations and/or discipline is a better reflection of risk indicia.

Firm Size	# of lawyers in conduct	% of total lawyers in conduct	# of lawyers with active invest/disc (not including complaints)	% of total lawyers with active invest/disc
Sole	1114	53%	260	61%
2 – 5	558	27%	110	26%
6 – 10	176	8%	23	6%
11 – 25	138	7%	14	3%
26 – 100	69	3%	8	2%
>100	45	2%	10	2%
Total	2100	100%	425	100%

17. The Committee also examined LawPRO claims statistics based on percentage of claims by firm size:[3]

[3] These statistics are a compilation of LawPRO information spanning 10 years. LawPRO advises they include and mirror the 2007 data.

Firm Size	No. of Claims	% of total
Solo	6763	37.5%
2 to 5	4838	26.8%
6 to 10	1846	10.2%
11 to 24	1614	8.9%
25 to 74	976	5.4%
75 plus	2003	11.1%
Total	18040	

18. While there are some percentage differences between the two sets of statistics, together they provide useful evidence of the level of risk that accompanies practice size and provide guidance on how to apportion scarce practice review resources to effect the best result.

19. This approach would ensure that lawyers with the highest risk of practice deficiencies are more likely to receive assistance than is currently the case. In both Law Society conduct matters and LawPRO negligence statistics practice management deficiencies play a significant role in lawyers' difficulties.

20. To accommodate the percentage differences in statistics the Committee proposes averaging them and using the following annual selection. The Professional Development and Competence department will monitor the statistics annually to ensure the selection continues to reflect the statistics.

Firm Size	Percentage of Total number of Practice Management Reviews to be conducted per year
Sole practitioner	50%
2-5	25%
6-10	10%
11-25	7%
26-100	4%
Over 100	4%

21. The Committee recognizes that under this approach approximately 57% of those in the 1-8 year selection category will be reviewed, as is currently the case. However, this may no longer represent as significant a gap given that the allocation of reviews will be tied more closely to risk categories. The recommended approach allows for more effective use of financial resources and will allow more sole and small firm lawyers to benefit from the assistance these reviews can provide.

PROPOSED LAWYER OATH AT CALL TO THE BAR

Motion

22. That Convocation approve the following in French and English as the lawyer oath that candidates for call to the bar of Ontario swear or affirm:

In accepting the honour and responsibility of life in the profession of law, I promise that I will, in good faith, safeguard justice by recognizing and respecting the dignity of the court and the importance of the client's cause, however unpopular. I will accord civility, fairness and candour to all.

At all times, and with my whole heart, I will champion the rule of law through diligent effort, whether in court or not, on behalf of all persons, whether powerful or frail, envied or despised, through strict adherence to the rules that govern members of our profession.
So help me God. (I do so affirm.)

J'accepte avec honneur la responsabilité d'exercer la profession d'avocat et je promets de servir de bonne foi la justice en reconnaissant et en respectant la dignité de la Cour et l'importance de la cause du client, quel que soit son degré d'impopularité. Je traiterai tout un chacun avec courtoisie, impartialité et honnêteté.

Toujours et sans réserve, je défendrai la primauté du droit avec diligence, devant les tribunaux ou en dehors, au nom de tous les justiciables, le faible comme le fort, sujet d'envie ou de mépris, dans le respect intégral des règles qui régissent les membres de notre profession.

Ainsi que Dieu me soit en aide (Je l'affirme solennellement.)

Background

23. At the Annual General Meeting in May 2008 members brought a motion calling for a change to the oath lawyers take upon call to the bar. The motion passed.

24. The Committee established a working group of Heather Ross (Chair), Susan Hare and Alan Silverstein to consider a new oath. The Committee has considered the working group's report, set out at Appendix 1 and recommends the proposed oath set out in the report and in the motion above, for Convocation's consideration, and if appropriate, approval.

25. The working group has considered the oath-related issues raised at the Annual General Meeting, including that lawyer candidates should swear or affirm an oath unique to their profession. The Committee is of the view that the proposed oath is appropriate for lawyer candidates at call to the bar.

Appendix 1

Report
Thursday, November 27, 2008

Working Group on the Lawyers' Oath of Office

Working Group Members
Heather J. Ross (Chair)
Susan Hare
Alan Silverstein

Prepared by Heather J. Ross
Bencher

BACKGROUND

1. In April 2007 Convocation approved an omnibus motion containing amendments and revisions to all of the *Law Society's* By-laws. The main purpose of that motion was to reflect the coming into effect of paralegal regulation by the *Law Society*, commencing May 1st, 2007. As part of that motion an amended form of oath for lawyers and a new oath for paralegals was passed. In July 2007, following the Calls to the Bar, Bencher Heather Ross wrote to the then Treasurer Gavin McKenzie suggesting that the language of the current oath for lawyers could benefit from redrafting.

2. Coincidently, on October 16th, 2007, Karen Andrews, a lawyer with the Rexdale Community Legal Clinic, wrote to then Treasurer Gavin McKenzie expressing her concern that the Barristers' Oath had been rewritten and that paralegals and lawyers now swear or affirm essentially the same oath. In her letter, Ms. Andrews also expressed dismay that the current oath for lawyers had omitted the reference to "not refusing causes of complaint reasonably founded." Ms. Andrews took this to mean a duty to provide pro-bono legal services, to support Legal Aid, to assist members of the community with their legal difficulties. She observed that there appeared to be "no access to justice requirement" in the new oath. The Treasurer replied to Ms. Andrews on February 22, 2008 and confirmed that he had referred the question to the Professional Development and Competence Committee to consider her letter and the wording of our oath generally, at the committee's meeting on April 10, 2008. The letter from Karen Andrews and the Treasurer's reply together with a second letter from Karen Andrews and the reply from the current Treasurer are set out at APPENDIX A.

3. Prior to the committee meeting on April 10, 2008, the *Law Society* was served with a motion on the issue of oaths to be considered at the Annual General Meeting on May 7, 2008. The Motion text is set out at APPENDIX B.

4. At its meeting in April 2008, the Committee created a working group to reconsider the wording of the oath for lawyers and appointed Heather J. Ross (Chair), Susan Hare, and Alan Silverstein to undertake a review of the subject and to provide the Committee with a new draft Oath of Office for lawyers, for consideration.

5. The correspondence from Karen Andrews and the Motion at the Annual General Meeting and the views expressed at the Annual General Meeting fell generally into the following categories:
   (1) That lawyers were objecting to being treated as and called a class of Licensee instead of being called Members;
   (2) That the changes to the content of the Barrister's Oath were unacceptable;

(3) Those changes made no mention of the lawyers' duty to ensure access to justice;
(4) That it was objectionable that the same Oath of Office required of lawyers was going to be taken by paralegals. The Lawyers' Oath of Office must be unique and distinct from the paralegal oath.

6. Your Working Group has undertaken consideration of items 2 and 3 of the foregoing list. The Working Group has focused solely on the drafting of a new Oath of Office for Lawyers.

7. Your Working Group also did not address the optional oath of allegiance to the Queen.

8. In the course of its work the Working Group considered the oaths administered by Law Societies across Canada. A comparative chart is set out at APPENDIX C.

9. The Working Group also considered the definition and history of oaths, the Rules of Professional Conduct, and the Chief Justice of Ontario Advisory Committee on Professionalism's definition of Professionalism entitled "Elements of Professionalism."

Definition

10. An oath has been variously defined as follows:

> oath (noun) a solemn promise, especially one that calls on a deity as a witness
>
> Source: Oxford English Dictionary
>
> oath (from the Anglo-Saxon *āo, also called plight*) is either a promise or statement of fact calling upon something or someone that the oath-maker considers sacred, usually a god, as a witness to the binding of the promise or the truth of the statement of fact. To swear is to take an oath.
>
> Source: Wikipedia
>
> oath of office. An oath taken by a person about to enter into the duties of public office, by which the person promises to perform the duties of that office in good faith.
>
> Source: Black's Law Dictionary (7th ed.)

A BRIEF HISTORY OF THE LAWYERS' OATH OF OFFICE

11. The order of the profession of law has a history that can be traced for more than 1100 years. It was part of the administration of the government of the realm for more than six centuries before Columbus arrived in North America.

12. An official oath of office has always been required for admission to the practice of law since the recognition of the profession of law.

13. By 1140, after the fall of the Western Empire and the onset of the Dark Ages, the legal profession of Western Europe collapsed. From 1150 onward, a small but increasing

number of men became experts in Canon Law, but only in furtherance of other occupational goals, such as serving as priests in the Roman Catholic Church.

14. From 1190 to 1230, however, there was a crucial shift in which some men began to practice Canon Law as a lifelong profession in itself.

15. The legal profession's return was marked by the renewed efforts of church and state to regulate it. In 1231 two French councils mandated that lawyers had to swear an oath of admission before practising before the bishop's courts in their regions, and a similar oath was promulgated by the Papal Legate in London in 1237. During the same decade, Frederick II, the emperor of the Kingdom of Sicily, imposed a similar oath in his civil courts. By 1250 the nucleus of a new legal profession had clearly formed. The new trend toward professionalization culminated in a controversial proposal at the Second Council of Lyon in 1275 that all ecclesiastical courts should require an oath of admission. Although not adopted by the council, it was highly influential in many such courts throughout Europe. The civil courts in England also joined the trend towards professionalization; in 1275 a statute was enacted that proscribed punishment for lawyers guilty of deceit, and in 1280 the mayor's court of the City of London promulgated regulations concerning admission procedures including the administering of an oath.

16. In the reign of Edward I (A.D. 1272-1307), —English history ceased to be "the domain of antiquarians," and became "the domain of lawyers." Lawyers were recognized as an existing order and their conduct regulated by the famous statute, Primer Westminster, A.D. 1275. This statute, the first English statute passed by a lawful Parliament consisting of the Commons, the Lords spiritual and temporal, and the King, provided that:

> If any serjeant, pleader or other do any manner of deceit or collusion in the King's Court or consent unto in deceit of the Court or to beguile the Court or the party and thereof be it tainted, he shall be imprisoned for a yeare and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader he shall be imprisoned in like manner by the space a yeare and a day at least; and if the trespass requires greater punishment it shall be at the King's pleasure.

17. The statute stated that the serjeant-at-law was required to take an oath:

> For the better understanding of this Act, it is necessary to set downe the oath of the sergeaunt-at-law."
> This oath consisteth on foure parts.
> 1. That he shall well and truly serve the King's people, as one of the sergeaunts of the law.
> 2. That he shall truly counsell them, that he shall be retained with after his cunning.
> 3. That he shall not defer, tract, or delay their causes willingly, for covetousness of money, or other thing that may tend to his profit.
> 4. That he shall give due attendance accordingly.

18. The lawyers' office was well established in France long before this time. In the year 707, the French parliament ceased to be a purely political body and assumed certain judicial functions. It became ambulatory and followed the King, holding sittings wherever the

King from time to time resided. Certain advocates attended at these sittings, and were recognized as lawyers and were entitled to practise in the Parliament. The body of laws made in 802, called the Capitularies of Charlemagne, recognized the profession of the lawyer and provided "that nobody should be admitted therein but men mild, pacific, fearing God and loving justice upon pain of elimination."

19. By an Ordinance of February 13th, 1327, Philippe deValois, then Regent, provided that:

> No advocate shall be permitted to plead if he has not taken the oath, and if he is not inscribed on the roll of advocates.

20. In 1344, further regulations were made by the Parliament of Paris, providing that:

> Those advocates who are retained should not be allowed to continue their practice unless they bind themselves by oath to the following effect:
> To fulfill their duties with fidelity and exactitude; not to take charge of any causes which they know to be unjust; that they will obtain from false citations; that they will not seek to procure a postponement of their causes by subterfuge or malicious pretexts; that whatever may be the importance of a cause, they will not receive more than thirty livres for their fee or any other kind of gratuity over and above that sum, with liberty, however to take less; that they will lower their fees according to the importance of the cause and the circumstances of the parties; and that they will make no treaty or arrangement with their clients depending on the event of the trial.

21. Among the decrees promulgated at a Council at St. Paul's, London, in 1237, by Cardinal Otto, Papal Legate of Pope Gregory IX, who had been summoned to England by Henry III, was one as to the oath to be taken by advocates as follows:

> We, therefore, rising to the assistance of justice, do, with the approbation of the council, decree, that whoever wishes to obtain the office of advocate shall make oath to the diocesan in whose jurisdiction he lives, that in cases in which he may plead, he will plead faithfully, not to delay justice or to deprive the other party of it; but to defend his client both according to law and reason. Otherwise, they shall not be admitted to plead, in matrimonial cases and elections, unless they make a like oath; and they shall not be admitted in other cases before the ecclesiastical judge for more than three terms, without an oath of this kind, unless by chance a demand is to be made on behalf of this church or his lord or for a friend or for a poor man, a foreigner, or any wretched person. Let all advocates beware that they do not themselves, or by means of others, suborn witnesses, or instruct the parties to give false evidence or to suppress the truth: those who do so shall be, ipso facto, suspended from offence and benefice, until they have made proper atonement for the same; and if they are convicted of so doing, they shall be duly punished, all other matters notwithstanding. Judges, too, who are ignorant of the law, should, if any doubtful point arise, from which injury may accrue to either party, ask the advice of some wise person, at the expense of both parties.

22. Philippe the Bold of France issued an ordinance on October 23, 1274 governing the functions and fees of attorneys. In that ordinance attorneys were exhorted to ensure

that the King's subjects had ready access to have their cases heard without lawyers charging "immoderate fees", or "maliciously protracting legal contests". Attorneys were required to swear upon the Sacred Gospels the oath:

> That in all cases which are being tried in said courts before which they practised in the past or shall practise, they will perform their duties bonâ fidê diligently and faithfully as long they reason to believe their case to be just. They shall not bring any case into said courts either as defending or counselling lawyers unless they shall have believed it to be just; and, if at any stage of the trial the case appears to them unjust, or even intrinsically bad, they shall discontinue to further defend it, withdrawing from said case entirely as defending or counselling lawyers. Whosoever declines to swear in accordance with this formula, shall take cognizance, that in said courts they are disbarred, as long as they persist in this state of mind.

The ordinance went on to further direct that for an entire case argued before a tribunal, the fee of the attorney shall not exceed the amount of 30 francs. The ordinance lastly provided that the oath had to be renewed by all attorneys every year.

23. By an edict of Francis I in 1536, on the administration of justice in the Bretagne and on the shortening of trials, the official character and duties of lawyers were recognized and enforced as follows:

> Article 37: That "advocates must not give advice to both parties under punishment of being heavily fined by financial penalties, suspension, or loss of all of their property."
>
> Article 39: That "if there should happen some poor and wretched people who on account of their poverty or because of the sway and fear of their parties (i.e. opponents), cannot obtain counsel, we enjoin the judges to provide counsel for them, and to punish and fine the attorneys and barristers who without reasonable ground, should have refused to take charge of them."

24. In England, on November 18, 1648 the Lord Commissioner Whitelocke, who was appointed by the King to confer the degree of the serjeant-at-law, then addressed the candidates upon the character of their office and its duties. He described the nature of the lawyer's office and its duties as then understood. He said:

> I hold it not impertinent to mention something to you of the duties of an advocate; which are some of them to the courts and some to the clients.
>
> 1. To the courts of justice he owes reverence, they being the high tribunals of law, of which Doctor and Student, and the Statute of Marlebridge saith, *Omnes, tam majores quam minores, justitiam recipient;* (Let all, as well the greater as the smaller, receive justice.) and therefore great respect and reverence is due to them from all persons, and more from advocates than from any other.
>
> 2. An advocate owes to the court a just and true information. The zeal of his client's cause, as it must not transport him to irreverence, so it must not mislead him to untruths in his information of the court.

> Remember that in your oath for one verb [you shall serve] you have two adverbs [well and truly].
> The duties of advocates to their clients are general and particular. "The general consist in three things,—secrecy, diligence, and fidelity.
>
> 1. For secrecy: advocates are a kind of confessors and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, subsigillo and he ought not to discover them to his client's prejudice; nor will the law compel him to it.
>
> 2. For diligence: much is required in an advocate in receiving instructions, not only by breviats, but by looking into the books themselves, in pursuing deeds, in drawing conveyances and pleas, in studying the points in law, and in giving a constant and careful attendance and endeavor in his clients' causes.
>
> 3. For fidelity: it is accounted vinculum societatis. The name of unfaithfulness is hateful in us all; and more in advocates than others, whom the client trusts with his livelihood without which his life is irksome; and the unfaithfulness or fraud of the one is the ruin of the other.
>
> For your duty to particular clients you may consider, that some are rich, yet with such there must be no endeavor to lengthen causes, to continue fees. Some are poor, yet their business must not be neglected if their cause be honest; they are not the worst clients, though they fill not your purses, they will fill the ears of God with prayers for you, and he who is the defender of the poor will repay your charity. Some clients are of mean capacity; you must take more pains to instruct yourself to understand their business. Some are of quick capacity and confidence, yet you must not trust to their information. Some are peaceable, detain them not, but send them home the sooner. Some are contentious, advise them to reconcilement with their adversary. Amongst your clients and all others, endeavor to gain and preserve that estimation and respect which is due to your degree, and to be a just, honest and discreet person. Among your neighbours in the country never foment but pacify contentions.

