

## MINUTES OF CONVOCATION

Thursday, 27<sup>th</sup> March, 2008  
9:00 a.m.

## PRESENT:

The Treasurer (Gavin MacKenzie), Aaron, Aitken (by telephone), Anand, Backhouse, Boyd, Bredt, Campion, Caskey, Chahbar, Conway, Crowe (by telephone), Epstein, Furlong, Gold, Gottlieb, Ground, Halajian, Hare (by telephone), Hartman (by telephone), Heintzman, Henderson, Krishna, Lawrie, Legge, Lewis, McGrath, Millar, Minor, Murphy, Murray, Porter, Potter, Rabinovitch, Ross, Rothstein, Ruby, St. Lewis, Sandler, Schabas, Silverstein, Strosberg, Swaye, Symes, Tough, Warkentin and Wright.

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Secretary: Katherine Corrick

The Reporter was sworn.

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## IN PUBLIC

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TREASURER'S REMARKS

The Treasurer extended condolences on behalf of Convocation to the family of the Honourable George Finlayson, Q.C., a former Treasurer, who passed away on March 23, 2008.

The Treasurer congratulated Ab Chahbar on his re-election as Chair of the London Police Services Board and Raj Anand on his appointment as Chair of the Ontario Human Rights Legal Support Centre.

The Treasurer reported on his activities since February Convocation.

DRAFT MINUTES OF CONVOCATION

An amendment was made to the draft minutes of Convocation's meeting of February 21<sup>st</sup> to indicate that Justice Carpenter-Gunn was appointed to the Superior Court of Justice for Central South Region. The minutes as amended were confirmed.

MOTIONS – COMMITTEE APPOINTMENTS

It was moved by Mr. Caskey, seconded by Ms. Aitken, –

THAT Brian Lawrie be appointed to the Proceedings Authorization Committee.

THAT Laurie Pawlitza be appointed to the LAWPRO Board of Directors.

THAT Michelle Haigh and Stephen Parker be appointed to the Compensation Fund Committee.

Carried

MOTION – APPOINTMENT OF COMMITTEE OF BENCHERS UNDER SECTION 37 OF BY-LAW 7

It was moved by Ms. Warkentin, seconded by Mr. Lawrie, –

That Paul Dray, Seymour Epstein, Susan McGrath and Bonnie Tough be appointed to the committee of benchers established under s. 37 of By-Law 7.

Explanatory Note

By-Law 7 [Business Entities] authorizes Convocation to appoint a committee of benchers to consider applications for review and appeals made under the By-Law. By-Law 7 governs the business structures through which the practice of law and provision of legal services may be carried out. A licensee may be required to obtain the Law Society's approval of the structure through which the licensee wishes to practice law or provide legal services, and other related matters. For example, a licensee may seek the Law Society's approval of a name for a professional corporation.

If the Society's approval is not granted, the By-Law provides for reviews or appeals of the decision before a committee of benchers. Section 37 of the By-Law reads as follows:

Committee of benchers

37. (1) Convocation shall appoint a committee of at least three benchers to consider applications for review and appeals made under this By-Law.

Term of office

(2) A bencher appointed under subsection (1) shall hold office until his or her successor is appointed.

Consideration of review or appeal: quorum

(3) Three benchers who are members of the committee appointed under subsection (1) constitute a quorum for the purposes of considering an application for a review or an appeal made under this Part.

This motion appoints the members of the committee of benchers for this purpose. It is anticipated that applications for review or appeals may be requested as paralegal licensees seek approvals under the By-Law.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

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

The Director of Professional Development and Competence reports as follows:

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CALL TO THE BAR AND CERTIFICATE OF FITNESS

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

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

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

ALL OF WHICH is respectfully submitted

DATED this 27th day of March, 2008

CANDIDATES FOR CALL TO THE BAR  
March 27th, 2008

Peter John Anderson  
Eva Violetta Baran  
Joyce Cristino Bondoc  
Jessica Anne Bullock  
Brent Douglas Timmons

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

Carried

### MOTION – TERMS OF REFERENCE FOR SUMMARY ORDER BENCHER

It was moved by Mr. Ruby, seconded by Mr. Millar, –

WHEREAS on June 28, 2007, Convocation (by appointing Tom Heintzman as "summary disposition [bencher]" and Paul Schabas as alternate "summary disposition [bencher]") appointed Tom Heintzman and Paul Schabas to make orders under sections 46, 47, 48 and 49 of the Law Society Act; and

WHEREAS on September 20, 2007, by virtue of an amendment to the rules of practice and procedure (made under section 61.2 of the Law Society Act) expanding the scope of authority of a summary disposition bencher, Tom Heintzman and Paul Schabas were authorized to make orders under section 47.1 of the Law Society Act;

THAT Convocation ratify and confirm the appointments of Tom Heintzman and Paul Schabas to make orders under sections 46, 47, 47.1, 48 and 49 of the Law Society Act.

Carried

### REPORT OF THE PARALEGAL STANDING COMMITTEE

Ms. Warkentin presented the Report.

Report to Convocation  
March 27th, 2008

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Paralegal Standing Committee

Committee Members  
Paul Dray, Chair  
Bonnie Warkentin Vice-Chair  
Marion Boyd  
James R. Caskey  
Seymour Epstein  
Michelle L. Haigh  
Tom Heintzman  
Paul Henderson  
Brian Lawrie  
Douglas Lewis  
Margaret Louter  
Stephen Parker  
Cathy Strosberg

Purpose of Report:    Decision

Prepared by the Policy Secretariat  
Julia Bass 416 947 5228

## COMMITTEE PROCESS

1. The Committee met on March 6th, 2008. Committee members present were Paul Dray (Chair), Bonnie Warkentin (Vice-Chair), Marion Boyd (by telephone), Seymour Epstein, Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter, Stephen Parker and Cathy Strosberg. Staff members in attendance were Malcolm Heins, Terry Knott, Diana Miles, Zeynep Onen, Elliot Spears, Naomi Bussin, Sybila Valdivieso, Lisa Mallia, and Julia Bass.

## FOR DECISION

### JUSTICES OF THE PEACE: REQUEST FOR EQUIVALENCY

#### Motion

2. That equivalency be granted to retiring Justices of the Peace, permitting them to apply to sit the paralegal licensing examination without an accredited diploma, provided they have a minimum of 3 years experience as a sitting Justice of the Peace.

#### Background

3. The Law Society has received a request from the Association of Justices of the Peace of Ontario (AJPO), that retired Justices of the Peace (JP's) be granted equivalency, for the purposes of being permitted to apply to sit the paralegal licensing examination after retiring from the bench, without acquiring an accredited college diploma. The submission and appendices from JP John Creelman are attached at Appendix 1.
4. This request is expected to affect quite a small number of persons. Most JP's do not return to other work after retirement, and some are lawyers, for whom this opportunity would not be relevant.
5. If this request were granted, JP's would have to fulfill all the other requirements for licensing, such as the examination, fees and insurance.

#### The Committee's Deliberations

6. The Committee is of the view that the expertise acquired by years of experience as a sitting JP can reasonably be compared with years of practice as a paralegal. Mr. Creelman points out that the *Courts of Justice Act* was recently amended such that, for lawyers wishing to be appointed to the Ontario Court of Justice, years as a JP are deemed equivalent to years practising law, provided the years add up to ten years. The relevant section is attached at Appendix 2.
7. To establish such an equivalency, it is appropriate to set a minimum number of years to qualify, as opposed to undertaking a case by case review of the individual's background and experience, which may seem arbitrary.
8. Upon consideration of the criteria for grandparented paralegals with experience, and a review of the JP's education and training manuals, the Committee recommends that a

minimum of 3 full years of activity as a JP be required to apply to write the licensing examination and be licensed to provide legal services.

Appendix 1

"John E. Creelman" <creelman@mac.com> 01/25/2008 03:09 PM  
To zonen@lsuc.on.ca  
cc jbass@lsuc.on.ca, James Clare <james.clare@jus.gov.on.ca>  
Subject AJPO Submission on Equivalency

Dear Ms. Onen and Ms. Bass,

Following up on our discussion regarding Justices of the Peace and the issue of equivalency for purposes licensing paralegals, I am attaching copies of a number of documents. Attached please find copies of documents extracted from the Association of Justices of the Peace submissions to our 4th Triennial Remuneration Committee chaired by Peter Cory. These include several charts that compare Judge and Justice of the Peace duties and jurisdiction, a summary of jurisdiction as well as information regarding our backgrounds and experience prior to appointment. Lastly you will find attached a copy of our Education Plan describing the rigorous training received by all Justices of the Peace in Ontario.

Briefly stated, AJPO is asking that equivalency be established for former Justices of the Peace who wish to pursue paralegal work. Their training and experience on the Bench should be recognized in lieu of what we understand will be two year programs of study at community colleges. In support of this position we draw your attention to the following:

-The Courts of Justice Act was recently amended to acknowledge that for purpose of appointment to a judgeship, ten years on the bench is deemed an adequate alternative to ten years at the bar.

-Retired Justices of the Peace currently teach in our community colleges and may well be instructors in the very courses required for licensing paralegals.

-There is an inherent conflict of interest in allowing the teaching institutions to determine equivalency. Apart from potentially different standards from institution to institution, the colleges or whoever will be offering courses are in the business of attracting paying students.

-The average Justice of the Peace with any appreciable tenure has presided over hundreds if not thousands of appearances by paralegals in our Courts whether they be 'speak to' matters or full blown POA trials.

Thank you again for the opportunity to meet twice now about this issue and we look forward to your response.

John E. Creelman  
Justice of the Peace  
1st Vice President, Association of Justices of the Peace of Ontario  
c.c. James Clare President, AJPO  
attachments:

## ONTARIO COURT OF JUSTICE

### JUSTICE OF THE PEACE

#### EDUCATION PLAN

Revised: November 2007

## ONTARIO COURT OF JUSTICE

### JUSTICE OF THE PEACE EDUCATION PLAN

The Education Plan for the justices of the peace of the Ontario Court of Justice encompasses both initial orientation and training of newly appointed justices of the peace as well as ongoing continuing education programmes for all justices of the peace.

The goals of the initial orientation and training programme are:

- to develop and maintain a sense of judicial independence and impartiality;
- to develop the skills necessary to exercise judicial responsibilities in an independent and impartial manner; and
- to develop an understanding of the legal issues and substantive law in areas in which a justice of the peace will be required to exercise jurisdiction.

The goals of the ongoing continuing education programmes are:

- to develop and maintain professional competence; and
- to develop and maintain social awareness.

The Education Plan is premised on the fact that the justice of the peace bench is a lay bench, and that justices of the peace on appointment usually do not have legal training. The Plan provides each justice of the peace on appointment with seven weeks of intensive workshops covering all aspects of the duties they will perform as a justice of the peace. These workshops are interspersed with a mentoring programme of up to six months duration, the mentoring being provided by experienced justices of the peace.

Continuing education programmes give each justice of the peace an opportunity of having a minimum of six days of continuing education per calendar year dealing with a wide variety of topics, including substantive law, evidence, *Charter of Rights*, skills training and social context.

While the programmes are developed and presented by judges and justices of the peace of the Court, frequent use is made of outside resources in the planning and presentation of programmes. Lawyers, judges, government and law enforcement officials, academics, and other professionals have been used extensively in most education programmes.

#### ADVISORY COMMITTEE ON EDUCATION

The coordination of the planning and presentation of education programmes is assured by the Advisory Committee on Education. The Committee includes the Associate Chief Justice—Co-ordinator of Justices of the Peace as Chair (*ex officio*) and justices of the peace nominated by the Associate Chief Justice and the Association of Justices of the Peace of Ontario. The Committee meets approximately four times per year to discuss matters pertaining to education and reports to the Associate Chief Justice.

The Senior Advisory Justice of the Peace chairs meetings of the Committee. The Senior Justice of the Peace/Administrator of the Ontario Native Justice of the Peace Program is also a member of the Committee. He is responsible for developing and co-ordinating special training and apprenticeship programmes for Native Justices of the Peace. Two bilingual justices of the peace who have been responsible for developing training programmes for bilingual justices of the peace are also members. The Ontario Court of Justice's counsel serves as a consultant.

The Advisory Committee provides administrative and logistical support for the education programmes presented within the Ontario Court of Justice. In addition, all education programmes are reviewed by the Advisory Committee, which makes recommendations to the Associate Chief Justice on changes and additions to existing programmes. The Committee also makes recommendations on the content and format of new programmes as they are being developed.

The Justice of the Peace Education Plan has been developed based on the following principles:

1. The Associate Chief Justice—Co-ordinator of Justices of the Peace is responsible, subject to the direction of the Chief Justice, for the training and education of justices of the peace, as a part of his responsibility for general supervision and direction over sittings of justices of the peace: s. 13(1) *Justices of the Peace Act*. In turn, the Associate Chief Justice has delegated responsibility for co-ordinating the development and implementation of education programmes to the Senior Advisory Justice of the Peace.
2. Justices of the peace as professionals are responsible for acquiring and maintaining a knowledge of the legislation and case law which affects their jurisdiction, as well as other relevant information of significance to the performance of their duties, and for developing and maintaining the skills necessary to perform these duties effectively.
3. Justices of the peace are judicial officers, and all education and training programmes should be based on that fact.
4. The education and training of a judicial officer involves exposure to the views and practices of different judicial officers who perform judicial functions in different ways. Often, particularly in grey areas of the law, there are no pre-defined



responses to deal with a matter. This is one of the most important realizations for a new justice of the peace.

