MINUTES OF CONVOCATION

Thursday, 23rd November, 2006
9:00 a.m.

PRESENT:

The Treasurer (Gavin MacKenzie), Aaron, Alexander, Backhouse, Banack, Boyd, Campion, Carpenter-Gunn, Caskey, Chahbar, Cherniak, Chilcott, Coffey, Copeland, Crowe, Curtis, Dickson, Doyle (by telephone), Dray, Eber, Feinstein, Filion, Finkelstein, Finlayson, Go, Gold, Gottlieb, Harris, Heintzman, Henderson, Krishna, Lawrence, Lawrie, Legge, Manes, Millar, Minor, Murphy, Murray, O'Donnell, Pawlitza, Porter, Potter, Robins, Ross, Ruby, St. Lewis, Silverstein, Simpson, Swaye, Symes, Wardlaw, Warkentin and Wright.

…….

Secretary: Katherine Corrick

The Reporter was sworn.

…….

IN PUBLIC

…….

MOTION – ELECTION OF BENCHER

WHEREAS Laurence Pattillo, who was elected from the Province of Ontario "A" Electoral Region (City of Toronto) on the basis of the votes cast by all electors, has been appointed a judge of the Superior Court of Justice; and

WHEREAS upon being appointed a judge of the Superior Court of Justice, Laurence Pattillo became unable to continue in office as a bencher, thereby creating a vacancy in the office of bencher elected from the Province of Ontario "A" Electoral Region (City of Toronto) on the basis of votes cast by electors residing in that electoral region.

It was moved by Mr. Millar, seconded by Mr. Heintzman -

That under the authority contained in By-Law 5, Avvy Go, having satisfied the requirements contained in subsection 50 (1) and subsection 52 (1) of the By-Law, and having consented to the election in accordance with subsection 52 (2) of the By-Law, be elected by Convocation as bencher to fill the vacancy in the number of benchers elected from the Province of Ontario "A" Electoral Region (City of Toronto) on the basis of the votes cast by all electors.

Carried

The Treasurer and benchers welcomed back Ms. Go to Convocation.

TREASURER'S REMARKS

The Treasurer welcomed the new paralegal benchers to Convocation, Paul Dray and Brian Lawrie, and announced the appointments by the Attorney General of Michelle Haigh, Margaret Louter and Stephen Parker to the Paralegal Standing Committee.

The Treasurer reported on his attendance at meetings and events since last Convocation.

REPORT OF THE TASK FORCE ON THE RULE OF LAW AND THE INDEPENDENCE OF THE BAR

Mr. Finkelstein presented the Report of the Task Force.

Final Report to Convocation
November 23, 2006

Task Force on the Rule of Law and the Independence of the Bar

Task Force Members
Neil Finkelstein, Co-Chair
Professor Constance Backhouse, Co-Chair
Earl A. Cherniak Q.C., Co-Chair
The Honourable Jack Major
The Honourable Michel Proulx
The Honourable Sydney Robins
Sheila Block
David Scott, Q.C.
Jack Giles, Q.C.
David Jackson
Professor Richard Simeon
Special Adviser – Carol Hansell
Research Director : Professor Lorne Sossin

Purpose of Report: Information

STATEMENT OF PRINCIPLES ON THE RULE OF LAW AND THE INDEPENDENCE OF THE BAR

1. The purpose of an independent Bar is to preserve and promote the right of those needing legal assistance to obtain such assistance from a lawyer who is independent of

the state and can therefore provide independent representation. People seeking to interpret the law to guide their conduct similarly need to be able to rely on counsel whose judgement is unimpeded by conflicting loyalties. Lawyers owe a duty of loyalty to their clients, including obligations of confidentiality. Lawyers also owe a duty to the justice system as "officers of the Court," which ensures a fair process and just outcomes. An independent Bar works in tandem with an independent judiciary in the implementation of the rule of law. For this reason, the Courts have affirmed that an independent Bar and an independent judiciary are constitutionally protected features of Canada's justice system.

2. It is when a person is most vulnerable that his or her lawyer can make the difference between a just and an unjust outcome, or between fair and unfair treatment. An independent Bar means that everyone is entitled to have their position presented fearlessly and zealously by an independent lawyer within the limits of the law; that no one should be denied the benefit of the law; and that no one may escape the consequences of the law. This commitment underscores the code of professional conduct that governs lawyers; it is also the essence of the lawyer's role in the administration of justice.

3. This Task Force is dedicated to raising public awareness regarding the role of an independent Bar in protecting the public. The independence of the Bar is a dynamic rather than static concept – it takes its strength from the public's commitment to a society governed by the rule of law and the commitment of lawyers to defend the rule of law. With the strength of these commitments in mind, the Task Force adopts the following fundamental principles:

    1) The independence of the Bar is an essential element of a free and democratic society.

    2) The independence of the Bar is a fundamental right of those who seek legal assistance.

    3) The independence of the Bar is constitutionally recognized as a necessary condition of an independent judiciary and of the rule of law.

    4) The independence of the Bar is both consistent with and necessary for the pursuit of legitimate public policy goals, such as defending national security.

Task Force on the Rule of Law and the Independence of the Bar

Final Report to Convocation

Introduction

1. The Task Force was established by Convocation in November 2005. The members of the Task Force are: Neil Finkelstein, Professor Constance Backhouse and Earl A. Cherniak Q.C., (Co-Chairs), the Honourable Jack Major, the Honourable Michel Proulx, the Honourable Sydney Robins, Sheila Block, David Scott, Q.C., Jack Giles, Q.C., David Jackson and Professor Richard Simeon. The Task Force was assisted by Special

Adviser Carol Hansell and Research Director Professor Lorne Sossin. The Task Force has met on four occasions, on February 1st, May 3rd, September 7th and October 25th.

2. The Task Force has developed a Statement of Principles on the rule of Law and the Independence of the Bar for Convocation's consideration, shown on the preceding page.

3. The Task Force is also submitting a Report setting out the matters considered during its work. This Report is attached at Appendix 1.

4. The Task Force commissioned six background papers on aspects of the independence of the bar from eminent academic authors. These papers are listed at Appendix 2, and can be viewed on BencherNet.

5. To permit the Report and Papers to receive a wider circulation, the Task Force submitted an application to the Law Foundation of Ontario (approved by Convocation on June 22, 2006) requesting funding for the publication of the material in book form in both official languages. This application was scheduled to be considered by the Law Foundation board on November 14, 2006. The Task Force also encourages the Law Society to work with the Ontario Justice Education Network (OJEN) to develop curricular materials to expose students to the importance of the independence of the Bar. The Task Force also encourages the Law Society to work with the Ontario Justice Education Netword (OJEN) to develop curricular materials to expose students to the importance of the independence of the Bar.

APPENDIX 1

Task Force on the Rule of Law and the Independence of the Bar Report: Protecting the Public Through an Independent Bar

The Rights guaranteed to all Canadians are dependent upon an independent Bar

Introduction

1. This Report aims to show how the public is better protected through an independent Bar; that is to say, lawyers who are able to put their clients' interests first without fear of constraint or punishment, especially by the state. People rarely need lawyers to defend them in normal circumstances. It is only where people find themselves in trouble with the law, or when their home or livelihood or family is in jeopardy in a legal proceeding that the lawyer's role as their advocate becomes essential. It is when a person is most vulnerable, that his or her lawyer can make the difference between a just and an unjust outcome, or fair or unfair treatment. An independent Bar means that everyone is entitled to have their position presented fearlessly and zealously by an independent lawyer within the limits of the law; that no one should be denied the benefit of the law; and that no one may escape the consequences of the law. This commitment underscores the code of professional conduct that governs lawyers; it is also the essence of the lawyer's role in the administration of justice.

2. The purpose of an independent Bar is not to extend privileges to lawyers to enable them to defend their interests against government or other external bodies. It is a right of the public who need legal assistance to obtain it from someone who is independent of the state and can thereby provide independent representation. Thus, for example, in some situations, people enjoy a constitutional right to legal assistance, as in the context of the criminal justice system, i.e. legal aid and court-appointed counsel. In other circumstances, such as legal assistance for tenants, social assistant recipients and other vulnerable groups, legal aid provides counsel on the Judicare model. In still other situations, such as commercial or family disputes, access to a lawyer may represent a significant financial investment. In all cases, clients may depend on their counsel to uphold a series of core values. Lawyers owe a duty of loyalty to clients, including obligations of confidentiality. Lawyers also owe a duty to the justice system as "officers of the Court," which ensures a fair process and just outcomes. In this sense, independent lawyers function in tandem with an independent judiciary in the implementation of the rule of law. For this reason, the Courts have affirmed that an independent Bar and an independent judiciary are constitutionally protected features of Canada's justice system to ensure the rights of Canadians.

3. The lawyer's role in this system is not abstract or academic. It is in the crises that affect ordinary people that the independence of the Bar takes on its clearest meaning. The case of *Roncarelli v. Duplessis* is one of the high watermarks of Canada's commitment to the rule of law. Mr. Roncarelli owned a popular Montreal restaurant called the Quaff Café. With the proceeds from the restaurant, he had been posting bail for fellow adherents of the Jehovah's Witnesses who had been arrested for "unlicensed vending." Almost 400 charges were laid against sect members, some of them charged many times if they refused to pay a $40 fine. Mr. Roncarelli posted bail for about 380 Witnesses. Angered by Mr. Roncarelli, Maurice Duplessis, who was both the Quebec premier and the Attorney General, warned Mr. Roncarelli he was in danger of losing his liquor licence. In December 1946, the restaurant's $2,000 supply of liquor was seized and Mr. Roncarelli's licence was revoked. He was forced to sell his business six months later and sued Premier Duplessis for damages. He retained A.L. Stein as counsel to represent him.

4. Mr. Stein accepted the case and approached other lawyers to act with him. Every one of them turned him down out of fear of Mr. Duplessis, and the political consequences that might ensue. Mr. Stein was at last joined by McGill University law professor Frank R. Scott. Mr. Roncarelli alleged the cancellation of his liquor licence was an act of reprisal. At trial, Mr. Roncarelli was awarded damages of $8,123 in a decision that stunned the Quebec legal community. Mr. Duplessis appealed the decision, while Mr. Roncarelli appealed for a greater award. After several twists and turns, the case made its way to the Supreme Court of Canada, which, in 1959, ruled in favour of Mr. Roncarelli.[1]

5. In the course of his judgment in *Roncarelli v. Duplessis*, Justice Rand held:

> "…there is no such thing as absolute and untrammeled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator … "Discretion" necessarily implies good faith in discharging public duty … Could an applicant be refused a permit because he

[1] *Roncarelli v. Duplessis* [1959] S.C.R. 121.

> had been born in another province, or because of the colour of his hair? The ordinary language of the legislator cannot be so distorted."
>
> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superceded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure.[2]

6. *Roncarelli v. Duplessis* has become the most cited Canadian judicial decision in the field of the rule of law. Justice Rand's judgment in the Supreme Court reflects the ideal of the independent judiciary as a bulwark against arbitrary state action. However, it is not open to Courts to choose their cases. An independent judiciary alone cannot preserve the rule of law. Independent lawyers are needed to bring cases forward and to represent clients with the courage of conviction. Principally, of course, cases such as *Roncarelli* depend on people who feel they have been wronged being able to turn to lawyers in whom they can place their confidence. The rule of law in this sense is not a technical constitutional standard but rather a public trust. It is in circumstances like *Roncarelli*, when that trust is put to the test, that the independence of the Bar becomes such a critical element of a free and democratic society. It is also in cases such as *Roncarelli* that the fragility of this protection is revealed. Much as all lawyers are indebted to the independent ideals of A.L. Stein, the many lawyers who declined to join him for fear of political reprisal stand as a cautionary tale. The independence of the Bar is only as strong as the belief on the part of lawyers, the public, the judiciary and the government that it is worth preserving and promoting.

7. The constitutional significance of an independent Bar warrants vigilance, but lawyers must also be alert to the challenges currently facing society and to the need for governmental response. National security is on the minds of many who believe other values may have to be sacrificed if countries such as Canada are to defend themselves against terrorist and other violent threats from within and without. It is important not to set up a false dichotomy. The choice lies not between respect for the independence of the Bar on the one hand or fighting terrorism on the other. As we will discuss below, the challenge lies in how to fight terrorism *and* ensure the independence of the Bar. It is only an independent Bar, for example, that can test government evidence effectively to ensure the innocent do not become ensnared in the efforts to keep the public safe. The independence of the Bar is not only a right in and of itself, it is also the glue that binds other rights critical to a free and democratic society. As Jack Giles Q.C. concluded in his consideration of this issue:

> The principle of an independent bar, like the principle of an independent judiciary, is an idea that has a fundamental constitutional character. This is so because where it is interfered with all other constitutional rights including the rule of law itself are placed in jeopardy.[3]

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[2] Ibid.

[3] Jack Giles, Q.C., "The Independence of the Bar" (2001), 59 *The Advocate* 549.

8. It is simply inconceivable that a constitution that guarantees fundamental human rights and freedoms should not first protect that which makes it possible to benefit from such guarantees, namely every citizen's constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent Bar.

9. Thus, this Task Force adopts these four fundamental principles:

    1) the independence of the Bar is an essential element of a free and democratic society;
    2) the independence of the Bar is a right of those who need legal assistance;
    3) the independence of the Bar is constitutionally recognized as a necessary condition of an independent judiciary and of the rule of law; and
    4) the independence of the Bar is both consistent with and necessary for the pursuit of legitimate public policy goals, such as defending national security.

The Independence of the Bar as an Evolving Concept

10. An obvious starting point in a Report such as this is to attempt to define the concept of an "independent Bar." There is no single definition that will encompass all important meanings of this term, nor is there necessarily a consensus among all lawyers as to its scope or content.

11. When one speaks of independence, whether of judgment or of action, it is natural to ask – independence from whom? The U.S. legal historian Robert Gordon outlined four understandings of independence in the context of lawyers:

> 1. independence from outside regulation - the legal profession should have autonomy in the regulation of its own practices;
>
> 2. independence from client control – lawyers should have autonomy to decide which clients and causes to represent and how to conduct that representation;
>
> 3. independence from political control - lawyers should be able to assert and pursue client interests free of external controls, especially influence and pressure from the government; and
>
> 4. independence to pursue public purposes – lawyers may provide services and technical skills for hire but their personal and political convictions cannot be purchased or coerced - a part of the lawyer's professional persona must be set aside for dedication to public purposes.'[4]

12. Many lawyers believe the concept of independence refers to the ability of the legal profession to regulate its own affairs, conduct its own discipline, determine its own entrance and licensing standards and so forth. Self-regulation may be consistent with the independence of the Bar, but this Task Force is focused on the relationship between lawyers and clients (and potential clients), and on the protection of the public interest that depends on that relationship.

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[4] 'The Independence of Lawyers' (1988) 68 Boston U. L. Rev. 1 at 6-10.

13. At the heart of this relationship is the concept of an independent Bar bound up in the scope of a lawyer's duties, whether understood as a duty of loyalty toward a client or a duty of integrity and honesty as an officer of the court. There was a time when these duties would have been understood differently by barristers and solicitors and may have varied across different communities of practice within the legal profession. Today, however, it is precisely this concept that reflects the public interest and public service component common to all lawyers. It is, in other words, why this Task Force takes as its point of departure the independence of the Bar and not only the independence of the individual lawyer.