25. On this foundation of the English law and this conception of the lawyer's office in England, the office of the lawyer was established in the colonies and provinces of England in North America.

Current Oath of Office for Lawyers

26. The current Oath of Office for Lawyers is as follows:

> I swear (or affirm) that I will conduct all matters and proceedings diligently and faithfully and to the best of my knowledge and ability. I will not seek to destroy any person's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favour or prejudice any person. In all things, I will conduct myself truly, honestly and with integrity. I will abide by the standards and rules governing the *practice of law* in the Province of Ontario. I will seek to improve the administration of justice. I will uphold the rule of law and I will uphold the

> interests, rights and freedoms of all persons according to the constitution and the laws of Canada and of the Province of Ontario.

(The current oath for paralegals is as follows:

> I swear (or affirm) that I will conduct all matters and proceedings diligently and faithfully and to the best of my knowledge and ability. I will not seek to destroy any person's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favour or prejudice any person. In all things, I will conduct myself truly, honestly and with integrity. I will abide by the standards and rules governing the *provision of legal services* in the Province of Ontario. I will seek to improve the administration of justice. I will uphold the rule of law and I will uphold the interests, rights and freedoms of all persons according to the constitution and the laws of Canada and of the Province of Ontario.)

Former Oaths

27. Prior to the revision to the oath creating one lawyers' oath from what historically were two oaths—the Barrister's Oath and the Solicitors' Oath—the oaths read as follows:

> Barrister's Oath
>
> You are called to the Degree of Barrister-at-law to protect and defend the rights and interests of such citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. You shall neglect no one's interest nor seek to destroy any one's property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any one, but in all things shall conduct yourself truly and with integrity. In fine, the Queen's interest and the interests of citizens you shall uphold and maintain according to the constitution and law of this Province. All this you do swear to observe and perform to the best of your knowledge and ability. So help you God. (or you so affirm.)
>
> Solicitor's Oath
>
> You also do sincerely promise and swear that you will truly and honestly conduct yourself in the practice of a solicitor according to the best of your knowledge and ability. So help you God. (or you so affirm).

28. The former Barrister's Oath was virtually unchanged for many years. For example, the Oath printed in the 1903 Rules of the Law Society of Upper Canada:

> You are called to the degree of Barrister to protect and defend the rights and interests of such of your fellow citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. You shall neglect no man's interest nor seek to destroy any man's property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any man, but in all things shall conduct yourself truly and with

> integrity. In fine, the King's interest and your fellow-citizens' you shall uphold and maintain according to the constitution and law of this Province.
>
> All this I swear to observe and perform to the best of my knowledge and ability – so help me God.

29. The former Solicitor's Oath had not been revised for some time:

> 1833: I also do sincerely promise and swear that I will truly and honestly demean myself in the practise of an Attorney at Law according to the best of my knowledge and ability. So help me God.
>
> 1975: You also do sincerely promise and swear that you will truly and honestly conduct yourself in the practice of a solicitor of the Supreme Court of Ontario according to the best of your knowledge and ability. So help you God.
>
> The reference to specific courts was removed in 1990.

30. On September 21, 2000, the former Admissions Committee proposed to Convocation that the two oaths be combined into one and presented for Convocation's consideration, a revised draft oath which read as follows:

> I promise and swear (or affirm) that I will honestly and diligently and to the best of my ability execute the duties of barrister and solicitor, abiding by the ethical standards and rules of the legal profession with honour and dignity I will not compromise; that I will not promote suits upon frivolous pretences but in all things I shall conduct myself truly and with integrity; that I will uphold and seek to improve the administration of justice and will uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of Ontario. (Optional) So help me God.

That proposed version of a combined Barristers and Solicitors' Oath did not pass Convocation and the issue did not return for consideration until now.

MOVING TO THE 21ST CENTURY

31. Historically, and until it was changed to the first person in April 2007, the Barrister's Oath under examination by this Working Group, was expressed in the second person, and contained principally prohibitive and prescriptive language. It was expressed in the negative. A practice had arisen that the oath was read by the Registrar of the Court of Appeal to the group of students being called to the bar. The new "calls" did not repeat the oath but swore or affirmed the Oath after it had been read to them. The Working Group suggests that this practice should change to one where the new "calls" say the oath themselves – this will, we suggest bring home the promises and pledges of the oath with much more impact and resonance than is currently the case.

32. The Working Group has attempted to capture the dignity and importance of the lawyers' office and of the duties imposed by the lawyer's official oath. The significance of the lawyer's oath is that it stamps the lawyer as an officer of the state, with rights, powers, and duties as important as those of the judges of the courts themselves. When a lawyer

is admitted to practice and takes the required oath of office he or she has as much right to discharge the duties of their office as a representative has to sit and act in a legislature. The lawyer has as much right to appear in court and be heard for a party to a cause as a judge has to hear and decide the cause. A lawyer is not the servant of his or her client. The lawyer is not the servant of the court. The lawyer is an officer of the court, with all the rights and responsibilities which the character of the lawyer's office gives and imposes. The lawyer is also an officer for life, whose office cannot be taken from him or her except for cause established by due process of law upon proof, hearing and judicial determination.

33. Since recorded history of the lawyers' oath of office, there is a recurring theme of access to timely, affordable justice, and the provision of pro bono services; to ensuring that justice was available to all regardless of station or wealth; oppression or poverty.

34. The oath of office taken by lawyers has always defined the duties and responsibilities of that office. In this sense, the oath is more than a promise about one's future conduct.

35. It is of the highest importance that the lawyer's oath of office should be so framed as to indicate the duties and responsibilities of those who take it. In short, the lawyer's oath should be a condensed code of legal ethics. That is what it was in England and France and in America from the beginning.

36. We have tried to capture in the new draft Oath of Office, the essential principles of our code of ethics, the principles that guide and inform our profession. And so, the overarching principles by which we promise ethical conduct in our Oath of Office are:

honour, good faith, integrity, honesty, fairness, courtesy and civility.

and we owe these duties, all of them, to everyone – clients, tribunals, other lawyers, paralegals and the public.

Proposed new LAWYERS' OATH OF OFFICE

> In accepting the honour and responsibility of life in the profession of law, I promise that I will, in good faith, safeguard justice by recognizing and respecting the dignity of the court and the importance of the client's cause, however unpopular. I will accord civility, fairness and candour to all.
> At all times, and with my whole heart, I will champion the rule of law through diligent effort, whether in court or not, on behalf of all persons, whether powerful or frail, envied or despised, through strict adherence to the rules that govern members of our profession.
>
> So help me God. (I do so affirm.)

37. In the course of this project and taking into consideration the many helpful views and thoughtful comments we have received thus far on this subject, the working group is of the view that the new oath should abandon negative, prohibitive, and prescriptive language in favour of an oath expressed to be in the first person.

38. Also, based on input from the Committee members and as a consequence of our own deliberations, as a matter of drafting style, we have tried to use language that is poetic

and heroic, inspirational and aspirational. An example of heroic and poetic language in an oath is found in The Obligation, the oath of office taken by engineers upon their admission to their profession. It, together with the entire admissions ceremony, was written by Rudyard Kipling. See APPENDIX D.

39. The Committee has thoroughly vetted the oath at two committee meetings in October and November 2008.

40. The Committee members' suggestions have largely been incorporated and what is presented in this report represents the culmination of the work of the Working Group since May 2008 and the larger committee.

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APPENDIX D

The Obligation

I_____, in the presence of these my betters and my equals in my Calling, bind myself upon my Honour and Cold Iron, that, to the best of my knowledge and power, I will not henceforward suffer or pass, or be privy to the passing of, Bad Workmanship or Faulty Material in aught that concerns my works before mankind as an engineer, or in my dealings with my own Soul before my Maker.

My Time I will not refuse; my Thought I will not grudge; my Care I will not deny towards the honour, use, stability and perfection of any works to which I may be called to set my hand.

My Fair Wages for that work I will openly take. My Reputation in my Calling I will honourably guard; but I will in no way go about to compass or wrest judgement or gratification from any one with I may deal. And further, I will early and warily strive my utter most against professional jealousy and the belittling of my working-colleagues in any field of their labour.

For my assured failures and derelictions I ask pardon beforehand of my betters and my equals in my Calling here assembled, praying that in the hour of my temptations, weakness and weariness, the memory of this my Obligation and of the company before whom it was entered into, may return to me to aid, comfort and restrain.

Upon Honour and Cold Iron, God helping me, these things I purpose to abide.

Rudyard Kipling

INFORMATION

QUARTERLY BENCHMARK REPORT

26. The Professional Development & Competence department's quarterly benchmark report for the period ending September 30, 2008 is set out at Appendix 2.

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

(1) Copies of a letter (by fax) from Karen Andrews, Barrister and Solicitor, Rexdale Community Legal Clinic to the Gavin MacKenzie, Treasurer dated October 16, 2007 re: Barristers Oath. Copy of a letter from the Treasurer to Karen Andrews dated February 22, 2008. Copy of a letter from Karen Andrews to bencher, Heather Ross dated June 27, 2008 re: Barristers' Oath and Paralegal Regulation. Copy of a letter from Derry Millar, Treasurer to Karen Andrews dated July 8, 2008 re: Barrister's Oath and Paralegal Regulation.

(Appendix A, pages 30 – 37)

(2) Copy of the Motion text before the Annual General Meeting on May 7, 2008.

(Appendix B, page 38)

(3) Copy of a chart setting out the oaths administered by Law Societies across Canada.

(Appendix C, pages 39 – 63)

Re: Practice Management Review Program Selection Criteria

It was moved by Ms. Pawlitza, seconded by Ms. Dickson, that Convocation approve the use of enhanced risk-based selection criteria for the practice management review program as follows:

a. One to eight years from call to the bar.
b. In private practice (category A).
c. In approximate proportion to the percentage of law firms represented in Law Society conduct matters and LAWPRO negligence claims for the entire profession determined annually.

Carried

PROFESSIONAL REGULATION COMMITTEE REPORT

Ms. Rothstein presented the Report.

Report to Convocation
November 27, 2008

Professional Regulation Committee

Committee Members
Linda Rothstein (Chair)
Julian Porter (Vice-Chair)
Bonnie Tough (Vice-Chair)
Bob Aaron
Melanie Aitken
Christopher Bredt
John Campion
Patrick Furlong
Gary Lloyd Gottlieb
Glenn Hainey
Brian Lawrie
Ross Murray
Sydney Robins
Baljit Sikand
Roger Yachetti

Purpose of Report: Decision

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

TABLE OF CONTENTS

AMENDMENTS TO BY-LAW 7

Motion

1. That Convocation approve amendments to the French version of By-Law 7 as set out in the following motion:

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT

BY-LAW 7
[BUSINESS ENTITIES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON NOVEMBER 27, 2008

MOVED BY

SECONDED BY

THAT the French version of By-Law 7 [Business Entities], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007 and February 21, 2008 be further amended as follows:

1. Subsection 15 (3) of the By-Law is deleted.

2. Sections 16 and 17 of the By-Law are deleted and the following substituted:

Interdiction d'offrir les services de non titulaires de permis

16. Dans le cadre de l'exercice du droit ou de la prestation de services juridiques, les titulaires de permis ne doivent pas offrir à leur clientèle les services d'une personne qui ne détient pas un permis, sauf en conformité avec la présente partie.

Prestation de services autorisés de non titulaires de permis

17. Dans le cadre de l'exercice du droit ou de la prestation de services juridiques, les titulaires de permis peuvent offrir à leur clientèle les services d'un non-titulaire de permis qui exerce une profession ou un métier qui sert les intérêts de l'exercice du droit ou de la prestation de services juridiques.

3. Paragraph 1 of subsection 18 (2) of the By-Law is amended by deleting "qui n'est pas titulaire de permis de catégorie P1".

Explanation

2. On October 30, 2008 Convocation amended By-Law 7. The amendments were provided in English only. The motion above makes the same amendments to the French version of the By-Law.

AMENDMENTS TO RULE 3 OF THE *RULES OF PROFESSIONAL CONDUCT*

Motion

3. That Convocation approve the draft of Rule 3 of the *Rules of Professional Conduct* set out in this report at paragraph 8.

4. On October 30, 2008, Convocation approved amendments to Rule 3 of the *Rules of Professional Conduct*, subject to review by the Law Society's Rules drafter.

5. The drafter, Donald Revell, has now completed that review and has prepared a revised version of the amended Rule for adoption by Convocation. The companion rule in the *Paralegal Rules of Conduct* (Rule 8) will also be before Convocation on the same basis.

6. No changes to the substance of the Rule have been made. Mr. Revell proposed some clarifying amendments to the commentary to rule 3.01(1) and added a definition of "marketing" which replicates the language that appeared in (and is now deleted from) the commentary to rule 3.02(1). This is consistent with the *Paralegal Rules of Conduct* and in the view of the Committee, is the appropriate structure.

7. The revised draft was sent to all members of the Committee for review and approval. Based on the response, the Committee is requesting that Convocation adopt the version of Rule 3 set out below. Appendix 1 is a redline version of the changes made to the draft of the Rule approved by Convocation in October.

8. The Rule for Convocation's approval is as follows:

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

3.01 (1) A lawyer shall make legal services available to the public in an efficient and convenient way.

Commentary

A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programmes of public information, education or advice concerning legal matters.

Right to Decline Representation - A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not decline representation merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act.

When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.08(7), without charge.

Restrictions

(2) In offering legal services, a lawyer shall not use means

(a) that are false or misleading,

(b) that amount to coercion, duress, or harassment,

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) that are intended to influence a person who has retained another lawyer for a particular matter to change his or her lawyer for that matter, unless the change is initiated by the person or the other lawyer, or

(e) that otherwise bring the profession or the administration of justice into disrepute.

Commentary

A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering his or her assistance to such a person. Rather, the rule prohibits the lawyer from using unconscionable or exploitive means that bring the profession or the administration of justice into disrepute.

3.02 MARKETING

Marketing Legal Services

3.02 (1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

(2) A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Commentary

Examples of marketing that may contravene this rule include:

a. stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
b. suggesting qualitative superiority to other lawyers;
c. raising expectations unjustifiably;
d. suggesting or implying the lawyer is aggressive;
e. disparaging or demeaning other persons, groups, organizations or institutions;
f. taking advantage of a vulnerable person or group;
g. using testimonials or endorsements which contain emotional appeals.

Advertising of Fees

(3) A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted,

(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and

(c) the lawyer adheres to the advertised fee.

3.03 ADVERTISING NATURE OF PRACTICE

Certified Specialist

3.03 (1) A lawyer may advertise that the lawyer is a specialist in a specified field only if the lawyer has been so certified by the Society.

Commentary

Lawyer's advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

In accordance with s. 27(1) of the Society's By-law 15 on Certified Specialists, the lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status

of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.

A lawyer may advertise areas of practice, including preferred areas of practice or that his or her practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

3.04 INTERPROVINCIAL LAW FIRMS

Interprovincial Law Firms

3.04 (1) Lawyers may enter into agreements with lawyers in other Canadian jurisdictions to form an interprovincial law firm, so long as they comply with the requirements of this rule.

Requirements

(2) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall comply with all the requirements of the Society.

(3) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that the books, records, and accounts pertaining to the practice in Ontario are available in Ontario on demand by the Society's auditors or their designated agents.

(4) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that his or her partners, associates, or employees who are not qualified to practise in Ontario are not held out as and do not represent themselves as qualified to practise in Ontario.

APPENDIX 1

RULE 3 – MARKETING OF LEGAL SERVICES

("redline" version)

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Services Available

3.01 (1) A lawyer shall make legal services available to the public in an efficient and convenient way.

Commentary
A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programmes of public information, education or advice concerning legal matters.
Right to Decline Representation - A lawyer ~~has a general right to~~ may decline a particular representation (except when assigned as counsel by a tribunal), but ~~it is a right to~~ that discretion should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not ~~exercise the right~~ decline representation merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act.
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(d) that are intended to influence a person who has retained another lawyer for a particular matter to change his or her lawyer for that matter, unless the change is initiated by the person or the other lawyer, or

(e) that otherwise bring the profession or the administration of justice into disrepute.