5. Education and training encompasses a broad variety of areas, including education on legal and jurisdictional issues, an understanding of the role of a judicial officer, the development of specific skills necessary to perform the functions of a justice of the peace, and the development of an awareness of social and cultural context in which social problems and conflicts may arise and manifest themselves in judicial proceedings.
6. Training and education is an essential and integral component of the work of a judicial officer. It is essential that time be made available for it as a part of the judicial officer's regularly scheduled responsibilities.
7. Education is an on-going process. Upon completion of initial training, ongoing continuing education programmes are required to maintain the standards which have been developed, to strengthen pre-existing skills and knowledge, and to update justices of the peace regarding legislative amendments and case law which affect the jurisdiction of a justice of the peace.
8. Technology will be an increasingly significant factor in the delivery of judicial services and education programmes.

The current education plan for justices of the peace of the Ontario Court of Justice is divided into two parts;

1. Initial Orientation and Training
2. Continuing Education

In addition, other educational resources are provided by the Ontario Court of Justice to the justices of the peace on an ongoing basis.

## I. INITIAL ORIENTATION AND TRAINING

### 1. Materials Provided

On appointment, each justice of the peace is provided with a copy of the following legal resources and materials:

- *Justice of the Peace Materials, 2005*
- *Introduction to Provincial Offences Act Trials*
- *Conduct of a Trial*, by Allen C. Edgar
- *Commentaries on Judicial Conduct*, by the Canadian Judicial Council
- *Ethical Principles for Judges*, by the Canadian Judicial Council
- *Writing Reasons: A Handbook for Judges*, by Edward Berry
- *Handbook for POA Prosecutors*
- *The Law of Traffic Offences*, by S. Hutchison, D. Rose and P. Downes
- *Stewart on Provincial Offences Procedure in Ontario*, by Sheilagh Stewart
- *The Portable Guide to Evidence*, by Michael P. Doherty
- *Ontario Litigator's Pocket guide to Evidence*, by James C. Morton

- *The Law of Bail in Canada*, by Gary Trotter
- *Hutchison's Canadian Search Warrant Manual, 2005*, by Scott Hutchison

In addition, bilingual justices of the peace are provided with the following:

- *Lexique bilingue de termes législatifs*
- *Lexique MRN*
- *Vocabulaire des véhicules de transport routier*
- *Guide du poursuivant*
- *Le nouveau petit Robert*

## 2. Workshops

Seven intensive week-long workshops are provided to all justices of the peace within the first few months following their appointment, including workshops on Orientation; Search and Seizure; Judicial Interim Release; and *Provincial Offence Act* Trials.

Resource people at the various workshops include judges, experienced justices of the peace, law professors, counsel with the Crown Law Office – Criminal of the Ministry of the Attorney General and the Department of Justice, Crown attorneys, counsel in private practice, and counsel from the Centre for Judicial Research and Education of the Ontario Court of Justice.

### a. Orientation Workshops

The Orientation Workshops are the first programmes offered to newly appointed justices of the peace, as soon as possible after their appointment. The workshops are designed on the presumption that newly appointed justices of the peace come into the system with limited knowledge of the judicial system or the role of a judicial officer. It is usually offered in small groups, the size dependent on the number of new appointments. The format includes lectures, discussion, and demonstrations. Resource people include experienced justices of the peace, as well as law professors and lawyers in private practice with expertise in specific areas of the law.

Topics covered include the structure of the courts and *stare decisis*; the adversarial system; onus and standard of proof; judicial independence and impartiality; administering oaths and affirmations; receiving an information and considering process; private prosecutions; subpoenas; an introduction to search warrants; peace bonds; weapons disposition and prohibition hearings; *Criminal Code* orders for assessment; *Mental Health Act* orders of examination; *Child & Family Services Act* warrants of apprehension; and *ex parte Provincial Offences Act* proceedings.

### b. Search and Seizure Workshop

This workshop is an intensive programme in all aspects of search warrants which may be issued by a justice of the peace. It reviews the legislation and case law under s. 487 of the *Criminal Code*, s. 11 of the *Controlled Drugs and Substances Act*, and other federal and provincial statutes as well as s. 8 of the *Charter of Rights and Freedoms*.

Arrangements are made for justices of the peace to spend a number of days in the Telewarrant Centre. They attend in small groups, reviewing examples of informations to obtain a search

warrant and search warrants and considering whether the warrant should issue and, if not, identifying the deficiencies in the material presented.

Specific topics covered include a review of the appropriate information required for a search warrant and information to obtain a search warrant; balancing reasonable expectations of privacy against the public interest in investigating and prosecuting offences; conditions to consider when issuing a warrant; specific rules applicable to warrants for material in the possession of lawyers, the media, and psychiatric facilities; the “four corners” rule; procedure for considering a warrant; giving reasons for refusing a warrant; sealing warrant material; and detention orders.

### c. Judicial Interim Release Workshops

The Judicial Interim Release Workshops provide an in-depth review of all aspects of the bail process. Part of the time in these workshops is spent reviewing transcripts of bail hearings and discussing whether the accused person should be detained and, if released, the type and conditions of release. The remainder of the time is spent in lectures, discussions, and demonstrations of the various proceedings relating to judicial interim release.

Specific topics covered include remands; Crown and reverse-onus bail hearings; the three grounds for detention; bans on publication; evidence; risk assessment; procedure; types of release; conditions of release; conditions of detention; releasing an accused following a bail hearing; revocation of bail; variation of bail; surety relief; and bail involving young persons.

### d. Workshops on *Provincial Offences Act* Trials

These are intensive workshops on the trial of an offence under the *Provincial Offences Act*. The focus is on relatively straightforward trials that comprise the majority of the trials over which justices of the peace preside. Such trials are completed in a single day, with an oral judgment delivered at the end of the trial, and with an unrepresented defendant or a defendant who is represented by an agent. Lectures, discussion groups and demonstrations are used to present the topics in this workshop.

Specific topics covered include the role of the prosecutor, defendant and justice of the peace; the presumption of innocence; proof beyond a reasonable doubt; elements of the offence; guilty pleas to the offence charged or another offence; *mens rea*, strict liability and absolute liability offences; defences to regulatory charges, including due diligence, reasonable mistake of fact and officially induced error; trial procedure; presentation of evidence; rules of evidence; dealing with an incompetent agent; requests for a bilingual trial; reasonable doubt and findings of credibility; reasons for judgment; sentencing; and trials of young persons.

## 3. Mentoring

In addition to the workshops described above, the core element of training for newly appointed justices of the peace remains mentoring. This involves the new justice of the peace working, usually on a one-on-one basis, with a more experienced justice of the peace who has been designated as a mentor by the Associate Chief Justice—Co-ordinator of Justices of the Peace. It allows the justice of the peace to learn on a practical basis how to carry out his or her judicial responsibilities.

Separate mentoring programmes are offered on the various duties justices of the peace perform, including intake courts, bail courts, assignment courts and *Provincial Offences Act* trial courts. Different justices of the peace are often involved as mentors at different stages of the programme. The period of time a new justice of the peace spends in a mentoring programme varies with the individual justice, but it can last up to six months and sometimes longer.

In order to strengthen the mentoring programme, the Ontario Court of Justice has also offered a number of workshops for mentors. These workshops focus on a discussion of issues faced by mentors in order to encourage consistency in training in the various parts of the province. They also include discussions of the mentoring process itself, and various mentoring and adult education techniques which may be of assistance in facilitating the learning process for new justices of the peace.

#### 4. Internal Judicial Progression

From time to time, justices of the peace with a non-presiding designation are re-appointed as presiding justices of the peace through internal judicial progression. As presiding justices of the peace, they acquire the authority to preside at the trial of an offence under the *Provincial Offences Act* and also consider walk-in guilty pleas.

In order to enable them to discharge these additional duties, these justices of the peace are also offered an opportunity to attend the workshops on the trial of an offence under the *Provincial Offences Act*. They also participate in the separate mentoring programme offered on *Provincial Offences Act* trial courts.

## II. CONTINUING EDUCATION

Continuing Education supports the on-going professional development of the justice of the peace bench. Various materials and programmes are provided on an ongoing basis to facilitate this process.

#### 1. Materials Provided

In addition to the materials provided on appointment, each justice of the peace is provided, on a periodic basis, with a copy of the following:

- *Criminal Code*
- *Provincial Offences Act*
- *Highway Traffic Act*
- *Ontario Provincial Offences, Justice of the Peace Edition*
- *Contraventions Act*
- On an annual basis, bilingual justices of the peace are also provided with a *Code Criminel*.

#### 2. Annual Spring and Fall Conferences

The cornerstone of the continuing education programmes for justices of the peace are the annual spring and fall conferences. The annual fall conferences have been offered to justices of the peace for many years; the annual spring conferences were added in 1993. Every justice of the peace is invited to attend one of these conferences in both the spring and the fall of each

year. Each of these conferences is three days in length. The conferences use a combination of lectures, panel discussions, demonstrations and small group discussions.

Resource people at these conferences have included judges of all levels of courts, including the Ontario Court of Appeal and the Supreme Court of Canada; experienced justices of the peace; counsel from the Crown Law Office – Criminal and local Crown Attorneys; counsel from the Ministries of the Environment, Labour and Natural Resources; counsel from the federal Department of Justice; defence counsel in private practice; law professors; academics from other fields; and professionals from a wide variety of backgrounds.

The topics covered at these conferences are wide ranging and vary from year to year. Specific topics which have been covered in recent conferences include delivering oral judgments; risk assessment and indicators of lethality at bail hearings; the *Youth Criminal Justice Act*; eye witness identification; workplace harassment; specific issues at trials of regulatory offences; accident reconstruction; search warrant issues; mistrials and bias; the *Domestic Violence Protection Act*; orders for examination under the *Mental Health Act*; child apprehension warrants under the *Child and Family Services Act*; evidence; stress management; and pre-retirement planning.

### 3. Native Workshop

The Native Workshop is a workshop to which all native justices of the peace are invited. It is sponsored jointly by the Office of the Chief Justice and the Ontario Native Justice of the Peace Program. These workshops focus on a mix of substantive legal issues and other non-legal issues relevant to native justices of the peace. It is three days in length, and held in northern Ontario. Approximately 20 – 25 native justices of the peace attend each year.

Resource people have included judges, experienced justices of the peace, counsel from the Crown Law Office – Criminal and the Crown Law Office – Civil as well as other lawyers in the Ministry of the Attorney General, lawyers in private practice, and representatives of various Aboriginal organizations.

Specific topics covered at recent native workshops include search and seizure, bail, private prosecutions, avoiding conflicts in small communities, Aboriginal rights of Métis, and community justice development projects of the Ontario Native Justice of the Peace Program.

### 4. French Workshop

A three day intensive workshop is offered to bilingual justices of the peace once a year. The workshop is usually held in Ottawa. Approximately 20 – 25 bilingual justices of the peace attend. The workshop is conducted entirely in French, allowing the participants to converse in the French language.

All resource people are fluent in the French language. They have included judges, experienced justices of the peace, law professors, legal translators, and counsel from the Ministry of the Attorney General and the Department of Justice.

A core part of each workshop is the enhancement of the use of French legal terminology. Recent topics have included discussions of anglicisms in French, the legal obligations of the court to provide French or bilingual services, accident reconstructions, delivering oral judgments in French and visits to the Supreme Court of Canada.

## 5. Computer Training

Since 1999, all justices of the peace have been provided with a laptop computer. Basic training was provided to most justices of the peace in Windows, Microsoft Word, and Microsoft Outlook. In addition, a number of justices of the peace have received training in Quicklaw.

Computer skills and literacy vary greatly among justices of the peace. The ability to function effectively in an electronic environment will become increasingly important in the upcoming months and years. The use of hyperlinks in a bi-weekly publication prepared by the Centre for Judicial Research and Education entitled, *Items of Interest* is designed to facilitate electronic research of case law and legislation. Computer training continues to be provided on an as-needed basis.

## 6. External Conference Policy

For some years, the Office of the Chief Justice has re-imbursed justices of the peace for the expenses incurred in taking workshops or conferences offered by outside sources, at the request of the justice of the peace. This funding was made available for workshops or conferences which assisted the justice of the peace in performing his or her assigned duties. There is now a budget in place for attendance at these conferences.

## 7. Specialized Workshops

In addition to the above regularly scheduled workshops, the Court also offers specialized workshops from time to time on a variety of topics, including trials of offences under the *Occupational Health and Safety Act* and the *Environmental Protection Act*, and advanced bail workshops.

# III. OTHER EDUCATIONAL RESOURCES

## 1. Centre for Judicial Research and Education

Justices of the peace of the Ontario Court of Justice have access to the Ontario Court of Justice Centre for Judicial Research and Education located at Old City Hall in Toronto. The Centre for Judicial Research and Education, a law library and computer research facility, is staffed by four counsel together with administrative staff and is accessible in person, by telephone, e-mail or fax. The Centre for Judicial Research and Education responds to specific requests from judges and justices of the peace for information and research.

In addition, the Centre provides updates with respect to legislation and relevant case law through its regular publication *Items of Interest*, which is distributed to every judge and justice of the peace electronically on a bi-weekly basis. It also contains hyperlinks to relevant legislation and web sites of interest, including those with decisions of the Supreme Court of Canada and the Ontario Court of Appeal.

## 2. Recent Developments

The Honourable Mr. Justice Ian MacDonnell also provides to justices of the peace of the Ontario Court of Justice his summary and comments on current criminal law decisions of the Ontario

Court of Appeal and of the Supreme Court of Canada in a publication entitled *Recent Developments*.