14. The concept of independence for the purposes of this Report captures two main ideas. The first idea (and ideal) of independence is that a lawyer, in reconciling her or his duties to a client and to the court, must exercise independent judgment. The second idea (and ideal) of independence is that the lawyer must remain free of external manipulation, state interference or ulterior influence in performing his or her duties. In this sense, it is possible to speak of the independence of the Bar as (1) a lawyer's independence of judgment and (2) a lawyer's independence of action.

15. Independence is not a static concept. It must adapt to new roles for lawyers, and new pressures on lawyers. It is also a deeply contextual concept. Independence in the context of an in-house lawyer or government lawyer will be experienced differently and constrained differently than a lawyer in private practice. Independence in the lawyer-client relationship implies different problems for barristers, who represent clients in litigation, than for solicitors, who represent clients in transactions. Yet, while its content may shift over time and across various contexts, the independence of judgment and the independence of action are common concerns for all lawyers.

16. The independence of the Bar is not absolute. A balance must be struck regarding the need for lawyers to be, and to be seen to be independent, and the boundaries which other priorities of public protection might place on that independence. For example, while solicitor-client communications are privileged, in the sense that they cannot be compelled by the state to further an investigation or a prosecution, there is an exception to this privilege where a serious crime involving death or serious bodily harm is imminent. In that context, the public interest in preventing the crime must take precedence over the public interest in protecting lawyer-client confidentiality. While lawyers are not the only group that must strike this balance, the Bar has a primary responsibility to ensure an optimal balance, one that enhances rather than erodes public protection and one that enhances rather than erodes the strength of the lawyer-client relationship and the rule of law. It is to assist with that objective that this Task Force was established.

17. This Report is divided into four sections. The first section will explore the independence of the Bar as a constitutional principle. The second section will examine the origins of the independence of the Bar and offer comparative perspectives on this issue. The third section considers the relationship between the independence of the Bar and the public. Finally, the fourth section will canvass how the independence of the Bar has been developed in the context of two recent case studies: the scope of lawyer-client confidentiality in relation to money laundering and the right to effective representation by a lawyer in relation to security certificates in the immigration and national security areas.

Section One: The Independence of the Bar as a Constitutional Principle

1.1 The governance of the legal profession is located in particular statutes – in Ontario, for example, the mandate and powers of the Law Society of Upper Canada are set out in the *Law Society Act*.[5] The independence of the Bar, unlike the rules governing the legal profession, may be found in many parts of our justice system. In this section, the sources of the independence of the Bar will be elaborated.[6]

(1) Constitutional Sources

1.2 Because the independence of the Bar is a protection for those who come before the justice system, Canada's Constitution recognizes the independence of the Bar in several settings, both in the text of the *Charter of Rights and Freedoms* and in unwritten principles such as judicial independence and the rule of law. The independence of the Bar may also now warrant recognition as a separate unwritten principle. These sources will be considered briefly in turn.

i) The *Charter of Rights*

1.3 The right to effective representation through counsel has been constitutionally guaranteed through a number of provisions of the *Charter*, particularly sections 7, 10(b) and 11(d). This right also constitutes a "principle of fundamental justice" for purposes of section 7 of the *Charter*. This means that whenever rights recognized under s.7 of the *Charter*[7] are raised, individuals have a right to effective representation by counsel. Effective representation by counsel is a necessary pre-requisite for a fair trial as guaranteed by section 11(d) of the *Charter*.[8] Finally, the right to "retain and instruct counsel" under section 10(b) has been interpreted broadly as protecting the solicitor-client relationship.[9] Solicitor-client privilege is also a "principle of fundamental justice" that is constitutionally protected under sections 7 and 8 of the *Charter.*

1.4 As the Supreme Court has affirmed in the criminal context, "The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by "partisan advocacy on both sides of the case"."[10] In *Smith v. Jones*,[11] Justice Major recognized solicitor-client privilege as "fundamentally important to our judicial system" and as an aspect of fundamental justice under s.7 of the *Charter*. While solicitor-client privilege is not absolute, Justice Major concluded, the occasions when it must be constrained should be rare.

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[5] R.S.O. 1990, c.L.8.

[6] This section draws on the paper prepared by Patrick Monahan for this Task Force entitled, "Constitutional Sources of the Independence of the Bar" (August 2006) 'Monahan'.

[7] See *R. v. G.D.B*., [2000] 1 S.C.R. 520 at para. 24.

[8] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 at para. 65.

[9] *R. v. Burlingham,* [1995] 2 S.C.R. 206 at para.14.

[10] *R. v. G.D.B.*, at para.25, citing *R v. Joanisse* (1995) 102 C.C.C. (3d) 35 (Ont. C.A.) at p.57.

[11] [1999] 1 S.C.R. 455 at para. 32.

1.5 Importantly, the recognition of solicitor-client privilege under the *Charter* follows the solicitor-client relationship outside the judicial system. In *Wilder v. Ontario Securities Commission*,[12] the Ontario Court of Appeal noted that the powers of the Ontario Securities Commission were subject to the maintenance and protection of solicitor-client privilege. Justice Sharpe held that the OSC is required to give appropriate consideration to solicitor-client privilege because it is a fundamental value of our legal system.

1.6 While the *Charter* provides specific protections for the public in relation to the criminal justice system and analogous situations such as disciplinary proceedings, the independence of the Bar as a constitutional principle extends to all those areas where parties come before a court. Below, the relationship between an independent Bar and an independent judiciary is elaborated.

ii) Judicial Independence, the Rule of Law and unwritten constitutional principles

1.7 Is it possible to characterize the right of access to effective assistance of independent legal counsel as an underlying constitutional principle which applies more generally in Canadian law, and not just in the specific contexts of sections 7, 8, 10(b) and 11(d) of the *Charter*?[13] Patrick Monahan concludes that, "In fact, there is judicial support for just such an expansive application of this concept."[14]

1.8 In granting an application for interlocutory relief to the Federation of Law Societies to restrain the government from enforcing the *Proceeds of Crime (Money-Laundering) Act, 2000*[15] against lawyers (which would have required lawyers to report cash transactions of over $10,000.00), Justice Cullity of the Ontario Superior Court held that the legislation clearly impinged upon and altered the traditional relationship between solicitors and their clients.[16] In his view, the legislation undermined the principle that lawyers should be independent of government. Justice Cullity noted that the relationship between lawyers and their clients is of fundamental importance to the rule of law and that there is a public interest in maintaining the lawyer-client relationship as one characterized by independence, loyalty and confidentiality. Courts in a number of other provinces also granted relief from the operation of this legislation against lawyers on a temporary basis, noting the significant impact that the legislation would have on solicitor-client privilege.[17] This case study is examined in more detail in the fourth

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[12] (2001), 53 O.R. (3d) 519.

[13] In *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, the Supreme Court of Canada recognized that there are at least four such underlying constitutional principles: federalism, democracy, constitutionalism and the rule of law and protection for minority rights. However this list was not exhaustive.

[14] Monahan, *supra* note 6.

[15] S.C. 2000, Ch. 17.

[16] *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 57 O.R. (3d) 383.

[17] See *Federation of Law Societies of Canada* v. *Canada (Attorney-General)*, [2001] A.J. No. 1697 (Alberta Court of Queen's Bench); *Federation of Law Societies of Canada* v. *Canada*

section of this Report but is mentioned here for its widespread constitutional recognition of the independence of the Bar.

1.9 The Supreme Court of Canada has recognized a number of unwritten constitutional principles. Foremost among these is that of the independence of the judiciary.[18] As Monahan notes, "The special relationship between lawyers and their clients, and particularly the independent advocacy, loyalty and confidentiality owed by lawyers to their clients, would seem to be similarly entitled to constitutional protection. A variety of courts and commentators have noted that an independent bar is essential to the maintenance of the independence of the judiciary."[19]

1.10 In *Lavallee, Rackel & Heintz*, Justice Lebel recognized the importance of the role of legal counsel for the independence of the judiciary and proper functioning of the administration of justice in the following terms:

> …[W]hether it is the pride or the bane of our civil and criminal procedure, Canadian courts rely on an adversarial system. An impartial and independent judge oversees the trial. He or she must make sure that it remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice. Nevertheless, the operation of the system is predicated upon the presence of opposing counsel. They are expected to advance often sharply conflicting views … An independent and competent Bar has long been an essential part of our legal system.[20]

1.11 The link between the independence of the judiciary and the independence of the bar is also implicitly recognized by sections 97 and 98 of the *Constitution Act, 1867*, which require that Judges of the Superior Courts in the provinces be chosen from the bars of those provinces. The Judicature sections of the *Constitution Act, 1867* implicitly recognize the independence of the judiciary, and also implicitly recognize the independence of the bars of the provinces as they existed in 1867 (this historical perspective is discussed below in the second section of the Report). Monahan concludes that, "to the extent that legislatures or governments seek to undermine the essential nature of the lawyer-client relationship, including counsel's ethical obligations of loyalty, advocacy and confidentiality, there would be a strong basis for challenging the validity of such legislation or government action."

(Attorney-General), [2002] S.J. No. 200 (Saskatchewan Court of Queen's Bench); *Law Society of British Columbia* v. *Canada (Attorney-General)* (2002), 207 DLR (4th) 736 (BCCA); *Federation of Law Societies of Canada* v. *Canada (Attorney-General)*, [2002] N.S.J. No. 199 (NSSC).

[18] *Manitoba Provincial Judges Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, determining that provincial legislation reducing salaries of provincial court judges was unconstitutional on the basis that it violated the unwritten principle of judicial independence.

[19] See Monahan, supra, note 6, citing *Andrew v. Law Society of British Columbia [1989] 1 S.C.R. 143,* and R. Millen, "Unwritten Constitutional Principles and the Enforceability of the Independence of the Bar", (2005), 30 S.C.L.R. 463 at 492-526; See also *R. v. Neil.*

[20] Supra note 8, at para. 68.

1.12 The rule of law is recognized as the cornerstone of our democratic form of government and another of the unwritten principles of the Canadian Constitution.[21] Just as the rule of law requires an independent judiciary, it also requires an independent legal profession in the sense that lawyers must be in a position to give independent legal advice to their clients free from government control or other improper external pressure. The fact that lawyers defend the rule of law by speaking for others and not for themselves is important. As Wes Pue has observed, "In speaking for others and to the state (directly or through the judicial bench) representatives inevitably emphasize consistency, equitable treatment of one party vis-à-vis others, prospective application of rules, and the notion that even the sovereign should behave consistently with past behaviour and publicly declared standards. Here lies the kernel of the rule of law. And the rule of law is the kernel of liberal constitutionalism."[22]

1.13 It is time to recognize the independence of the Bar as a separate underlying principle of the Canadian Constitution, rather than being included in other principles such as the independence of the judiciary by necessary implication.[23]

2. International Norms

1.14 International law may be seen as a further source of recognition for the importance of the independence of the Bar as a means of protecting the public. The Supreme Court has recognized that such international human rights norms form part of the "basic tenets of the legal system" in Canada.[24]

1.15 International norms and instruments recognize the link between effective legal representation and protection of civil rights. The UN *Basic Principles on the Role of Lawyers*[25] contains a number of references to the roles of professional associations of legal practitioners. These provisions include:

> 24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external influence…
>
> 26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national laws and custom and recognized international standards and norms…
>
> 28. Disciplinary procedures against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent

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[21] *Secession Reference*, *supra* note 13.

[22] Wes Pue, "Death Squads and "directions over lunch": A Comparative Review of the Independence of the Bar" (August 2006), a paper prepared for this Task Force.

[23] Millen, *supra* note 19.

[24] See *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

[25] Basic Principles on the Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).

> statutory authority, or before a court, and shall be subject to an independent judicial review.

1.15 To the same effect is the "Code of Conduct for Lawyers in the European Union", adopted by the *Conseil des Barreaux de l'Union Européenne* in 1988 (and amended in 2002) as a statement of the "common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross border practice."[26] (Section 1.3.1) The EU Code of Conduct states that a "free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society."[27]

1.16 This link between the independence of the Bar, defending the rule of law and safeguarding human rights is a key foundation for the administration of justice around the world. The International Bar Association (1990), for example, asserted that:

> The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services:
>
> An equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressures or interference, direct or indirect is imperative for the establishment and maintenance of the rule of law.
>
> It is essential to establish conditions in which all persons shall have effective and prompt access to legal services provided by an independent lawyer of their choice to protect and establish their legal, economic, social, cultural, civil and political rights.
>
> Professional associations of lawyers have a vital role to uphold professional standards and ethics, to protect their members from improper restrictions and infringements, to provide legal services to all in need of them, and to co-operate with governmental and other institutions in furthering the ends of justice.

1.17 The recognition of the public's right to an independent Bar may be traced to the text of the Canadian Constitution, its unwritten constitutional principles and international norms. These sources of recognition reinforce one another. The independence of the Bar as a constitutional foundation, however, does not exist in a vacuum. It has taken on forms and structure as the result of particular historical and cultural trends, both within Canadian jurisdictions and beyond them. It is to these origins and comparative perspectives that the Report now turns.

Section Two: The Independence of the Bar in Historical and Comparative Perspective

2.1 Most lawyers in Canada have a general sense that the special protections associated with the lawyer-client relationship and the role of lawyers as officers of the Court date back to

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[26] Council of the Bars and Law Societies of the European Union, *Code of Conduct for Lawyers in the European Union,* 28 October 1988, as amended 28 November 1998 and 6 December 2002, available at: http://www.ccbe.org.

[27] Ibid.

the medieval mists of Canada's common law tradition in England, were inherited by Britain's Canadian colonies, and have become more steeped in Canada's legal and constitutional order over time. The historical literature, however, suggests a less ancient and less clear progression toward independence.[28] While there are important lessons to be gleaned from reviewing the history of the independence of the Bar, a comparative perspective sheds light both on the importance and the fragility of an independent Bar around the world. Together, an historical and comparative perspective on the independence of the Bar suggests both that the rule of law and the protection of the public cannot be secured in its absence, and yet, it remains highly vulnerable to attack and to public indifference.

(1) The Historical Perspective

2.2 The origin of the legal profession in England reveals a fragmented profession:

> The English legal profession was divided into several branches in the early modern period, the most important for our purposes being serjeants at law, barristers, attorneys and solicitors. Serjeants at law formed the highest order of the profession and dated from medieval times; they initially possessed a monopoly on pleading in the Court of Common Pleas and formed the exclusive pool from which the judges of both the courts of Common Pleas and King's Bench were appointed. Attorneys, who were responsible for initiating procedures in the common law courts dated from medieval times, while barristers were a later development. It was not until 1590 that a call to the bar of one of the four inns of court was recognized as the minimum qualification for pleading before the superior courts of common law. Solicitors performed work similar to that of attorneys, but in the court of chancery.
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> By the mid-sixteenth century attorneys and solicitors were forbidden admission to the inns of court, and barristers were likewise forbidden from practising in either of those capacities. By the eighteenth century the inns of court were considered to be voluntary societies, not corporations, against which the prerogative writs did not run; their powers, derived from long usage rather than statute, were in theory delegated by the judges, and their actions were subject to review only by the judges as visitors. To this day there is virtually no statutory regulation of barristers and none of the inns, a hallmark of the deference afforded them by the state and hence of their autonomy. Barristers are not considered officers of the court, but rather 'officers of justice.'
>
> Attorneys and solicitors, by contrast, were considered officers of the court and subject to its disciplinary powers, and have long been subject to statutory regulation. Their own voluntary society, the Society of Gentlemen Practisers of Law in the Courts of Common Law and Equity, founded in 1739, was the predecessor of The Law Society, the modern professional organization of English solicitors. A statute of 1729 required an English attorney to undergo an apprenticeship of five years with an attorney 'duly sworn and admitted,' at the end of which he would take an oath and be examined by the judges on his fitness and capacity to act before being enrolled. The examination long continued to be 'very perfunctory' but the judges took more seriously the disciplining of miscreant

[28] In this analysis, we rely on the paper commissioned by this Task Force by Professor Philip Girard, entitled "The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities" (August 2006).