Commentary
A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering his or her assistance to such a person. Rather, the rule prohibits the lawyer from using unconscionable or exploitive means that bring the profession or the administration of justice into disrepute.

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(a) is demonstrably true, accurate and verifiable,
(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and
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Commentary

~~Marketing includes not only advertisements and other similar communications in various media but also firms names, which may include trade names, letterhead, business cards and logos. All are means by which a lawyer may make representations to the public for the purpose of promoting the lawyer's professional services.~~

Examples of marketing that may contravene this rule include:

a. stating an amount of money that the lawyer has recovered for a client or refer to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
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Re: By-Law 7 Motion

It was moved by Ms. Rothstein, seconded by Mr. Hainey, that Convocation approve amendments to the French version of By-Law 7 as set out in the Report.

Carried

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

BY-LAW 7
[BUSINESS ENTITIES]

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3. Paragraph 1 of subsection 18 (2) of the By-Law is amended by deleting "qui n'est pas titulaire de permis de catégorie P1".

Re: Amendments to Rule 3 of the *Rules of Professional Conduct* (Advertising and Marketing)

It was moved by Ms. Rothstein, seconded by Mr. Hainey, that Convocation approve the draft of Rule 3 of the *Rules of Professional Conduct* set out in this report at paragraph 8.

Carried

CONTINUATION OF THE PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE REPORT

Re: Lawyer's Oath

It was moved by Ms. Ross, seconded by Ms. Pawlitza, that Convocation approve the following in French and English as the lawyer oath that candidates for call to the bar of Ontario swear or affirm:

In accepting the honour and responsibility of life in the profession of law, I promise that I will, in good faith, safeguard justice by recognizing and respecting the dignity of the court and the importance of the client's cause, however unpopular. I will accord civility, fairness and candour to all.
At all times, and with my whole heart, I will champion the rule of law through diligent effort, whether in court or not, on behalf of all persons, whether powerful or frail, envied or despised, through strict adherence to the rules that govern members of our profession.

So help me God. (I do so affirm.)

J'accepte avec honneur la responsabilité d'exercer la profession d'avocat et je promets de servir de bonne foi la justice en reconnaissant et en respectant la dignité de la Cour et l'importance de la cause du client, quel que soit son degré d'impopularité. Je traiterai tout un chacun avec courtoisie, impartialité et honnêteté.

Toujours et sans réserve, je défendrai la primauté du droit avec diligence, devant les tribunaux ou en dehors, au nom de tous les justiciables, le faible comme le fort, sujet d'envie ou de mépris, dans le respect intégral des règles qui régissent les membres de notre profession.

Ainsi que Dieu me soit en aide (Je l'affirme solennellement.)

The addition of the words "and promote access to justice for all" was accepted as a friendly amendment.

The matter was sent back to the Committee for further consideration.

Item for Information

- Quarterly Benchmark Report

REPORTS FOR INFORMATION ONLY

Audit Committee Report

- General Fund Financial Statements for the Nine Months Ended September 30, 2008
- Compensation Fund Financial Statements for the Nine Months Ended September 30, 2008
- Repayable Allowance Program – Activity Report
- Investment Compliance Reporting

Report to Convocation
November 27, 2008

Audit Committee

Committee Members
Beth Symes (Chair)
Ab Chahbar (Vice Chair)
Melanie Aitken

Larry Banack
Marshall Crowe
Seymour Epstein
Glen Hainey
Doug Lewis

Purpose of Report: Information

Prepared by Wendy Tysall
Chief Financial Officer – 416-947-3322

COMMITTEE PROCESS

1. The Audit Committee ("the Committee") met on November 12, 2008. Committee members in attendance were Beth Symes(c), Ab Chahbar(v-c), Marshall Crowe, Seymour Epstein and Doug Lewis.

2. Staff in attendance were Malcolm Heins, Wendy Tysall, Fred Grady, Zeynep Onen, Maria Loukildelis and Brenda Albuquerque-Boutilier.

3. In attendance from Deloitte & Touche LLP were Ms. Paula Jesty, Mr. David Ross and Mr. Sam Persaud.

FOR INFORMATION

GENERAL FUND - FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED

SEPTEMBER 30, 2008

4. Convocation is requested to receive the financial statements for the General Fund as at September 30, 2008 for information.

5. The third quarter financial statements for the General Fund with accompanying management analysis are attached.

General Fund
Financial Statement Highlights
For the nine months ended September 30, 2008

Background

6. The Society's General Fund is composed of a number of funds:

7. The Unrestricted Fund is the Society's operating fund, representing the bulk of the Society's revenues and expenses relating to the licensing and regulation of lawyers.

8. There are a number of special purpose funds restricted by Convocation. These are the Paralegal, Capital Allocation, Invested in Capital Assets, County Libraries, Repayable Allowance, Endowment, Special Projects and Working Capital Reserve funds.

9. The Paralegal Fund captures revenues and expenses related to the licensing and regulation of paralegals.

10. The Capital Allocation Fund is the source of funding for the Society's acquisition of major capital assets and the repair and upgrade of Osgoode Hall. The fund is replenished by a dedicated annual levy, currently $75, on all lawyers and paralegals.

11. The Invested in Capital Assets Fund represents the net book value of the Society's physical assets. Additions to the fund represent the capitalization of assets acquired through the capital allocation fund. Additions are recorded annually by means of an inter-fund transfer on the Statement of Changes in Fund Balances. Amortization is reported as an expense of the fund.

12. The County Libraries Fund reports the transactions between LibraryCo Inc. and the Law Society. The Law Society levies an amount on lawyers as approved by Convocation in the annual budget, currently $235 per lawyer. This levy is reported as income of the fund and transfers to LibraryCo Inc. are reported as an expense of the fund.

13. The Repayable Allowance Fund is used to provide financial assistance to those enrolled in the Society's Licensing Process. The fund is replenished annually through the budget process by a $100,000 annual contribution.

14. The Society's Endowment Fund is the J. Shirley Denison Fund, administered under the terms of the will by Convocation for the relief of poverty for lawyers, former lawyers, their spouses and licensing process candidates.

15. The Special Projects Fund is used to carry forward funding to a future fiscal period for a program or activity for which funding is not provided in the current year budget. For 2008, the fund is comprised primarily of funding for the McMurtry Gardens of Justice and start-up of the Retention of Women in Private Practice Working Group.

16. The Working Capital Reserve is maintained by policy of Convocation to ensure cash is available to meet the operating needs of the Society. By policy, the fund is maintained at a balance of up two months of operating expenses.

17. In addition to the General Fund, separate financial statements are prepared for the Compensation Fund, LibraryCo Inc., LAWPRO, the Combined Errors and Omissions Insurance (E&O) Fund and the stand-alone E&O Fund.

Financial Statements

18. The General Fund Financial Statements are prepared under Generally Accepted Accounting Principles for Canadian not-for-profit corporations using the restricted fund method of accounting. Revenues are recognized when earned and expenses are recognized when incurred.

19. Unless specifically related to a particular restricted fund, all revenue, including investment income, is recognized as revenue of the Unrestricted Fund.

20. The General Fund Financial Statements for the nine months ended September 30, 2008 comprise the following statements with comparative numbers for September 30, 2007:
    - Balance Sheet
    - Statement of Revenues and Expenses
    - Statement of Changes in Fund Balances

21. Supplemental schedules include Schedules of Revenues and Expenses for both the Unrestricted Fund and the Paralegal Fund comparing the results of operations for the nine months to the year-to-date budget for these funds.

Balance Sheet

22. Cash and short-term investments of $25.6 million (2007: $18.8 million) have increased over the twelve months as a result of surpluses during the period and receipts from paralegals.

23. Accounts receivable are for the most part lawyers' annual fees that are paid as part of the monthly installment plan and paralegals' annual fees.

24. Portfolio investments are shown at market value of $11.6 million compared to market value of $11.3 million in September 2007. Interest income and unrealized currency gains arising from the depreciation in the Canadian dollar have limited the effects of the financial turmoil on the General Fund. By the end of October, the net asset value of our long term investments had decreased by less than 1% since the beginning of the year.

25. Capital assets of $19.3 million have decreased slightly from $20.7 a year ago in line with scheduled amortization offset by projects approved in the capital budget.

26. Accounts payable and accrued liabilities are largely related to amounts due but not yet paid for regulation costs such as counsel fees, the Federation of Law Societies fees, accrued payroll charges and licensing process exam administration. During the year, a claim relating to infrastructure upgrades at Osgoode Hall was settled, allowing the release of the provision included in accounts payable and accrued liabilities for the settlement of the claim.

27. Deferred revenue of $14.6 million is comprised largely of lawyers' and paralegals' fees billed but not yet earned and licensing process fees billed but not yet earned.

28. Unclaimed trust funds continue to increase, now totaling $1.8 million compared to $1.7 million at September 30, 2007.

29. The total of fund balances within the general fund has increased from September 2007 by $2.5 million to $39.7 million. As approved by Convocation in 2008, $2.7 million was transferred from the Unrestricted Fund to the Working Capital Reserve.

Revenues and Expenses

30. Annual fee revenue is recognized on a monthly basis. Annual fees have increased from $33.3 million in 2007 to $35.1 million in 2008, due to the addition of approximately 750 lawyers and a fee increase of $92 per lawyer, and revenue from the first billing of annual fees for paralegals.

31. Professional development and competence revenues have increased to $12.3 million from $7.1 million in 2007. The increase is due largely to the recognition of licensing examination fees for grand-parented paralegal entrants, received in 2007 and recognized in 2008 when the examinations were given. In addition, enrolment in the lawyer licensing process has increased and the tuition fee for lawyer candidates increased from $2,750 in 2007 to $2,940 in 2008.

32. Investment income includes interest, dividends, realized and unrealized capital gains / losses. Investment income at $3.7 million is only nominally higher than 2007 despite higher capital balances. This underperformance is primarily attributable to unrealized capital losses although the significant weighting of our investments towards fixed income securities provides a foundation of interest income and reduces volatility in overall capital values. Investment markets have further deteriorated since the end of September. If financial markets do not recover, applying investment results as at November 10, 2008 to these financial statements would result in a decrease of $55,000 to the general fund surplus.

33. At $4.2 million, other income has decreased by $700,000 from 2007, a decrease primarily attributable to the $1.2 million in one-time funding for CanLII expenses received from the Law Foundation in 2007.

34. As analyzed below, overall, expenses are up over 2007, both in the unrestricted fund and restricted funds.

35. Regulatory expenses of $11.8 million are higher than the same period in 2007 by $800,000. The increase is mainly due to increased budgeted expenditures across the regulatory division offset by a decline in actual spending on counsel fees from $1.4 million in 2007 to $1.1 million in 2008.

36. Professional development and competence expenses are $800,000 more than for the same period in 2007 ($11.6 million versus $10.8 million), primarily as a result of increased spending to date on the Licensing Process for lawyers, CLE expenses increasing in line with revenue, and increased activity in practice review as budgeted.

37. At $6 million, administrative expenses are $249,000 more than the same period in 2007, consistent with budgeted increases.

38. Other expenses have increased from $4.4 million to $4.9 million with increased spending on catering, bencher remuneration and expenses, CanLII, OLAP and payroll accruals as budgeted.

39. Capital allocation fund expenses have decreased from $2.4 million in 2007 to $1.4 million in 2008, reflecting the repayment of the LFO grant for the Ottawa building that occurred in 2007.

40. County libraries fund expenses have increased to just over $6 million from $5.4 million as the levy increased by $11 in 2008 to $235 per lawyer.

41. Paralegal fund expenses have increased from $719,000 to $2.1 million in 2008 with paralegal spending in 2008 being for the full three quarters compared to two quarters of start-up activities at the same period in 2007.

Changes in Fund Balances

42. The unrestricted fund balance has a surplus year to date of $3.1 million, offset by the transfer of $2.7 million to the working capital reserve fund, as approved by Convocation, and $100,000 to the repayable allowance fund as approved in the 2008 annual budget. The transfer of $2.7 million to the working capital reserve brings the balance in that fund to approximately the equivalent of two months of operating expenses. This is the maximum permitted by policy.

43. The paralegal fund balance of $1.3 million captures results from paralegal start-up and 2008 operations year to date. Grandparent good character hearings will carry over into 2009 and the residual of the paralegal fund balance not appropriated to reduce paralegal fees in 2009 will be held as a contingency to fund extraordinary costs associated with good character hearings.

44. The county library fund holds funds collected from lawyers' annual fees for transfer to LibraryCo for county library purposes. The fund deficit of $290,000 is the result of the timing of funding for the significant electronic products expense being weighted towards the beginning of the year. The deficit will be eliminated by year-end.

45. The repayable allowance fund has made loans to 27 candidates in need for a total of $77,000 (2007: $84,000 to 34 candidates).

46. The endowment fund balance reflects interest earned on the fund's cash reserves and payments made from the J. Shirley Denison Fund.

47. Payments from the special projects fund relate primarily to the McMurtry Gardens of Justice.

FOR INFORMATION

COMPENSATION FUND - FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2008

60. Convocation is requested to receive the financial statements for the Compensation Fund as at September 30, 2008 for information.

61. The Compensation Fund financial statements with accompanying management analysis are attached.

Compensation Fund
Financial Statement Highlights
For the nine months ended September 30, 2008

Background

62. By statute, the Law Society maintains a compensation fund to mitigate losses sustained by clients as a result of the dishonesty of a member of the Law Society of Upper Canada. Prior to 2008, the fund was known as the Lawyers Fund for Client Compensation. With paralegal regulation added to the Society's mandate, the fund was renamed the Compensation Fund and now permits members of the public to seek compensation from the Society as a result of dishonesty by paralegals licensed by the Law Society of Upper Canada, as well as by lawyers.

63. The annual Compensation Fund levy for lawyers was set at $200 for the 2008 fiscal year with the adoption of the annual budget for lawyers in October 2007. The annual Compensation Fund levy for paralegals was set at $145 for the 2008 fiscal year with the adoption of the annual budget for paralegals in February 2008. The first actual licences for paralegals were issued with an effective date of March 31, 2008, resulting in a prorated levy of $109 for 2008 for these newly licensed paralegals.

One Compensation Fund, Two Pools

64. Beginning in 2008, the revenues and expenses related to paralegals have been segregated from those of lawyers in order to maintain separate funding pools to satisfy claims arising from each group without using the funds provided by each to satisfy claims and expenses of the other.

65. This is accomplished by segregating the Fund Balance between lawyers and paralegals on the Balance Sheet and by segregating revenues and expenses on the Statement of Revenues and Expenses and Change in Fund Balances.

Sources of Funding

66. The fund is financed by annual levies on lawyers and paralegals approved on an annual basis by Convocation. The second primary source of revenue for the fund is income earned on the investment of cash reserves surplus to the operating needs of the fund. A third, and far less significant funding component, is the collection of recoveries from members as a part of the disciplinary process.

Expenses of the Fund

67. In addition to claims paid to clients (currently with limits of $150,000 for lawyers and $10,000 for paralegals), the fund has direct administrative expenses for staff, etc., has allocated administrative expenses charged to it similar to all Law Society operating departments, pays 100% of the cost of the spot audit program (including its allocated administration costs), 25% of the costs of the investigations department and 6% of the cost of the discipline department.

68. The allocation of spot audit costs was approved by Convocation with the introduction of the program in 1998. The program is considered a significant factor in the mitigation of claims against the fund. Work completed by the investigations and discipline departments assists the Fund in processing claims and therefore the Fund receives an allocation of costs from these two departments.

Financial Statements

69. The Compensation Fund Financial Statements are prepared under Generally Accepted Accounting Principles for Canadian not for profit corporations using the restricted fund method of accounting. Revenues are recognized when earned and expenses are recognized when incurred.

70. The Compensation Fund Financial Statements for the nine months ended September 30, 2008 comprise the following statements with comparative numbers for September 30, 2007:

- Balance Sheet
- Statement of Revenues and Expenses and Change in Fund Balances

The Paralegal Pool

71. At this time, the revenue and expenses associated with paralegals are relatively small, given the small number of those licensed by the third quarter. At the end of September, no claims have been made against the Fund regarding the actions of licensed paralegals.

The Lawyer Pool

72. The pool's balance of $20.7 million has decreased from what was reported in September 2007 by $1.2 million. The Fund's financial statements for the nine months ended September 30, 2008 identify a deficit of $696,000 compared to a surplus of $1.4 million for the same period in 2007. The change from surplus to deficit is attributable to the change in reserve for unpaid grants.

73. The reserve for unpaid grants is based on an actuarial valuation prepared as at June 30, 2008. This estimate is reflected in the reserve on the Balance Sheet and the increase in reserve for unpaid grants on the Statement of Revenues and Expenses and Change in Fund Balances.