### 3. Regional Meetings

The Ontario Court of Justice is divided into seven regions for the purposes of judicial administration. All regions hold annual regional meetings. While the meetings principally provide an opportunity to deal with regional administrative and management issues, they also have an educational component.

## Appendix 2

### Courts of Justice Act R.S.O. 1990, CHAPTER C.43

Last amendment: 2006, c. 35, Sched. C, s. 20.

#### [EXCERPT]

#### PROVINCIAL JUDGES

##### Appointment of provincial judges

42. (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such provincial judges as are considered necessary. 1994, c. 12, s. 16.

##### Qualification

(2) No person shall be appointed as a provincial judge unless he or she,

- (a) has been a member of the bar of one of the provinces or territories of Canada for at least 10 years; or
- (b) has, for an aggregate of at least 10 years,
  - (i) been a member of a bar mentioned in clause (a), and
  - (ii) after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect to a position held under a law of Canada or of one of its provinces or territories. 2006, c. 21, Sched. A, s. 5 (1).

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

Copies of attachments to an e-mail from John E. Creelman, Justice of the Peace re: Recent Changes in the Jurisdiction of a Justice of the Peace to Act, Recent Changes in Scheduling and Assignment of Justices of the Peace, Ontario Court of Justice Judicial Functions: Justices of the Peace and Judges (Non-Trial Matters in Criminal and Regulatory Offences, Schedule "A": Sampling of Program and Degree Certifications Held by Justices of the Peace and Prior Employment Experience and Skills of Justices of the Peace on Appointment.

(Appendix 1, page 5 - 24)

Re: Justices of the Peace: Request for Equivalency

It was moved by Ms. Warkentin, seconded by Mr. Lawrie, that equivalency be granted to retiring Justices of the Peace, permitting them to apply to sit the paralegal licensing examination without an accredited diploma, provided they have a minimum of 3 years experience as a sitting Justice of the Peace.

Carried

REPORT OF THE AUDIT COMMITTEE

Ms. Symes presented the Report.

Report to Convocation  
March 27, 2008

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Audit Committee

Committee Members  
Beth Symes (Chair)  
Marshall Crowe (Vice-Chair)  
Ab Chahbar  
Ross Murray  
Vern Krishna

Purpose of Report:    Decision  
                                 Information

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

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## COMMITTEE PROCESS

1. The Audit Committee ("the Committee" ) met on March 18, 2008. Committee members in attendance were Beth Symes (c.), Marshall Crowe, Ab Chahbar, and Ross Murray.



2. Staff in attendance were Malcolm Heins, Wendy Tysall and Andrew Cawse. Also attending were Michelle Strom, Kathleen Waters and Akhil Wagh from LawPro and Dan Markovich from Hewitt Associates.

### FOR DECISION

### COMBINED FINANCIAL STATEMENTS OF THE ERRORS AND OMISSIONS INSURANCE FUND FOR THE YEAR ENDED DECEMBER 31, 2007

#### Motion

3. That Convocation approve the audited combined financial statements for the Law Society of Upper Canada Errors & Omissions Insurance Fund for the year ended December 31, 2007.
4. The audited combined financial statements for the Law Society of Upper Canada Errors & Omissions Insurance Fund for the year ended December 31, 2007 are attached from page 36 for Convocation's approval.
5. The audited financial statements for the Lawyers' Professional Indemnity Company for the year ended December 31, 2007 are attached for Convocation's information.
6. The Lawyers' Professional Indemnity Company administers The Law Society of Upper Canada Errors and Omissions Insurance Fund under a management services agreement.
7. Ms. Michelle Strom (President & CEO), Ms. Kathleen Waters (President & CEO designate) and Mr. Akhil Wagh (CFO) from LawPro will be in attendance at Convocation.

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

Copy of the audited combined financial statements for the Law Society of Upper Canada Errors & Omissions Insurance Fund for the year ended December 31, 2007.

(pages 1 – 62)

#### Re: E & O Financial Statements

It was moved by Ms. Symes, seconded by Mr. Chahbar, that Convocation approve the audited combined financial statements for the Law Society of Upper Canada Errors & Omissions Insurance Fund for the year ended December 31, 2007.

Carried

#### TREASURER'S REPORT TO CONVOCATION

Treasurer's Report to Convocation  
March 27, 2008

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LAWPRO's Annual Meeting

Purpose of Report: Decision

Prepared by: Katherine Corrick

FOR DECISION

Motion

1. That Convocation authorize the Treasurer to vote the proxy in favour of the proposed shareholder resolutions set out at Appendix 1.

Background

2. The Annual and General Meeting of Shareholders of the Lawyers' Professional Indemnity Company will be held on April 23, 2008.
3. At the meeting, the shareholder will be asked to vote on the proposed shareholder resolutions set out at Appendix 1.
4. Traditionally, the Treasurer has signed the proxy to vote the Law Society's shares in favour of the resolutions.
5. The Treasurer seeks Convocation's guidance on the exercise of the proxy.
6. The minutes of the 2007 Annual and General Meeting of Shareholders are attached at Appendix 2.

APPENDIX 1

LAWYERS' PROFESSIONAL INDEMNITY COMPANY

ANNUAL AND GENERAL MEETING OF SHAREHOLDERS  
WEDNESDAY, APRIL 23, 2008

PROPOSED SHAREHOLDER RESOLUTIONS

1. APPROVAL OF MINUTES OF PREVIOUS MEETING

RESOLVED that the minutes of the April 25, 2007 Shareholders Meeting are accepted.

2. APPROVAL OF FINANCIAL STATEMENTS

RESOLVED that the financial statements of the Company for the year ended December 31, 2007 are approved.

### 3. ELECTION OF DIRECTORS

RESOLVED that [*George D. Anderson, Constance B. Backhouse, James R. Caskey, Q.C., Abdul A. Chahbar, Ian D. Croft, Douglas F. Cutbush, E. Susan Elliott, Lawrence A. Eustace, Abraham Feinstein, Q.C., Frederick W. Gorbet, Malcolm L. Heins, Rita Hoff, William G. Holbrook, Laurie H. Pawlitza and Kathleen A. Waters*], are elected directors of the Company to hold office until the next annual meeting of shareholders or until their successors are elected or appointed.

### 4. APPOINTMENT OF AUDITORS

RESOLVED that [*Deloitte & Touche LLP*] are appointed as auditors of the Company to hold office until the next annual meeting of shareholders at such remuneration as may be fixed by the directors and the directors are authorized to fix such remuneration.

### 5. CONFIRMATION OF ACTS OF DIRECTORS AND OFFICERS

RESOLVED that all acts, contracts, by-laws, proceedings, appointments, elections and payments, enacted, made, done and taken by the directors and officers of the Company to the date hereof, as the same are set out or referred to in the resolutions of the board of directors, the minutes of the meetings of the board of directors or in the financial statements of the Company, are approved, sanctioned and confirmed.

## APPENDIX 2

-DRAFT-

MINUTES OF THE ANNUAL AND  
GENERAL MEETING OF THE  
SHAREHOLDERS of Lawyers'  
Professional Indemnity Company  
held at 1 Dundas Street West, Suite  
2200, Toronto, Ontario on  
Wednesday, April 25, 2007 at the  
hour of 2:00 p.m.

Present in Person:

George D. Anderson, Constance B. Backhouse, Kim A. Carpenter-Gunn, James R. Caskey, Q.C., Abdul A. Chahbar, Ian D. Croft, Douglas F. Cutbush, Lawrence A. Eustace, Abraham Feinstein, Q.C., Frederick W. Gorbet, Malcolm L. Heins, Rita Hoff, William G. Holbrook, Laurie H. Pawlitza and Michelle L. M. Strom.

Present by Proxy:

Duncan Gosnell advised the Chair that a proxy had been received from the Law Society appointing Malcolm Heins as its nominee, being a quorum of the shareholders of the Company.

Present by Invitation was:

Duncan D. Gosnell. Kim Carpenter-Gunn acted as Chair for the meeting and Duncan Gosnell acted as Secretary for the meeting.

The Chair stated that a quorum was present, and notice of the meeting had been sent to all of the directors and shareholders and to the auditor of the Company, and she therefore declared the meeting to be duly constituted for the transaction of business.

#### ACCEPTANCE OF MINUTES

The Chair presented to the meeting the minutes of the June 8, 2005 Shareholders Meeting.

ON MOTION DULY MADE by Malcolm Heins, SECONDED by George Anderson AND UNANIMOUSLY CARRIED, the following resolution was passed:

RESOLVED that the minutes of the April 26, 2006 Shareholders Meeting are accepted.

#### PRESENTATION OF FINANCIAL STATEMENTS

The Chair presented to the meeting financial statements of the Company for the year ending December 31, 2006, which were approved by the Board of Directors on February 21, 2007. The report of the auditor to the shareholders was read by Ian Croft.

ON MOTION DULY MADE by Ian D. Croft, SECONDED by Frederick Gorbet AND UNANIMOUSLY CARRIED, the following resolution was passed:

RESOLVED that the Company's financial statements for the year ended December 31, 2006, are approved.

#### ELECTION OF DIRECTORS

The Chair then stated that it was in order to proceed with the election of directors and declared the meeting open for nominations.

Malcolm Heins nominated the following:

George D. Anderson  
Constance B. Backhouse  
Kim A. Carpenter-Gunn  
James R. Caskey, Q.C.  
Abdul A. Chahbar  
Ian D. Croft  
Douglas F. Cutbush  
Lawrence A. Eustace  
Abraham Feinstein, Q.C.  
Frederick W. Gorbet  
Malcolm L. Heins  
Rita Hoff  
William G. Holbrook

Laurie H. Pawlitza  
Michelle L.M. Strom

ON MOTION DULY MADE by Malcolm Heins, SECONDED by William Holbrook AND UNANIMOUSLY CARRIED, the following resolution was passed:

RESOLVED that George D. Anderson, Constance B. Backhouse, Kim A. Carpenter-Gunn, James R. Caskey, Q.C., Abdul A. Chahbar, Ian D. Croft, Douglas F. Cutbush, Lawrence A. Eustace, Abraham Feinstein, Q.C., Frederick W. Gorbet, Malcolm L. Heins, Rita Hoff, William G. Holbrook, Laurie H. Pawlitza, and Michelle L.M. Strom, are elected directors of the Company to hold office until the next annual meeting of shareholders or until their successors are elected or appointed.

#### APPOINTMENT OF AUDITORS

ON MOTION DULY MADE by Ian Croft, SECONDED by George Anderson AND UNANIMOUSLY CARRIED, the following resolution was passed:

RESOLVED that Deloitte & Touche LLP are appointed as auditors of the Company to hold office until the next annual meeting of shareholders at such remuneration as may be fixed by the directors and the directors are authorized to fix such remuneration.

#### CONFIRMATION OF ACTS OF DIRECTORS AND OFFICERS

ON MOTION DULY MADE by Malcolm Heins, SECONDED by Douglas Cutbush AND UNANIMOUSLY CARRIED, the following resolution was passed:

RESOLVED that all acts, contracts, by-laws, proceedings, appointments, elections and payments, enacted, made, done and taken by the directors and officers of the Company to the date hereof, as the same are set out or referred to in the resolutions of the board of directors, the minutes of the meetings of the board of directors or in the financial statements of the Company, are approved, sanctioned and confirmed.

There being no further business, the meeting was then adjourned.

Chair

Secretary

Re: LAWPRO Proxy

It was moved by Mr. Millar, seconded by Mr. Campion, that Convocation authorize the Treasurer to vote the proxy in favour of the proposed shareholder resolutions set out in the Report at Appendix 1.

Carried

The Treasurer expressed Convocation's thanks to Michelle Strom.

## REPORT OF THE TRIBUNALS COMMITTEE

Mr. Sandler presented the Report.

Report To Convocation  
March 27, 2008\*

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Tribunals Committee

Committee Members  
Mark Sandler (Chair)  
Bonnie Warkentin (Vice-Chair)  
Raj Anand  
Larry Banack  
Jennifer Halajian  
Derry Millar  
Joanne St. Lewis

Purposes of Report: Decision  
Information

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

\*Deferred from February 21, 2008 Convocation

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Office of Counsel to the Hearing Panel

## COMMITTEE PROCESS

1. The Committee met on February 7, 2008. Committee members Mark Sandler (Chair), Bonnie Warkentin (Vice Chair), Raj Anand, Jennifer Halajian, Derry Millar, and Joanne St. Lewis attended. Bencher Paul Dray also attended. Staff members A.K. Dionne, Grace Knakowski, and Sophia Sperdakos also attended.

## FOR DECISION

### GUIDELINES FOR ADJUDICATORS RESPECTING ORAL/WRITTEN REASONS FOR DECISION

#### MOTION

2. That Convocation approve the “housekeeping” amendments to the guidelines for adjudicators respecting oral/written reasons for decision as set out at Appendix 1.
3. That Convocation permit the Committee to make future housekeeping amendments to guidelines without seeking Convocation’s approval.

#### Background

4. In September 2006 Convocation approved guidelines for adjudicators respecting oral/written reasons for decision. Housekeeping amendments are necessary to reflect changes in the language of the *Law Society Act* since the guidelines were originally approved. The proposed amendments are highlighted in the document at Appendix 1.
5. The Committee is of the view that it is not the best use of Convocation’s time to consider housekeeping amendments to guidelines such as these. Instead its approval for amendments should be reserved for proposals that seek substantive changes. The Committee proposes that in future it be permitted to make housekeeping amendments to guidelines without Convocation’s approval.