> attorneys and solicitors, many of whom were brought to their attention by the Society of Gentlemen Practisers itself.[29] (footnotes omitted)

2.3 It is difficult to say with certainty when the legal profession in England attained independence in the sense in which the term is now used. Consider, for example, the role of defence lawyers in the criminal justice system, where a right to counsel independent of state interests has come to represent a fundamental constitutional right. Before the eighteenth century an accused felon had no right to appear by counsel in England. The first exception was contained in the *Treason Trials Act* of 1696, and only gradually and hesitantly thereafter did the role of defence counsel become established, until the *Prisoners' Counsel Act* of 1836 in England guaranteed every accused the right to appear by counsel. Criminal justice historians have shown how doctrines such as the right to remain silent and the presumption of innocence had little effect at a time when the accused had no one to speak for him or her. Ironically, English barristers had been able to defend those charged with misdemeanours long before they were granted the right to defend those charged with more serious crimes that highlighted the oppositional role of the barrister, and the need for their independence from the state. There is another important lesson to draw from this period of English history, which is that the independence of the Bar has relied, from the outset, on state recognition, which in turn is related to public demand and public needs.

2.4 The other important dynamic in securing the independence of the Bar in England was the parallel process of securing an independent judiciary that took place over this period. This process is often thought to have culminated in the *Act of Settlement* in 1701. However, achieving formal independence was the beginning rather than the end of the story. Philip Girard states that 'the routine deployment of patronage among up-and-coming barristers [was used] to develop a class of court lawyers who were trained in crown service from an early stage in their careers, [and] who became eligible to serve as judges because they were politically "safe".'[30]

2.5 As judges assumed more power in the English legal order, eighteenth-century British governments took a greater interest in judicial appointments and cultivating a group of loyal barristers. The key instruments by which this policy was advanced were the liberal use of the King's Counsel commission and the encouragement of parliamentary service by barristers, both of which became pre-requisites to judicial appointment. The King's Counsel commission was not, at this time, a mere honorific: barristers holding it 'were literally retainers of the Crown and the ministry of the day.'[31] They could not appear against the Crown without first obtaining special license, and hence became unavailable as defence lawyers.[32] Most notably, judges of this period also enjoyed limited security of tenure. Judicial commissions expired on the death of the monarch who appointed them until the *Demise of the Crown Act* 1761, and in that period several superior court judges were purged upon the accession of a new monarch in 1702, 1714, and 1727. The *Act of Settlement* said Parliament had to 'establish judicial salaries,' but well into

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[29] Ibid.

[30] Girard, *supra* note 28, citing Lemmings, 'Independence of the Judiciary' at 127-8.

[31] Lemmings, *Professors of the Law* at 270.

[32] By the middle of the nineteenth century it was said that the licence could not be refused, but it is not clear when the change occurred: 'Right of Queen's Counsel to Defend Prisoners' (1881) Can. L.J. 76, citing an English source of 1863.

the eighteenth centuries, judicial salaries were often paid in arrears, with pensions remaining a matter of "grace" until 1799.

2.6 The emergence of an independent Bar in England is not a story of an increasingly powerful and defiant Bar asserting its will against the State, but rather the story of an evolving relationship between lawyers, judges, the government and the public.

2.7 Independence, as we understand the term, thus came at different times and in different forms to these various branches of the English legal profession. The statute creating the Law Society of Upper Canada in 1797 was the earliest attempt to provide a legislative foundation for self-regulation of the legal profession in the British Empire (including in England itself, where the Bar had no statutory authority). Colonial Bars were typically supervised by the judges of the superior courts and the regulation of attorneys was distinct from that of barristers. The Law Society legislation, however, allowed the Society to promulgate rules for the admission and regulation of 'barristers' as well as attorneys and required both to become members of the Society. From this point forward in Ontario, the values and principles binding on all lawyers would become more significant than the remaining divisions in their practice.

2.8 Explanations for this distinctive Canadian path vary. Christopher Moore, for example, argues that the 1797 Act was an attempt by the tiny local bar 'to pull itself up by its own bootstraps' and in particular to force any immigrant English barristers to join it instead of 'pulling rank' over the locals.[33] As Girard observes, not only did the Bar in Upper Canada enjoy more legitimacy through having its own legislative foundation, it also developed greater independence than its English counterpart:

> Some institutional and economic factors in early Upper Canada and elsewhere in British North America militated in favour of a more independent bar than in England. The new world was not as enamoured of private prosecutions as the old, and relied to a much greater extent on public prosecutions. The law officers of the Crown in Upper Canada from an early date possessed a monopoly on criminal prosecutions at the assizes, which they exercised at first personally, and later by deputies... This more frequent appearance of lawyers for the prosecution may have helped to lessen resistance to the appearance of lawyers for the defence, who appeared fairly regularly even before the enactment of Upper Canada's Felon's Counsel Act, passed in the same year as its English equivalent.[34]

2.9 Lawyers in Upper Canada enjoyed a more positive reputation in the colony as they demonstrated their independence of government on numerous occasions in the pre-Confederation period. During a number of high-profile scandals in the early nineteenth century in Upper Canada, well-known lawyers conducted spirited defences in a number of politically charged trials. Thus, William Warren Baldwin, then Treasurer of the Law Society, appeared in a series of proceedings in the late 1820s arising from the harassment of the clerk of the peace for Saltfleet District, George Rolph. Several magistrates, a sheriff and other leading citizens engaged in a physical attack on him which included tarring and feathering. Another example might be the 'types riot,' in which scions of leading Upper Canadian families, including law clerks of attorney general John Beverley Robinson, destroyed William Lyon Mackenzie's

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[33] Moore, *Law Society* at 30.

[34] Girard, supra note 28.

printing press. Robinson and his solicitor general declined to institute criminal proceedings. When a committee of the Assembly issued a report highly critical of the law officers' actions, Robinson took the unusual step of writing to all the barristers in Upper Canada, seeking their views on the committee's charges. Baldwin did not hesitate to reply that in his opinion, Robinson had been 'derelict in his duty to uphold the Constitution, not just as a Crown officer but as a member of the Law Society.'[35]

2.10 Members of the bar of Upper Canada provided notable assistance to accused persons tried in the wake of the rebellion of 1837. During the first set of nine treason trials held at Kingston before the regular assizes in the summer of 1838, a rising young barrister and future nation-builder named John A. Macdonald, only two years at the bar, secured acquittals or the dropping of charges in every case. Macdonald was lauded by contemporaries for his vigorous defence and Crown counsel was also praised for his 'great integrity and impartiality.'[36]

2.11 The independence of the Bar of Upper Canada was enhanced not only by the character of many of its earliest members but also by the mode of practice that characterized this era as well. Before the 1880s few lawyers practiced with more than one partner, and few had more than a handful of clients. Carol Wilton has suggested that this type of practice may have insulated lawyers in Upper Canada from being dominated by the needs of any particular client or group.[37] It was for this reason that Law Society leaders initially took a dim view of the advent of in-house counsel, the first of whom were employed by railway companies in the 1850s.[38]

(2) A Comparative Perspective

2.12 While a number of factors converged to create the conditions for an independent Bar to take root in Canada generally and Ontario specifically at this early juncture, a comparative review of the challenges faced by lawyers in other parts of the world in establishing and maintaining their independence, particularly from government, reveals both the fragility and the significance of an independent Bar for the rights of the public. This includes, for example, the Bar of Hong Kong, which enjoyed many of the same British colonial vestiges, as did the Bar of Upper Canada.

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[35] Moore, *Law Society,* at 74.

[36] Barry Wright, 'The Kingston and London Courts Martial,' in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials II: Rebellion and Invasion in the Canadas, 1837-1839* (Toronto: University of Toronto Press for the Osgoode Society, 2002) at 135.

[37] Carol Wilton, 'Introduction' to Carol Wilton, ed., *Essays in the History of Canadian Law, vol. VII, Inside the Law: Canadian Law Firms in Historical Perspective* (Toronto: University of Toronto Press for the Osgoode Society, 1996) at 8.

[38] Jamie Benidickson, 'Aemilius Irving: Solicitor to the Great Western Railway, 1855-1872' in Wilton, *Inside the Law*, notes the opposition of the legal periodical press to Irving's appointment, which it characterized as 'meretricious,' 'degrading,' and 'a studied insult to the profession.' Cited in Girard, *supra* note 28, who notes that this stance disappeared in the later nineteenth century with the rise of business corporations and the modern multi-partner law firms that arose to represent them.

2.13 In The *Second Periodic Report on the Hong Kong Special Administrative Region of the People's Republic of China in light of the International Covenant on Civil and Political Rights* the organized Bar in Hong Kong accused the "Central Authorities" under the Basic Law of exercising power in such a way as to corrode "the Rule of Law and the Independence of the Judiciary" (para. 2). The Bar's wide-ranging brief also supported the creation of a "statutory human rights commission" (para. 16), expressed alarm at the clandestine operations of Mainland security personnel in Hong Kong (para. 21), and sought humane treatment of both Hong Kong residents detained on the Mainland and asylum seekers in Hong Kong (paras. 22, 23). It protested the conditions of police cells (para. 27), inadequate protection from domestic violence (para. 30), the inadequacy of an Independent Police Complaints Council with no investigatory powers (para. 31), the absence of laws prohibiting racial discrimination (para. 33) or discrimination on the basis of sexual orientation (para. 34), and the wide-open violations of privacy likely to result from relying on "the undefined expression 'public security' to authorize surveillance or the interception of communications (para. 37). Immigration matters, police searches, Falun Gong and the exchange of information between Hong Kong and Chinese security authorities, constitutional amendment, and elections law were all addressed. In all of this, the Bar assumed the voice of a defender of public interest, and did so in a language intended to reach a wide public. Its cause – the rule of law, integrity of judicial processes, procedural regularity, and compliance with constitutional text and spirit – are themes of broad resonance.

2.14 Hong Kong reflects both the difficulty of sustaining a rule of law culture (even where democratic institutions and independent courts are present) and the crucial role lawyers play in that struggle. The very fact that the Bar could and did submit a report to the international community critical of the government is of course significant. Lawyers elsewhere have been subject to far more serious threat. Lawyers have been persecuted in Uganda, subjected to politically-motivated prosecutions in Kenya and Iran, subjected to travel restrictions, detained, tortured or assassinated in Zimbabwe, India, Thailand and Sri Lanka.[39]

2.15 The fact that lawyers are subject to persecution and prosecution in so many parts of the world is only half the story. Where the independence of the Bar and an independent judiciary do not exist, ordinary citizens become even more vulnerable to the abuses of government authority or other more powerful segments of society. The example of Nazi Germany, referred to in the rationale for this Task Force, represents the most bracing cautionary tale. It is significant that before the reign of Nazi terror could begin, it was first necessary to suspend the powers of democratic institutions and to strip the bench and bar of any meaningful independence from the state.[40]

2.16 Even where an independent Bar is present, there is good reason not to be complacent about its stature with government or the public. A lack of public confidence in self-regulatory institutions, for example, were cited in both the Australian jurisdictions that moved from self-regulation to co-regulation of the legal profession and in the U.K., that has just instituted a co-

[39] Sources for these abuses are detailed in Pue, *supra* note 22.

[40] See Christian Joerges & Navraj Singh Ghaleigh, ed., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Oxford: Hart Publishing, 2003).

regulation framework with a government-created Legal Services Board.[41] When the additional governmental role in legal regulation was announced in these jurisdictions, very little public opposition (or even public commentary) ensued.

2.17 As stated above, the purpose of this Task Force is to inquire into the relationship between public protection and an independent Bar. If there is an overarching lesson to be learned by looking to the origins of an independent Bar in Ontario and viewing the independence of the Bar in comparative perspective, it is that where public confidence in the Bar erodes or fails to be established, the Bar cannot effectively defend the rule of law or protect those enmeshed in the legal system. It is therefore vital to understand the public's perception of the role of lawyers both in relation to the rule of law and protecting the public.

Section Three: The Independence of the Bar and the Public

3.1 At the outset, the aim of this Task Force was described as to better understand the relationship between the independence of the Bar and the protection of the public. The independence of the Bar, in this sense, is not a web of rights and entitlements enjoyed by lawyers but rather a series of duties and obligations owed by lawyers to clients and to the public interest and by other legal and political institutions to the Bar to protect those duties and obligations.

3.2 It is difficult, however, to determine the public's understanding and appreciation of the independence of the Bar, or its perception of lawyers in relation to the rule of law more generally. As Angela Fernandez notes in her paper "Limitations on the Use of Opinion Polls in Assessing the Public Image of Lawyers", there are good reasons to mistrust the usual measures of the public's view (polls, surveys, etc). For example, people often express negative views about the legal profession, but express satisfaction with *their* lawyer or lawyers who have touched *their* life. A 2002 American Bar Association survey of 300 households, for example, found that 76% of consumers who have hired a lawyer in the past five years were either very satisfied (58%) or somewhat satisfied (18%) with the lawyer.[42]

3.3 While the overall public appreciation for the independence of the Bar is difficult to quantify, it is clear that many people who do not have personal experience with a lawyer form what are, in the main, negative views, through the media and popular culture. One study involving first year law students in various countries (Argentina, Australia, England, Germany, Scotland, and the United States) concluded that a significant number of students in each

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[41] On the report which led to this initiative, see Sir David Clementi, (2004, December) Review of the Regulatory Framework for Legal Services in England and Wales http://www.legal-services-review.org.uk/content/report/report-chap.pdf (Accessed August 15, 2006). For a representative sample of the Australian approach, see New South Wales Law Reform Commission, (1993) Report on Scrutiny Legal Profession (Syndey: Law Reform Commission of NSW) (http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R70EXEC) (Accessed August 27, 2006).

[42] See American Bar Association, "Public Perceptions of Lawyers: Consumer Research Findings" (April 2002), 19 (placing these results next to similar levels of satisfaction from 1998). Available at http://www.abanet.org/litigation/lawyers/publicperceptions.pdf (accessed August 28, 2006).

country derived much of their overall negative impression of lawyers from news, television, and film.[43] Much of this negative view stems from exposure to lawyers who put their own interests (or, in some cases, their client's interests) ahead of the public interest. The three primary negative findings in the 2002 ABA survey were: (i) lawyers are viewed as greedy, manipulative, and corrupt; (ii) lawyers have too many connections to politics, the judiciary, government, big business, and law enforcement; and (iii) lawyers do a poor job of policing themselves.[44] The Bar is viewed in that survey "as an 'Old Boys Network,' more similar to a union or club than a professional association."[45] Overall, "the legal profession is among the least reputed institutions in American society," ranking only above the media in terms of consumer confidence.[46] Of course, there is reason to doubt American surveys present an accurate picture of Canadian public opinion, but Canadians are exposed to many of the same media and cultural portrayals shaping American public opinion.