Third Quarter Balance Sheet

74. The reserve for unpaid grants has increased from $8.7 million a year ago to $11.6 million based on the actuarial valuation. Nearly half the increase is attributable to claims recently received from the clients of one lawyer.

Third Quarter Revenues and Expenses and Change in Fund Balances

75. Annual fee revenues of $5 million have increased by $300,000 from 2007. The increase is attributable to the inclusion of paralegals and the increase in the number of lawyers.

76. Investment income has increased from $439,000 to $723,000. If financial markets do not recover, applying investment results as at November 10, 2008 to these financial statements would result in a decrease of $892,000 to the Compensation Fund Balance. It should be noted that most of this reduction is attributable to unrealized capital losses and any improvement in market conditions should reduce the negative impact on the Fund.

77. Grants paid of $841,000 have decreased by $224,000 compared to 2007. These payments relate largely to claims previously reserved.

FOR INFORMATION

REPAYABLE ALLOWANCE PROGRAM

78. A financial analysis of the Repayable Allowance Program ("RAP") is set out for information below.

Repayable Allowances Approved

YEAR	APPLIED	APPROVED	AMOUNT
2003	40	37	$117,167
2004	98	87	$290,295
2005	81	66	$212,482
2006	43	36	$94,282
2007	37	34	$84,583
2008 (UP TO SEPT)	33	27	$77,271
TOTAL	332	287	$876,080

79. The large reduction in 2006 is attributable to the new Licensing Process model implemented at that time which required less time and financial resources from candidates.

Repayable Allowances Forgiven

YEAR	APPLIED	APPROVED	AMOUNT
2005	6	1	$5,606
2006	5	4	$13,330
2007	6	3	$14,452
2008	9	6	$33,890
TOTAL	26	14	$67,278

Repayable Allowances Repaid

YEAR	REPAYMENT
2003	$4,879
2004	$7,340
2005	$61,587
2006	$66,030
2007	$58,707
2008	$80,899
TOTAL	$279,442

Background

80. The RAP commenced in 2001 as a replacement for a student loan program regarded an unfocused and administratively onerous. The student loan program had been in place since 1990 and lent a total of just over $1million to about 40 students a year. The RAP was put in place with more established policies and is a broader program as it includes articles. In addition, pre-call education has evolved considerably since 1990.

81. In September 2008, Convocation approved the recommendations of the Licensing and Accreditation Taskforce which will lead to further reductions in the tuition fee and the time commitment required from candidates. The changes in the program will mean licensing process candidates will no longer be eligible for OSAP funding leading to a possible increase in the demand for RAP loans.

Program Description

82. The program offers financial assistance to candidates enrolled in the Licensing Process (including articles) who demonstrate need and have exhausted all other sources of funding. It is therefore a program of last resort for candidates struggling to pay their tuition and / or living expenses.

83. The maximum allowance is $5,000 per candidate per year.

84. In considering applications, the typical criteria are considered such as debt load, income, dependants and expenses. Pursuant to the Law Society's commitment to equity and diversity, additional consideration is given to individuals from communities underrepresented in the legal profession.

85. RAP terms applicable to most recipients (i.e. those called to the Bar) are:

    a. Interest is charged at one percent more than prime, (prime is currently 4%), but only from six months after completion of the Licensing Process.
    b. Repayment is required in full, three years after being called to the Bar.

86. Recipients may apply for forgiveness of repayment on compassionate grounds, such as medical disability or on grounds of inadequate income.

Program Assessment

87. In 2007, the Law Society reviewed the career paths of successful and unsuccessful applicants to the RAP in order to assess any discernible pattern. We concluded that both groups matched the profile of the profession in general, although the small populations of successful and unsuccessful applicants makes meaningful statistical analysis difficult.

88. 79% of unsuccessful applicants were practicing, 12% have been called to the bar but are currently not working, 3% were still in the licensing process, 2% were in discipline or suspended and 1% is outside of Ontario. It appears the lack of assistance from the RAP was ultimately not an obstacle to failed applicants in their progress within the profession.

89. Similarly, RAP applicants who received financial assistance are progressing within the profession. The 2007 statistics showed 68% of successful applicants were practicing and employed, 5% were retired / not working, 4% were not in Ontario, 2% were administratively suspended, 2% had died / resigned, 14% were still in the licensing process and 5% had withdrawn from the licensing process.

Other Financial History

90. Initial funding for the RAP was $590,000 from the increased volume of tuition fee revenues from the double cohort year. The fund has been periodically topped up. At the end of September 2008, the balance in the RAP fund was $77,000.
91. $118,000 has been written off as uncollectable.

Other RAP Information

92. Other forms of assistance for candidates are the Law Society's deferred payment plan (spreads payments of tuition fees over the licensing process and articles), Law Society bursaries, the Denison Fund for impoverished members and candidates, the Ontario Student Assistance Program and financial institutions including the Maytree Foundation and Metro Credit Union Immigrant Employment Loan Program.

93. The RAP program is publicized on the Law Society's website, by the Law Society's candidate support staff and by Law Society staff at visits to law schools.

FOR INFORMATION
STATEMENT OF COMPLIANCE – SHORT-TERM PORTFOLIO

95. Convocation is requested to receive the Compliance Statements for the General Fund and Compensation Fund investment portfolios as at September 30, 2008 for information.

FOR INFORMATION
AUDIT PLANNING

96. Ms. Paula Jesty, Mr. David Ross and Mr. Sam Persaud, auditors, Deloitte & Touche LLP communicated with the Audit Committee on planning for the audit for the 2008 financial year which ends on December 31. The Committee reviewed the audit plan and associated fees.

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

(1) Copies of the General Fund Financial Statements (Balance Sheet, Statement of Revenues and Expenses and Statement of Changes in Fund Balances) for the nine months ended September 30, 2008.

(pages 14 – 16)

(2) Copies of the Compensation Fund Financial Statements (Balance Sheet and Statement of Revenues and Expenses and Change in Fund Balances for the nine months ended September 30, 2008.

(pages 24 – 25)

(3) Copies of the Compliance Statements for the General Fund and Compensation Fund investment portfolios as at September 30, 2008.

(pages 31 – 34)

Report to Convocation
November 27, 2008

Audit Committee

Committee Members
Beth Symes (Chair)
Ab Chahbar (Vice Chair)
Melanie Aitken
Larry Banack
Marshall Crowe
Seymour Epstein
Glen Hainey
Doug Lewis

Purpose of Report: Information

Prepared by Wendy Tysall
Chief Financial Officer – 416-947-3322

COMMITTEE PROCESS

1. The Audit Committee ("the Committee") met on November 12, 2008. Committee members in attendance were Beth Symes(c), Ab Chahbar(v-c), Marshall Crowe, Seymour Epstein and Doug Lewis.

2. Staff in attendance were Malcolm Heins, Wendy Tysall, Fred Grady, Zeynep Onen, Maria Loukildelis and Brenda Albuquerque-Boutilier.

3. In attendance from Deloitte & Touche LLP were Ms. Paula Jesty, Mr. David Ross and Mr. Sam Persaud.

Unrestricted Fund Schedule of Revenues and Expenses
Budget to Actual Comparison

48. Total revenues are $43.3 million compared to budget of $42.6 million.

49. The major variances between actual results for the three quarters and the budget year-to-date include:

- Annual fees are $374,000 less than budget. Fees from new lawyers called to the bar in the second half of the year should decrease this variance by year end.
- Professional development and competence revenue is over budget by $448,000, primarily as a result of greater enrollment in the licensing process.
- Other income is over budget by $607,000 primarily due to recoveries related to regulatory matters.

50. Total expenses are $44.1 million compared to budget of $46.3 million. Professional development and competence expenses are under budget by $868,000. A significant part of this variance can be attributed to the timing of expenses related to the licensing process, although most of this portion is expected to be reduced by year-end. The business model for the certified specialist program was revised after the budget was finalized resulting in under spending to date of $144,000.

51. Other expenses at $1.9 million are under budget by $501,000 due to the unused contingency and less spending on furniture and equipment than expected.

52. Policy and legal services are under budget by $314,000 primarily as a result of savings in legal affairs from lower than budgeted fees for outside counsel and savings generated as a result of staff vacancies.

53. Catering expenses are over budget, somewhat offset by increased revenues, as costs continue to increase with the world wide increase in the cost of food and the industry practice of fuel surcharges being added to delivery charges.

Paralegal Fund Schedule of Revenues and Expenses

Budget to Actual Comparison

54. Revenues totaling $4.3 million are ahead of budget primarily as a result of more applicants for the licensing program in 2008 than budgeted. In addition to generating greater revenues, the increased intake has resulted in expenses in some areas being nominally ahead of budget.

55. Total year-to-date expenses in the Paralegal Fund are $2.1 million against year-to-date budgeted expenses of $2.5 million. The net under spending is attributable to timing differences on tribunal expenditures which are $375,000 less than budget at the end of September.

56. The surplus of $2.1 million is largely due to the recognition of grandparent licensing exam revenue received in 2007 for exams written in 2008. Revenue from annual fees for paralegals will continue to be recognized to the end of 2008; however, fourth quarter expenses are expected to exceed fourth quarter revenues, reducing the surplus.

57. The actual balance of the fund at the end of 2008 will largely be dependent upon the progress of good conduct hearings for grandparent applicants (tribunal expenses noted above).

58. The paralegal budget is a consolidation of the extended startup and annual operating budgets for paralegals approved in February 2008. The startup budget projected a surplus for 2009 sufficient to eliminate the deficit ($822,000) from 2007 as well as to fund costs for good character hearings for grandparent applicants.

59. Good character hearings will carry over into 2009 and the residual of the paralegal fund balance not appropriated to reduce paralegal fees in 2009 will be held as a contingency to fund extraordinary costs associated with good character hearings.

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

Copy of the Law Society's Unrestricted Fund, Schedule of Revenues and Expenses and the Law Society's Paralegal Fund, Schedule of Revenues and Expenses.

(pages 17 – 18)

Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones Report

- *Public Statement for Pakistan*
- Accessibility Study
- Public Events

Report to Convocation
November 27, 2008

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones

Committee Members
Janet Minor, Chair
Raj Anand, Vice-Chair
Paul Copeland
Mary Louise Dickson
Avvy Go
Susan Hare
Doug Lewis
Rabbi Dow Marmur
Judith Potter
Linda Rothstein
Mark Sandler
Beth Symes

Purpose of Report: Information

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

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on November 13, 2008. Committee members Janet Minor, Chair, Raj Anand, Vice-Chair, Mary Louise Dickson, Avvy Go, Judith Potter, and Beth Symes participated. Milé Komlen, Chair of the Equity Advisory Group (the "EAG"), also participated. Kathy Laird, Executive Director of the Human Rights Legal Support Centre, made a presentation to the Committee about the Centre. Staff members Jewel Amoah, Josée Bouchard, Diana Miles, Marisha Roman, Sophia Sperdakos, Rudy Ticzon and Mark Wells attended.

FOR INFORMATION

PUBLIC STATEMENT FOLLOWING THE FIRST ANNIVERSARY OF

OUSTER OF JUDGES

2. On November 3, 2008, lawyers in Pakistan gathered to mark the first anniversary of the dismissal of the Chief Justice of Pakistan and other members of the judiciary by former President Pervez Musharraf.

3. In November 2007, then President Pervez Musharraf of Pakistan imposed a state of emergency, suspended the national constitution, dismissed and detained members of the Supreme Court and other levels of the judiciary, and arrested hundreds of Pakistani lawyers. There were reports by various media sources, human rights organizations and national and international legal organizations that as many as 3500 lawyers had been detained since the imposition of the state of emergency.

4. A number of legal organizations around the world released statements condemning the actions of the Pakistan authorities, including the Canadian Bar Association, the American Bar Association, Lawyers' Rights Watch Canada ("LRWC"), Human Rights Watch, Amnesty International, the Law Society of England and Wales, the International Bar Association, the Commonwealth Lawyers Association and the International Commission of Jurists.

5. On November 9, 2007, the Law Society issued a public statement expressing its concern for the dismantling of the rule of law in Pakistan. The statement condemned the imposition of the Proclamation of Emergency, the suspension of the Constitution of the Islamic Republic of Pakistan, the dismissal of Chief Justice Iftikhar Muhammad Chaudhry and over 40 other judges, the abrogation of the rule of law and of the independence of the Supreme Court Bar Association, and the reported detention of at least 3500 lawyers and civil rights activists.

6. On November 29, 2007, the Law Society along with the Ontario Bar Association hosted a gathering in support of lawyers and defenders of the rule of law in Pakistan. About 400 lawyers and friends came to Osgoode Hall to show solidarity with their colleagues in Pakistan. More than 200 people signed a petition against the Pakistan authorities' actions

7. On January 3, 2008, the Law Society released a public statement condemning the assassination of Benazir Bhutto, former Prime Minister of Pakistan, and the deaths of others who perished in the attack on her life on December 27, 2007.

8. In February 2008, LRWC attended the 7th Session of the United Nations Human Rights Council in Geneva and made written and oral presentations regarding Pakistan on behalf of LWRC and sixteen human rights organizations, including the Law Society.

9. Although the state of emergency has since been lifted, and some members of the judiciary have been reinstated, Chief Justice Chaudhry along with several other members of the judiciary have yet to be reinstated.

10. The Law Society continues to take an active interest in the status of the rule of law in Pakistan and the human rights situation as it affects lawyers and members of the judiciary. At the beginning of November 2008, the Human Rights Monitoring Group recommended to the Treasurer that a public statement be issued to express the Law Society's support for lawyers in Pakistan and to highlight its concern that the Chief Justice and other members of the judiciary have not been reinstated. Further to its mandate and in light of the urgency of the matter, the Human Rights Monitoring Group asked that the Treasurer approve the public statement without Convocation's approval.

11. The mandate of the Human Rights Monitoring Group is,

a. to review information that comes to its attention about human rights violations that target members of the profession and the judiciary, here and abroad, as a result of the discharge of their legitimate professional duties;
b. to determine of the matter is one that requires a response from the Law Society; and
c. to prepare a response for review and approval by Convocation.

12. The mandate further states that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation's place and take such steps, as he or she deems appropriate. In such instances, the Human Rights Monitoring Group shall report on the matters at the next meeting of Convocation.

13. The Treasurer approved the public statement presented at Appendix 1 and the Human Rights Monitoring Group reports the matter to Convocation, in accordance to its mandate.

SUPPORT FOR FACT FINDING MISSION IN THE PHILIPPINES

14. On November 2, 2008, LRWC asked the Law Society to consider adding its support to a fact finding mission of Netherlands Lawyers for Lawyers Foundation, scheduled for November 4 to 13, 2008. The purpose of the mission is to investigate the current human rights situation of judges and lawyers in the Philippines.

15. The situation of attacks against lawyers in the Philippines has been ongoing for several years, as was outlined in a 2006 investigative report titled *From Facts to Action*.[1] The report noted incidents of serious harassment, intimidation and killings of lawyers and judges in the Philippines as a result of the performance of their professional duties.

16. The Law Society endorsed the recommendations in the 2006 report along with the Asian Human Rights Commission, Amnesty International, The Bar Human Rights Committee of England and Wales and LRWC.

17. Since the Law Society first learned of the grave human rights situation faced by judges and lawyers in the Philippines, it has regularly intervened through letters of intervention and endorsed the intervention efforts of external organizations.

18. In addition to endorsing the report of Netherlands Lawyers for Lawyers, the Law Society expressed its concern about the situation in the Philippines in November 2006 in a letter to the government of the Philippines. A copy of this letter of intervention was sent to the President of the Integrated Bar of the Philippines, in an effort to convey the Law Society's solidarity with lawyers in the Philippines. The Integrated Bar of the Philippines responded to the Law Society in February 2007, thanking the Law Society for its concern and expressing hope for future correspondence from the Law Society.

19. In February 2008, LRWC attended the 7th Session of the United Nations Human Rights Council in Geneva and made submissions about the extra-judicial killings in the Philippines. Included it its submission was reference to the Law Society as one of the

[1] The Report of the International Fact Finding Mission, *From Facts to Action: Report on the attacks against Filipino lawyers and judges,* was released by the Netherlands Lawyers for Lawyers Foundation on July 24, 2006.

organization to support the 2006 report of Netherlands Lawyers for Lawyers entitled *From Facts to Action: Report on the Attack against Filipino Lawyers and Judges.*

20. In April 2008, the Law Society sent a letter to Hina Jilani, the United Nations Secretary General's Special Representative on the Human Rights Defenders, expressing its support for an investigation into the situation of human rights defenders in the Philippines.