## PUBLICATION OF TRIBUNALS DECISIONS – DISMISSAL OF APPLICATIONS

#### MOTION

6. That Convocation direct that Hearing Panel dismissals of Law Society applications be published in the same manner as other Hearing Panel decisions.

#### Introduction and Background

7. Notices of Applications respecting members are posted on the Law Society’s website. Currently, however, if an application against a member is dismissed, the Law Society does not publish this fact. So for example, the case summary would not appear in the *Ontario Reports* where other decisions are set out. While these decisions would be available on CanLII assuming there are reasons for decision, the public is not generally likely to search CanLII for this information.

8. Given the Law Society's commitment to transparency in its hearing processes there does not seem to be a justification for failing to publish notices of dismissals.
9. While there may be some licensees who prefer not to have the information about the original complaint made known again, the Committee is of the view that on balance it seems only fair to make it known when a licensee has been found not guilty of professional misconduct or conduct unbecoming. Moreover, it is in the public interest.

## INFORMATION/MONITORING

### OFFICE OF COUNSEL TO THE HEARING PANEL

#### Conclusion

10. In its final report to Convocation dated April 26, 2007 the Tribunals Composition Task Force included the following recommendation:

That the Tribunals Committee be invited to consider the merits of establishing the Office of Counsel to the Hearing Panel.

11. The Committee has considered the issues as it was invited to do and has concluded that no such Office should be established at the Law Society at this time. Its analysis follows.

#### Background

12. A number of administrative tribunals and professional regulators have established units within their organizations known most often as Office of Tribunal Counsel or Office of Independent Counsel. The role varies from organization to organization, but generally speaking its main function is to provide support by way of advice and research and answering legal questions the adjudicators may have in the course of proceedings (e.g. on admissibility of evidence, substantive law or procedure, etc.).
13. The role is generally a public one in the sense that the Counsel's research, advice and answers to questions are shared with all parties. Its main advantage or reason for being is most often described as providing neutral information or advice to the panel that does not derive from any of the parties interested in the outcome of the proceedings.
14. The role exists almost exclusively in organizations whose adjudicators are not lawyers. Other law societies do not have this position.

#### Examples of uses of Counsel by Other Professions and Tribunals

15. Appendix 2 contains a chart of some professional bodies that use independent Counsel and the roles they play within each organization. The role is limited to advice, not direction and the advice given to adjudicators must be shared with the parties.
16. The Health Professions Procedural Code, made under the *Regulated Health Professions Act* states in section 44:

If a panel obtains legal advice with respect to a hearing, it shall make the nature of the advice known to the parties and they may make submissions with respect to the advice.



This statement codifies the public nature of the role and the appropriateness of establishing such a position within the regulated health professions.

17. In a 2003 orientation program for members of the Royal College of Dental Surgeons of Ontario the supporting material asked, "What is an Independent Legal Counsel? (ILC)" Among other points it noted,
  - ILC is the legal counsel to the Discipline Panel, and provides advice to the Panel on issues of procedure, admissibility of evidence and substantive law.
  - ILC is independent, that is he or she must not favour the interests of the College or those of the Member.
  - ILC must be "indifferent" as to the outcome of the proceedings, provided that the process has been respected throughout.
  - ILC will occasionally request time to consider submissions made to the Panel by the parties, review legal authorities presented (if any), and/or make his or her own inquiry of legal sources, before advising the Panel.
18. In a professional development program out of Alberta in 2007 the Environmental Appeals Board noted in response to the question, "Why does a tribunal need legal counsel?" that,
  - citizens are becoming more aware of their rights and more active in asserting those rights;
  - issues and legal arguments are becoming more complex;
  - tribunal members have other specialized expertise; and
  - main role of tribunal counsel is to uphold the principles of natural justice and procedural fairness.
19. Both these programs reveal the role of Tribunal Counsel to impart advice on legal issues and procedure.

#### Advantages and Disadvantages of Establishing an Office of Counsel to the Hearing Panel

##### Possible Advantages

20. Counsel to the Hearing Panel may assist in enhancing consistency from panel to panel in dealing with procedural issues, applying established policy and addressing precedent. This is by no means the only way to enhance this feature, however, given the influence of both adjudicator experience and ongoing education.
21. Another possible advantage may be that to the extent there is an unrepresented party before the panel, Counsel may be seen as contributing to procedural fairness. It is important to note, however, that both prosecutors and adjudicators have an important role to play in such circumstances as is evidenced by current practice in both criminal and civil justice courts.
22. A third possible advantage is one that is largely applicable to tribunals in which none of the panel members is a lawyer, namely that Counsel to the Hearing Panel would be in a position to provide assistance where legal considerations are at play.

### Possible Disadvantages

23. For whatever advantages the establishment of the office might have, the Courts have ruled in a number of instances that Tribunal Counsel must be cautious not to “descend into the arena” by demeanour or involvement in the actual progression of the proceeding. Criticism has been levelled at Counsel who participate in the proceeding without being asked, interfere in cross-examination, or appear dominant over or at least equal to the adjudicators.
24. There is also the risk that panels will come to rely on the advice of the Counsel over the submissions of parties, not because it is necessarily better or more accurate, but because it is given by a “disinterested source” and that source becomes a familiar one to panels. Needless to say this has the potential to compromise the transparency and objectivity of the process. Even if this is not the case, the appearance to the parties of over influence may result in disrespect for or frustration with the process. To the extent that the issue is legal in nature it might be argued that a panel with no lawyers on it will rely even more heavily on Counsel.<sup>1</sup>
25. The Law Society has taken a number of steps to promote the separation of the tribunals processes from the prosecutorial functions. There is a potential concern that for Counsel to the Hearing Panel to be seen as truly independent the lawyer could not be a member of Law Society staff but would have to be outside counsel. This complicates the nature of the appointment.

### Tribunals Composition Task Force consideration of Counsel role

26. In the course of its deliberations the Tribunals Composition Task Force considered whether there would be a place in the Law Society’s Tribunal process for Counsel. As can be seen from the excerpt from the Task Force’s report set out at Appendix 3 it envisioned a narrower role for Counsel than is typically the case in other administrative tribunals. In the course of its deliberations the Task Force received a memorandum on the issue, which is set out at Appendix 4.
27. Its ultimate consideration did not include some of the broader components of the role. Without recommending the creation of the position, the Task Force’s consideration was that to the extent a Counsel role might be contemplated, its role would be to review draft panel decisions to ensure that they are consistent with the existing jurisprudence of the Hearing Panel. This is different from the role that Publications Counsel currently plays and if such a Counsel role were to be introduced, the Publications Counsel position would continue to exist.
28. There are some possible benefits to having Tribunal Counsel perform the limited function of reviewing draft decisions from a jurisprudential perspective. Without in any way trying to limit the freedom, and indeed the requirement, that the panel that has heard the case must make the decision the Counsel may be an additional resource that

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<sup>1</sup> This is not the scenario for Law Society panels, which will always have at least one and usually two lawyers adjudicating on any matter. Hearings in which a paralegal licensee is the subject will have a lawyer, a lay benchers and a paralegal adjudicating.

supports the panel in rendering the best decision it can. Such an oversight or advisory role can play a part in ensuring the growth and development of Tribunal jurisprudence.

29. The potential disadvantage or risks of even this limited Counsel role are similar to the ones set out under the broader Counsel role discussed above, in particular, that there will be a perceived or real sense that Counsel has greater influence over the process than appropriate and that panels may, in certain circumstances, defer to Counsel. There might also be the perception that Counsel has participated in the panel's deliberation and/or written the decision for the panel. Although these risks can be reduced there is the potential for this perception to persist.
30. In addition, there is the potential for the Counsel's additional views to complicate the process procedurally. What, for example, would the process be if the Counsel identified to a panel that its decision was inconsistent with the jurisprudence? The panel must be free to accept or reject the Counsel's advice, but to what extent should the parties have an opportunity to make submissions if issues of inconsistency with jurisprudence are raised?
31. In October 2007 the Committee responded to an earlier request of Convocation that the Committee consider whether law clerks could be made available to adjudicators to assist them with preparing reasons for decision. An excerpt from the Committee's report is set out at Appendix 5. In its report the Committee noted that it is a principle of natural justice that the persons who hear a proceeding must decide the matter and this extends to the writing of the reasons for decision. The approach the Committee adopted on that issue is relevant to its considerations here.
32. Having considered the possible advantages and disadvantages of establishing the Office of Counsel to the Hearing Panel, the Committee has concluded that there is insufficient reason to do so. The Tribunals Composition Task Force did not point to any particular deficiency in the current approach to justify changing it. Moreover, in weighing the possible advantages and disadvantages of establishing this new position the Committee is of the view that the disadvantages outweigh the advantages. In particular the Committee emphasizes the importance of the principle that those who hear the matter should decide it and should be perceived to be deciding it. In the Committee's view, the potential danger to that principle in establishing the Office of Counsel to the Hearing Panel is not justified at this time either on the basis of need or benefit.

## Appendix 2

Profession	Do you have counsel to the tribunal? If so, what is their role?
Physicians & Surgeons	<p>The College has independent legal counsel (ILC) to the Discipline Committee and the Fitness to Practise Committee. Independent Legal Counsel carries out various responsibilities and duties including:</p> <ul style="list-style-type: none"> <li>• Legal Advice to Panels of Committees – see s.44 of Code requirement to make advice known to the parties;</li> <li>• Legal Research;</li> <li>• Review of draft decisions and editorial assistance in</li> </ul>

	<p>confines of <i>Khan</i> decision;</p> <ul style="list-style-type: none"> <li>• Proactive advice to improve policy and procedure including rules of the committee; Rules of committee audit/review as required;</li> <li>• Research memoranda in response to issues and questions related to cases or in preparation for Council, business or educational meetings;</li> <li>• Ad hoc advice to Chairs, panel members and the Hearings Office manager;</li> <li>• Delivers orientation and education of Committee members.</li> </ul>
Pharmacists	The College has ILC to give legal advice on the record, if asked by the panel.
Chartered Accountants	ILC sits with the Panel and answers any legal questions that they may have. For example, they may answer questions on issues of evidence.
Teachers	<p>ILC to the Committee is always present at hearings and at pre-hearings, if requested by the presiding officer.</p> <p>The role of ILC is to give impartial legal advice to the panel, to help the panel make a legally correct decision. It is important to remember that ILC's advice is just that – advice. ILC cannot direct how the panel should decide the case or an issue.</p>
Professional Engineers	ILC provides independent legal advice on the record to the Committee.
Ontario Rental Housing Tribunal	They provide advice to the Chair, Adjudicators, the Director and Managers.

## Appendix 3

## EXCERPT FROM TRIBUNALS COMPOSITION TASK FORCE REPORT OF APRIL 26, 2007

Counsel to the Tribunal

101. As a matter related to the integrity of the decision-making function of the tribunal, the Task Force considered the merits of counsel to the chair of the tribunal. Unlike the broader duties of counsel to some administrative tribunals, the Task Force envisaged a counsel whose primary duty would be to review draft panel decisions to ensure that the decision is consistent with existing jurisprudence of the Hearing Panel. This type of resource is common in most sophisticated administrative tribunals.
102. The Law Society's Tribunals Office currently includes the position of Publications Counsel, whose responsibilities include coordinating the production of reasons of the Hearing Panel and preparing the reasons for publication on Quicklaw and CanLII.
103. The counsel the Task Force conceived would not replace the Publications Counsel, as the role is different. The new counsel would be available to provide guidance to the chair, and through him or her, to the panels, with respect to the written reasons for decision. The advice would be provided in a neutral way to ensure consistency in the

body of jurisprudence created by the Hearing Panel, with instruction on how, but not what, to write. In complex cases or where intricate procedural or jurisdictional issues are raised, counsel to the hearing panels may be of added benefit.

104. The Task Force is suggesting that Convocation consider the merits of counsel to the Hearing Panel. The Task Force recognizes that the suggestion for such a counsel position is only peripherally related to the Task Force's specific mandate. The Task Force also acknowledges that creating a new position within the operational departments is a matter for the Chief Executive Officer, the relevant senior manager and the Human Resources Department.
105. However, to the extent that the position of counsel may, broadly speaking, assist in improving the tribunal function, and in that sense is an extension of the policy recommendations reflected in this report, the Task Force is bringing the matter to the attention of Convocation. Convocation may wish to refer this matter to the Tribunals Committee for review.

Appendix 4

#### MEMORANDUM

To: Tribunals Composition Task Force

From: Jim Varro

Date: February 1, 2006

Re: Information on Law Society's Consideration of Counsel to Hearing Panels

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At the Task Force's January 25, 2006 meeting, a question about counsel to the Society's Hearing Panel was raised. This memorandum outlines the previous consideration of this issue at the Society. Counsel to the Panels has never been discussed as a matter of policy at Convocation.

In April 1998, the Professional Regulation Committee ("the PRC"), chaired at the time by Eleanor Cronk, received a report from a team of staff (the PRROGRAM team) that had been organized to comprehensively review the regulatory processes at the Society as part of a Society-wide improvement initiative called Project 200. In a series of reports to the PRC, the team provided its views on ways to enhance, through "redesign" initiatives, the regulatory effectiveness of the Society. One of the suggestions was that counsel be appointed to discipline committees. The following is the report that the team provided to the PRC on this issue:

#### *COUNSEL TO DISCIPLINE COMMITTEES*

1. Many self-regulating or regulatory bodies maintain counsel to their discipline and appeal tribunals. These counsel essentially provide legal advice to the tribunal on matters connected with the tribunal's authority, such as issues of process or jurisdiction.