3.4 This issue of public perception is crucial, as it often provides a basis for politicians and policy-makers to seek to curb core independence protections (for example, lawyer-client confidentiality) in pursuit of public ends such as crime control or national security. Media attention, of course, can also have a salutary effect on the perception of lawyers. In the US, for instance, large-scale *pro-bono* work done on behalf of 9-11 victims' families is cited as having the potential to increase confidence in the Bar.[47]

3.5 While it is important to pay attention to media and cultural representations of lawyers, good publicity cannot be a sustainable foundation for an independent Bar. The key to greater public understanding of the independence of the Bar and its importance to securing the rule of law and the protection of the public is education. In this vein, it is interesting to note the recent recommendations of the Panel on Justice and the Media, established by the Ontario Attorney General.[48] One of the Panel's recommendations is to work with the Ontario Justice Education Network (OJEN) to enhance public education materials on the justice system and this clearly will have benefits for public understanding of the role of lawyers in the justice system as well

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[43] Michael Asimow, Steve Greenfield, Guillermo Jorge, Stefan Machura, Guy Osborn, Peter Robson, Cassandra Sharp, and Robert Sockloskie, "Perceptions of Lawyers: A Transnational Study of Student Views on the Image of Law and Lawyers," 12 *International Journal of the Legal Profession* (2005): 407-36.

[44] See ibid., 4, 7-10. See Amy E. Black & Stanley Rothman, "Shall we Kill all the Lawyers First?: Insider and Outsider Views of the Legal Profession," 21 *Harvard Journal of Law and Public Policy* (1998): 848.

[45] ABA, "Public Perceptions of Lawyers (2002)," 10

[46] ABA, "Public Perceptions of Lawyers (2002)," 6.

[47] See ibid., 29-31, 31 ("[L]arge-scale pro-bono work done on behalf of victims' families has the potential to ameliorate some of the negativity generated by lawsuits, assuming that consumers are made aware of these public service activities").

[48] For the report of the Panel, see http://www.paneljusticeandmedia.jus.gov.on.ca/pjm/en/.

(this Task Force encourages the Law Society to work with OJEN to develop curricular materials to expose students to the importance of the independence of the Bar).[49]

3.6 In light of the observation in the second section, that the right of the public to an independent Bar is closely related to the right of the public to an independent judiciary, it is important to ensure these concepts are linked in education and other materials used for public dialogue.

3.7 While it is important to learn more about the public perception in Canada of lawyers generally, and of the independence of the Bar specifically, the need to better communicate the role of an independent Bar in protecting the public is apparent. Just as an independent judiciary is not self-executing, and depends on independent lawyers to maintain the rule of law, so the independence of the Bar amounts to little more than a slogan if it is not backed up by public understanding and public support. That understanding and support is put to the test most when the independence of the Bar appears to be in conflict with policy objectives that are themselves intended to protect the public. Two such situations will be discussed below.

Section Four: Applying the Independence of the Bar

4.1 The independence of the Bar thus is a well-recognized but fragile element of public protection. It is at its most fragile when other priorities appear more important to the public interest in particular circumstances. Recently, national security and the threat of terrorism have emerged as priorities that have been portrayed as being at odds with the independence of the Bar. This has led to at least two specific disputes that will be explored in this section: (1) the right to effective representation in cases involving security certificates; and (2) the right to solicitor-client confidentiality in the context of corporate governance and money laundering.

4.2 As the discussion below demonstrates, in each case, the independence of the Bar complements rather than impedes achieving the policy goals at issue. This discussion also provides an opportunity to see the core features of an independent Bar – namely, solicitor-client confidentiality and privilege in solicitor-client communications – in context. The two cases also demonstrate that issues of independence arise quite differently for barristers and for solicitors but that the rule of law and protection for the public are at stake in both settings.

(1) Right to Effective Representation and National Security

4.3 As noted in section two in the discussion of the origins of the independence of the Bar, the lynchpin for an independent Bar is the right of individuals who are enmeshed in the legal system to be represented by counsel. The foundation of representation is solicitor-client confidentiality and the privilege that arises in solicitor-client communications. The Supreme Court of Canada, prior to the enactment of the Charter, characterized the principle of solicitor and client confidentiality as a broad substantive right that is enforceable in any circumstances where it is threatened and not just in court or tribunal proceedings where one party seeks to compel evidence of the communication.[50] In Solosky, Dickson J., as he then was, stated, “the

[49] The Panel also recommended the creation of a Justice & Media Liaison Committee in Ontario to provide for ongoing dialogue between the media and the courts. Among the members of this new body would be representatives of “legal organizations.”

[50] *Solosky v. the Queen* (1979), 50 C.C.C. (2d) 495 (S.C.C.).

right to communicate in confidence with one's legal adviser is a fundamental civil and legal right."[51] [52]

4.4 This right to confidence in the privacy of solicitor-client communications promotes a number of values including candour, effective provision of legal advice, access to justice, personal autonomy and control over the dissemination of personal information, and the principles of devotion to the client's cause and loyalty and trust between solicitor and client that are essential to the proper workings of the adversarial system.[53] However, the unique feature of solicitor and client confidentiality, from a legal policy perspective, is that it is not merely a private right of the individual litigant, but that is also serves broad public interest functions within the justice system as a whole.[54] The Supreme Court of Canada has repeatedly emphasized this point, as discussed above, describing the right as "central to the administration of justice in an adversarial system" and as "a principle of fundamental importance to the administration of justice."[55]

4.5 Notwithstanding the view that solicitor-client confidentiality and privilege represent fundamental rights, the Supreme Court has affirmed on a number of occasions that they are not absolute rights. In particular, the Court recognized an exception to this right where there was "an imminent risk of serious bodily harm or death to an identifiable person or group." Cory J., who wrote the majority judgment in *Smith v. Jones*, also hinted at the future development of an analogous exception in cases involving "national security."[56] In *McClure,* the Court recognized another exception to solicitor and client privilege in cases where the communication is "likely to raise a reasonable doubt as to the guilt of the accused." This so-called "full answer and defence" exception only applies as a last resort, that is, in circumstances of necessity where a criminal accused "is otherwise unable to raise a reasonable doubt as to his guilt in any other way."[57]

4.6 These limits on solicitor-client confidentiality and privilege are significant and highlight a delicate balance between the rights of those who seek counsel and the rights of those in legal or physical jeopardy. These exceptions to the rule, however, do not imperil a person's right to

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[51] Ibid. at 510.

[52] (August 2006) This paper was prepared for the Task Force.

[53] See, for example, *General Accident Assurance Co. et al. v. Chrusz et al.* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.) per Doherty J.A.

[54] Michael Code and Kent Roach, "The Independence of the Bar and the Public Interest: The Scope of Privilege and Confidentiality in the Context of National Security" (August 2006) This paper was prepared for the Task Force.

[55] Per. Arbour J. in *Lavallee*, *supra* note 8 at 37 and per. Cory J. in *Smith v. Jones* (1999), 132 C.C.C. (3d) 225 at 241 (S.C.C.). Most recently, in *Blank v. Canada (Minister of Justice)* 2006 S.C.C. 39 at para. 26, Fish J. stated that the "confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice."

[56] *Supra* note 11 at 242.

[57] R. v. McClure [2001] 1 S.C.R. 445 335-36.

effective representation by counsel. That right is at stake in the recent controversy involving Canada's procedure for issuing and sustaining security certificates against non-citizens who are viewed by the government as being a danger to national security. This issue is currently before the Supreme Court.[58]

4.7 The legislative framework giving rise to our current security certificate system is relatively simple. The procedure was recently modified when the Immigration and *Refugee Protection Act*,[59] or I.R.P.A., was passed in 2001. It authorizes the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to "sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security ... and refer it to the Federal Court". A designated judge of the Federal Court must then "determine whether the certificate is reasonable" on the basis of "the information and evidence available". If the judge determines that the certificate is "reasonable," the decision becomes "final and may not be appealed or judicially reviewed" and in turn, the certificate becomes "conclusive proof" of inadmissibility to Canada and operates as a non-appeal-able "removal order," without the necessity of an admissibility hearing.

4.8 The judge assessing the reasonableness of the certificate hears the Government's evidence in support of the certificate *ex parte* and *in camera* if "its disclosure would be injurious to national security." Persons named in the certificate are provided with "a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate." However, where the evidence is secret, it may not be shared with the affected party but still may be relied upon by the judge. The effect of the security certificate legislative scheme is that part or all of the Government's case in support of the security certificate is never heard or responded to by the person named and his/her counsel. This essentially allows the Government to advance its case in secret, without any adversarial testing of the evidence or response to the evidence by the person affected and his/her counsel.

4.9 The core aspect of the adversarial system from which the security certificate scheme derogates is "the right to meet the case." This compendious term, used in civil, criminal and administrative law, refers to the litigant's entitlement to hear the evidence put against him/her and to challenge that evidence by way of cross-examination and/or rebutting evidence. While this is a fundamental individual right, it also engages the role of effective representation in preserving the independence of the judiciary and the rule of law. In this sense judges cannot apply the rule of law unless they are independent of both the government and the parties, and this requires effective and independent representation of parties that come before the Court. In other words, just as the rule of law cannot be implemented without an independent judiciary, an independent judiciary cannot exist without counsel to assume the adversarial role necessary to test the evidence upon which the judge will decide the case. In the security certificate context, the lawyer and client are cast in a passive role where they neither hear the evidence, discuss it in confidence, investigate it, nor respond to it at the hearing.

4.10 While Federal Court judges are obliged to fulfill their statutory mandate, they have openly expressed unease with the position in which this scheme places them. One judge expressed his concern in the following terms:

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[58] *Charkoui v. Canada* (*M.C.I.*), File Number 30762; *Almrei v. Canada* (*M.C.I.*), File Number 30929; *Harkat v. Canada* (*M.C.I.*), File Number 31178.

[59] S.C. 2001, c. 27.

> This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function. Often, when I speak in public I make the customary disavowal that I am not speaking for the Court and I am not speaking for my colleagues but I am speaking only for myself. I make no such disavowal this afternoon. I can tell you because we talked about it, we hate it... We do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party ... If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that... we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us.[60]

4.11 It is not for the Court or for the Bar to dictate to government how best to achieve the very significant policy ends that will sometimes impinge on solicitor-client relationships. However, where there is a means of achieving those ends while preserving the integrity and independence of solicitor-client relationships, this alternative clearly must be preferred. In the context of security certificates, for example, the policy end involves both public safety and preserving the secrecy of documents relating to national security, and in some cases obtained through other governments with the promise of confidentiality.

4.12 There are alternative means of achieving the policy ends in the security certificate context. For example, in the U.K. ,"special advocates" receive special security clearances before being permitted to act for individuals in analogous circumstances to those under Canadian security certificates. Another alternative in the *Canada Evidence Act* is a provision of which requires the Court to balance "the public interest in disclosure" against the competing "public interest in non-disclosure" due to national security concerns. The Court must then determine whether one interest "outweighs" the other in importance in the particular context of the case. These statutory provisions also allow the Court to limit the extent of disclosure by imposing "any conditions that the judge considers appropriate." While this Task Force expresses no view on the outcome of the current litigation before the Supreme Court, the principle we do wish to advance is that the independence of the Bar is not an obstacle to the realization of public policy goals – it is a complement to such goals. Again, to take the example of security certificates, the policy ends at issue would clearly be frustrated either by the certificate being sustained in error or being sustained in circumstances that are unfair to the affected person. Providing effective representation ensures the certificates are reviewed in a fashion which addresses these twin hazards.

(2) Solicitor-Client Confidentiality in the Context of Corporate Governance and Money Laundering

4.13 The second example of applying the independence of the Bar in context involves the recent controversy over the impact on solicitor-client confidentiality in the corporate context. In part, this renewed scrutiny has been influenced by high-profile corporate scandals involving

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[60] The Honourable James K. Hugessen "Remarks" in David Daubney et al eds. *Terrorism, Law and Democracy: How is Canada Changing After September 11?* (Montreal: Yvon Blais. 2002) at 384-385.

Enron, Worldcom and Tyco.[61] The U.S. Congress responded to these events by enacting the *Sarbanes-Oxley Act* of 2002 and the United States Securities and Exchange Commission (SEC) developed standards of professional conduct for attorneys. These measures sought to recast lawyers as "gatekeepers" for the enforcement of regulatory standards against corporate conduct and raised the extent to which lawyers can maintain their independence both against corporate management and state regulators.

4.14 Independence has been one of the overarching themes in corporate governance for a number of years – and in particular in the last five years. Most often independence means independence from management. Independence of the board from management means more effective oversight of management. Independence of the external auditor means greater integrity in audit opinion delivered to shareholders. Independence of the internal auditor from management means more reliable review [62]of management processes.

4.15 The independence of certain relationships is protected by statute. Changing auditors requires extensive public disclosure under securities laws and most corporate statutes provide the auditor to communicate directly with shareholders if they are being removed or replaced. Members of the board also have the right to communicate directly with shareholders if they are being removed or replaced. As a result, these changes are made in a transparent manner and the auditor or the director are empowered to share with the party they were appointed to serve (the shareholders) any concerns they have about the reason that they are being removed or replaced.

4.16 Under most corporate statutes, only the full board may remove a chief executive officer from office (or appoint a chief executive officer). Accordingly, the full board is in a position to vet the quality (ethical and otherwise) of the CEO and to have a voice in his or her termination. Under Ontario's corporate statute, the same applies to the removal (or appointment) of the chief financial officer. Current governance practices also protect the internal auditor. There is now general acceptance of the practice of having the internal auditor report directly to the audit committee (and hired and fired with the participation of the audit committee). As a result, the internal auditor need not fear reprisals from senior management for reports on deficiencies in processes or controls.

4.17 There are no provisions in the corporate statutes or in securities laws dealing with the appointment or removal from office of the corporation's outside counsel or its in-house counsel. The result is that counsel can be removed by the chief executive officer (and often by some other member of management) without any member of the board being consulted. Public disclosure may follow for public companies (in the case of in-house counsel) – but not always. Moreover, counsel seldom has any formal reporting relationship (and therefore access) to the board. While he or she may request an in camera session with the board, a committee or the chairman, there is seldom any regularized communication of this nature as is afforded to the external auditor and now the internal auditor.

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[61] For a discussion of these scandals and how they have influenced the direction of the regulation of lawyers in Canada, see Paul D. Paton, "Corporate Counsel and Corporate Conscience: Ethics and Integrity in the Post-Enron Era," (2006) Canadian Bar Review (Special Edition on Ethics) [in press] 'Paton'.

[62]

4.18 Counsel not only are vulnerable to pressure from corporate management, they also may be vulnerable to government action, as noted above. While rules have been adopted dealing with a lawyer's reporting obligations in settings of possible corporate wrongdoing,[63] the most significant threat to the independence of the Bar has occurred in the context of legislation aimed at countering money laundering.