21. The Netherlands Lawyers for Lawyers Foundation is conducting a follow-up verification and fact-finding mission to its original fact-finding mission of 2006. The verification and fact finding mission, scheduled for November 4 to 13, 2008, is supported by the Netherlands Bar Association, the Flemish Bar Association (Belgium), Amsterdam Bar Association, Netherlands Association for the Judiciary, Netherlands Judges for Judges Foundation, Netherlands Lawyers without Borders Foundation, the Integrated Bar of the Philippines, Amnesty International and LRWC.

22. Further to its mandate, the Human Rights Monitoring Group asked the Treasurer to approve the inclusion of the Law Society as a supporter of the current fact-finding mission conducted by Netherlands Lawyers for Lawyers. As the mission had already started, the Treasurer approved the request on an urgent basis. The media release is presented at Appendix 2 for Convocation's information.

23. The mandate of the Human Rights Monitoring Group states that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation's place and take such steps, as he or she deems appropriate. In such instances, the Human Rights Monitoring Group shall report on the matters at the next meeting of Convocation.

QUALITATIVE WEBSITE ACCESSIBILITY REPORT

24. In 2008, the Law Society retained the Strategic Counsel to assess the accessibility of its website from three types of users, those with no vision, those with low vision and those with physical disabilities. The Law Society will use the findings of the research to inform its ongoing efforts to improve the accessibility and transparency of its website. The key findings are very positive and indicate that the website has a high level of accessibility. The report is presented to Convocation at Appendix 3 for information.

PUBLIC EDUCATION EQUALITY SERIES CALENDAR 2008 - 2009

International Human Rights Day
In partnership with the University of Ottawa, Faculty of Law, Gordon Henderson Centre for Human Rights

Topic: *Stories of Women's Inequality and Strategies for Gender Justice*
Date: December 9, 2008
Time: Panel Discussion from 4 to 6 p.m
Reception: 6 p.m.

Black History Month
In partnership with the Canadian Association of Black Lawyers

Topic: *Professional Development Series: Best Practices in Practice Management*
Date: February 5, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

International Women's Day
In partnership with the Women's Law Association of Ontario, the Feminist Legal Analysis Section of the OBA, the Barbra Schlifer Clinic, and the Legal Education Action Fund for Women

Topic: *The Presence of Female Judges: Do They Make a Difference?*
Date: March 2, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

International Day for the Elimination of Racial Discrimination
In partnership with the Canadian Lawyers for International Human Rights, Lawyers Rights Watch, Human Rights Watch, Amnesty International, and Canadian Lawyers Abroad

Topic: Proposed topics: *Racism and Environmental Justice or Politics and Race*
Date: March 19, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

Symposium on Consulting with Métis Communities in Ontario
In partnership with the Métis Nation of Ontario

Topic:
Date: April 1, 2009
Time: Presentations from 2 to 6 p.m.
Reception from 6 to 8 p.m.

National Holocaust Memorial Day
In partnership with B'nai Brith Canada

Topic: *Professionals as Perpetrators, Victims and Bystanders in the Holocaust – Lessons for the Future*
Date: April 21, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

Asian Heritage Month
In partnership with the Federation of Asian Canadian Lawyers, the South Asian Legal Clinic of Ontario, and the South Asian Bar Association

Topic: *Professional Development Series: Perspectives in Interjurisdictional Family Law Issues*
Date: May 5, 2009
Time: Panel Discussion from 4 to 6 p.m.

Reception: 6 p.m.

National Access Awareness
In partnership with ARCH Disability Law Centre

Topic: *Access to Justice for Persons with Disabilities*
Date: May 25, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

National Aboriginal Day
In partnership with the Toronto Aboriginal City Celebration Committee, Aboriginal Legal Services of Toronto, the Aboriginal Law Section of the Ontario Bar Association and Rotiio> taties Aboriginal Advisory Group

Topic: *Perspectives in the Indian Residential Schools Resolution Process*
Date: June 11, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

Pride Week
In partnership with the Sexual Orientation and Gender Identity Section of the Ontario Bar Association

Topic: *Politics and Legal Rights: The Future of Gay, Lesbian, Bisexual, and Transgender Equality*
Date: June 25, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

Appendix 1

The Law Society of Upper Canada Expresses its Support for Lawyers and Judges in Pakistan Following the First Anniversary of Ouster of Judges

Toronto: Monday November 3rd, 2008 marked the one year anniversary of the state of emergency imposed by former Pakistani president, Pervez Musharraf. Although the emergency has been lifted, and a new government has been formed, many of the conditions of last year's tenuous political situation remain. For instance, many of the judges, including Chief Justice Iftikar Chaudhry, who had been removed by Musharraf, have still not been reinstated by President Asif, Ali Zardari.

Thousands of lawyers, political party workers and human rights activists gathered on the streets of Rawalpindi on Monday November 3, 2008 to mark the anniversary of the state of emergency and to reissue calls for the reinstatement of Justice Chaudhry and the other judges. The lawyers protested to vent their anger at the lingering restrictions to the rule of law in Pakistan, and warned that there would be a storm of protests if their demands are ignored by the government.

Since the State of Emergency and the suspension of constitutional rights were carried out last year by former president Musharraf, the Law Society of Upper Canada has taken an active

interest in the tenuous political situation in Pakistan, and its impact on lawyers and judges in that country.

On November 9, 2007, the Law Society of Upper Canada released a public statement condemning the state of emergency, the dismissal of the judges and critiquing the violations of the rule of law carried out by the Musharraf government. Further, on November 29, 2007, the Law Society of Upper Canada along with the Ontario Bar Association organized a gathering of lawyers in support of lawyers and defenders of the rule of law in Pakistan. The Law Society of Upper Canada's interest in Pakistan was expressed once again on January 3, 2008, when it issued a statement condemning the assassination of former Pakistan Prime Minister Benazir Bhutto. The assassination raised concerns about further violations of the rule of law.

Although the current government, led by Prime Minister Asif Ali Zardari, is gradually moving toward constitutional democracy, the Law Society of Upper Canada condemns the fact that an independent judiciary has not been restored. On the anniversary of the suspension of the Constitution and the dismissal of the superior judiciary, the Law Society of Upper Canada is concerned that the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, and about fourteen superior court judges have not been restored to their judicial positions. The Law Society of Upper Canada also notes with dismay that the elected government has tacitly accepted General Pervez Musharraf's unconstitutional actions, and has taken no substantive steps to reverse the unconstitutional actions of November 3rd, 2007.

The Law Society of Upper Canada urges the government of Pakistan to reinstate all members of the judiciary who were summarily dismissed by former president Musharraf, and to work with both judges and lawyers to ensure the full operation of the rule of law and constitutional entitlements in Pakistan.

In recent days, the Barreau du Quebec and the New Zealand Law Society have written letters to the Pakistan authorities expressing their concern over the current political situation and its impact on judges and lawyers. The Law Society of Upper Canada joins its colleagues in Canada and abroad in striving to safeguard the rule of law in Pakistan and in expressing solidarity with members of the legal profession in Pakistan.

"We echo the message of other legal organizations, and urge President Zardari to reinstate Chief Justice Chaudhry as well as any other members of the judiciary who have yet to be reinstated", said Law Society of Upper Canada Treasurer W. A. Derry Millar. "Such action is vital to solidifying of the rule of law in Pakistan and safeguarding members of the legal profession", he continued.

The Law Society of Upper Canada governs lawyers and paralegals in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct and by upholding the independence, integrity and honour of the legal professions for the purpose of advance in the case of justice and the rule of law.

Appendix 2

Law Society supports fact-finding mission investigating human rights situation in the Philippines

Toronto: The situation of attacks against lawyers in the Philippines has been ongoing for several years, as was outlined in a 2006 investigative report titled *From Facts to Action*. The report noted incidents of serious harassment, intimidation and killings of lawyers and judges in the Philippines as a result of the performance of their professional duties.
The Law Society of Upper Canada endorsed the recommendations for intervention in the 2006 report along with the Asian Human Rights Commission, Amnesty International, The Bar Human Rights Committee of England and Wales and Lawyers Rights Watch Canada.

Since the Law Society first learned of the grave human rights situation faced by judges and lawyers in the Philippines, it has regularly intervened through letters of intervention and endorsed the intervention efforts of external organizations.

Information about the situation of lawyers and judges in the Philippines was first brought to the Law Society's attention in a report of a fact finding mission conducted by Netherlands Lawyers for Lawyers Foundation in 2006. This same group is about to conduct a follow-up verification and fact-finding mission.

At present, the verification and fact finding mission scheduled for November 4-13, 2008 is supported by the Netherlands Bar Association, the Flemish Bar Association (Belgium), Amsterdam Bar Association, Netherlands Association for the Judiciary, Netherlands Judges for Judges Foundation, Netherlands Lawyers without Borders Foundation, the Integrated Bar of the Philippines, and Lawyers' Rights Watch Canada.

Attached to the original Report in Convocation file, copy of the Qualitative Website Accessibility Report – October 2008.

(Appendix 3, pages 13 – 31)

Federation of Law Societies of Canada Report
- Response to Competition Bureau

Federation of Law Societies of Canada Report
November 27, 2008

Response to the Competition Bureau

Purpose of Report: Information

Prepared by: Katherine Corrick

INFORMATION

FEDERATION OF LAW SOCIETIES OF CANADA'S RESPONSE TO THE REPORT OF THE COMPETITION BUREAU'S STUDY ON REGULATED PROFESSIONS

Background

1. In December 2007, the Competition Bureau of Canada issued a report entitled, "Self-Regulated Professions: Balancing Competition and Regulation." The Report studied five self-regulated professions, including the legal profession.

2. In January 2008, then Treasurer, Gavin MacKenzie, indicated to Convocation that the Federation of Law Societies of Canada would be responding to the Competition Bureau on behalf of all law societies in the country.

3. On November 18, 2008, the Federation sent to Sheridan Scott, Commissioner of Competition, the report attached at Appendix 1 entitled, "Self-regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-regulation in Canadian Professions." This report was prepared by University of Toronto Law Professors Michael Trebilcock and Edward Iacobucci, experts in the law and economics of Canadian competition policy.

Appendix 1

SELF-REGULATION AND COMPETITION IN ONTARIO'S LEGAL SERVICES SECTOR: AN EVALUATION OF THE COMPETITION BUREAU'S REPORT ON COMPETITION AND SELF-REGULATION IN CANADIAN PROFESSIONS

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INTRODUCTION

A recent report from the Canadian Competition Bureau, "Self-Regulated Professions: Balancing Competition and Regulation" (2007) expresses concern that self-regulation of Canadian professions may undermine competition in these sectors. The Bureau makes an empirical claim that productivity in the professions is low in Canada relative to the U.S., which motivates its investigation of competition and self-regulation. The Bureau reviews a number of specific regulations imposed in the legal and other professions and in some cases makes suggestions for improving competition, and hence productivity in these sectors.

In this report, we critically assess the Bureau's report. Section I considers the empirical basis for the claim that productivity is low in Canadian professions, and also considers the connection between such a claim and competition and self-regulation in the legal sectors. Aside from pointing out the lack of specificity about law in the empirical evidence, Section I shows that concern about competitiveness because of comparative productivity data in the U.S. and Canada is unwarranted: output measures in the professional sectors are market-based; and market conditions, such as competitiveness, necessarily affect market-based measures. The relative productivity figures therefore do not say much about competition. Indeed, as we discuss, the relatively low productivity numbers could reflect *greater* competition in Canada.

Section II departs from an implicit analysis of competition from examining productivity data and moves to an explicit analysis of competition in Ontario's legal services market. Section II outlines the usual methodology employed by the Competition Bureau to assess the competitiveness of markets and applies it to a sample of Ontario legal services markets. Not

only are legal services markets unconcentrated, but analysis of barriers to entry further supports a conclusion that Ontario's legal services markets are competitive in structure.

Section II reveals a competitive market structure, but this does not necessarily imply robust competition. It is possible that there could be concerns about self-regulation limiting competition despite an otherwise competitive market structure. For example, mandatory minimum fee schedules would impair competition even if there were hundreds of competitors. Section III reviews some aspects of self-regulation that the Bureau touches on in its report, although does not explore them in great detail. While the Bureau identifies some areas of potential concern, other matters are of much less importance. Section IV concludes by outlining some general principles that ought to govern self-regulation of the legal profession.

SECTION I: THE COMPETITION BUREAU'S EMPIRICAL FOUNDATION

A. The Bureau's Empirical Concerns

The Competition Bureau's study of self-regulation of Canadian professions is motivated, at least in part, by some rather sobering statistics about labour productivity in Canadian professions. To demonstrate the influence of these empirical conclusions on the Bureau's thinking, the Bureau's report begins with a Foreword by the Competition Commissioner, which itself begins by citing productivity evidence:

> The professions comprise up to one fifth of Canada's service economy and seven percent of the total hours worked in Canada's business sector. It is cause for concern, therefore, that labour productivity in this important sector of the Canadian economy is approximately half that of the professions in the United States and is in the bottom quintile for labour productivity among Canadian industries.[1]

The Executive Summary begins similarly:

> Despite comprising a significant part of the service economy in Canada, perhaps as much as one fifth, the professions comprise one of the overall economy's least productive sectors. According to the Conference Board of Canada, professional services rate in the bottom quintile for productivity per hours worked. In addition, labour productivity in the professions in Canada is approximately half that of the professions in the United States. At the same time, the professions are one of the most regulated sectors of the Canadian economy, and the regulation in place in the professions is more restrictive in Canada than in many member nations of the Organization for Economic Co-operation and Development.[2]

The apparently dismal performance of the professions motivates the Bureau's study. Following on the first passage from the Executive Summary, the Bureau states:

> Given a considerable body of evidence that shows that reducing regulation improves competition and, as a result, productivity, it is reasonable to ask whether and how

[1] Competition Bureau, "Self-Regulated Professions: Balancing Competition and Regulation" (2007) at v.

[2] *Id.* At vii.

> professional services could be less regulated in Canada. The Competition Bureau is ideally placed to answer this question, since one of its primary responsibilities is advocating for competition in Canada. On several occasions, the Bureau has advised Canadian regulatory bodies on how to improve their approach to regulation to realize the benefits of competition. The Bureau also has considerable experience investigating anti-competitive behaviour in the professional services sector.[3]

Thus, lest there be any uncertainty in drawing the potential connection between sub-par performance and competition, the Bureau makes the linkage explicit: it is worth studying competition in the professions since competition spurs productivity and the professions exhibit low productivity.

In this section, we critique the Bureau's approach to the empirical evidence. In our view, the evidence that the Bureau cites as motivating its study is not only insufficiently targeted for the Bureau to draw meaningful inferences, but the findings could, in fact, be evidence of greater competition in Canada than in the US. We examine each point in turn.

B. The Scope of the Evidence

The main study upon which the Bureau relies for its productivity data is a report of the Conference Board of Canada, *Mission Possible: Stellar Canadian Performance in the Global Economy.*[4] The study provides the empirical conclusion that labour productivity in Canadian professional services is not even half that in the U.S., and that it is in the bottom quintile of industries relative to the U.S.[5] The Conference Board itself relies on an Industry Canada study on U.S.-Canada relative labour productivity.[6] Rao, Tang and Wang study Canadian productivity in a variety of industries relative to the U.S. They find that productivity is lower in Canadian professional services than in the U.S., and that relative productivity in professional services is poor compared to other Canadian industries.

We begin our response to the empirical evidence cited by the Bureau by noting its lack of precision. The Rao et al. study upon which the Conference Board and, in turn, the Bureau, rely does not purport to offer a profession-by-profession analysis of relative labour productivity. Rather it groups the professions into a single class of "professional services." Specifically, in

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[3] *Id.* at vii.

[4] Glen Hodgson and Anne Park Shannon, *Mission Possible: Stellar Canadian Performance in the Canadian Economy* (2007).

[5] At p. 46.