2. While the scope of the redesign project did not originally include a review of this type of facility within the Law Society, it became apparent that as a related function to the discipline hearing process, the role of counsel to the Discipline Committee may be an appropriate addition to the redesign.

#### Redesign Proposals

3. The Program Team called for the creation of a Legal Services Office (LSO) which would provide a range of services for the entire Law Society, including the regulatory process. One of the functions within the office would be that of counsel to the Discipline Committees. Under the redesign, this counsel would, among other things, provide advice, research and assistance with the decision-making function of the tribunal.
4. It was envisaged that the LSO would also provide supervision for the activities of the hearings support staff, supervise the investigation and conduct the prosecution of unauthorized practice matters and oversee the activities of outside counsel retained by the Law Society (i.e. outside investigation of complaints against benchers).
5. The position of counsel to the Committee would encompass these responsibilities to the extent that they did not conflict with the counsel role<sup>2</sup>, in which case it may be necessary to maintain LSO staff specifically for counsel duties.
6. On a related point, it is proposed that the LSO would be staffed and operated separately from the regulatory/discipline department as a means of avoiding potential conflicts or questions of bias.
7. The Institute of Chartered Accountants is one organization that has, as a standing feature of its process, counsel to both the discipline and appeal panels. Bylaw 579 of the Institute states that "...members of the panel may seek legal advice from the legal adviser to the discipline committee and in such case the nature of the advice sought shall be made known to the parties in order that they may make a submission as to the law". A similar provision applies to its appeal committee.
8. Counsel retained as the legal adviser to the discipline and appeal panels at the Institute of Chartered Accountants, Robert Peck, was interviewed and provided his perspective on his role and its place in the process. He indicated the following:
  - he performs the role of "gatekeeper" respecting evidentiary matters, providing advice as needed on the appropriate tests to be applied, and assisting in the panels' understanding of the arguments presented;

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<sup>2</sup> For example, where an outside investigation is under the direction of the LSO counsel, it would not be appropriate, should the matter proceed to hearing, for that counsel to advise a hearing panel in the prosecution of the that case.

- he is available to answer questions about the proceeding and the process generally;
- he provides guidance to the panels with respect to the written reasons for decision, with instruction on how, but not what, to write, providing advice in a neutral way and educating panels on this aspect of their responsibilities;
- he addresses legal and policy questions, for example, where in the assignment hearings or disclosure meetings, the panels are narrowing issues and are seeking to resolve what can be resolved at that stage;
- he assists in managing the process, in advising on legal challenges brought by the parties on jurisdictional or process issues, ensuring that where legal questions are raised by the panel, counsel for both sides have, where appropriate, an opportunity to address it;
- he undertakes legal research as required for the purposes of his advice to the panels.

#### Implementation Issues

9. While it is recognized the disciplinary tribunals of other regulatory bodies have legal counsel because they otherwise do not have any legal expertise “at the table” (because they are not lawyers), the fact that lawyers (with lay benchers) comprise the Law Society’s discipline hearing panels should not automatically discount the need or the usefulness of counsel to the tribunals.
10. Having said the above, it is recognized that, given the variety of cases heard by hearing panels, counsel to the panels may not always be necessary.
11. Some cases are uncomplicated (a simple Forms case is one example). Further, the legislative reforms anticipate that many of these straightforward, single-issue or “minor offence” cases will be heard by one-member hearing panels. These cases may not warrant the attendance of advisory counsel at the hearing.<sup>3</sup>
12. However, another feature of the legislative reforms is the end of the current bifurcated hearing process (where hearing panels’ reasons and decisions are considered by Convocation (except for reprimands in Committee)). In the new system, hearing panels’ decisions will be final, subject to an appeal to an Appeal Panel appointed by Convocation.
13. In light of this fundamental change, in complex cases or where intricate procedural or jurisdictional issues are anticipated to be raised, the role of counsel to the hearing panels may be an important and helpful addition to the process.
14. To address the above issues, a policy could be developed to give a seized hearing panel the discretion to appoint a counsel to the hearing panel in certain circumstances.

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<sup>3</sup> This report predated to the amendments to the *Law Society Act* effective February 1999.

## Summary

15. Independent counsel to the tribunals may serve to emphasize to both the lawyer appearing before the tribunal and the public who is interested in the process that there is a separation between the decision-making responsibility of the tribunal, as it weighs the facts, law and arguments, and advice on process or jurisdictional questions which may arise in the course of the hearing. Generally, it cannot but assist in assuring the interested parties that the process is fair, open and efficacious.

The PRC also received a letter from then Vice-chair Harriet Sachs, who, unable to make the April 1998 meeting, wished to express her views on the proposal. The text of the letter is attached at Appendix 1.

Ultimately, the PRC decided not to pursue this proposal and discussion of it ended at the PRC level.

## Appendix 1.

April 7, 1998.

Mr. Jim Varro,  
The Law Society of Upper Canada,  
Osgoode Hall,  
130 Queen Street West,  
TORONTO, Ontario.  
MSH 2N6

Dear Jim:

Unfortunately, I will not be able to attend the above meeting. I am writing this letter because of one issue which appears in the Discussion Paper on Policy Issues Arising from the PRROGRAM Team Report and Implementation of Regulatory Design Through Project 200. I would ask that you put this letter before the members of the Committee so that my views on this issue can be made known to them.

Beginning at page 8 of the Discussion Paper, a proposal is made that the Law Society consider having the ability to appoint counsel to their discipline and appeal tribunals. I appreciate that it is contemplated that this should only take place in complex cases or where intricate procedural or jurisdictional issues are anticipated to be raised. In the McCruer Report the role of counsel to regulatory tribunals was developed. It was developed in appreciation of the fact that many administrative tribunals did not have lawyers sitting as adjudicators. This is not the case with the Law Society. From our ranks judges are chosen. Judges do not have counsel appointed to assist them in making their decisions. In my opinion, to appoint independent counsel to either our Committee hearings or our Appeal Tribunal is, in effect, saying that we are unable to understand the legal arguments put to us by counsel and make decisions on our own. Quite frankly, I find this suggestion demeaning.



The suggestion is also made that the appointment of an independent counsel gives an appearance of fairness to the process. I have appeared frequently before administrative tribunals on behalf of a party where the tribunal has had independent counsel. In fact, my experience is that the presence of independent counsel, rather than reassuring both counsel, is one which in and of itself can cause concern to counsel. Good independent counsel can alleviate this concern. The concern is one that arises in two ways:

- (a) a perception that the independent counsel is on the side of one party or the other and, consequently, there is a feeling of a two against one situation; and
- (b) a perception that it does not matter what one says in legal argument, the tribunal will listen to its independent counsel rather than the counsel arguing before them.

My point is not that independent counsel cannot be useful in situations where the members of the tribunal do not have legal expertise. Rather, it is that the presence of independent counsel does not in and of itself increase the appearance of fairness to the process. If this were the case, our legal system would be designed so that all of our fact finding tribunals, including the courts, had independent counsel.

Yours very truly,

Harriet Sachs  
HS:ljt

cc: Ms. E. Cronk 598-3730

Appendix 5

#### EXCERPT FROM TRIBUNALS COMMITTEE REPORT – JUNE 2007

- 33. In the Committee's view it is not appropriate for non-panel members to assist with the writing of reasons. The *Law Society Act* specifies who is eligible for appointment to the Hearing and Appeal Panels. It is a principle of natural justice that the persons who hear a proceeding must decide the matter and in the Committee's view this extends to the writing of the reasons for decision.
- 34. For this reason the Committee does not believe that it is appropriate for law clerks to assist panels with preparing their reasons.
- 35. Having decided this, the Committee wishes to emphasize, however, that there are a number of tools already in place to support adjudicators in writing their reasons as follows:
  - a. Adjudicators have received a number of guidelines and templates to assist them including,
    - i. template for written reasons for decision (will be redistributed as this was given out some time ago);
    - ii. two templates for oral reasons (included in the adjudicator education binder);

- iii. guidelines for adjudicators respecting oral/written reasons for decisions (approved by Convocation September 2006 – included in the adjudicator education binder). These guidelines articulate when written reasons are required;
  - iv. guidelines for endorsements (included in the adjudicator education binder);
  - v. guidelines for possible wording for oral/written reasons respecting specific topics (included in the adjudicator education binder);
- b. Publications Counsel reviews all reasons before they are released and published for factual errors, spelling and grammar errors and consistent use of terms;
  - c. Adjudicators have access to Law Society jurisprudence and will receive copies each month of all decisions sent to CANLII and Quicklaw;
  - d. Electronic versions of many of the documents in a proceeding, such as the Notice of Application, the Agreed Statement of Facts and, in the case of an appeal, the facts are available for the use of adjudicators when writing their reasons so that they do not have to re-type the information; and
  - e. The Chairs of the Hearing and Appeal Panels are available to respond to adjudicators' questions on process issues.
36. The question was raised whether it was permissible for adjudicators to seek the assistance of their staff to type their reasons. The Committee is of the view that members of an adjudicator's staff are subject to the same requirements of confidentiality as the adjudicator and as such there is no prohibition on seeking such assistance.

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

Copy of the Guidelines for Adjudicators Respecting Oral/Written Reasons for Decision.  
(Appendix 1, pages 5 – 6)

Re: Guidelines for Adjudicators Respecting Oral/Written Reasons for Decision

It was moved by Mr. Sandler, seconded by Ms. Warkentin,

- 1. that Convocation approve the "housekeeping" amendments to the guidelines for adjudicators respecting oral/written reasons for decision as set out in the Report at Appendix 1.
- 2. that Convocation permit the Committee to make future housekeeping amendments to guidelines without seeking Convocation's approval.

Carried

Re: Publication of Tribunal Decisions – Dismissals of Applications

It was moved by Mr. Sandler, seconded by Ms. Warkentin, that Convocation direct that Hearing Panel dismissals of Law Society applications be published in the same manner as other Hearing Panel decisions.

Carried

*For Information Only*

- Office of Counsel to the Hearing Panel

Ms. Minor rose to congratulate Joanne St. Lewis on a very successful symposium on black history held a few weeks ago.

Mr. Bernard Amyot, President of the Canadian Bar Association, addressed Convocation.

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IN PUBLIC

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### *REPORTS FOR INFORMATION ONLY*

Equity and Aboriginal Issues Committee/

Comité sur l'équité et les affaires autochtones Report

- Barrier-free Osgoode Hall Courthouse
- Endorsement of Statement about Lawyers and Judges in Pakistan
- Equity Public Education Series Calendar 2008

Professional Regulation Committee Report

- Report of the Complaints Resolution Commissioner

Report to Convocation  
March 27, 2008

---

Equity and Aboriginal Issues Committee/  
Comité sur l'équité et les affaires autochtones

Committee Members  
Janet Minor, Chair  
7Raj Anand, Vice-Chair  
Paul Copeland  
Mary Louise Dickson  
Avvy Go  
Susan Hare  
Paul Henderson  
Doug Lewis



Judith Potter  
Robert Topp

Purposes of Report: Decision and Information

Prepared by the Equity Initiatives Department  
(Josée Bouchard, Equity Advisor - 416-947-3984)

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### Barrier Free Osgoode Hall

Endorsement of statement about lawyers and judges in Pakistan

Equity Public Education Series Calendar 2008

## COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on March 6, 2008. Committee members Janet Minor, Chair, Raj Anand, Vice-Chair, Mary Louise Dickson, Avvy Go, Paul Henderson and Judith Potter attended. Milé Komlen, Chair of the Equity Advisory Group (the "EAG"), also attended. Staff members Malcolm Heins, CEO, Josée Bouchard, Marisha Roman, Deidre Rowe Brown and Sophia Sperdakos attended.

## FOR INFORMATION

### BARRIER FREE OSGOODE HALL

79. In 2006, the Chief Justice, members of the judiciary, the Ministry of the Attorney General and representatives of the Ontarians with Disabilities Committee, stated that the main access at Osgoode Hall Court House should allow barrier free equal access to the public and the legal profession. The Ontario Realty Corporation ("ORC") is the corporation responsible for the management of provincial assets and the Osgoode Hall Court House.

80. On July 16, 2007, the ORC released a report outlining alternatives and options, developed by Taylor Hazell Architects Ltd., for barrier-free access to Osgoode Hall Court House. The options were designed to take into account the sensitivity of heritage issues at the main entrance and to conform with the *Ontario Disabilities Act 2001* ("ODA") and the *Ontario Building Code 2006* ("OBC").
81. Following extensive consultations, the ORC chose a "barrier-free symmetrical ramps to new landing at main entrance option". The Law Society was involved in this project from its inception and The Law Society's curator attended the ORC meetings relating to this project.
82. The option chosen is based on the underlying premise that access through the main door of the courthouse is an essential element to providing equal and dignified access to all. The option includes sloped sandstone walkways from the east and west rising to a new sandstone landing. The walkways will not require railings; the heritage cow gates will not be altered; and the alterations will be reversible. The existing balustrade, its base, the plinth and urns for both sides will be raised to the height of the new landing above the finished floor of the landing. Four new risers will be constructed within the area of the granite paved forecourt and rise to the landing. Further information about the design is available by contacting the Policy Secretariat or the Equity Initiatives Department.
83. On March 4, 2008, the ORC held a stakeholder meeting to present the approved design for the barrier free entrance to Osgoode. Benchers and staff of the Law Society attended the meeting. The Law Society attendees were Laura Legge, member of the Heritage Committee, Mary Louise Dickson, member of the Equity Committee and Janet Minor, Chair of the Equity Committee. Staff members Terry Knott, Élise Brunet, Josée Bouchard and Sophia Sperdakos also attended.
84. Jill Taylor, the heritage architect retained to undertake this project, presented the design and architectural drawings, and a three dimensional mockup of the front of Osgoode Hall.
85. Both through the mockup and the presentation, it appeared that substantial effort has gone into considering the heritage components of the issue and accommodating them as much as possible, while respecting the underlying premise that accessibility through the main door of the courthouse is an essential requirement. It was clear that the architects have paid attention to the overall visual effect of the changes on the building, the need to integrate the look, and the respect for preserving the original materials under the new.
86. The Equity Committee met on March 6, 2008 and was of the view that the design does its best to accommodate both heritage and access.
87. The Heritage Committee was also represented at the stakeholder meeting on March 4, 2008. Its representatives agree that substantial effort has gone into considering the heritage components of the access issue and accommodating them as much as possible and that the design balances the two considerations (access and heritage).