4.19 The *Proceeds of Crime (Money-Laundering) Act*,[64] required lawyers and others such as accountants, insurance companies, casinos, securities dealers, realtors, banks and other institutions taking deposits, to report any transactions that exceeded $10,000 in cash, international transfers that exceeded $10,000, as well as "suspicious transactions", to the Financial Transactions and Reports Analysis Centre of Canada, (FINTRAC). A clear implication of the Act is to legislate a breach of solicitor-client privilege; a principle that is recognized as a tenet of responsibility and independence of the profession. The matter is made more complicated when considered in light of the fact that if members of the profession are expected to serve a proactive role in advancing the rule of law, a legitimate question is raised with regard to how to negotiate that function with the role of in house counsel as employee and lawyer.

4.20 The legal profession viewed the provisions of the legislation and proposed regulations that affected legal counsel as infringing on solicitor-client confidentiality and the professional independence of Canadian lawyers. In particular, if a transaction were subject to the reporting requirements of the legislation, a lawyer would be required to report a client's name, address and occupation and the source of the client's funds. Further, the lawyer would be prohibited from disclosing to the client that such a report had been made, and would be subject to serious criminal penalties for violating the new rules. The legislation also included powers to search a lawyer's office without a warrant and to copy records.

4.21 The legal profession's response to the proposed scheme was vigorous and led to several lawsuits. A Working Group of the Law Society of British Columbia established in response to concerns about the legislation, reflected the prevailing view of the profession in the following terms:

> [A] statutory requirement for disclosure will substantially and unreasonably infringe on the confidentiality of the solicitor-client relationship and the independence of legal counsel, will put the interests of lawyers in conflict with those of their clients and will place them in breach of long-established legal, professional and ethical duties owed to the client."[65]

4.22 CBA President Eugene Meehan, in response to the proposed scheme, observed that "Uncertainty in the integrity of the privilege or confidentiality will create uncertainty in and

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[63] Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2004) at Rule 2.02 (5.1) and (5.2), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/rule_amends_march2504.pdf>.

[64] *Proceeds of Crime (Money-Laundering) and Terrorist Financing Act* S.C 2000, c. 17.

[65] Law Society of British Columbia, "Proceeds of Crime Working Group calls for changes to money laundering legislation," Benchers Bulletin, (May-June 2001), online:<http://www.lawsociety.bc.ca/publications_forms/bulletin/2000-01/01-06-01_BillC22.html>

undermine the solicitor-client relationship…"[66] The CBA's April 2000 submission to the House of Commons Standing Committee on Finance on the proposed legislation urged Parliament to oppose conscripting lawyers as instruments of state enforcement, arguing that the "social cost of conscripting the legal profession into the role of state investigators against their own clients is profound." Before the Senate Committee on Banking Trade & Commerce, Meehan acknowledged that there was a balancing to be done, but was clear that the "possible beneficial effects of the bill are outweighed by its predictable deleterious effects."

4.23 The legislation was enacted notwithstanding these concerns. On the day the legislation's application to lawyers became law, the Law Society of British Columbia and the Federation of Law Societies of Canada, on behalf of provincial and territorial law societies, brought applications in British Columbia for declarations that certain provisions of the Act were unconstitutional and of no force or effect to the extent that they applied to legal counsel.[67] In a November 2001 decision, the British Columbia Supreme Court granted an interlocutory injunction relieving lawyers of the reporting requirements; courts in Alberta, Ontario, Saskatchewan and Nova Scotia followed suit. In May 2002, the Attorney General reached an agreement with the Petitioners to exempt all Canadian lawyers and Quebec notaries from application of the Act until the constitutional challenge was heard in BC Supreme Court and the Court had decided the case on the merits.

4.24 On April 15, 2003, the BC Supreme Court ordered the adjournment of the constitutional challenge on consent until November 1, 2004.[68] The adjournment followed the decision by the federal government on March 20, 2003 to repeal several regulations subjecting Canadian lawyers to the *Act* [69]. In June 2004, the hearing set for November 1, 2004 was adjourned to October 31, 2005.

4.25 Finally, on May 13, 2005, the BC Supreme Court adjourned the matter *sine die* on the following conditions:

1. That if a new set of regulations affecting legal counsel is enacted pursuant to the Proceeds of Crime Act by the Federal Government without the consent of the Federation, that the coming into force of those regulations would be deferred in accordance with the May 2002 Agreement between the Federation and the Attorney General of Canada;

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[66] Quoted in Ibid.

[67] *Federation of Law Societies of Canada v. Canada (Attorney General*), [2001] B.C.J. No. 2420 (November 20, 2001) (BCSC); *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2001] A.J. No. 1697 (December 12, 2001) (Alta. Q.B.); *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002) 57 O.R. 3d(383), [2002] O.J. No. 17, (S.C.J.) (January 9, 2002); *Federation of Law Societies of Canada v. Canada (Attorney General*), [2002] S.J. No. 200 (April 15, 2002) (Sask. Q.B.);

[68] See Federation of Law Societies of Canada, "Money-Laundering Chronology of Events," (May 2005) online:< http://www.flsc.ca/en/pdf/ml_chronology.pdf>.

[69] See Canada Gazette, Vol. 137, No. 2, March 25, 2003, online:<http://www.flsc.ca/en/pdf/ml_SDR2003-102.pdf>

2. That the Attorney General of Canada agree to interlocutory injunctions exempting legal counsel and legal firms from the application of the Act and its Regulations should it become necessary to maintain the status quo at any stage of the proceedings: and

3. That the Federation and the Attorney General have an unrestricted right to re-set the petition for hearing.[70]

4.26 Thus, the substantive question of the constitutionality of the provisions has never been conclusively decided. The federal Justice Minister reiterated in August 2006 that the question of lawyer obligations in respect of money laundering is not closed.[71]

4.27 The money laundering litigation is significant because it reflects the difficulties the Bar may have in informing the public of the rationale for its positions. The Courts themselves were clearly troubled by the adversarial position of the Bar opposing the government's attempt to curb money laundering. Justice Watson of the Alberta Court of Queen's Bench, for example, noted that "manifestly important and even definitive social values in Canada" and that the matter at hand "is of considerable importance to the social order of Canada and also, though, to Canada's obligations as a nation on the planet." The public interest in controlling money laundering and for Canada to participate in the international effort to prevent terrorist activity, a concern heightened by recent events, was said to be "overwhelming and obvious."[72]

4.28 As in the case of security certificates, the question in the context of money laundering is whether solicitor-client confidentiality and the duty of loyalty need necessarily be juxtaposed with the legitimate public interest in curbing money-laundering. In the Nova Scotia litigation, Chief Justice Kennedy observed,

> The functions of legal counsel are at the heart of the constitutionally protected principles of fundamental justice. The rule of law, the right to counsel, the right to remain silent, the privilege against self-incrimination and the right to a fair trial. That's why, these are the reasons why, these are the principles that the applicants say they are trying to protect. That is the public interest. That is the broad public interest that they say they represent. The proper functions of legal counsel sustain and allow for the constitutionality, the entrenched principles that are so significant to the maintenance of the rule of law.[73]

4.29 In the end, what remains from the money laundering litigation is a series of signals from judges about their obvious discomfort with the transformation of the traditional role of lawyer as client advocate and representative into potential informant, and the consequent transformation

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[70] Ibid. The Order of the Supreme Court of British Columbia is found online:<http://www.flsc.ca/en/pdf/ml_13May05.pdf

[71] The Hon. Vic Toews, Minister of Justice, speaking at the Canadian Bar Association Annual Meeting, St. John's Newfoundland, August 14, 2006, cited in Paton, *supra* note 62.

[72] *Federation of Law Societies of Canada v. Canada (Attorney General*) [2002] N.S.J. No. 199 (N.S.S.C.) at para 67.

[73] *Federation of Law Societies of Canada v. Canada (Attorney General)* [2002] N.S.J. No. 199 (N.S.S.C.) at paras 76-77.

of the relationship between lawyer and client itself, and yet a sense that broader public interest concerns in an age of terrorism suggest this debate is just beginning. As Paul Paton concludes,

> The legislation and the willingness of the Attorney General of Canada to defend a public interest concern it found "obvious and overwhelming" over concerns about the sanctity of the solicitor-client relationship is profound. Given that the government has signaled that the issue is not closed, the legal profession should be prepared to re-engage the discussion. In so doing, a simple assertion of the sanctity of the relationship will not be enough; instead, framing privilege and confidentiality as synonymous with the public interest rather than something to be juxtaposed against it, will at least give judges and elected officials reason for pause.[74]

4.30 Law societies have not responded to the money laundering legislation by litigation alone, but have also taken steps to address the government's policy concerns through means consistent with an independent Bar. For example, the Law Society of Upper Canada in January 2005 amended Rule 2.02(5) of the Rules of Professional Conduct, adding commentary on lawyers' responsibilities when their suspicions are raised about the legality of a transaction for which the lawyer receives instructions[75] , and changes to By-Laws 18 and 19 to institute new record-keeping provisions with respect to receipt of cash[76] and a prohibition on receipt of cash in an aggregate amount of $7500 or more in respect of any one-client file[77] , all based on a Federation of Law Societies Model Rule.

4.31 The money-laundering cases serve as a cautionary tale as to the willingness of elected officials to challenge traditional roles and rules relating to the legal profession in favour of the broader public interest, and to take initiatives to legislate in areas the profession has considered part of its core values (i.e. solicitor-client confidentiality).

4.32 The security certificate and the money laundering examples also demonstrate that the Bar remains both vigilant against government incursions against its independence and open to responding to legitimate government policy interests through alternative means. The independence of the Bar, understood as a right enjoyed by the public and as a mechanism for maintaining and defending the rule of law, will sometimes come into conflict with governmental preferences and expressions of the public interest. When such conflict occurs, it is undesirable to see the issue in terms of which could or should trump the other, achieving government policy priorities or preserving the independence of the Bar. Rather, wherever possible, the two must be reconciled. The rule of law may come to mean different things in different settings but it will

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[74] Paul Paton, "The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?" (August 2006) Paper prepared for this Task Force.

[75] Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.02(5) (Commentary); see also Practice Pro, "Obligations Placed on Ontario Lawyers by Anti-Money Laundering Legislation and Amended LSUC Rule of Professional Conduct and By-Laws" online:http://www.practicepro.ca/practice/mlguide.asp; also Law Society of Upper Canada, Report of the Professional Regulation Committee to Convocation, January 27, 2005

[76] Law Society of Upper Canada, By-Law 18, Section 2 and Section 2.1

[77] Law Society of Upper Canada, By-Law 19, Section 1.1-1.4

always represent a check on the scope of possible government action. As the Supreme Court has observed, "the rule of law is a highly textured expression."[78] At the end of the day, it is an independent Bar which most often provides both the texture and the expression.

Section Five: Conclusions

5.1 The future challenges facing the Bar are significant and to some extent uncertain. The regulation of paralegals by the Law Society of Upper Canada may lead to new questions about the role of other participants in the justice sector.

5.2 The analysis set out in this report suggests that complacency should not be an option. While the need for an independent Bar arguably has never been greater, the fragility of this ideal, particularly when faced with urgent public policy priorities, is apparent. What can be done?

5.3 This Report does not emerge in a vacuum. The decision to launch this Task Force, the Federation of Law Society's intervention in the money laundering and security certificate litigation, and other proactive initiatives demonstrate the commitment of the profession generally and many committed lawyers individually to the values of an independent Bar. Preserving and promoting the commitment of the legal community to an independent Bar is vitally important. Because the purpose of an independent Bar is to protect the public, however, it is also critical that the public be more fully engaged in this issue.

5.4 This Task Force has sought to contribute to this public discussion in order to 1) reinforce and renew the commitment of the profession to the ideals of protecting the public through an independent Bar, and 2) deepen the understanding and engagement of the public with this issue. The independence of the Bar is a dynamic rather than static right – it takes its strength from the public's enduring commitment to a society governed by the rule of law and the vigilance of lawyers in defending the rule of law.

Appendix "A" The Rationale for This Task Force

In the background document prepared for the Law Society's consideration of the Task Force at Convocation in November of 2005, the rationale for the Task Force was set out in the following terms:

> There is no current comprehensive statement of the reasons why an independent Bar is a necessary corollary to the rule of law. Lawyers reflexively adopt the concept as a fundamental principle, but do not often articulate the reason for it. The Task Force, through its Report, must explain to legislatures, the executive, the judiciary, and the public, all of whom are the stakeholders in the rule of law, why an independent Bar is essential.
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> Canada has a Constitution which is similar in Principle to that of the United Kingdom.: *Constitution Act, 1867* (preamble); see also the preamble to the *Charter of Rights*, which explicitly describes Canada as being founded upon principles that recognize ... the rule of law.

[78] See *Secession Reference*, *supra* note 7

As stated by the Supreme Court of Canada in the Secession Reference [1997] 2. S.C.R. 217:

> In our constitutional tradition, legality and legitimacy are linked. Speaking directly about the rule of law, the Supreme Court in the *Secession Reference* quoted its earlier decision in the *Manitoba Language Rights Reference* [1985] 1 S.C.R. 721 at 750:
>
> > the principle [of the rule of law] is clearly implicit in the very nature of a Constitution.

The Supreme Court said as well in the Secession Reference:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis* [1959] S.C.R. 121 at 142 is a fundamental postulate of our constitutional structure. As we noted in the *Patriation Reference* [1981] 1 S.C.R. 753 at 805-6, the rule of law is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its most basic level, the rule of law vouchsafes to the citizens and residents of a county a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.
>
> ...
>
> In the *Manitoba Language Rights Reference*, supra, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained at p. 749, that the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principal of normative order. It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference*, supra, at para. 10, that the exercise of all public power must find its ultimate source in a legal rule. Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance. (emphasis added)

The difficulty is that the rule of law is not self-executing. It depends upon an independent judiciary which, like the rule of law itself, is an unwritten principle of Canadian constitutional law. As stated by Chief Justice Lamer for the majority of the Supreme Court of Canada in *Reference re: Remuneration of Judges* (P.E.I.) [1998] 3. S.C.R. 3:

> ... I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitutional Acts. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867. The specific provisions of the Constitution Acts, 1867 to 1982, merely elaborate that principle in the institutional apparatus which they

> create or contemplate: *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306, per Rand J. (emphasis added)

An independent judiciary, however, cannot function in a vacuum. There is an interdependent relationship between the judiciary and the Bar. Because the judiciary must be impartial, it cannot initiate cases. To do so would be to take sides. The courts must thus await cases brought by counsel. Without independent counsel, it is fair to say that cases like *Roncarelli v. Duplessis,* supra, and *Switzman v. Elbling*, supra, would never have been brought.

That is why Shakespeare explained in King Henry The Sixth, Part II that the first step to an effective dictatorship is to kill all the lawyers. It also explains why one of Hitler's first steps in taking control of the Third Reich was to abolish an independent judiciary and Bar.

Further, because judges must be impartial, they cannot lead evidence, cross-examine, or make argument. They must remain above the fray. It is therefore left to counsel to pursue the development and presentation of the case without fear of penal sanction. Without independent counsel to do that, the rule of law could not function.

As stated by McKinnon J. in *Labelle v. Law Society of Upper Canada* (2001), 52 O.R. (3d) 398 at 408 (Ont. S.C.J.):

> An independent bar is essential to the maintenance of an independent judiciary. Just as the independence of the courts is beyond question (see *Valente* v. R., [1985] 2 S.C.R. 673; 14 O.A.C. 79), so the independence of the bar must be beyond question. The lawyers of the independent bar have been the constant source of the judges who comprise the independent judiciary in English common law history. The habit of independence is nurtured by the bar. An independent judiciary without an independent bar would be akin to having a frame without a picture.