[6] In fact, it is not entirely clear how the Conference Board derived its results. At p. 46, it notes that it co-sponsored research in 2004 on labour productivity that it updated for the purposes of the 2007 report. It cites Brenda Lafleur and Andrew Sharpe, "The Canada-U.S. Productivity Gap: Deepening our Understanding", in *Performance and Potential 2004-05: How Can Canada Prosper in Tomorrow's World?* Ottawa: The Conference Board of Canada, 2004, which presumably is the basis of the 2004 study to which the 2007 report refers, but the central results on relative productivity in the 2007 report are attributed to Someshwar Rao, Jianmin Tang and Weimin Wang, "What Explains the Canada-U.S. TFP Gap?" Working Paper 2006-08. It is thus not clear how the upgraded 2004 results affect the Rao et al. 2006 results.

the Rao et al. study "professional services" is defined pursuant to the North American Industry Classification System code 54. This code includes a wide range of professional services. Specifically, NAICS 54 is defined as follows:

> NAICS Sector: 54 Professional, Scientific, and Technical Services. The Professional, Scientific, and Technical Services sector comprises establishments that specialize in performing professional, scientific, and technical activities for others. These activities require a high degree of expertise and training. The establishments in this sector specialize according to expertise and provide these services to clients in a variety of industries and, in some cases, to households. Activities performed include: legal advice and representation; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.
>
> This sector excludes establishments primarily engaged in providing a range of day-to-day office administrative services, such as financial planning, billing and recordkeeping, personnel, and physical distribution and logistics. These establishments are classified in Sector 56, Administrative and Support and Waste Management and Remediation Services.[7]

The wide definition of professional services casts serious doubt about the utility of productivity data in evaluating, or even motivating the evaluation, of regulation in any given profession. Regulation of veterinarian services has nothing to do with regulation of the legal profession. Thus, even if it were true that professional services as a whole were significantly underproductive compared to the U.S. or some other benchmark, it is not at all obvious that this would have any relevance at all to productivity in any particular profession. Productivity in "professional services" represents an average overview of productivity in a range of unrelated sectors, and the average, of course, may or may not reflect productivity in any particular profession. It is entirely possible, for example, that productivity in the legal profession is very high, while it is not in the accounting profession, and the average is relatively low productivity overall. In such a setting, reform to the legal profession could do more harm than good despite overall low productivity in the professions. To be sure, a focus on the professional services sector is more informative about productivity in the Canadian legal profession than, say, examining economy-wide average productivity: legal services is a more significant element of professional services than it is of the economy as a whole. But there is still considerable uncertainty about the connection between professional productivity as defined in the report the Bureau relies upon and productivity in the legal profession. This is thus one reason to doubt the empirical basis that the Bureau cites to launch its investigation of regulation in the legal (or indeed any) profession.

Another concern about the scope of the evidence cited by the Bureau in motivating its study relates to the connection between self-regulation and productivity in the legal profession. A conclusion that the legal profession in fact has lower productivity than in the U.S. does not indict regulation in the sector. The Bureau seems to move in a linear fashion from concerns

[7] See http://www.census.gov/epcd/ec97/industry/E54.HTM.

about productivity to concerns about self-regulation. There are, of course, a host of factors that may impact productivity in the legal profession other than self-regulation.

One important disconnection between labour productivity data and the effects of self-regulation concerns the role of capital and other inputs. If a particular industry in Canada is undercapitalized relative to the U.S., then labour productivity in that industry is likely lower than in the U.S., since capital contributes to the per-labourer output of an industry. If the legal profession in Canada relies less on capital than its American counterpart, then there is a significant potential explanation of a labour productivity gap that has nothing to do with self-regulation, unless one can tell a story of how Canadian self-regulatory rules restrict capital structure more than American rules. It may be that self-regulation concerning the partnership ownership structure of law firms affects the cost of capital, but it is not obvious how Canadian rules diverge in important ways from the U.S. on this score.

In fact, there is evidence that the Canadian professional services sector relies less on capital than does the American sector. Rao et al. report that machinery and equipment capital intensity in 2004 in Canadian professional services was only 34% of that in U.S. professional services. This is undoubtedly a major source of varying productivity across the two sectors.

Another reason to doubt the connection between self-regulation and productivity arises because lawyers are constrained to produce within the confines of a legal system over which they have little control. Suppose that there were a court system that required a large number of low-value interlocutory hearings before a decision could be rendered in a contract dispute. Or suppose that backlogs in courts deter cases from being heard in a timely fashion. Lawyers, rather than spending their time on relatively high-valued matters like the outcome of litigation, would have their productivity shackled by the litigation system, which is outside the purview of self-regulation. Thus, even if low productivity in the Canadian legal profession could be demonstrated, the causes of this productivity require careful study before one could conclude that self-regulation is the, or even a, cause.

C. Inferences about Competition from Labour Productivity Data in Professional Services

The Bureau's central concern with self-regulation is that it potentially limits competition in undesirable ways. Lack of competition in turn may be a contributing cause of the sobering productivity results that the Bureau cites to motivate its study. As this section explains, however, inferences about the state of competition in professional services cannot be drawn with any confidence from labour productivity results.

To explain our concerns, it is necessary to review how labour productivity figures are calculated. In the Rao et al. study comparing U.S. and Canadian labour productivity, a preliminary matter concerns currency translation. The authors attempt to render production statistics comparable across the countries by establishing an industry-by-industry exchange rate that reflects purchasing power parity: i.e., if calculated accurately, a business in the industry in question in Canada spending a purchasing-power-parity [PPP], industry-specific converted dollar in Canada purchases exactly what a dollar in the U.S. would purchase in the same industry.

Once the appropriate exchange rate is calculated, the dollar value of production in each industry in each country is calculated. For the result that the Bureau cites, Rao would calculate the value of production of "professional services" in each country in dollar terms. Notice that

production is not defined according to some unit of output (e.g., number of widgets produced), but rather according to dollar value – this is crucial to our analysis here, as we explain below.

Once the dollar value of production in the professional services market is calculated, labour productivity is found simply by dividing the value of production by the units of labour that were required to create this output. These ratios in the U.S. and Canada are compared to determine relative productivity in the professional sectors in each country.

Rao et al. find that Canadian productivity is low relative to the U.S. The Bureau relies on this to support an investigation into whether competitive restrictions in the professions are in part responsible for this poor performance. The problem with the Bureau's analysis is that anti-competitive practices in professional services could in fact *increase* the productivity statistics that Rao et al. produce. To return to a point just emphasized, productivity statistics that Rao et al. provide rely on the dollar value of production divided by the number of workers in the sector. The dollar value of production does not capture quantity of output only, but also the price at which it was sold. Thus, on this methodology, the productivity of an acre of planted corn would be measured not by the number of cobs grown, but by the market value of the corn sold. This methodology, perhaps particularly in the service sector, makes sense: it would be impossible to measure the "quantity" of legal services provided. But by examining revenue rather than quantity, the productivity figures depend on market conditions, not just on the production technologies of the suppliers in question.

Suppose that markets are perfectly competitive.[8] In this case, professional service providers are compelled to charge their marginal costs. The revenue in the industry will reflect the total costs of production. If, however, there is market power in an industry, because of anti-competitive self-regulation or some other reason, then revenue will be greater than total costs. This may affect productivity data. Consider two alternative scenarios. In the first scenario, each lawyer in a competitive market is very productive, perhaps because of greater investment in capital. In the second scenario, there is only one, very unproductive lawyer who is the only provider of legal services in a particular market. Each lawyer in the two scenarios may be able to charge $500 per hour: lawyers in the competitive market charge $500 per hour because of competition and their high degree of productivity; the lawyer in the second market is unproductive, but can charge a monopoly rate of $500 per hour. High productivity and market power are indistinguishable when examining the value of services sold per hour of a lawyer's time. The only way to distinguish productivity is to measure the "quantity" (not hours) of legal services provided per labourer, but legal services cannot be reduced to quantity.

In some industries it may be feasible to account for market power by adjusting the PPP exchange rate. An analyst might be able to gauge the mark-up on a product sold by comparing the costs of inputs and the prices of output and attempt to back this out of the productivity analysis. Similarly, if there were an objective method of measuring the quantity of legal output, the market power factor would not cloud productivity statistics. One need not know the market price of corn to calculate how many cobs an acre produces; thus, productivity per acre can be calculated without reference to market conditions/power. If one could count the "cobs" produced by a lawyer, then one could compare labour productivity in competitive and non-competitive markets unproblematically. But it is not possible to measure a given "quantity" of legal services

[8] See, e.g., Aklilu Zegeye and Larry Rosenblum, "Measuring Productivity in an Imperfect World" (2000) 32 Applied Economics 91.

directly, which makes a direct analysis of quantity-produced-per-lawyer impossible. Moreover, without an ability to ascertain quantity, one cannot measure the mark-up on the price charged for a given quantity of legal services in an attempt to back out market power from the productivity estimates. Competitive conditions will inevitably affect the measurement of productivity in the professional sector.

Market power may exaggerate labour productivity statistics. Thus, if market power in legal services arises because of anti-competitive self-regulation that leads to a smaller number of lawyers than competitive markets would support, all things equal, revenue per hour of professional services will be *higher* than in competitive markets. This in turn would tend to *increase* productivity as calculated by revenue over labour inputs. Market power in this instance would exaggerate productivity.[9]

It is therefore problematic for the Bureau to conclude that there may be competitive problems driving low productivity statistics in Canadian professional services relative to the U.S. Canadian and U.S. productivity measures would be comparable if the degree of competition in each market is the same, but not if they are different. Indeed, one could coherently argue that the reason why revenue over labour in Canadian professional services is lower than it is in the U.S. is because Canadian markets are more competitive than those in the U.S., and hence prices are lower all things equal.

None of this is to say that it is unwise for the Bureau to conduct a study of competition and self-regulation in the Canadian legal profession. But it is clear that the apparent empirical basis upon which the Bureau relies does not support the exercise. Not only is an examination of average productivity in professional services too broad to indict any particular profession, but the result that Canadian professional services are less productive as measured by revenue over labour inputs may in fact reflect greater competition in Canadian markets. Until there is a non-market based measure of productivity, akin to counting corn cobs, any productivity study of the legal profession will be contingent on competitive conditions, and thus not particularly useful in drawing inferences about competitive conditions.

SECTION II: COMPETITIVE CONDITIONS IN THE ONTARIO LEGAL SERVICES MARKET

Productivity statistics do not suggest that the Canadian, or Ontarian, legal services market is uncompetitive. But this does not mean that the markets are competitive. In this section we analyze more directly competitive conditions in Ontario's legal services market. While our analysis is hardly dispositive on the matter, our exploration suggests that the legal services market in Ontario appears to be robustly competitive.

A. Defining the Market

The first step in investigating the competitive conditions in a market is to define more precisely what the market is.[10] There are two dimensions to the market: the product market and geographic market. Consider an attempt to determine whether Canada Dry brand ginger ale participates in a competitive or weakly competitive product market. Before answering the question, one has to ask what the product market is. Is the Canada Dry brand sufficiently strong

[9] *Id.*

[10] See, e.g., Competition Bureau, Merger Enforcement Guidelines (2004).

that it competes in its own market? Does it compete with other branded ginger ale sellers? Does it compete with all ginger ale sellers? Carbonated drink sellers? Non-alcoholic drink sellers? Drink sellers? The broader the market, the more competition Canada Dry faces in its market.

On the geographic market dimension, consider an attempt to determine the competition facing a grocery retailer (assuming "grocery retailing" to be a product market). A grocery store is located at Yonge and Bloor. Does it compete with a grocery store three blocks away? Four blocks away? A kilometer away? Ten kilometers away? The obvious impact of the answers to these questions illustrates that geographic market definition is also crucial in evaluating competition in a market.

Defining the market is a fundamental first step in evaluating the competitiveness of the legal services market, but markets cannot simply be discovered as objective facts. Rather, they are constructs. The key question in establishing an algorithm for determining markets is whether a product exerts competitive discipline on another product such that neither seller of each product can ignore the other in setting prices and quality. In what has become the standard approach in countries with sophisticated competition policy enforcement, the Competition Bureau's Merger Enforcement Guidelines (2004) [MEGs] offer the following procedure for defining the product market (often referred to as the “hypothetical monopolist” test).[11] First, start with an initial product (Canada Dry). If there were a single seller of that product, could that seller raise prices from competitive levels by 5% and sustain the higher price for a year profitably? If not, then the inquiry should include in the market the next-closest substitute for the initial product (ginger ale). The question is then repeated: could a single-seller of the group of products raise prices by 5% profitably. If not, then the next closest substitute is brought in (carbonated drinks). And so on. The market is defined by the smallest group of products which a single seller could profitably sell at a 5% premium to competitive levels.

An analogous process applies to defining the geographic market: start with an initial location (Yonge and Bloor). If a single seller at this location could profitably raise prices from competitive levels by 5%, then this location is a geographic market; if not, then add the next closest location to the market (three blocks away). If a single seller could raise prices by 5% profitably in this larger area, then the market is defined; if not add the next closest location, and so on.

Put more intuitively, relevant product (service) and geographic markets are defined by the willingness of consumers to substitute away from goods (or services) or switch to alternative (perhaps more distant) suppliers when faced with a small but significant and non-transitory price increase. The greater their willingness to switch, the broader the relevant market.

To undertake a thorough examination of competitive conditions in the legal services market in Ontario would require an examination of legal clients' price sensitivities. In some areas of practice, one would expect these sensitivities to be relatively large. In tax advisory work, for example, the line between legal practice and accounting advisory work may not be precisely drawn, which in turn suggests that an attempt to raise prices for legal advice on tax matters beyond competitive levels may induce clients to hire accountants instead. In other areas of

[11] See also, Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (U of T Press, 2002), chap. 2 and 4.

practice, these sensitivities are likely smaller. If the price of criminal defence work rose by 5%, it is not obvious that clients would have more attractive alternatives.

Given that we do not undertake an empirical examination of legal clients' price sensitivities (or "demand elasticity", to use the conventional economic jargon), we cannot define product markets for legal services precisely. However, as we discuss, the data in our view resoundingly suggest robustly competitive market structures even on relatively narrow definitions.

Similarly, we do not have data on clients' willingness to shop around for legal services from providers outside their immediate geographic region. Again, except for very small communities, however, even narrow market definitions do not suggest a lack of competition in Ontario's legal services markets. For very small communities, we do look to some implicit evidence of broader geographic competition, as we discuss.

In what follows, we will consider various product market definitions. One is the most general: legal services. Others are more specific product markets, such as corporate/commercial law; wills, estates and trust law; family law; and real estate law. We also treat geographic markets as being municipal in scope, rather than larger regional markets which may well be appropriate in some cases.

B. Market Concentration

Once markets are defined, the next step in determining competitive conditions concerns an evaluation of market concentration in the market. The Merger Enforcement Guidelines [MEGs] take an approach in which a merger would be unproblematic if market shares of the merging parties are below certain thresholds, while if they are above the thresholds, further analysis would be required. There are, in general, two forms of anticompetitive behaviour that the MEGs and competition policy address. First, there may be a concern that an individual seller in a market may be able to act sufficiently insulated from competition that it can charge supra-competitive prices (or provide sub-optimal quality). Second, there may be concern that a group of sellers collectively may be able to act in an explicitly, or implicitly, coordinated fashion such that prices are higher than competitive levels, or quality is lower. The MEGs set out different market share safe harbours depending on the nature of the competitive concern. If the concern is unilateral conduct, the Bureau suggests that it will not challenge a merger if the merging parties have a joint market share of under 35%. If the concern is multilateral conduct, the Bureau will not challenge a merger unless the four largest firms have a market share of at least 65%, and the merged entity would have at least a 10% market share.

These safe harbours are useful in analyzing competition in Ontario's legal services market. Using data from lawyers' annual information forms that lawyers must file with the Law Society of Upper Canada as a condition of licensure, we examine the number of lawyers in a variety of municipalities, as well as number of firms on the assumption that lawyers within a firm coordinate their production, providing legal services generally and in practice areas. We do not include a firm as practicing in a particular area unless at least one lawyer at the firm reports spending at least 10% of her time in this area. Note that the numbers we provide on specific product lines understate competition because of this restriction. As the MEGs note, a producer not selling at all in a particular product (or geographic) market at competitive prices may nevertheless be included in the market if the producer would begin selling in that market in response to a price increase. In our data, we exclude *de minimus* participation in a line of legal

services, but sellers providing less than 10% of their efforts in a certain line of business are very likely to be able to increase their participation above 10% in the event of anti-competitive price increases in that line of business. Indeed, since lawyers are licensed to practice in any area, lawyers not providing legal advice at all in a particular area may be induced by market power profits to begin doing so in the face of less than competitive market conditions.

The results from a sampling of legal services markets in different sizes of Ontario municipalities are as follows:

Type of Legal Practice		Toronto	London	Timmins	Orillia	Flesherton
	Population[12]	2.5 million	353,000	43,000	30,000	700
Overall	# of lawyers	13315	887	51	55	1
	# of firms	4239	853	41	52	1
Corporate/commercial	# of lawyers	3475	130	4	9	0
	# of firms	1282	65	4	8	0
Wills, estates, trust	# of lawyers	816	105	4	13	1
	# of firms	586	103	4	1	1
Family/matrimonial	# of lawyers	815	94	13	14	0
	# of firms	597	77	11	12	0
Real estate	# of lawyers	1658	141	12	17	1
	# of firms	1021	133	7	12	1

The number of firms practicing in a practice and geographic area does not indicate relevant market shares, so the safe harbour numbers of the MEGs are not directly applicable here. But for the larger municipal centres, it strikes us as highly implausible that any single firm would have a market share over 35%, or that any four firms would collectively have a market share of 65% or more. The average market share of London firms that provide family law services is just over 1%. Even if some firms are ten times the average size, this is a market that the Competition Bureau would view as robustly competitive. These figures are even more suggestive of competition if the total number of law firms is the focus, and it is plausible to assume (as we do) that lawyers would begin to move into other lines of practice if these were particularly lucrative given a lack of competition.