## ENDORSEMENT OF STATEMENT ABOUT LAWYERS AND JUDGES IN PAKISTAN.

88. On March 6, 2008, the Human Rights Monitoring Group considered a request by the Lawyers' Rights Watch Canada to endorse the Statement provided at Appendix 7 about lawyers and judges in Pakistan. The Monitoring Group approved the request. Lawyers' Rights Watch wished to release the statement urgently. Therefore, in light of the urgency of the matter, the Treasurer approved the request on March 11, 2008.

The request was based on the following mandate, approved by Convocation:

“The mandate further states that where Convocation’s meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation’s place and take such steps, as he or she deems appropriate. In such instances, the Human Rights Monitoring Group shall report on the matters at the next meeting of Convocation. “

89. The following organizations have also endorsed the statement:  
 Dutch Lawyers for Lawyers Foundation – L4L (the Netherlands)  
 Asian Human Rights Commission – AHRC (Hong Kong)  
 Lawyers Without Borders Canada – LWB/C (Canada)  
 International Association of Democratic Lawyers – IADL (International/India)  
 Republican Attorneys Association – RAV (Germany)  
 Bar Human Rights Council of England and Wales – BHRC (United Kingdom)  
 National Lawyers Guild – NLG (United States)  
 American Association of Jurists – AAJ (International/Argentina)  
 Rule of Law Project at the Lahore University of Management Sciences - LUMS (Pakistan)  
 International Association of People's Lawyers –IAPL- (International/Philippines)  
 National Union of Peoples' Lawyers- NUPL (Philippines)  
 Counsels for the Defense of Liberties – CODAL (Philippines)

## EQUITY PUBLIC EDUCATION SERIES CALENDAR 2008

### National Holocaust Memorial Day

*In partnership with B'nai Brith Canada*

Date: April 30, 2008

Time: Panel Discussion from 4 to 6 p.m., Donald Lamont Learning Centre

Reception: 6 p.m., Convocation Hall

### South Asian Heritage Month

*In partnership with the South Asian Legal Clinic of Ontario*

Date: May 12, 2008

Time: Panel Discussion from 4 to 6 p.m., Donald Lamont Learning Centre

Reception: 6 p.m., Convocation Hall

### National Aboriginal Day

Date: June 16, 2008

Time: Panel Discussion from 4 to 6 p.m., Donald Lamont Learning Centre

Reception: 6 p.m., Convocation Hall

### Pride Week

*In partnership with the Sexual Orientation and Gender Identity Section of the Ontario Bar Association*

Date: June 24, 2008

Time: Panel Discussion from 4 to 6 p.m., Donald Lamont Learning Centre

Reception: 6 p.m., Convocation Hall

### Louis Riel Day

Date: TBD

Time: Workshop from 4 to 6 p.m., Donald Lamont Learning Centre

Reception: 6 p.m., Convocation Hall

## Appendix 7

### LAWYERS' RIGHTS WATCH CANADA

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

February 20 2008

Lawyers Rights Watch Canada (LRWC)

Contact: Gail Davidson

lrwc@portal.ca

Tel: +1 604 738 0338

Fax: +1 604 736 1175

Language: English

### HUMAN RIGHTS COUNCIL

Seventh session

Statement by Lawyers Rights Watch Canada<sup>14</sup> to the Seventh Session of the Human Rights Council regarding unlawful emergency measures in Pakistan

#### I. Recommendations

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<sup>14</sup> The Dutch Lawyers for Lawyers Foundation – L4L (the Netherlands), the Asian Human Rights Commission – AHRC (Hong Kong), Lawyers Without Borders Canada – LWB/C (Canada), the International Association of Democratic Lawyers – IADL (International/India), the Republican Attorneys Association – RAV (Germany), the Bar Human Rights Council of England and Wales – BHRC (United Kingdom) and the National Lawyers Guild – NLG (United States), the American Association of Jurists – AAJ (Latin American/Argentina) and the Rule of Law Project at the Lahore University of Management Sciences - LUMS (Pakistan/Lahore) share the views expressed in this statement.

Lawyers Rights Watch Canada calls on the Human Rights Council to fulfill its duty to promote and protect the rule of law and fundamental rights and freedoms in Pakistan by recommending and monitoring:

The immediate, unconditional release of detained jurists, including: Chief Justice Iftikhar Chaudhry, Aitzaz Ahsan, President of the Supreme Court Bar, Ali Ahmed Kurd, Justice (retired) Tariq Mahmood.

The rescission of all laws purporting to come into force under authority of the Proclamation of Emergency of November 3, 2007.

The reinstatement of all judges removed from office by the Provisional Constitution Order No. 1 of 2007, November 3 2007 and removal from office of judges signing the Oath of Offices (Judges) Order, 2007 on conditions that are reasonable and just.

The strict adherence by Pakistan officials to laws validly in force prior to November 3, 2007 and to applicable international standards protecting the independence of lawyers and judges including those embodied in the UN *Basic Principles on the Role of Lawyers*<sup>15</sup> and the *Basic Principles on the Independence of the Judiciary*.<sup>16</sup>

Strict adherence by Pakistan to domestic law and international standards governing arrests, detentions and the humane treatment of prisoners, including non-derogable prohibition against torture and cruel and inhumane treatment or punishment and denial of due process.

## II. Background

On November 3rd 2007 Pervez Musharraf, then President and Chief of Army Staff of Pakistan, issued a Proclamation of Emergency, suspended the Constitution of the *Islamic Republic of Pakistan* (Constitution) and proclaimed the Provisional Constitution Order No. 1 of 2007 (PCO) and the Oath of Offices (Judges) Order, 2007. (Oath)

These emergency measures are unlawful under the Constitution, fail to meet UN standards for states of emergency and violate international standards for non-derogable rights. These measures arbitrarily:

Suspended<sup>17</sup> rights guaranteed by the Constitution to life, liberty, freedom of expression, movement and association, equality and to freedom from arbitrary arrest; and,

Destroyed rights to a fair trial and to effective and independent legal representation

Barred judicial independence by summarily removing all superior judges from office and decreeing that only judges taking the Oath to uphold the PCO, and not the Constitution, could continue in office; and,

Removed access by Pakistani people to judicial safeguards against all arbitrary and illegal acts by the state including the violation of non-derogable rights; and,

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<sup>15</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>16</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>17</sup> Provisional Constitution Order No. 1 of 2007, 3 November 2007, s. 2(1).

Provided absolute impunity for criminal acts and civil wrongs by state officials.<sup>18</sup>

Musharraf's PCO mandated that all superior court judges would cease to hold office immediately and thereafter, the President could allow any judge taking the Oath to continue in office.<sup>19</sup> The Oath, which prohibits judges from exercising any judicial authority "against the President, Prime Minister or any person exercising powers or jurisdiction under their authority", resulted in the majority of superior court judges, including over half of the Supreme Court Bench, being removed from office and many were arrested.

Further extra-legal measures proclaimed include the Constitution (Amendment) Order, 2007 (P.O. No. 5 of 2007, Nov. 21/07) and the Constitution (Second Amendment) Order, 2007 (P.O. No. 6 December 14, 2007) (Constitutional Amendments Order). The Constitutional Amendments Orders perpetrate the illegality of the PCO by purporting to create a Constitutional requirement limiting the bench to judges taking the Oath as well as provisions validating all actions taken under the 'authority' of the PCO and other presidential orders and barring any "prosecutions or other legal proceedings"<sup>20</sup> in respect of either the presidential orders or actions taken there under.

The Constitutional Amendments Orders assure the continuation of human rights violations unrestricted by judicial oversight, deny legal remedies in independent courts and guarantee impunity for state perpetrators.

### III. The Constitution of Pakistan

The Constitution authorizes temporary emergency measures only as a necessary last resort to contain war, external aggression or internal aggression uncontrollable by other means.<sup>21</sup> The Constitution does empower or allow the president to hold the Constitution in abeyance even during a validly declared emergency. The emergency provisions contemplated by the Constitution are protective in purpose not repressive. The absence of any circumstances justifying emergency other extra-constitutional measures was determined by the full 7-member (legitimate) bench of the Supreme Court of Pakistan on Nov. 3, 2007. The Supreme Court rejected the expectation that applications before the court would be decided against the 'Government' as a valid emergency measures trigger.

In addition the PCO and other orders proclaimed violate the constitutional guarantee that "...the independence of the Judiciary shall be fully secured" and the prohibition on the removal of

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<sup>18</sup> *Supra*, s. 2(3).

<sup>19</sup> Oath of Office (Judges) Order, 2007, sec. 3.

<sup>20</sup> Constitutional (Amendment) Order, 2007 P.O. No. 5 of 2007, s. 6 (4).

<sup>21</sup> *The Constitution of Pakistan*, PART X Emergency Provisions s. 232. Proclamation of emergency on account of war, internal disturbance, etc.  
(1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.

judges except on recommendation of the Supreme Judicial Council.<sup>22</sup> The suspension of constitutional provisions relating to the operation of the High Courts is forbidden during emergency measures.<sup>23</sup>

#### IV. UN Standards for States of Emergency

Similarly the emergency measures fail to meet all but one (proclamation) of the widely accepted threshold principles for states of emergency set out in the final report of Leandro Despouy as Special Rapporteur on States of Emergency.<sup>24</sup> These principles reflect those articulated by others as necessary to limit human rights abuses during states of emergency.<sup>25</sup> Despouy concluded that the UN has an obligation to ensure that states of emergency are properly applied in a manner that maintains the rule of law<sup>26</sup> and affirmed the following threshold principles of legitimacy.

Legality: A state of emergency may be “extended only in accordance with the Constitution or Fundamental Law [of the state] and the obligations imposed by international law.”<sup>27</sup>

Proclamation: The public must receive adequate notification of the scope of the emergency measures.

Notification: The proclamation of a state of emergency must be reported to the Secretary-General of the UN<sup>28</sup> in a report that sets out:

- a) the motivating circumstances
- b) the territory to which it applies
- c) the period for which it is introduced
- d) the measures it authorizes

<sup>22</sup> *The Constitution of Pakistan*, Objective Resolution and article 2A. and art .209(7).

<sup>23</sup> *The Constitution of Pakistan Part VII Emergency Measures*.

<sup>24</sup> Leandro Despouy, Special Rapporteur per Economic and Social Council res. 1985/37, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency*, E/CN.4/Sub.2/1997/19  
<http://www.derechos.org/nizkor/except/despouy97en.html>

<sup>25</sup> *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (1985) 7 Hum. Rts. Q. 3; *Study on the Implications on Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Doc. E/CN.4/Sub2/1982/15 1982 (Questiaux Report); INTER-AM. C.H.R. La Protección de los Derechos Humanos Frente Suspensión de las Garantías Constitucionales o “Estado de Sitio”, 39 OEA/Ser.L/VII.15, doc.12 (1966) (prepared by IACHR member Daniel Hugo Martins; *The Paris Minimum Standards of the Human Rights Norms in a State of Emergency*, approved by the 61<sup>st</sup> conference of the International Law Association in 1984.

<sup>26</sup> *Ibid*, note 10, para.8.

<sup>27</sup> *Supra*, para 52.

<sup>28</sup> *International Covenant on Civil and Political Rights*. Art. 4 (3).

the provisions of the State's Constitution and legislation and the obligations under international law that are affected.<sup>29</sup>

Time Limitation: The extent, duration and scope of a state of emergency must be strictly limited to what is required to meet the exigencies of the situation and protect the vital interests of the population.<sup>30</sup>

Exceptional Threat: A state of emergency can only be imposed in response to an imminent threat to the state that cannot be otherwise contained.

Proportionality: The scope and duration of the emergency measures must be proportional to the threat.

Concordance: Any temporary derogation of rights effected by emergency measures must be both strictly required by the exigencies of the crises and not in violation of other rights obligations including non-derogable rights.

Despouy also concluded that;

The rule of law, democracy and human rights form a single entity that a state of emergency cannot break either exceptionally or temporarily.<sup>31</sup>

Even during a state of emergency, *jus cogens* requires the observance of judicial guarantees, which are recognized as indispensable.<sup>32</sup>

## V. International Standards

International standards require universal protection of non-derogable rights by all states.<sup>33</sup> The emergency measures violate these standards by destroying judicial independence and thereby preventing judicial safeguards against abuses of non-derogable rights by the state. The four non-derogable rights: right to life, freedom from torture and cruel or degrading treatment or punishment, freedom from slavery and servitude and protection from *ex post facto* criminal law, cannot exist except through an independent judiciary that is effectively protected by and from the state.