The role of the legal profession was also articulated by McIntyre J. in *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 187-8:

> It is incontestable that the legal profession plays a very significant, in fact, a fundamentally important role in the administration of justice, both in the criminal and the civil law. ... I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. ... By any standard, these powers and duties [of independent counsel] are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.
> See generally *Law Society of British Columbia v. A.G. Can* (2001), 207 O.L.R. (4th) 705 at 724-730 (B.C.S.C.); affirmed (2002), 207 D.L.R. (4th) 736 (B.C.C.A.)

The foregoing principle of an independent Bar is not controversial at the level of broad principle. However, as is often the case, the devil is in the details. There have been significant incursions into specific areas of the independence of the Bar by state actors, including the courts themselves, which, if left unchecked, threaten the rule of law itself.

Several examples will suffice.

First, an independent Bar means, at the very least, that a lawyer stands between the individual and the state. Yet both corporate governance and anti-terrorism legislation in Canada require lawyers to inform on their clients on pain of penal sanctions. Effectively, the lawyer is conscripted by the state as a foot soldier.

Second, counsel cannot provide truly independent advice if his client cannot candidly describe the problem. Lawyer-client confidentiality is thus critical to insure a fair process in implementing the rule of law. As stated by Allan J. in *Law Society of British Columbia,* supra at 725-6:

> [64] In *Descoteaux v. Mierzwinski,* [1982] 1 S.C.R. 860 at p. 875, 70 C.C.C. (2d) 385, 141 D.L.R. (3d) 590, Lamer J. found that solicitor-client confidentiality was a substantive rule of law. In Canada (Attorney General) v. Law Society of British Columbia, supra, the Supreme Court recognized that an independent bar was a cornerstone of a democratic society and that the bar must be free from government regulation. In *Pearlman v. Manitoba Law Society Judicial Committee,* [1991] 2 S.C.R. 869 at p. 887, 84 D.L.R. (4th) 105 Iacobucci J., finding that the self-governing status of the legal profession was created in the public interest, endorsed the conclusions of the Ontario Report of the Professional Organizations Committee (1980):

The authors noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:

> Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decision, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.

In the recent decision of *Mangat,* supra, the Supreme Court re-affirmed the value of an independent bar and the critical role if plays in the proper administration of justice. Gonthier J., for the Court, acknowledged that solicitor-client confidentiality is a principle of fundamental justice. (emphasis added)

However, aspects of lawyer-client privilege have been significantly attenuated by both legislation and judicial decisions in the last five years. This must be reviewed, and its impact on the independence of the Bar and the rule of law must be assessed by the Task Force.

By way of a third example, under the *Immigration Act*, a foreign national considered a terrorist threat by Canadian security agencies can be detained without charge and without disclosure to him of the reasons for the detention. It is true that a Federal Court judge must review the detention, but the detainee cannot defend himself because the underlying evidence is kept confidential from him. That evidence is led *ex parte* before the judge by Crown counsel alone. No special advocate is appointed to receive disclosure of the evidence, to challenge it, or to make contrary submissions. The consequence is to force the Courts to decided case involving an individual's liberty with

only the Crown's side of the case being effectively presented. That process is inimical to the rule of law and the independence of the judiciary.

For these reasons, it is important that the Task Force report on an urgent basis about the interdependence of the rule of law and the independence of the Bar, and the need to resist incursions into that independence."

APPENDIX 2

TASK FORCE ON THE RULE OF LAW &
THE INDEPENDENCE OF THE BAR

COMMISSIONED PAPERS

1. Patrick J. Monahan, Osgoode Hall Law School: The *Independence of the Bar as a Constitutional Principle in Canada*

2. Angela Fernandez, University of Toronto: *Polling and Popular Culture (News, Television, and Film): Limitations of the Use of Opinion Polls in Assessing the Public Image of Lawyers*

3. W. Wesley Pue, University of British Columbia: *Death Squads and "directions over lunch": A Comparative Review of the Independence of the Bar*

4. Philip Girard, Dalhousie University: *The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities*

5. Michael Code and Kent Roach, University of Toronto: *The Independence of the Bar and the Public Interest: the Scope of Privilege and Confidentiality in the Context of National Security*

6. Paul D. Paton, Queen's University: *The Independence of the Bar and The Public Interest Imperative: Lawyers as Gatekeepers, or Instruments of State Enforcement?*

It was moved by Mr. Gottlieb, seconded by Mr. Aaron, that the title of the Report be amended to be the Report of the Task Force on the Rule of Law and the Independence of the Legal Profession.

Lost

ROLL-CALL VOTE

Aaron	Against	Lawrie	Against
Alexander	Against	Legge	Against
Backhouse	Against	Manes	Against
Banack	Against	Millar	Against
Campion	Against	Minor	Against
Carpenter-Gunn	Against	Murray	Against
Caskey	Against	O'Donnell	Against
Chahbar	Against	Pawlitza	Against

Cherniak	Against	Porter	Against
Chilcott	Against	Potter	Against
Coffey	Against	Robins	Against
Copeland	Against	Ross	Against
Crowe	Against	Ruby	Against
Curtis	Against	St. Lewis	Against
Dickson	Against	Silverstein	Against
Doyle	Against	Simpson	Against
Dray	Against	Swaye	Against
Eber	Against	Symes	Against
Feinstein	Against	Warkentin	Against
Filion	Against	Wright	Against
Finkelstein	Against		
Go	Against		
Gottlieb	For		
Harris	Against		
Heintzman	Against		
Henderson	Against		
Krishna	Against		

Vote: 1 For; 46 Against

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of October 26, 2006 were amended by changing the words “about 36 lawyers” in an amendment to the Equity and Aboriginal Committee Report to “about 36,000 lawyers”.

The Draft Minutes of Convocation of October 26th, as amended, and the Draft Minutes of Special Convocation of November 9th 2006 were confirmed.

MOTION – APPOINTMENTS

It was moved by Mr. Millar, seconded by Mr. Heintzman -

THAT Abraham Feinstein be appointed to the Paralegal Standing Committee to replace Laurence Pattillo who was appointed to the Bench.

THAT Neil Finkelstein be appointed to the Board of Governors of the Law Commission of Ontario.

THAT Mark Sandler be appointed as a trustee on the Board of Trustees of the Law Foundation of Ontario to replace Laurence Pattillo who was appointed to the Bench.

THAT Janet Minor be appointed a Law Society's representative on the Ontario Lawyers' Assistance Program Board of Directors to replace Laurence Pattillo who was appointed to the Bench.

Carried

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PARALEGAL STANDING COMMITTEE BY-LAW 9.1

It was moved by Mr. Simpson, seconded by Ms. Carpenter-Gunn and Mr. Lawrie, that, pursuant to the authority contained in paragraph 1 of subsection 62 (0.1) and paragraph 10.1 of subsection 62 (1), a by-law be made as follows:

BY-LAW 9.1

PARALEGAL STANDING COMMITTEE

INTERPRETATION

Interpretation: "Committee"

1. In this By-Law, "Committee" means the Paralegal Standing Committee.

ESTABLISHMENT OF COMMITTEE

Establishment of Committee

2. There is hereby established a standing committee to be known as the Paralegal Standing Committee in English and Comité permanent des parajuristes in French.

JURISDICTION OF COMMITTEE

Jurisdiction of Committee

3. The Committee is responsible for developing, for Convocation's approval, policy options on the following matters:

1. The classes of licence for the provision of legal services in Ontario issued under the Act, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence.

2. The licensing of persons to provide legal services in Ontario, including the qualifications and other requirements for licensing and the application for licensing.

3. The regulation of persons licensed to provide legal services in Ontario in respect of,

   i. the handling of money and other property, and

   ii. the keeping of financial records.

4. The rules of professional conduct applicable to persons licensed to provide legal services in Ontario.

5. The requirements to be met by persons licensed to provide legal services in Ontario with respect to indemnity for professional liability.

6. The professional competence of persons licensed to provide legal services in Ontario, including,

   i. the requirements to be met by such persons with respect to continuing legal education, and

   ii. the review of the professional business of such persons.

7. Guidelines for professional competence applicable to persons licensed to provide legal services in Ontario.

8. The provision of legal services through professional corporations.

9. The provision of information to the Society, and the filing of certificates, reports and other documents, relating to the Society's functions under the Act, by persons licensed to provide legal services in Ontario.

10. The election of five persons who are licensed to provide legal services in Ontario as members of the Committee.

11. The election of two persons who are licensed to provide legal services in Ontario as benchers.

12. The appointment of the chair of the Committee.

OPERATION OF COMMITTEE

Term of office of Committee members appointed by Convocation

4. (1) Subject to subsection (2), a person who is appointed as a member of the Committee by Convocation shall continue to be a member of the Committee until his or her successor is appointed.

Removal from Committee

(2) Convocation may remove from the Committee any person that it has appointed as a member of the Committee if the person fails to attend three consecutive meetings of the Committee.

Quorum

5. Four members of the Committee constitute a quorum for the transaction of business.

Meetings by telephone conference call, *etc.*

6. The Committee may meet to transact business by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other instantaneously and simultaneously.

Right to attend meeting

7. (1) Subject to subsection (2), no person other than a member of the Committee may attend a meeting of the Committee.

Same

(2) The following persons who are not members of the Committee may attend a meeting of the Committee:

1. A bencher.

2. An officer or employee of the Society.

3. A person not mentioned in paragraph 1 or 2 with the permission of the Committee.

Voting rights

8. Only members of the Committee may vote at meetings of the Committee.

GENERAL

Non-application of By-Law 9

9. The provisions of By-Law 9 do not apply with respect to the Committee.

BY-LAW 9.1

COMITÉ PERMANENT DES PARAJURISTES

INTERPRÉTATION

Interprétation : « Comité »

1. La définition qui suit s'applique au présent règlement administratif.

« Comité » Le Comité permanent des parajuristes.

CONSTITUTION DU COMITÉ

Constitution du Comité

2. Est constitué un comité permanent nommé Comité permanent des parajuristes en français et Paralegal Standing Committee en anglais.

COMPÉTENCE DU COMITÉ

Compétence du Comité

3. Le Comité élabore et soumet à l'approbation du Conseil des options stratégiques concernant les questions suivantes :

1. Les catégories de permis autorisant à fournir des services juridiques en Ontario délivrés en application de la Loi, l'étendue des activités autorisées dans le cadre de chaque catégorie ainsi que les conditions ou les restrictions auxquelles est assujettie chaque catégorie.

2. L'octroi à des personnes d'un permis les autorisant à fournir des services juridiques en Ontario, y compris les qualités requises à cette fin et les autres exigences pertinentes ainsi que les modalités de demande de permis.

3. La réglementation des personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario en ce qui a trait aux éléments suivants :

   (i) la manutention de sommes d'argent et d'autres biens,

   (ii) la tenue de registres financiers.

4. Les règles de déontologie applicables aux personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario.

5. Les exigences auxquelles doivent satisfaire les personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario sur le plan de l'assurance responsabilité professionnelle.

6. La compétence professionnelle des personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario, notamment ce qui suit :

(i) les exigences auxquelles elles doivent satisfaire sur le plan de la formation permanente,

(ii) l'inspection de leurs activités professionnelles.

7. Les lignes directrices concernant la compétence professionnelle des personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario.

8. La fourniture de services juridiques par le biais de sociétés professionnelles.

9. La communication au Barreau de renseignements se rapportant aux activités qu'il exerce aux termes de la présente loi, ainsi que le dépôt d'attestations, de rapports et d'autres documents se rapportant à ces activités, par les personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario.

10. L'élection de cinq personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario comme membres du Comité.

11. L'élection de deux personnes titulaires d'un permis les autorisant à fournir des services juridiques en Ontario comme conseillers ou conseillères.

12. La nomination du président ou de la présidente du Comité.

FONCTIONNEMENT DU COMITÉ

Mandat des membres du Comité nommés par le Conseil

4. (1) Sous réserve du paragraphe (2), les personnes nommées au Comité par le Conseil occupent leurs fonctions jusqu'à la nomination de leurs successeurs.

Expulsion

(2) Le Conseil peut expulser du Comité les membres qu'il y a nommés et qui n'assistent pas à trois de ses réunions consécutives.

Quorum

5. Le quorum pour les affaires courantes du Comité est de quatre membres.

Réunions par téléconférence, etc.

6. Le Comité peut se réunir pour traiter ses affaires courantes par téléconférence ou par d'autres moyens de communication, notamment électroniques, afin que toutes les personnes qui participent aux réunions puissent communiquer les unes avec les autres simultanément.

Droit d'assister aux réunions

7. (1) Sous réserve du paragraphe (2), seuls les membres du Comité peuvent assister à ses réunions.

Idem

(2) Bien que n'étant pas membres du Comité, les personnes suivantes peuvent assister à ses réunions :

1. Les conseillers et les conseillères.

2. La direction et le personnel du Barreau.

3. Outre les personnes mentionnées aux dispositions 1 et 2, celles qui y sont autorisées par le Comité.

Droit de vote

8. Seuls les membres du Comité ont le droit de voter à ses réunions.

DISPOSITIONS GÉNÉRALES

Non-application du règlement administratif 9

9. Les dispositions du règlement administratif 9 ne s'appliquent pas au Comité.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

Re: Candidates for Call to the Bar

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
ASSEMBLED IN CONVOCATION

The Director of Professional Development and Competence presents the following candidates for Call to the Bar of Ontario pursuant to By-Law 11, section 7:

(a) Transfer from another Province

The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 23rd, 2006:

John Gordon Allen	Province of Nova Scotia
Robert Bosenius	Province of Alberta
Robert Michael Kozak	Province of Manitoba
Robert Hugh Morrison	Province of Manitoba
Margaret Melinda Munro	Province of British Columbia
Corey David Steinberg	Province of British Columbia

(b) Transfer from another Province

The following candidates have successfully completed the transfer examinations, filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 23rd, 2006:

William Ambrose Amos	Province of Quebec
Catherine Bouchard	Province of Quebec
Ohannes Mardiros Kechichian	Province of Quebec

(c) Licensing Process (Bar Admission Course)

Pursuant to By-Law 11, section 7(2) the following candidates have satisfied the requirements and have been excused from participating in a call day ceremony. The following candidates have successfully completed the Licensing Process (Bar Admission Course), filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 23rd, 2006:

Eileen Michelle Quinn	Bar Admission Course

ALL OF WHICH is respectfully submitted.

DATED this the 23rd day of November 2006.

Report to Convocation
November 23, 2006

New Call to the Bar Process

Purpose of Report: For Information/Background

Diana C. Miles
Director, Professional Development and Competence
(416) 947-3328

1. The approval of the candidates for call to the bar in November 2006 is the first application of the new call to the bar process approved by Convocation in September 2005. This new process supports greater flexibility in meeting the needs of monthly call candidates who are predominantly transfer candidates and candidates applying under

the National Mobility Agreement. The purpose of this report is to provide background information on the new call to the bar process.

2. Under the former Bar Admission Course the in-person ceremonial calls to the bar took place in July, with smaller in-person calls to the bar held at the monthly Convocations in September, October and November and from January to June, whenever numbers warranted them.