On the other hand, market shares in the smaller centres appear much greater and may on their face suggest competitive concerns. But we doubt that these markets present competitive problems. The geographic definition we rely on in the table concerns location within the municipality itself. Given the relatively large cost of legal services for any given customer,

[12] Population data from http://www.citypopulation.de/Canada-Ontario.html, except for Flesherton's, which was found at wikipedia.org.

we suspect that many would travel to other nearby centres rather than pay supra-competitive prices for local providers. It is implausible that buyers would spend much time traveling to realize a 5% lower price of a single grocery item, but it is not implausible that buyers would travel to realize a 5% savings on the cost of legal services, just as they would when shopping for household appliances or automobiles or doing the weekly family food shop. But one need not rely only on principled speculation; there is market evidence that geographic markets are broader than the municipalities. We examined yellowpages.ca for advertisements for lawyers serving Flesherton, Ontario, a town of 700 in southwestern Ontario. It turns out that there are over ninety law firms serving Flesherton, located in nearby towns like Hanover, Dundalk, Markdale and Shelburne, as well as relatively close larger centres, like Meaford, Owen Sound and Collingwood. Market share data suggest that legal services markets in Ontario are quite competitive.

C. Barriers to Entry

Even accepting narrow geographic and product market definitions, our sample of Ontario cities appears to have very competitive markets for legal services. But even if markets were concentrated, this would not end the assessment of competition. Another key consideration, as the MEGs stress, is barriers to entry. Concentrated markets do not pose competitive concerns if entry barriers are low. If new firms can enter in response to the exercise of market power, supracompetitive pricing would attract new entry and would only be transient. At the limit, even a firm with 100% market share cannot raise prices above competitive levels if entry of new competitors were costless and instantaneous. More generally, the MEGs suggest that the Bureau will not have competitive concerns about a merger, even if it creates concentrated markets, if entry would occur within two years that would constrain any significant price increase.

Even if there were some residual concern about competition in smaller centres, it is highly implausible that market power could be sustained in any given centre for long. The barriers to entry into the legal market concern investments in human capital: it takes time and effort to earn a law degree and earn one's professional accreditation. Once a lawyer is accredited within Ontario, however, there are almost non-existent barriers to entering different geographic markets. Indeed, given inter-provincial mobility agreements, entry into Ontario by lawyers from elsewhere in Canada is also very easy. Thus, if some geographic markets were robustly competitive, like London's, while others permitted lawyers to earn supra-competitive returns, one would expect there to be entry into the less competitive market as the result of lawyers migrating from the more competitive market. Even very concentrated market shares, then, would not necessarily indicate market power. In reality, it is likely that there are few law firms in smaller centres because there is lower demand, and perhaps higher costs (for example, lower economies of scale).

Before concluding our discussion of actual competitive conditions in Ontario's legal services market, we note in passing another strong indication of the robust nature of competition, or at least an indication that self-regulation is not a potent force in restricting competition. While a minority of lawyers earn very high hourly fees, in the several hundred dollar range, most others earn much lower fees. Legal Aid Ontario, for example, pays hourly rates

below $100. Hadfield[13] , in a critique of self-regulation of the legal profession, acknowledges that in the individual legal services sector in the U.S. incomes and fees have either remained stable or decreased slightly with a perceived glut of lawyers and un- or under-employment – a view in part corroborated in Ontario in a recent study by a Law Society of Upper Canada Committee of the challenges facing sole practitioners and small law firms in maintaining financially viable practices.[14]

There are no regulatory restrictions preventing low-earners from earning $800 an hour. Thus, the significant variation in returns to lawyers do not result from regulation. While the higher-earning lawyers are a minority, they are responsible for a disproportionate share of the value of the legal services market. Given that there would be a group of lower-paid lawyers willing to compete with them, the high returns that this cadre earns are not the result of less competition. Indeed, many of the higher-earning lawyers are involved in international business transactions, in which case they face stiff competition not only from other Canadian lawyers, but from international law firms.[15] Low productivity in this disproportionately valuable segment of the legal services sector, if it existed, could not be blamed on a lack of competition.

SECTION III: REGULATORY RESTRICTIONS ON COMPETITION

A. The Bureau's Assessment of Regulatory Restrictions on Competition in the Legal Professions: A Critique

In the Competition Bureau's 2007 study of the professions in Canada: Self-Regulated Professions: Balancing Competition and Regulation, the Bureau claims "that much of the productivity problem that plagues Canada's professions may be due to regulators not considering competition issues, or considering them inadequately, when they were creating their regulatory schemes, in the context of a very different Canadian economy than exists today." Section I shows that the productivity statistics on which the Bureau relies do not provide a basis for casting doubt on competition in the Canadian or Ontarian legal services industry. Section II directly investigates competition in Ontario's legal services market and, using the Competition Bureau's approach to evaluating the competitiveness of markets, concludes that markets are very competitive in structure. This Section addresses any residual doubts about competition in Ontario's legal services market. Even in the presence of competitive market structures it is possible for self-regulation to restrict conduct such that competitive outcomes are not achieved. For example, if self-regulation established a mandatory minimum fee schedule, there would be serious concern about competition even in very unconcentrated markets. While a searching examination of the Bureau's line-by-line recommendations for regulatory reform is beyond the scope of this report, we begin the section by reviewing some of the Bureau's recommendations, then provide some thoughts about the importance of the recommendations. We conclude that the Bureau fails to provide compelling evidence of serious concern about a lack of competition

[13] Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System," (2000) 98 *Michigan Law Review* 953; Gillian Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets," (2008) *Stanford Law Review* 101.

[14] Final Report of the Sole Practitioner and Small Firm Task Force, Law Society of Upper Canada, March 24, 2005.

[15] This observation suggests that the Toronto legal market is even less concentrated than the above data suggest.

in the legal profession; though this conclusion does not necessarily negate the case for pro-competitive regulatory changes at the margins.

B. The Bureau's Recommendations

The Bureau's study focuses on various categories of regulatory constraints on competition in the professions:

1) restrictions on entering the profession
2) restrictions on mobility
3) restrictions on overlapping services and scope of practice
4) restrictions on advertising
5) restrictions on pricing and compensation
6) restrictions on business structure

In the chapter of the study on the legal profession, the study examines a number of classes of regulatory restrictions on competition and makes recommendations thereon. Amongst the more important of these are the following:

1. Market Entry Restrictions

The study notes that there are significant variations across provinces in the length of the professional legal training course and articling period, which suggests that the entry requirements may have been set, in some instances, at a higher than necessary level, thereby increasing the requirements that prospective lawyers have to meet to enter into the profession.

The study notes that while in the past there have been significant barriers to inter-provincial mobility of lawyers within Canada, most provinces have now fully implemented the National Mobility Agreement (NMA). It sets out principles that govern temporary and permanent mobility among signatory provinces and largely eliminates any inter-provincial restrictions on mobility.

With respect to international mobility, the study notes that the Council of Canadian Law Deans and the Federation of Law Societies of Canada have created the National Committee on Accreditation (NCA) to evaluate internationally-trained lawyers' requirements. The study questions the necessity of residency requirements that are still maintained by many provinces.

With respect to overlapping services and scope of practice, the study is critical of the scheme recently adopted in Ontario for regulating paralegals and administered by the Law Society of Upper Canada. The study recommends that to the extent that paralegals need to be regulated the proper avenue for this is not through law societies, given the conflict of interest that arises from one competitor regulating another. The study also recommends that law societies should neither prohibit related legal service providers, such as paralegals and title insurers, from performing legal tasks nor limit their ability to do so unless there is compelling evidence of demonstrable harm to the public.

2. Market Conduct Restrictions

The study is critical of restrictions that continue to be maintained in some provinces on the content and format of lawyers advertising, and argues the case for some form of specialist certification or designation to reduce information asymmetries between service providers and

consumers. The study also recommends that restrictions on comparative advertising should be relaxed or removed.

The study notes that most provinces have removed any mandatory or suggested minimum fee schedules.

With respect to regulations relating to business structure, the study recommends that law societies should consider less intrusive mechanisms than prohibiting multidisciplinary practices to circumvent possible conflicts of interest. Examples to follow are those from the Law Society of Upper Canada and the Barreau du Quebec, both of which allow lawyers to form partnerships with non-lawyers under certain conditions and appropriate regulations. In order to allow for multidisciplinary practices, law societies will have to remove restrictions that currently prohibit or discourage lawyers from working in multidisciplinary arrangements with other professionals.

C. Analysis

While a detailed analysis of the merits of these regulatory restrictions is beyond the scope of this paper, we believe that the following caveats on the Bureau's views are in order.

With respect to market entry restrictions, in particular the length of professional training courses and articling periods from one province to the other, these differences seem relatively trivial, and in the light of the National Mobility Agreement (NMA), which now provides for relatively unrestricted temporary and permanent mobility of lawyers amongst signatory provinces, these differences become even more trivial.

In any event, it is of course the case that licensing requirements restrict entry; that is precisely their point. The concern is to ensure that relatively poorly informed clients are well-served by their lawyers, and human capital investment by lawyers is necessary to achieve this aim. And it is worth noting that costly qualification periods, if constant over time, cannot even conceptually confer market power rents on lawyers. It is true that unnecessarily costly restrictions will limit competition and provide some ex post rents to lawyers, but this does not necessarily benefit lawyers on balance since they must incur the ex ante costs of entering the profession themselves. It would be of net benefit to lawyers, for example, to allocate scarce licences to practice law arbitrarily to a handful of lawyers, since those fortunate enough to receive the licence get something for nothing. But forcing lawyers to incur costs to become lawyers implies that lawyers will enter the profession only to the extent that expected future returns cover their costs of investing in the licence. Such restrictions reduce competition and increase fees, but any benefit ex post is consumed by the cost of obtaining the licence in the first place. There is no net benefit to lawyers.

We would be more suspicious of regulatory barriers to entry if they were altered over time. Currently qualified lawyers may conclude that they can realize something for nothing by increasing the costs of qualification, and thus reducing competition, while not having to undertake such extra costs themselves. The Bureau, however, does not consider trends over time, which renders its analysis of regulatory entry barriers problematic.

As Gillian Hadfield acknowledges in two recent critical reviews of the regulation of the legal profession in the U.S.,[16] while artificial barriers to entry are the commonly recognized sources of monopoly power in the market for lawyers, empirically there has to be some doubt that they are an important source. She notes that over the last few decades in the U.S. there has been a tremendous increase in the number of lawyers entering the profession. While increases in the number of lawyers entering the profession in Canada has probably been less dramatic, modest expansion in the intake of students at Ontario law schools over the last several decades, the prospect of accreditation of new law schools in the future, and the ability of law graduates from other provinces to move into the Ontario market with very few, if any, restrictions on their mobility all suggest that market entry restrictions are not a significant constraint on competition.

With respect to the market conduct restrictions that the Bureau study focuses on, we do not doubt that self-regulation that establishes fee schedules, or severely restricts advertising, could impact competition in undesirable ways. But, as the Bureau's study notes, most provinces have removed any mandatory or suggested fee schedules in recent years. Moreover, regulators, especially in the case of Ontario, have removed most restrictions on lawyers' advertising. Without commenting on the overall net benefits of such further deregulation, the Bureau's recommendations that remaining restrictions on comparative advertising should be relaxed or removed concern a relatively minor feature of most advertising.

The Bureau study is also critical of the scheme recently adopted in Ontario for regulating paralegals and administered by the Law Society of Upper Canada, on the grounds that there is an obvious conflict of interest in one competitor regulating another. This conflict is a legitimate source of concern: lawyers as a whole may resist entry by new competitors that drive their earnings down.[17] However, the Bureau fails to touch on the complexity of the regulatory issues[18] , or to note that the regulatory regime that has been adopted in Ontario for the regulation of paralegals, after many years of study and debate, involves a carefully balanced governance structure, whereby the by-laws governing the qualifications, roles, and responsibilities of paralegals are to be developed by a committee comprising five lawyer benchers, five elected paralegals, and three lay benchers. Whether this governance regime sufficiently addresses actual or perceived conflicts of interest remains to be seen, but its design is clearly sensitive to this concern.

The Bureau's recommendations with respect to regulations relating to business structure, in particular those prohibiting multidisciplinary practices, raise more controversial

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[16] Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System," (2000) 98 *Michigan Law Review* 953; Gillian Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets," (2008) *Stanford Law Review* 101.

[17] As noted above, lawyers may have an incentive to increase barriers to entry over time, while a regulatory change authorizing paralegals to perform some work previously done by lawyers effectively has the opposite effect.

[18] For example, s. 4.1 of Ontario's Law Society Act requires the Law Society to regulate "all persons who practise law in Ontario or provide legal services in Ontario." The statutory reference to "providing legal services" requires the Law Society to regulate paralegals.

issues,[19] although notably the Bureau recommends that the regulations adopted by the Law Society of Upper Canada in this respect are an example for other provinces to follow.

We are concerned that the Bureau's report treads too lightly over some of the nuances surrounding the general question of the legal profession's regulation of the boundaries of the profession. These boundary questions, such as those involving paralegals, are complex and involve many trade-offs. In our view, the only satisfactory approach to a policy critique or defence of self-regulation in this regard is an issue-by-issue analysis of the particular regulation in question. We have noted, for example, the nuances associated with regulation of paralegals; similar complexities arise with other matters. For example, issues surrounding the sale and distribution of title insurance are far from straightforward. In the U.S., there was substantial deregulation of the title insurance market that permitted sellers to provide a bundle of services, some of which (e.g., real estate conveyancing) traditionally lay within the purview of the legal profession. There have been a number of complaints about business practices in the title insurance industry, and corresponding investigations by state and federal authorities. Indeed, the U.S. Government Accountability Office released a report in April, 2006 suggesting further study of the industry's cost structures, business practices and regulation. This experience reinforces the notion, noted by the Bureau, that the benefits, as well as the costs, of regulation must be weighed carefully before conclusions about these regulatory boundary issues can be reached.

As to the Bureau's proposal for some form of specialist certification or designation to reduce information asymmetries between service providers and consumers, this is a controversial issue. One of us has, in earlier writing,[20] expressed scepticism as to the wisdom of devoting scarce regulatory resources (both public and private) to ambitious specialty certification programs, for the following reasons. First, there will be pressures for the proliferation of specialty classes as members of the profession strive to differentiate their services from others' and thus attempt to reap whatever competitive advantage is associated with real or imagined service differentiation. Second, there will be disputes within the profession over the appropriate specification and boundaries of each specialty, over the appropriate criteria by which one is judged to be a specialist and over the even-handedness and competence with which the plans are being administered, particularly if their administration primarily resides in the hands of those already certified as specialists. A substantial amount of the scarce regulatory resources of the profession is likely to be invested in supporting the plans under the weight of these pressures. Fourth, plans that start off only as specialty certification programs are likely over time to become, at least in part, *de facto* specialty licensing programs, as those successful in having themselves certified as specialists then succeed in establishing exclusive claims to specialized competence (e.g., by persuading large institutional employers or various demand-side regulatory agencies, legal aid administrators, etc., to stipulate specialty certification as a necessary qualification for undertaking particular professional functions or categories of work). These developments are likely to lead, on the one hand, to a very extreme form of segmentation of professional service markets with a concomitant loss of mobility of human resources within those markets and, on the other hand, to a major new demand on the scarce regulatory resources of the governing bodies of the profession.

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[19] Michael Trebilcock and Lila Csorgo, "Multidisciplinary Professional Practices: A Consumer Welfare Perspective," (2001) 25 *Dalhousie Law Journal* 1.

[20] Michael Trebilcock, "Regulating Legal Competence," (2001) 34 *Canadian Business law Journal* 444.

SECTION IV: CONCLUSION: PRINCIPLES TO GOVERN SELF-REGULATION OF THE LEGAL PROFESSION

To summarize, there may be some residual competitive concerns about self-regulation of the legal profession, but they are much more limited than the list raised by the Bureau. We do not resolve these matters in this sub-section, but offer some general principles for addressing the issues.