The non-derogability of judicial independence is the foundation upon which all human rights law rests and is secured or implied by these same instruments. Pakistan, as UN member, has accepted a duty to promote respect for human fundamental rights and freedoms in accordance with UN principles.<sup>34</sup>

## VI. Conclusions

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<sup>29</sup> *Ibid* note 10, para 68.

<sup>30</sup> Despouy, *supra*.

<sup>31</sup> Despouy, *supra*, para 101.

<sup>32</sup> Despouy, *supra*, para 113 citing *Zelaya v. Nicaragua*, Human Rights Committee, communication 328/1988 adopted 20 July, 1994.

<sup>33</sup> Including the *Geneva Conventions*, (common article 3), *Protocols I and II to the Geneva Conventions*, the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights* and the *Basic Principles on the Role of Judges*.

<sup>34</sup> *Charter of the United Nations*, Art. 4, preamble.



To be lawful the imposition, duration and removal of emergency measures must: 1) conform to the Constitution; 2) substantially meet UN standards; and, 3) maintain protection of non-derogable rights. Access to judicial safeguards of non-derogable rights remains an absolute requirement during emergency measures.

The Proclamation of Emergency of November 3, 2007 is unlawful by all these tests. All laws brought into force and all state actions taken in reliance on the legitimacy of the *Proclamation of Emergency* of November 3, 2007 must be considered as enacted and done without legal authority and therefore as null.

## VII. UN Human Rights Council Mandate

The Human Rights Council is mandated to promote and protect human rights by, *inter alia*, preventing violations, removing obstacles to enforcement, engaging states in dialogue and making recommendations for the protection of human rights.<sup>35</sup> Monitoring states of emergency, when human rights are most at risk, is therefore a key function of the Human Rights Council.

The UNHRC must first affirm the illegitimacy of the Constitutional Amendment Orders and then act effectively to encourage and promote remedies necessary to restore the Constitution (as it was prior to the Proclamation of Emergency), restore an independent judiciary and properly redress violations of the law.

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<sup>35</sup> General Assembly Res. A/RES/48/141 20 Dec. 1993, articles 3 (a), (f), (g) and General Assembly Res. A/RES/60/251, 3 Apr. 2006, art. 5(i).

Report to Convocation  
March 27, 2008

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## Professional Regulation Committee

Committee Members  
Clayton Ruby, Chair  
Julian Porter, Vice-Chair  
Linda Rothstein, Vice-Chair  
Melanie Aitken  
Christopher Bredt  
Tom Conway  
Brian Lawrie  
George Finlayson  
Patrick Furlong  
Gary Gottlieb  
Ross Murray  
Sydney Robins  
Bonnie Tough  
Roger Yachetti

Purpose of Report: Information

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

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Report of the Complaints Resolution Commissioner ..... TAB A

## COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on March 6, 2008. In attendance were Clay Ruby (Chair), Linda Rothstein (Vice-chair), Christopher Bredt, Tom Conway (by telephone), George Finlayson, Gary Gottlieb, Brian Lawrie, Ross Murray and Bonnie Tough. Alan Silverstein also attended by telephone. Staff attending were Naomi Bussin, William Holder, Terry Knott, Zeynep Onen, Pamela Pereira, Elliot Spears, Sybila Valdivieso, Jim Varro and Miriam Weinfeld.

## REPORT OF THE COMPLAINTS RESOLUTION COMMISSIONER

### Introduction

2. Part I of By-Law 11 (Regulation of Conduct, Capacity and Professional Competence) governs the office of the Complaints Resolution Commissioner. The By-Law requires that the Commissioner submit an annual report to the Professional Regulation Committee. The Committee must then provide the report to Convocation. The relevant section of the By-Law reads:

#### Annual report

3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.
3. The report prepared by the Commissioner, Clare Lewis, and reviewed by the Committee, is presented for the information of Convocation.

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## APPENDICES

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## ANNUAL REPORT 2007

### A. Introduction

On April 1, 2005, Convocation appointed Clare Lewis as the first Complaints Resolution Commissioner, pursuant to sections 49.14 through 49.19 of the *Law Society Act* (the *Act*) and in accordance with O. Reg. 31/99. The position of Complaints Resolution Commissioner was created to provide an independent review of the Law Society's consideration of a complaint and its decision to take no further action in respect of the complaint. The Act had been amended by the *Law Society Amendment Act, 1998*, to provide for the creation of this position. The first appointment was for a two-year period and on April 1, 2007 the appointment was renewed for a further three-year term. Attached, as Appendix 1, is a copy of the relevant provisions of the Act.

Pursuant to Section 62 (0.1) of the *Act*, the Law Society adopted By-Law 37, which governed the referral of complaints to the Complaints Resolution Commissioner. On May 1, 2007, Convocation revoked By-Law 37 and its provisions were included in a new by-law, By-Law 11<sup>1</sup>, Part I. Attached, as Appendix 2, is a copy of applicable provisions of By-Law 11. This By-Law includes a description of the functions of the Complaints Resolution Commissioner in the review and resolution of complaints and also provides for the administrative functions to be performed by the Office of the Complaints Resolution Commissioner.

Prior to the appointment of the Complaints Resolution Commissioner, reviews were performed by Lay Benchers functioning as Complaints Review Commissioners in accordance with By-Law 20<sup>2</sup>, which is attached as Appendix 3. With the exception of the standard of review, the review function performed by the Complaints Review Commissioners was very similar to the review function now being performed by the Complaints Resolution Commissioner.

In conducting a review of the Law Society's decision to close a complaint file, the Complaints Review Commissioners determined whether the Law Society's decision was appropriate. The standard of review, as set out in By-Law 11 section 7, however, is a standard of reasonableness. It requires the Complaints Resolution Commissioner to determine whether the

<sup>1</sup> By-Law 11 was made on May 1, 2007 and amended on June 28, 2007

<sup>2</sup> By-Law 20 was revoked on December 9, 2005 and replaced with a new unrelated By-Law.

Society's consideration of the complaint and its resulting decision to take no further action with respect to the complaint was reasonable. In performing an ombudsman type of role, some degree of deference is given in assessing the decision of the Law Society staff. When the Commissioner is satisfied that the decision of the Law Society to close a file is reasonable, no further action is taken. However, when the Commissioner is respectfully of the view that the decision arrived at by the Law Society is not reasonable, the file is referred back to the Law Society with a recommendation that further action be taken.

By-Law 11 also requires the Complaints Resolution Commissioner to prepare an annual report. In particular, section 3 provides as follows:

#### Annual Report

3. Not later than March 31 in each year, the Commissioner shall submit to the standing committee of Convocation responsible for professional regulation matters a report upon the affairs of the Office of the Commissioner during the immediately preceding year, and the committee shall lay the report before Convocation not later than at its regular meeting in June.

The Complaints Resolution Commissioner submitted his first Annual Report to the Standing Committee of Convocation (Professional Regulation Committee) in March 2006. The Report provided a comparison of the statistical data gathered during the last quarter of the Lay Benchers' activities and the statistical information from the Complaints Resolution Commissioner for the period April 1, 2005 through December 31, 2005. The 2006 Annual Report was submitted to the Standing Committee in March 2007 and the Committee laid the Report before Convocation in June 2007.

This is the Annual Report for 2007. Included in this report is statistical information collected during the 2005 and 2006 calendar years, and in certain instances data collected in 2004 will also be reflected, for comparison purposes.

#### B. Composition of the Office of the Complaints Resolution Commissioner

Throughout 2007, the Office of the Complaints Resolution Commissioner was comprised of a Complaints Resolution Coordinator, part-time Counsel and the Complaints Resolution Commissioner who also performs his functions on a part-time basis. In order to meet the growing demand for reviews and with the implementation of the resolution function, approval for the hiring of an additional part-time counsel was obtained in late 2007.

#### C. The Review Function

By-Law 11 provides the Complaints Resolution Commissioner with two distinct functions. In addition to the review function, the Commissioner has the authority to perform a formal resolution function. To date, the Commissioner has only been performing reviews.

When the staff of either the Complaints Resolution or Investigations departments close a complaint file, the complainant has the right to ask for a review of the Law Society's decision. The Society's closing letter to the complainant includes an Information Sheet (see Appendix 4 attached), which explains the role of the Complaints Resolution Commissioner and the process to be followed.

On receipt of a request for review by the Office of the Complaints Resolution Commissioner, the complainant receives a letter of confirmation from the Coordinator. The Professional Regulation Division notifies the licensee who is the subject of the complaint in writing of the complainant's request for review. The investigator is advised of the request and is responsible for preparing the materials for the review. Although the Commissioner is provided with the entire Law Society file, the investigator is responsible for preparing bound copies of the materials, referred to as the Complaints Review Index, to be used at the review meeting. The Complaints Review Index includes copies of all the materials that the complainant provided to the Law Society, together with copies of correspondence between the Law Society and the complainant, and a copy of the closing letter or report prepared by the Law Society.

Once the Complaints Review Index is completed, this book of documents is provided to the Coordinator for distribution to the complainant. The Coordinator then schedules the date for the review meeting. A letter confirming the date, accompanied by the Complaints Review Index, is sent to the complainant. The Commissioner and Counsel also receive a copy of the bound materials for review in advance of the meeting.

Documentation that falls within the confidentiality provisions of s. 49.12<sup>3</sup> of the *Law Society Act* is provided to the Complaints Resolution Commissioner in a separate Confidential Index Book. The type of information considered confidential includes:

1. Personal information collected about the Licensee
2. Evidence from third parties which is protected by confidentiality or solicitor-client privilege
3. Solicitor-client information, when the Complainant is not the client or the information is in respect of other clients

(i) Reviewable Complaints

Section 4(1) of By-Law 11 identifies which complaints the Commissioner may review. A review is only available when,

- (a) the merits of the complaint have been considered by the Law Society;
- (b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
- (c) the complaint has not been previously reviewed by the Commissioner; and
- (d) the Law Society has notified the complainant that it will be taking no further action in respect of the complaint.

Section 4 (2) provides that a complaint may not be reviewed by the Complaints Resolution Commissioner if, in the opinion of the Commissioner, it concerns only the quantum of fees or disbursements charged by a licensee, a licensee's filing requirements, the handling of money and other property or negligence of a licensee.

(ii) The Review Meeting

Most reviews conducted by the Commissioner are performed in a personal meeting with the complainant. Counsel to the Commissioner is also present. On occasion, the complainant is accompanied by his or her legal counsel. The licensee is not entitled to participate. The Coordinator is usually in attendance to provide administrative support.

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<sup>3</sup> 49.12 (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

Complaints review meetings were traditionally held in Convocation Room, or occasionally in the Benchers Dining Room. The Complaints Resolution Commissioner was concerned about the formality of these rooms so the location of the review meetings was changed. Although consideration was given to moving the location off-site entirely, it was decided that the costs of doing so outweighed the benefits. Furthermore, during a review meeting, the Commissioner often requires access to the administrative services provided by the Law Society including photocopying services and on-site security. As a result, the review meetings are now conducted in other locations of the Law Society.

When the complainant is unable to attend a meeting in person, the review may be conducted by teleconference. There were 10 reviews conducted by telephone in 2007. There were 15 reviews conducted by telephone in each of 2005 and 2006. In some circumstances, for example when the complainant fails to attend without a request for an adjournment, or if the complainant is unwilling or unable to participate, the review may proceed based on the written material alone. Nine reviews proceeded in this manner in 2007, six in 2006 and only one such review was conducted in 2005.

Although the meetings are held, for the most part, at Osgoode Hall, in December 1997, to provide greater accessibility to the process for those complainants who reside outside of the Toronto area, Convocation approved the holding of complaint review meetings in centres outside Toronto. The Complaints Review Commissioners held review meetings in Kitchener, London and Ottawa. The Complaints Resolution Commissioner has continued this practice. In 2007, 12 review meetings were conducted in Ottawa. The demand for reviews in the Ottawa Region has grown dramatically. In 2006, only five review meetings were conducted in Ottawa. It is anticipated that at least 12 files will be reviewed in Ottawa during the Spring of 2008 and a second trip will be required later in the year to meet the increased demand for reviews.

There were also three reviews performed in Cambridge during 2007 and although three reviews were scheduled to proceed in London, only one personal meeting took place. The second London file was returned to the investigator for further work in advance of the meeting; the third complainant failed to attend the meeting and the review proceeded on the written material.

### (iii) Disposition of Complaints

After reviewing the Law Society's consideration of the complaint and its resulting decision to take no further action in respect of the complaint, if the Complaints Resolution Commissioner is satisfied that the Law Society's consideration and decision was reasonable, the Commissioner will so notify the complainant and the Society. The *Act* provides that the Commissioner's decision is final and not subject to appeal. If the Commissioner is not satisfied that the Law Society's decision to close the file was reasonable, the Commissioner is required to refer the complaint back to the Law Society with a recommendation that further action be taken. The Complainant is notified of the Commissioner's decision, in writing, within several weeks of the review meeting. If the Commissioner refers a complaint back for further action and the Society determines not to follow the Commissioner's recommendation, the Society provides the Commissioner and the complainant with a written explanation for its determination.

## D. Review Meeting Statistics

### (i) Requests for Review

In 2007, 154 requests for review were received. The following Table 1 provides a breakdown of the departments that conducted the investigation from which the review was requested.