3. The vast majority of bar admission course graduates were called to the bar at the ceremonial calls. Since the introduction of the National Mobility Agreement in 2003, most of the candidates who take advantage of the monthly calls are transfer candidates, already lawyers in other signatory jurisdictions who are eligible for transfer without having to pass examinations. The exception to this has been the monthly calls that follow examination rewrites when the number of Ontario candidates for admission is somewhat higher.

4. In the new Licensing Process, there are three licensing examination offerings – May/June, November and March. Candidates will be able to write their examinations and any rewrite examinations in any of these sittings. Because of the shortened duration of the Licensing Process the typical candidate will complete the licensing requirements approximately one year after completion of law school. Most candidates will have completed the examinations and skills program requirements before they complete the articling requirement. The vast majority of candidates will therefore be eligible for call to the bar in June. In the case of candidates who must rewrite examinations, or who choose to space out the writing of their licensing examinations, it will require approximately 6 to 8 weeks to process their examinations, and if the candidates are successful, ready their files for call to the bar.

5. The administrative effort and cost associated with 8 monthly calls and 5 ceremonial calls (3 in Toronto, 1 in Ottawa and 1 in London) are significant. With the start of the new Licensing Process, it was appropriate to consider whether a new approach to calls to the bar would provide students with enhanced flexibility to complete the process. The goals of the new approach are,

    a. call candidates to the bar as expeditiously as possible following their completion of the licensing requirements;

    b. administer only as many calls as is necessary to accomplish (a);

    c. use alternatives to the in-person monthly calls to the bar where appropriate; and

    d. be cost efficient.

6. Based on these goals the following new approach was proposed and approved by Convocation in September 2005:

    a. There will be three in-person calls to the bar; in September, January and June. The June calls to the bar will be the ceremonial calls that occur in Ottawa, London and Toronto. These will accommodate the vast majority of students who complete the licensing requirements as well as those who have written or re-written examinations in March. The September and January calls will

accommodate primarily those students who have written or re-written examinations in May/June (September call) or November (January call). Depending upon numbers, these two additional in-person calls to the bar will take place on a Convocation date.

b. A new "paper" call to the bar procedure will be introduced for transfer candidates and for admission of law professors and deans. A paper-based call for these transferring lawyers and law professors or deans will obviate the need for monthly calls, will save staff time and resources, and will be cost efficient. Paper-based calls are already used in some other Canadian law societies, such as British Columbia.

c. Transfer candidates and law professors or deans will be eligible for a live call should they wish to attend one. Ontario candidates will be required to attend a live call. The Director of Professional Development and Competence, or her designate, will, however, have discretion in exceptional circumstances to allow an Ontario candidate to be called to the bar through the paper-based call.

It was moved by Ms. Pawlitza, seconded by Professor Backhouse, that the candidates for the call to the bar set out in the Director's Report be approved.

Carried

MOTION – BY-LAW 5 AMENDMENT

It was moved by Professor Krishna, seconded by Mr. Heintzman -

THAT By-Law 5 [Election of Benchers] made, under paragraph 6 of subsection 62 (1) of the *Law Society Act*, on January 28, 1999 and amended on February 19, 1999, March 26, 1999, April 26, 2001, September 28, 2006 and October 26, 2006 be further amended as follows:

1. Subsection 2 (3) is amended by deleting "election day/jour de l'élection" and substituting "the fourth Friday in March/quatrième vendredi de mars".

Carried

MOTION – AMENDMENT TO BY-LAW 16 [PROFESSIONAL LIABILITY INSURANCE LEVIES]

It was moved by Ms. Carpenter-Gunn, seconded by Mr. Simpson -

THAT By-Law 16 [Professional Liability Insurance Levies], made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, April 30, 1999, May 28, 1999, September 24, 1999, September 19, 2002, June 26, 2003, September 25, 2003 and September 22, 2005 be further amended as follows:

1. Clause 9 (2.1) (a) of By-Law 16 [Professional Liability Insurance Levies] is deleted and the following substituted:

(a) which is a signatory to,

(i) the National Mobility Agreement originally entered into in December 2002 by the Society, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Nova Scotia Barristers' Society and the Law Society of Newfoundland; or

(ii) until December 31, 2011, the Territorial Mobility Agreement originally entered into in November 2006 by the Society, the Law Society of Yukon, the Law Society of Northwest Territories, the Law Society of Nunavut, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Law Society of New Brunswick, the Nova Scotia Barristers' Society, the Law Society of Prince Edward Island and the Law Society of Newfoundland;

a) il est signataire,

(i) de l'Accord de libre circulation nationale conclu en décembre 2002 par le Barreau, la Law Society of British Columbia, The Law Society of Alberta, la Law Society of Saskatchewan, la Société du Barreau du Manitoba, le Barreau du Québec, la Nova Scotia Barristers' Society et la Law Society of Newfoundland;

(ii) jusqu'au 31 décembre 2011, de l'Accord de libre circulation territoriale conclu en novembre 2006 par le Barreau, le Barreau du Yukon, le Barreau des Territoires du Nord-Ouest, le Barreau du Nunavut, la Law Society of British Columbia, The Law Society of Alberta, la Law Society of Saskatchewan, la Société du Barreau du Manitoba, le Barreau du Québec, le Barreau du Nouveau-Brunswick, la Nova Scotia Barristers' Society, la Law Society of Prince Edward Island et la Law Society of Newfoundland;

Carried

HERITAGE COMMITTEE REPORT

Professor Backhouse presented the Heritage Committee Report.

Re: 175th Anniversary Budget

Report to Convocation
November 23, 2006

Heritage Committee

Purpose of Report: Decision

Committee Members
Constance Backhouse (Chair)
Andrea Alexander (Vice Chair)
Robert Aaron
Gordon Bobesich
Andrew Coffey
Patrick Furlong
Allan Lawrence
Laura Legge

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

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COMMITTEE PROCESS

1. The Committee met on November 9, 2006. Committee members Constance Backhouse (Chair), Andrea Alexander (Vice Chair), Bob Aaron and Laura Legge attended. Staff members Susan Lewthwaite, Allyson O'Shea and Sophia Sperdakos attended.

CELEBRATION OF THE 175TH ANNIVERSARY OF THE FIRST CONVOCATION IN OSGOODE HALL

Motion

2. That Convocation approves the Committee's budget, set out at Appendix 2, for the celebration of the 175th anniversary in 2007 of the first Convocation in Osgoode Hall.

Introduction and Background

3. On February 6, 2007 the Law Society will celebrate the 175th anniversary of the official opening of Osgoode Hall in 1832. On that date Convocation held its first meeting in the building. The Law Society has previously organized events and activities to celebrate the

100th anniversary and the 150th anniversary of Osgoode Hall. These activities and events have included the publication of brochures on the building's history, special calls to the bar, concerts and celebratory dinners.

4. In May 2006 the Committee presented Convocation with its proposal and budget to celebrate the anniversary. At that time Convocation approved the celebration of the 175th anniversary and approved an initial expenditure of $5,185 in 2006 out of the contingency fund. The balance of the Committee's funding request was to be considered as part of the 2007 budget process.

5. In October 2007 Convocation approved the Law Society's 2007 budget. Included in the budget calculations was $70,000 earmarked for the 175th anniversary celebrations should Convocation approve that amount. Convocation did not specifically address the 175th anniversary budget at that time and accordingly is now being requested to do so.

6. The Chair of the Finance and Audit Committee has advised the Committee that it is not necessary for the Heritage Committee to present its budget again to the Finance and Audit Committee as the funding has already been set aside, should Convocation decide to approve it.

7. The legal profession in Ontario has a number of unique features among which are,

    a. the length of time the profession has existed as a self-regulating entity; and

    b. the existence, for much of the profession's history, of Osgoode Hall as a symbol of the profession and its place in Upper Canadian and Ontario society.

8. The Heritage Committee's mandate is to highlight the Law Society's and the legal profession's long and significant role in Ontario society. The history of the profession and the history of Osgoode Hall are inextricably linked to the growth of Upper Canada and the province of Ontario and, in the Committee's view, should be marked in an appropriate fashion.

9. The Committee has considered a number of possible initiatives the Law Society could undertake to commemorate the 175th anniversary of Osgoode Hall. In doing so it has taken into account the following:

    a. The events should highlight the building and grounds, but as well the history of the profession, to reflect their inter-relationship.

    b. Events should be well publicized and members should be encouraged to visit the building during 2007.

    c. There should be a permanent commemoration of the anniversary.

    d. Where possible the Law Society should partner with other organizations to develop initiatives.

    e. The initiatives should be such that they can be developed using current Law Society staff, without additional contract staff being required.

10. Keeping these factors in mind the Committee developed a plan, which was provided to Convocation in May 2006 and is reproduced here at APPENDIX 1.

11. The Committee also provided Convocation with its proposed budget in May 2006 and does so again, with some revision to reflect the amount already approved by Convocation in May 2006. This is set out at APPENDIX 2.

APPENDIX 1

CELEBRATION TO MARK THE 175TH ANNIVERSARY OF OSGOODE HALL

VIRTUAL EXHIBITION / OSGOODE HALL GROUNDS EXHIBITION/PROPOSED INVITATION TO LIEUTENANT -GOVERNOR

The launch of the 2007 celebration will highlight Osgoode Hall (building and grounds).

In partnership with the Archives of Ontario, the Law Society will present a virtual exhibit of the historic architectural drawings of Osgoode Hall. This is an on-line exhibition. The exhibition will be accessible on the Archives of Ontario website. The Law Society has assumed responsibility for developing the exhibit content. The Archives of Ontario has assumed responsibility for the technical components of the exhibition. The goal is to "launch" the exhibit in February 2007 with a reception in Convocation Hall. It will be possible to run the on-line exhibit on a CD-Rom and projector so the attendees can see it during the reception.

This event will also be combined with the opening of the Osgoode Hall Grounds Exhibition that is currently in development. It will be set up in Exhibition Hall and attendees at the reception can take in that exhibit as well.

It is proposed to extend an invitation to the Lieutenant Governor to open the event. Given his direct connection to Ontario and his interest in Ontario history, it is hoped that his schedule will permit him to attend. It is proposed that a dinner for the Lieutenant Governor and invited guests take place following the reception.

The two events will work well together to showcase Osgoode Hall. Informational postcards will highlight the website for the virtual exhibit and promote the grounds exhibition.

LEGAL HISTORY SYMPOSIUM

A one-day "history of the legal profession" symposium is proposed for the fall of 2007. The symposium will take place on site in the Lamont Learning Centre (holds 200-250 people).

There will be a call for papers. It is hoped that the symposium can be done in collaboration with the Osgoode Society, which will be invited to participate in the editorship and publication of papers from the conference.

The celebration of the history of the legal profession is a logical extension of the celebration of Osgoode Hall, as discussed above.

This component of the celebration is particularly important because it will allow for the permanent commemoration of the event through the publication of the papers presented at the Symposium.

COMMEMORATIVE PLAQUE

A plaque commemorating the 175th anniversary of the first Convocation will be placed in the bencher wing.

BANNERS/POSTCARDS

There will be banners (2 ft. by 5 ft. weather resistant) on the lampposts of the building (7-10), on the entrance gates (8-10) and extras for other locations (5-10). The design will be done in-house. Postcards will be printed to outline the events and the anniversary.

BRANDING FOR THE YEAR ON POSTAGE CANCELLATIONS, LETTERS AND OTHER MATERIALS

There will be a special postage cancellation stamp and special letterhead to commemorate the 175th anniversary. These will be used throughout the year.

COMMUNICATION AND MARKETING

The Communications department will publicize the anniversary. Rather than trying to define it as the 175th anniversary of the first Convocation in Osgoode Hall, the anniversary may be more easily understood as the 175th anniversary of the official opening of Osgoode Hall.

TOURS AND TAKING GRADE NINE STUDENTS TO WORK

There will be additional effort to encourage more visitors, including members of the Law Society, to tour the building and to focus greater attention in the tours on “noteworthy” Treasurers and the 175th anniversary.

Law firm members will be encouraged to send their Grade Nine children to Osgoode Hall for the annual “Take Your Child to Work” event. The session will include some recognition of the special anniversary. This is already in the planning stages.

THE HISTORY MOMENTS

The Treasurer’s history moments for 2007 will focus on the building.

GENERAL LAW SOCIETY EVENTS MARKETING BROCHURE

The Law Society’s events marketing brochure will be revised to focus on the anniversary and encourage people to hold their events at Osgoode Hall. This is already in development.

APPENDIX 2

PROPOSED BUDGET FOR 175TH ANNIVERSARY PROPOSAL

VIRTUAL EXHIBITION / OSGOODE HALL GROUNDS EXHIBITION/INVITATION TO LIEUTENANT-GOVERNOR

	Cost
Reception:	
Staff, security, maintenance	$ 2300.00
Food and drink	$ 5700.00
Dinner	$ 7320.00
LEGAL HISTORY SYMPOSIUM	
Travel, accommodation for presenters	$ 25000.00
Refreshments	$ 300.00
Reception	$ 8000.00
Dinner	$ 6555.00
Publication subvention	$ 7000.00
PLAQUE	$ 1900.00
BANNERS/POSTCARDS	*
SPECIAL POSTAGE AND LETTERHEAD	*
COMMUNICATION INITIATIVES	$ 4900.00
TOTAL	$ 68,975.00

* Convocation has already approved from 2006 budget.

INFORMATION/MONITORING

DONATION OF MATERIAL TO LAW SOCIETY ARCHIVES

12. The Law Society of Upper Canada Archives acquires documentary material of enduring value created and/or accumulated by the Law Society of Upper Canada, and accepts, when resources permit, records and other documentary material that possess significance for the legal profession in Ontario.

13. The capability of the Archives to acquire documentary material is influenced by the following factors:

    a. The existing resources to make material available for research purposes in a reasonable period of time.

    b. The availability of appropriate storage facilities.

14. In considering whether a donation should be accepted, the following criteria are considered:

    a. The material meets the parameters of the acquisition policy respecting the types of material that may be collected.

    b. The subjects, functions or activities documented by the material are not already well documented in the existing holdings.

    c. There is information on the provenance or context of the material.

    d. The material will likely be used by researchers and staff.

    e. The extent and terms of any restrictions (including access, display and copyright) are reasonable.

    f. The material is in good physical condition with no conservation needs that cannot be met by the Archives in a reasonable period of time.

    g. The material does not pose a hazard to the facility, other material in the holdings, or staff.

    h. There is adequate space available to properly store and care for the material.

    i. The donor has the legal right to place the material in the Archives.

15. Items donated to the Archives may be eligible for tax receipts, through the agency of the Law Society Foundation. A protocol is in place for determining whether a tax receipt can be provided to a donor, valuating the proposed donation, arranging for an approved donation to be obtained and issuing the tax receipt.

It was moved by Professor Backhouse, seconded by Ms. Alexander, that Convocation approve the Committee's budget set out at Appendix 2, for the celebration of the 175th anniversary in 2007 of the first Convocation in Osgoode Hall.

Carried

Item for Information

- Donation of Material to Law Society Archives

The Treasurer withdrew for the debate on the Cherniak/Millar motion.

Ms. Pawlitza took the Chair.

REPORT – MOTION TO AMEND BY-LAW 6

Mr. Cherniak presented the Report on the motion to amend By-Law 6.

REPORT TO CONVOCATION
November 23, 2006

MOTION TO AMEND BY-LAW 6

Purpose of Report: Decision

FOR DECISION

AMENDMENT TO BY-LAW 6

Motion

1. That Convocation approve an amendment to By-law 6 to provide that the election of the Treasurer occurs every year on the day on which the regular meeting of Convocation is held in April.