It is a truism that much economic and social regulation in the professions and in countless other contexts has an impact on competition in the sector in question, if competition is simply defined as maximizing the number of competitors. In Canada, as in most other countries, a plethora of legislation and regulations (national and subnational) regulate aspects of private market conduct and hence competitive conditions in such markets. Fraud and misleading advertising are not legitimate forms of competition, nor is coercion of customers. In some contexts economic regulation addresses the insufficiency of competitive forces as an effective discipline, e.g., natural or protected monopolies. In other contexts, regulation addresses the distributional impacts of competition, including, for example, the many laws regulating conditions of employment in labour markets, agricultural marketing boards or supply-management schemes. In other contexts, service quality or ethical concerns are reflected in licensing or conduct requirements as conditions of (and barriers to) entry into a given class of economic activity. In yet other contexts, regulation addresses externalities from economic activities, such as pollution, often by setting standards that act as entry barriers to potential competitors. In other contexts, regulation is designed to protect industries from foreign competition, *e.g.*, trade barriers or foreign ownership restrictions or to protect domestic cultural values, *e.g.*, Canadian content requirements in broadcasting. In others, state ownership or public provision is seen as a surrogate for competition (*e.g.*, health care).

Thus, it is obvious that national competition laws cannot possibly be interpreted as over-riding or displacing all these forms of regulation but must take all or most of them as givens – as equally legitimate expressions of the democratic will as the enactment of the *Competition Act* itself.[21] This is the motivation for the robust "regulated industries defence" that has evolved in Canada. This defence substantially shields regulated conduct from competition law scrutiny.[22] It is thus insufficient for a critic to point to a particular piece of self-regulation as restricting competition and rest its case; the countervailing purpose of the regulation must be considered.

We acknowledge, on the other hand, that scepticism about *self-regulation* may be particularly acute, given the direct benefits to the regulators from adopting anti-competitive regulations. Perhaps because of this concern, delegated self-regulation is relatively exceptional and is accorded to a relatively small number of occupational groups or professions. For example, the big five Canadian banks (or other highly concentrated industries) have not been accorded substantial self-regulatory powers over their industries, presumably because this

[21] R.S.C. 1985, c. C-34.

[22] See Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto, University of Toronto Press, 2002), ch. 11; Michael Trebilcock, Regulated Conduct and the Competition Act," (2005) 41 *Canadian Business L.J.* 492; Competition Bureau of Canada, Technical Bulletin on "Regulated Conduct," June 2006.

would entail significant risks of antisocial forms of collusion or cartelization. Equally, used car dealers, door-to-door salespeople, and telemarketers have not been accorded self-regulatory authority. The delegation of regulatory authority by government to self-governing professional body hence requires a demonstration that self-regulation is more effective and/or less costly than direct regulation or perhaps regulation by a quasi-independent regulatory agency (analogous to e.g., the Ontario Energy Board or the Canadian Radio-Television and Telecommunications Commission). Thus, a case needs to be established rather than assumed for professional self-regulation.[23]

Once a need for some form of regulation has been established, the case for professional self-regulation turns on four kinds of considerations: the cost of information, the cost of error, the cost of enforcement, and the establishment of trust.[24] Although there is great diversity in the activities of the different professions, there are common elements as well. In each case, we find the application of a body of knowledge that is systematic and sometimes arcane. This is a knowledge base which, by its nature, can be acquired only by long and arduous training. Second, the activities of the professions touch on some of the most fundamental of human affairs. Third, professional practitioners are numerous and their clients are even more numerous. Professional services intrinsically involve the application of general knowledge to particular cases; they are, therefore, essentially individual in scope. Finally, the essence of the professional relationship involves the assumption of an agency role by the practitioner, acting on behalf of all relevant interests involved in the decision-making, the client's interests and those of third parties, and suppressing altogether his own interests. This agency function cannot be established and cannot be maintained in the absence of trust. Professionals must be trusted to act for their clients rather than for themselves, and they must be trusted to be sensitive to the interests of affected third parties. Without trust, professional relationships would flounder.

The choice between direct and self-regulation of quality in these professional markets is affected by these four characteristics. The determination that a service is of high quality or that a practitioner is adequately qualified can be made only by the application of the systematic knowledge base of the profession. If the state chooses to regulate the quality of professional services directly, it may, of course, hire "experts" (presumably from the profession in question) to assist it in its task. Clearly, however, the acquisition of this information is costly, even if it is facilitated by retaining expert advisors. The delegation of regulatory powers to the profession itself would place the responsibility for quality assurance in the hands of people who have sufficient knowledge to do the job.

The costs of error are also high. Since the activities of professionals are important, the performance of poor quality services or, more generally, the certification or licensure of unqualified practitioners, constitutes a serious challenge to the public interest. In extreme cases, public health and safety may be imperiled. Even in less dramatic circumstances, the state cannot easily countenance "errors" made in quality assurance in these markets. Such errors will, of course, be more numerous when the regulator lacks the information necessary to assess quality correctly. The combination of the high costs of acquiring such information and the high

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[23] See Michael Trebilcock, "Regulating the Market for Legal Services," (2008) 45 *Alberta L. Rev.* 215.

[24] See Michael Trebilcock, Carolyn Tuohy and Alan Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario, prepared for the Professional Organizations Committee* (Toronto, Ministry of the Attorney General, 1979).

costs of doing without it appear to argue in favour of delegating the regulatory function to the profession itself.

There are further arguments supporting such a delegation. The fact that professional practitioners are so numerous, and that their services are so myriad, implies that enforcement of quality standards constitutes a formidable undertaking. The strong allegiances to the profession and its norms, developed and internalized by members as part of their education and training, serve to enhance voluntary compliance with quality standards. In this way the enforcement costs associated with monitoring and policing legions of practitioners can be substantially reduced by delegating this responsibility to the profession as a whole.

Finally, trust relationships are extremely fragile, especially when they touch on matters of importance. But trust is fundamental to the professional's role; the professional "agent" cannot perform his function without this trust. Individual clients and the public at large are much more likely to have confidence in the activities of practitioners when the state has indicated its confidence in the profession as a whole. The delegation of regulatory authority to a self-governing body of the profession signals such a trust and thereby reinforces the establishment and maintenance of similar trust relationships at the individual level.

However, despite these virtues of self-regulation in some professional markets, we accept that the delegation of regulatory authority is not itself without costs. There are risks that a self-regulating profession will not adequately discharge its responsibilities, particularly in the face of conflicts of interest that may arise. These are likely to be particularly pronounced in areas where the profession's economic interests are at stake, such as in the protection of a professional monopoly over rights to practice and in the discouragement of competitive practices among its members or the protection of obsolete or inefficient production functions and associated investments in human capital even though these may yield normal competitive rates of return to existing service providers (professional protectionism rather than consumer protection).[25]

This tension in turn raises complex issues in striking an appropriate balance between independence and accountability, which we do not pursue in detail here.[26] These may raise special concerns in the case of the legal profession relative to other professions because lawyers often assume a professional responsibility for representing clients with interests adverse to government (or the State) and are thus vulnerable to recriminations or retribution through regulatory bodies over which government exercises any significant influence (a problem all too evident in many developing countries and authoritarian regimes).[27]

In evaluating existing professional rules, particularly those that may impact on competitive conditions in the provision of legal services, and in evaluating proposed rules that

[25] See Hadfield, op cit.

[26] See The Report of the Professional Organizations Committee (Ontario: Ministry of the Attorney General, 1980) ch. 2; Trebilcock, Tuohy, and Wolfson, *op.cit.*ch. 7; Michael Trebilcock, "Regulating the Market for Legal Services," *Alberta Law Review , op.cit.*

[27] See Michael Trebilcock and Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008), chapter 9, "Professional Regulation."

may have such an impact, we believe that it would be appropriate for the Law Society of Upper Canada in initiating such processes, and for the Attorney General of Ontario in his or her oversight capacity, to apply a "least restrictive means" or "proportionality" test. This test is well developed in various other legal contexts. Writing in the context of international trade rules, Alan Sykes, in a recent paper,[28] points out:

> Least restrictive means requirements and related principles which require regulators to pursue regulatory objectives in the manner that is "least restrictive" of other societal values, pervade national and international legal systems. In American constitutional law, they appear in First Amendment cases, in equal protection cases, and in dormant commerce clause cases, among others. They perform similar functions in European law, such as in the jurisprudence of Articles 30 and 36 of the Treaty of Rome. They may be found in a number of articles of the North American Free Trade Agreement (NAFTA), and they play an essential role in the law of the World Trade Organization (WTO)."

It should be added that a similar test is applied under Section I of the Canadian Charter of Rights and Freedoms in justifying derogations from constitutionally protected rights and freedoms – the so-called proportionality test initially developed by the Supreme Court in *Oakes* (1986).[29] In an international trade law context, Sykes addresses various WTO obligations on member states not to adopt rules or regulations in purported furtherance of various social policy objectives that are more restrictive of international trade than necessary to achieve those objectives. In analyzing an increasingly rich body of WTO dispute settlement case-law on this question, Sykes concludes that it largely reflects simply a crude cost-benefit analysis, constrained by an awareness of error costs and uncertainty. Regulations that seem likely to be wasteful are more likely to be condemned under the least trade restrictive means test when the cost of erroneously condemning them are small, and when the costs of any reduction in compliance with the stated regulatory objectives are small. In this sense, least restrictive means analysis in the WTO may be viewed as sensible cost-benefit analysis under uncertainty. By "crude" Sykes means that the WTO dispute settlement body does not actually quantify the costs and benefits of alternative regulatory policies in dollars or some other metric. Rather, the decision maker proceeds more impressionistically and qualitatively to assess the effect of alternative policies on trade (in our case, competition), the administrative difficulties and resource costs associated with alternative policies, and the regulatory efficacy of those policies, then weighs these considerations in making a decision.

Sykes argues that the attention to error costs and uncertainty is evident in the hesitancy of decision-makers (especially the WTO Appellate Body) to hold that an alternative is less restrictive of trade (or that the challenged policy is not "necessary") if the alternative policy may be less efficacious and if the value of regulatory efficacy is great. Thus, for example, if the regulatory objective relates to some highly valued interests such as the protection of human life, then the challenged regulation will be upheld if there is any doubt as to the ability of the proposed alternative to achieve the same level of efficacy. This practice may be understood as

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[28] Alan O. Sykes, "The Least Restrictive Means," (2003) 70 *University of Chicago Law Review* 403; see also Jan Neumann and Elisabeth Turk, "Necessity Revisited: Proportionality in World Trade Organization Law After Korea-Beef, EC-Asbestos, and EC-Sardines," (2003) 37 *Journal of World Trade* 199.

[29] See, more generally, David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004), especially chapter 5.

a recognition of the fact that the costs of an erroneous decision – the loss of life – would be extremely high, and that even a small probability of an erroneous decision counsels against condemning the measure under scrutiny. By contrast, where the regulatory objective relates to some less important interest, and the proposed alternative is considerably less restrictive of trade, decision makers may condemn a challenged regulation even when the efficacy of the proposed alternative regulation may be less than the efficacy of the challenged regulation. Likewise, where an alternative regulation is clearly less restrictive of trade and there is no doubt as to its efficacy in achieving regulatory goals, the mere fact that it is somewhat more costly for regulators to implement will not prevent the decision maker from condemning the challenged regulation.

In our context, the test that law societies and Attorneys General to whom they account should apply to existing or proposed professional rules or regulations that may have an impact on competitive conditions in markets for legal services is whether the rules or regulations in question, in pursuing legitimate non-competition-related objectives (e.g., promoting professional ethical values, avoiding conflicts of interest, protecting vulnerable or ill-informed consumers), restrict competition no more than necessary (relative to reasonably available regulatory alternatives) in achieving those objectives.

Secretary's Report
- Annual General Meeting Motion

Secretary's Report to Convocation
November 27, 2008

Annual General Meeting Motion

Purpose of Report: Information

Prepared by: Katherine Corrick

INFORMATION

MOTION CARRIED AT THE LAW SOCIETY'S
ANNUAL GENERAL MEETING

Background

1. The Law Society of Upper Canada held its Annual General Meeting on May 7, 2008.

2. The following motion was carried at the meeting.

> Whereas By-Laws of the Law Society of Upper Canada (LSUC) have been changed such that the LSUC no longer has members but, instead, licensees,
>
> Whereas it is demeaning to lawyers to be treated as a class of licensee,

Whereas a society by definition must have members,

Whereas it was unnecessary to change the name and content of the barristers' oath or to administer substantially the same or any oath to paralegals, whose qualifications are substantially different from those of lawyers,

Whereas the L1 licensees' oath makes no mention of lawyers' duty to try to ensure access to justice by all or of champerty and maintenance, and whereas the new requirement to "improve the administration of justice" is a vague and incomplete substitution, and

Whereas these changes were made without consultation with the members, let alone their consent,

Be it resolved that the Benchers of the Law Society of Upper Canada (LSUC) immediately take steps to amend the By-Laws of the LSUC such that lawyers are again called "lawyers" or "barristers and solicitors" and not "licensees" and lawyers who are in good standing in Ontario are again called "members."

Be it further resolved that the Benchers of the Law Society of Upper Canada (LSUC)

(a) immediately take steps to amend By-Law 4, section 21(1) by restoring the traditional barristers' oath and requiring that it be administered only to admittants to the bar and not in any form to paralegals, and

(b) refrain from changing the traditional barristers' oath once restored unless they consult the CJO and all members of the LSUC (which is to say all lawyers in good standing in Ontario), inform the members of the views presented, and propose and permit members to propose changes at annual general meeting of the LSUC.

3. Section 42 of By-Law 2 requires that the motion be communicated to Convocation at its first regular meeting after the annual general meeting and that the motion be considered by Convocation within six months of the meeting.

4. Section s. 42(2) of By-Law 2 provides that the motion is not binding on Convocation.

Use of the word “licensee”

5. It is incorrect to state, as it does in the motion, that “the Law Society of Upper Canada no longer has members, but instead licensees.” It is further incorrect to assert that lawyers are no longer barristers and solicitors. Lawyers remain barristers and solicitors and remain members of the Law Society of Upper Canada pursuant to sections 1.1(2) and 2(2)(c) of the *Law Society Act*. That was not changed by the Law Society’s by-laws.

6. The Law Society is bound by the language in the Act when drafting its by-laws as it derives its authority for making its by-laws from section 62(0.1) and (1) of the *Law*

Society Act. These sections of the Act follow the language of the rest of the Act and use the word "licensee."

7. In response to the motion that Convocation amend the Law Society's by-laws to eliminate the use of the word "licensee" in reference to lawyers, then Treasurer Gavin MacKenzie informed Convocation on May 22, 2008 that despite the fact that the drafters of the *Law Society Act* adopted the word "licensee" as a collective noun to refer to both lawyers and paralegals, Mr. Heins had instructed Law Society staff to use the terms "lawyers" and "paralegals" whenever possible.

8. A great deal of effort was required to change the nomenclature of "licensee" within the operation of the Law Society. The Law Society's web site, database and regular modes of communication had been changed to accommodate the word "licensee" in preparation for the implementation of paralegal regulation. After May 22, 2008, all public systems, forms and documents, including the Law Society's web site were amended. This included such forms as the Complaint Form, Lawyer Referral Service invoices, the annual fee billing form, and the Members Annual Report. The Online Lawyer and Paralegal Directory was changed. Online Frequently Asked Questions were amended. The Ontario Lawyers Gazette, the Ontario Reports, and the Annual Report were also changed.

The Lawyers' Oath

9. In April 2008, a working group of the Professional Development and Competence Committee was established to review the oath candidates for call to the bar are required to take.

10. The working group reported to the Professional Development and Competence Committee at its meeting in November. The Committee will be reporting to Convocation on the issue of the lawyers' oath on November 27, 2008.

Tribunals Committee Report

- Quarterly Statistics

Report to Convocation
November 27, 2008

Tribunals Committee

Committee Members
Mark Sandler (Chair)
Alan Gold (Vice-Chair)
Raj Anand
Thomas Conway
Jennifer Halajian
Tom Heintzman
Paul Schabas

Joanne St. Lewis
William J. Simpson

Purposes of Report: Information

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

COMMITTEE PROCESS

1. The Committee met on November 13, 2008. Committee members Mark Sandler (Chair), Raj Anand, Thomas Conway, Jennifer Halajian, Thomas Heintzman, Paul Schabas, Joanne St. Lewis, and William J. Simpson attended. Staff members Lesley Cameron, Katherine Corrick, A.K. Dionne, Grace Knakowski, Lisa Mallia, Zeynep Onen, Arwen Tillman, Elliot Spears, Sophia Sperdakos, and Sybila Valdivieso also attended.

FOR INFORMATION

TRIBUNALS QUARTERLY STATISTICS FOR THIRD QUARTER 2008

2. The Tribunal Office's quarterly statistics for the third quarter of 2008 are set out at Appendix 1 for Convocation's information.

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

Copy of the Tribunal Office's quarterly statistics for the third quarter of 2008 (July 1 – September 30, 2008).

(Appendix 1, pages 4 – 20)

CONVOCATION ROSE AT 12:55 P.M.

Confirmed in Convocation this 29th day of January, 2009.

Treasurer