Introduction and Background

2. At the September 28, 2006 meeting of Convocation Earl Cherniak (mover) and Derry Millar (seconder) gave notice to Convocation of their intention to move the motion set out above at the October 26, 2006 Convocation.

3. Currently, by-law 6 provides,

> *Time of election*
>
> 1. (1) Subject to subsection (2), there shall be an election of Treasurer every year on the day on which the regular meeting of Convocation is held in June.

4. The consequence of this provision is that in a bencher election year, the Treasurer election is held at the second Convocation following the bencher election. Newly elected and new lay benchers with little experience with the issues and, in at least some instances, with little knowledge of the Treasurer candidates, must vote for Treasurer.

5. In some election years, particularly when the government appoints new lay benchers, as much as 25-35% of the bench may be made up of first time benchers.

6. The Law Society Act, provides as follows, respecting the Treasurer election:

> Election of Treasurer
>
> 25. (1) The benchers shall annually, *at such time as the benchers may fix,* elect an elected bencher as Treasurer. [emphasis added]

Bencher by virtue of office

(2) The Treasurer is a bencher by virtue of that office and ceases to hold office as an elected bencher.

Re-election

(3) The Treasurer is eligible for re-election as Treasurer, despite having ceased to hold office as an elected bencher, but, after a new election of benchers takes place under subsection 15 (1), the Treasurer may be re-elected only if he or she is an elected bencher.

7. Subsection 25(3) was included in the 1999 amendments to the *Law Society Act* following a decision of Convocation in 1993 that necessitated a legislative amendment. At the Law Society's Annual General Meeting in 1993 a motion was introduced that read as follows:

> Therefore it is moved that effective in the 1993 Treasurer election, no person shall be eligible to be a Treasurer of the Law Society who has not been elected as bencher by the membership in the most recent bencher election, and that the Law Society propose to the Attorney General for Ontario an amendment to the *Law Society Act* to effect the foregoing.

8. This was raised because prior to the amendment the custom that a Treasurer stands unopposed for a second one-year term meant that in some instances a Treasurer's second term would occur following an election in which the Treasurer had not run for election as a bencher. The movers of the motion at the Annual General Meeting were of the view that, to avoid compromising democratic principles, only a bencher who had been elected in the most recent election should be eligible for the position of Treasurer. Convocation debated and approved the motion, including the provision that a legislative amendment be sought.

9. The wording of section 25(3) does means that *following an election* a Treasurer could not seek re-election for a second term if he or she had not been elected in that election. The wording does not, however, preclude the change of election dates contemplated in the motion. Moreover, the amendment would not affect the current process of annual Treasurer elections in each of the four years of a bench's term.

10. In considering the proposed amendment to By-law 6 Convocation is asked to consider the value of Treasurer continuity for the first year of a "new" bench and the contribution this continuity can make to the effective operation of Convocation and its policy direction.

<u>Cherniak/Millar Motion</u>

That Convocation approve an amendment to By-Law 6 to provide that the election of the Treasurer occurs every year on the day on which the regular meeting of Convocation is held in April.

Mr. Heintzman presented the deliberations of the Governance Task Force on the motion.

An amendment to move the date to February was accepted.

It was moved by Mr. Banack, seconded by Mr. Aaron, that the Cherniak/Millar motion be tabled.

Carried

REPORTS FOR INFORMATION ONLY
Lawyers Fund for Client Compensation Committee Report
Access to Justice Committee Report

Report to Convocation
November 23, 2006

Lawyers Fund For Client Compensation
Committee

Committee Members
Bradley Wright, Chair
Marshall Crowe, Vice-Chair
Robert Aaron
Richard Filion
Allan Gotlib
Holly Harris
Alan Silverstein
Gerald Swaye

Purpose of Report: Information

Prepared by the Lawyers Fund for
Client Compensation Department

COMMITTEE PROCESS

1. The Committee met on November 9, 2006. Members in attendance were Bradley Wright (Chair), Robert Aaron, Dr. Richard Filion, Holly Harris, Gerald Swaye and Dr. Allan Gotlib (by teleconference). Staff and others in attendance were Zeynep Onen, Dan Abrahams, Maria Loukidelis, Andrew Cawse and Craig Allen (LawPRO VP & Actuary).

FOR INFORMATION

DEFINITIONS OF DISHONESTY USED BY THE FUND

2. Subsection 51(5) of the *Law Society Act* states in part that "Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member…". The dishonesty requirement is underscored by Guideline 1(c), which provides that it must be

shown that the claimant's loss was in consequence of dishonesty on the part of the member in connection with the member's law practice. Dishonesty is not, however, defined in either the *Law Society Act* or in the Guidelines. As a result, the Fund has relied on definitions from Compensation Fund Referee Reports and from case law when reviewing claims. During a recent meeting of the Review Sub-Committee, there was an inquiry about the definition or standard of dishonesty applied by the Fund.

3. Staff prepared a brief report setting out the definitions and sources upon which Fund staff have relied in determining whether a claim meets the dishonesty requirement. The report was provided to the Committee for information. In summary, for the purposes of the Fund:

a) Dishonesty does not have to meet the standard of criminal behaviour as defined in the Criminal Code – the threshold is lower for the purposes of the Fund;
b) Dishonesty is defined by the "reasonable person" standard;
c) Dishonesty can be characterized as a lack of honesty, integrity, candour, honour, and so on as set forth in numerous dictionary definitions;
d) Dishonesty may be found in a breach of fiduciary duty; and
e) Dishonesty may be found in a failure to follow the *Rules of Professional Misconduct.*

REVISITING GUIDELINE 2(a)

4. One of the items identified for review and discussion by the Committee over the past year was Guideline 2(a). This Guideline provides in part as follows:
…[A] solicitor and client relationship between the claimant and the member is not required,

(a) when it can be shown that the claimant relied on the member and the loss was in consequence of dishonesty by the member in connection with any trust related to the member's law practice where the member was or is a trustee; …

5. The Committee considered a staff discussion paper outlining the background and history of the Guideline. The Committee was also given some examples of problematic claims and possible options for the Committee to consider.

6. Following a discussion, the Committee determined that the Guidelines do not require amendment at this time; however the Committee underscored the need to apply, in appropriate circumstances, Guidelines 7 and 8, which allude to a claimant's own carelessness, contributory negligence or voluntary acceptance of risk.

QUARTERLY REPORT AND FUND STATUS

7. Craig Allen, Vice-President and Actuary at LawPRO, reported that the Fund's balance was $19.7 million as of September 30, 2006. This is an improvement on the Fund balance as of December 31, 2005, which was $17.9 million and is up slightly from $19.5 million as of June 30, 2006. The improvement is attributable to a positive variance in current year claims and current year internal costs as well as greater than expected recoveries. A copy of Mr. Allen's written report is attached as Appendix "1".

GRANTS PAID BY THE FUND

8. The Committee wishes to report that the following grants were approved and paid from the Fund between July 13, 2006, and October 20, 2006, in the amounts shown. (Only members whose discipline proceedings are completed or who are deceased are identified by name.)

Member (Status if Disciplined)	Number of Claimants	Total Grants Paid ($)
Anderson, Cameila (Permitted to resign)	2	$1,551.28
Campbell, Gordon Donald (Disbarred March 21, 2006)	1	$100,000.00
Gardner, Donald A., Deceased (Permitted to Resign 1997)	1	$500.00
Howard, Graham Irwin (Disbarred May 8, 2003)	1	$141.40
Kolman, Doron Jorden (Disbarred October 18, 2001)	1	$100,000.00
MacDonald, Colin Clive (Disbarred March 8, 2006)	1	$34,637.60
Muslim Sarko, Mohammed (Permitted to Resign September 15, 2006)	6	$18,968.83
Scott, James William (Suspended September 30, 2005)	1	$32,972.46
Solicitor # 138 (Suspended September 30, 2005)	1	$6,544.50
Solicitor # 145 (Suspended July 18, 2006)	70	$1,536,051.52
Solicitor # 150 (Suspended October 6, 2006)	1	$3,149.09
Solicitor # 154 (Suspended September 30, 2005)	1	$900.00
Solicitor # 160 (Suspended September 30, 2005)	1	$120.77
Solicitor # 161(Suspended October 6, 2006)	1	$100,000.00
Solicitor # 162 (Suspended September 16, 2005)	2	$10,200.00
		$1,945,737.45

LAWYERS' PROFESSIONAL INDEMNITY COMPANY
MEMORANDUM

TO: LAW SOCIETY OF UPPER CANADA

FROM: CRAIG ALLEN

CC: MICHELLE STROM

DATE: OCTOBER 19, 2006

RE: UNPAID CLAIMS LIABILITY, SEPTEMBER 30, 2006, LAWYERS' FUND FOR CLIENT COMPENSATION

The unpaid claims liability, as at September 30, 2006 for the Lawyers' Fund for Client Compensation, is estimated to be $8,315,000. This amount is

- discounted for the time value of money (in the amount of $388,000),
- includes a provision for internal claims handling expenses (in the amount of $2,273,000), and
- includes a margin to provide for unfavourable developments as claims proceed toward resolution (in the amount of $891,000).

The September 30, 2006 unpaid claims liability is below that at December 31, 2005, which was set at $10,678,000.

On a nominal basis the liability at September 30, 2006 is $7,812,000, which compares to a nominal liability of $10,049,000 at December 31, 2005.

To calculate the unpaid claims liability amount, add the margin for unfavourable developments and subtract the time value of money.

Nominal claims liability	$7,812,000
Add: Margin for unfavourable developments	$891,000
Less: Time value of money	$388,000
Unpaid Claims Liability	$8,315,000

The following table summarizes the individual items that account for the carrying forward of the December 31, 2005 nominal claims liability through to September 30, 2006:

	Claims	Internal Costs	Total
Claims Liability at December 31, 2005	$6,903,000	$3,146,000	$10,049,000
Add: Adverse (Favourable) Development on Claims Reported before December 31, 2005	499,000	208,000	707,000
Claims Liability at December 31, 2005 with Benefit of Hindsight	7,402,000	3,354,000	10,756,000
Add: Claims Incurred in Jan.- September 2006	1,653,000	304,000	1,957,000
Less: Payments Made in Jan.- September 2006	3,635,000	1,266,000	4,901,000
Claims Liability at September 30, 2006	5,420,000	2,392,000	7,812,000

Fund Balance

The Fund Balance as at September 30, 2006 is $19.7 million, increased from $17.9 million at December 2005. The 2006 budget was set to break even – thus, the growth in the Fund Balance is explained by variances from budget. The increase of $1.8 million is primarily explained by the following items, and their respective variances from budget:

Item	Actual	Budget	Variance Favorable/(Unfavorable)
Current Year Claims	$1,653,000	$2,025,000	$372,000
Development on Prior Year Claims	$707,000	$0	($707,000)
Current Year Internal Costs	$304,000	$1,280,000	$976,000
Release of PFAD *	$253,000	$0	$253,000
Recoveries	$967,000	$71,000	$896,000
Total			$1,790,000

* The Provision for Adverse Deviation (PFAD) is a supplement added to discounted claims liabilities, to increase the likelihood that the claims provision is sufficient. As the undiscounted provision has decreased from $10,049,000 to $7,812,000, the PFAD required has declined correspondingly. This reduced requirement, when released, is an addition to income.

Report to Convocation
November 23, 2006

Access to Justice Committee

Committee Members
Marion Boyd, Co-Chair
Judith Potter, Co-Chair
Andrea Alexander
Paul Dray
Tracey O'Donnell

Purposes of Report: For Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228 and Allyson O'Shea 416 947 3458

COMMITTEE PROCESS

1. The Committee met on October 26th, 2006. Members in attendance were Marion Boyd and Judith Potter (Co-Chairs), Andrea Alexander, Paul Dray and Tracey O'Donnell. Staff in attendance were Julia Bass and Allyson O'Shea.

FOR INFORMATION

LITIGATION FINANCING

2. In November 2005, the Emerging Issues Committee considered the issue of the arrival in Canada of the concept of 'Litigation Financing'. The background information prepared for the Emerging Issues Committee is attached at Appendix 1. The issue was referred to a working group of Emerging Issues and Access to Justice, which recommended that developments be monitored by the Access to Justice Committee.

3. The term 'Litigation Financing' refers to an arrangement whereby a private company agrees to provide a plaintiff with the necessary funds to engage in a lawsuit or to cover personal expenses during the course of a lawsuit, that the plaintiff might not otherwise be able to afford. Unlike a typical loan agreement, the requirement to repay the advance is contingent upon success in the litigation. However, in addition to repayment of the advance, the plaintiff who receives litigation financing must also assign a portion of the proceeds of the lawsuit to the company, in the event the lawsuit is successful.

4. Litigation financing is well established in the United States, and it appears that there has been some interest in expansion into the Canadian marketplace. In the September 30, 2005 issue of the *Ontario Reports*, an advertisement appeared for a New York-based company called *LawMax Legal Finance*, which offers litigation financing. Although *LawMax Legal Finance* has not advertised in the *Ontario Reports* since that time, the company's website currently claims they offer "non-recourse advances against pending cases to individuals and corporations in the United States and Canada."

5. The Access to Justice Committee considered that there are potential concerns with the concept of litigation financing as it has developed in the US, including:

   a. The financing is always described as a "non-recourse cash advance" rather than a loan, because if considered as a loan there would be in effect a very high rate of interest that would probably violate consumer protection anti-usury laws. This has been characterised by American commentators as "Predatory Lending";
   b. The fact that the service has been advertised in the *Ontario Reports* may lend it legitimacy;
   c. The interest of such service providers in the Canadian market suggests a continuing problem of affordability for some plaintiffs in the civil justice system.

6. The Access to Justice Committee is of the view that the Law Society should continue to monitor developments in this area, as it may become appropriate to recommend a regulatory response.

JUSTICE COULTER OSBORNE: CIVIL JUSTICE REVIEW

7. Justice Coulter Osborne has been appointed by the Ontario Attorney General to lead a review of the civil justice system in Ontario and to recommend actions to make the civil justice system more accessible and affordable. The Terms of Reference of the project are attached at Appendix 2.

8. Justice Osborne has been asked to deliver his report by late spring 2007. The Access to Justice Committee recommends that Justice Osborne be invited to meet with the members of Convocation to permit them to raise any issues they believe that Justice Osborne should consider.

'INTO THE FUTURE' CONFERENCE ON CIVIL JUSTICE

9. The Canadian Forum on Civil Justice (CFCJ) is continuing with the 'Into the Future' programme, holding a smaller invitation-only event in Toronto on December 7th and 8th, following on the larger conference that took place in Montreal on May 1st and 2nd. The Law Society is a sponsor of the December event, which will take place at the Ontario Bar Association. The Law Society will be represented by the Treasurer, the CEO and a staff member. Papers from the conference will be posted on the website of the CFCJ.

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

(1) Copy of a memorandum together with attachments from Jim Varro to the Emerging Issues Committee dated November 2, 2005 re: Financing Litigation.
(Appendix 1, pages 5 – 49)

(2) Copy of the Terms of Reference re: Civil Justice Reform Project.
(Appendix 2, pages 50 – 60)

CONVOCATION ROSE AT 1:10 P.M.

Confirmed in Convocation this 8th day of December, 2006.

Treasurer