Table 1 – 2007 CRC Requests Received by Department

(see graph in Convocation Report)

For comparison purposes, Table 2 below provides the department breakdown for 2006.

Table 2 – 2006 CRC Requests Received by Department

(see graph in Convocation Report)

Table 3 below provides a summary of the current status of the 154 files for which a request for review was received in 2007, as at March 1, 2008.

Table 3 – Status of 2007 Requests

(see graph in Convocation Report)

Following receipt of the requests for review during 2007, 10 files were withdrawn to allow further investigation to be performed. On eight of these withdrawn files, the department Manager identified the need for further investigation during a managerial review for readiness to proceed. Counsel to the Complaints Resolution Commissioner identified the need for further investigation prior to the review meeting on two files. Following discussions with the department Manager, it was agreed that further work would be performed in advance of the review meeting. An eleventh file was withdrawn prior to the review meeting at the request of the complainant.

(ii) Reviews Conducted

From January 1, 2007 through December 31, 2007, the Complaints Resolution Commissioner conducted a review of 108 files. The requests for review were received on each of these files in either 2006 or 2007. Seventy-nine files were reviewed in 2006. Since there were 29 more files reviewed in 2007 than in 2006, there was a 36.7 % increase in the number of files reviewed. In 2005, a total of 69 reviews were performed, 17 by the Complaints Review Commissioners and 52 by the Complaints Resolution Commissioner.

Table 4 below identifies the department that conducted the investigation.

Table 4 – CRC Reviews Conducted in 2007 – By Department

(see graph in Convocation Report)

The 93 reviews of files received from the Complaints Resolution department represent approximately 86% of the total reviews, the 14 from the Investigations department represent approximately 13% and the one review of a file from the Intake department, represents less than 1% of the total reviews conducted in 2007.



In 2006, of the 79 files reviewed, 67 (approximately 85%) were from the Complaints Resolution department, 10 (approximately 13%) were from Investigations and two (approximately 2%) had been considered by outside counsel.

Table 5 that follows identifies the types of cases or nature of the issues that were reviewed by the Commissioner during 2007.

Table 5 – Case Types for Cases in CRC 2007

(see graph in Convocation Report)

Table 6 below provides the same information for the data collected in 2006.

Table 6 – Case Types for Cases in CRC 2006

(see graph in Convocation Report)

(iii) Review Meeting Results

Figure 1(1), set out below, depicts the dispositions rendered following all reviews conducted in 2007.

Figure 1(1) – 2007 Review Results

(see chart in Convocation Report)

The 2007 review results, depicted in figure 1(1) above, indicate that in 2007 a total of 14 complaints, representing 12.96% of the files reviewed, required further action. Twelve of the 14 files were from the Complaints Resolution department and two cases were from the Investigations department. This statistical data does not include the two files that were taken back by the investigating department at the suggestion of Counsel to the Complaints Resolution Commissioner prior to the review meeting.

The following figures 1(2), 1(3) and 1(4) depict the dispositions achieved in 2006, 2005 and 2004 respectively. This information is being provided for comparison purposes only.

Figure 1(2) – 2006 Review Results

(see chart in Convocation Report)

The 2006 review results, depicted in figure 1(2) above, indicate that in 2006 a total of 13 complaints, representing 16.45% of the files reviewed, required further action. Nine of the 13 files were from the Complaints Resolution department, three cases were from the Investigations department and Outside Counsel investigated one of the files.

## Figure 1(3) – 2005 Review Results

(see chart in Convocation Report)

In 2005, 13 or 18.84% of the files reviewed were referred back for further action. Of the 13 files referred back in 2005, the former Complaints Review Commissioners made five of the referrals and eight were made by Clare Lewis as the Complaints Resolution Commissioner.

## Figure 1(4) – 2004 Review Results

(see chart in Convocation Report)

In 2004, 20.77% of the files reviewed by the Complaints Review Commissioners were referred back for further action.

(iv) Status of Files Referred Back for Further Action in 2007

Figure 2(1) sets out the Law Society's response on the 14 files that the Complaints Resolution Commissioner referred back to the Law Society for further action in 2007, in accordance with By-Law 11 section 7.

## Figure 2(1) – 2007 Referral Back Results

(see chart in Convocation Report)

For comparison purposes, Figure 2(2) below sets out the status of the files that were referred back to the Law Society for further action in 2006.

## Figure 2(2) – 2006 Referral Back Results

(see chart in Convocation Report)

(v) Schedule of Review Meetings

During 2006, on average, three files were reviewed on each scheduled review date. A review day was scheduled for every two week period. The occasional file was also reviewed in the absence of the complainant (e.g. where the complainant is unable or unwilling to participate). However, because of the growing number of requests for review, during 2007 it became essential to increase the number of files being reviewed on each review date from three to four files. On occasion, telephone meetings were also held on separate dates and a larger number of files were reviewed in the absence of the complainant. Because of the increasing demand for reviews and the current waiting time, beginning in May 2008, two consecutive days of meetings will be held every two weeks.

In addition to the increase in review meetings, it is anticipated that cases will also be streamed to the Complaints Resolution Commissioner for the resolution process. Given the Commissioner's part-time schedule, in order to avoid lengthy scheduling delays, further case management techniques will have to be developed. This may include conducting fewer face-to-face reviews.

#### E. Jurisdictional Issues

Not all complainants are entitled to a review by the Complaints Resolution Commissioner.

Section 4 of By-Law 11, in part, provides as follows:

- 4(1) A complaint may be reviewed by the Commissioner if,
- (a) the merits of the complaint have been considered by the Society.

Section 4(1) of By-Law 11, has been interpreted to mean that the Commissioner can only review those files that have been investigated under the investigation authority set out in section 49.3 of the *Act*. This means that generally complaints referred to the Complaints Resolution or Investigations departments are reviewable by the Commissioner, but the Commissioner does not have the authority to review those cases closed earlier in the process, for example, because of the Law Society's lack of jurisdiction to act on the complaint.

Following four reviews of files referred to the Commissioner in 2005 from the Intake department, it became clear to the Commissioner that since the Commissioner did not have the authority to review the Intake files, an alternate process for review was required. Following discussions with the Director, Professional Regulation, a Law Society process for responding to requests for a review from decisions made by the Intake department was established. When a complainant disputes the closure of a complaint file by the Intake department, the request for further review is considered by the Director, Professional Regulation and dealt with accordingly.

When a request for review is now received by the Commissioner following a complaint closing by the Intake department, the complainant is advised that the Commissioner does not have the jurisdiction to review the matter and the complaint is referred back to the Intake department for a further response. The Intake Manager reviews the file. If the Manager believes that the file should remain closed and the Complainant remains dissatisfied, then the Director, Professional Regulation, reviews the file. A similar review process is used for complaints closed by Complaints Services in the Client Service Centre.

In 2007, following the Director's review of a file closed by the Intake department, the Director, Professional Regulation, recommended to the Complaints Resolution Commissioner that he consider the complainant's request for review. After reviewing the content of the Law Society's file, it was agreed that the complaint had in fact been considered on its merits and, therefore, the complaint was reviewable by the Commissioner. A review meeting was subsequently conducted by the Complaints Resolution Commissioner.

#### F. Systemic Issues

The Commissioner has continued to identify systemic issues during the review process.

Although a number of files have remained closed following a review meeting, both the Commissioner and his counsel have worked with the Director, Professional Regulation, her counsel and Management on an informal basis to clarify issues and identify, address and improve practices and procedures within the Professional Regulation departments. For example, during 2007:

- Discussions have taken place regarding communications within the file and the content of closing letters.

- In specific instances, disclosure of documents included in the Index Book has been discussed.
- Additional materials that were received after the files were closed have been provided to the department manager and/or the investigator for consideration, before conducting the review meetings.
- Following review meetings, discussions regarding related files have taken place with the department manager.
- The Commissioner's concerns regarding a licensee's general course of conduct have been discussed.
- The Commissioner has identified general conflict of interest concerns for the Law Society's consideration .

The Commissioner has raised these issues and concerns in an effort to support and improve the Law Society's service to the public.

#### Counsel to the Complaints Resolution Commissioner

Prior to the establishment of the Office of the Complaints Resolution Commissioner, the Complaints Review Commissioners were assisted at the reviews by pro bono counsel. In the late fall of 2004, the position of Counsel to the Complaints Resolution Commissioner was created. The establishment of a permanent Counsel position has allowed for greater consistency in the practices and procedures of the office.

As a result of Counsel's review of files well in advance of the review meetings, Counsel has identified, in at least two cases, work that was still required to be performed by the investigator in advance of the meeting. Consequently, following consultation with Counsel to the Director and the department Manager, the complaint files were returned to the Law Society for further action and the review meetings were cancelled. This approach met the needs of the complainant while eliminating the need for a review meeting.

The Director, Professional Regulation, and the Commissioner and their respective Counsel, continue to develop mutually supportive practices and procedures relevant to the review process.

#### G. The Resolution Function

In addition to the review function performed by the Complaints Resolution Commissioner, section 9 of By-Law 11 also provides that the Society may refer a complaint to the Complaints Resolution Commissioner for resolution.

This function provides a more formal resolution process for addressing complaints. By-Law 11 states that the Society will determine whether a matter is referred to the Commissioner for resolution, prior to the file being closed or referral to the Proceedings Authorization Committee. The Society can only refer a file to resolution with the consent of the complainant, the licensee and the Society. The Complaints Resolution Commissioner has the broad discretion to determine the process for the resolution function.

To date, no files have been referred to the Complaints Resolution Commissioner. However, during 2006, Counsel to the Commissioner, in consultation with the Director, Professional Regulation and her counsel, drafted a proposal for identifying and streaming files for resolution. Counsel to the Director created the necessary policies to implement the process, with implementation anticipated in 2007.

One file was identified as appropriate for resolution during 2007. However, after identifying the file and before streaming, the parties were contacted to obtain the necessary consents. The complainant was not prepared to participate in the process and the file was, therefore, investigated in the ordinary course.

The anticipated transfer of files to the Commissioner for resolution, coupled with the increasing demand for reviews, has created the need for a second counsel position. Effective in 2008, the office complement will include two part-time Counsel.

H. The Commissioner's Observations

The following are Clare Lewis' general observations on the complaints review process in 2007:

I have seen a substantial increase in the number of requests for review over the past year. I am of the view that, for the most part, this increase has arisen because shortly after my appointment the Law Society's Closing Letters have included a specific reference to the complainant's right to request a review and every Closing Letter is accompanied by the Information Sheet which advises the complainant of his or her right to request a review. Furthermore, improvements to the Law Society's website have made information about the complaints review process more readily available. I have endeavoured to accommodate the increased demand by increasing the number of reviews conducted.

As Complaints Resolution Commissioner, I believe that I have provided the public with an independent and impartial forum for reviewing the Law Society's decisions to close complaint files and I have made every effort to ensure that public complaints are responded to in a transparent, fair and effective manner. To ensure greater transparency in the complaints process, I have provided complainants with comprehensive reasons for my decision.

During the performance of my functions as Complaints Resolution Commissioner, I have continued to identify issues and have made recommendations for improving the Law Society's processes. The communications among this office, Counsel to the Director, Professional Regulation and Management have been open and encouraging. I believe this interaction has resulted in a smooth and effective transfer of files.

Furthermore, I believe that as a result of the Law Society's increased efforts to achieve performance excellence through reorganization of the complaints processes and the establishment of this office which provides an oversight function, I have found it necessary to refer fewer cases back to the Law Society for further action.

Working with the Law Society to protect the public interest, since my appointment in April 2005, has been both challenging and rewarding.

Appendix 1

Law Society Act

R.S.O. 1990, CHAPTER L.8

COMPLAINTS RESOLUTION COMMISSIONER

#### Appointment

49.14 (1) Convocation shall appoint a person as Complaints Resolution Commissioner in accordance with the regulations. 1998, c. 21, s. 21.

#### Restriction

(2) A bencher or a person who was a bencher at any time during the two years preceding the appointment shall not be appointed as Commissioner. 1998, c. 21, s. 21.

#### Term of office

(3) The Commissioner shall be appointed for a term not exceeding three years and is eligible for reappointment. 1998, c. 21, s. 21.

#### Removal from office

(4) The Commissioner may be removed from office during his or her term of office only by a resolution approved by at least two thirds of the benchers entitled to vote in Convocation. 1998, c. 21, s. 21.

#### Restriction on practice of law

(5) The Commissioner shall not engage in the practice of law during his or her term of office. 1998, c. 21, s. 21.

#### Functions of Commissioner

49.15 (1) The Commissioner shall,

- (a) attempt to resolve complaints referred to the Commissioner for resolution under the by-laws; and
- (b) review and, if the Commissioner considers appropriate, attempt to resolve complaints referred to the Commissioner for review under the by-laws. 1998, c. 21, s. 21.

#### Investigation by Commissioner

(2) If a complaint is referred to the Commissioner under the by-laws, the Commissioner has the same powers to investigate the complaint as a person conducting an investigation under section 49.3 would have with respect to the subject matter of the complaint, and, for that purpose, a reference in section 49.3 to an employee of the Society holding an office prescribed by the by-laws shall be deemed to be a reference to the Commissioner. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 48 (1).

#### Access to information

(3) If a complaint is referred to the Commissioner under the by-laws, the Commissioner is entitled to have access to,

- (a) all information in the records of the Society respecting a licensee who is the subject of the complaint; and
- (b) all other information within the knowledge of the Society with respect to the subject matter of the complaint. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 48 (2).

### Delegation

49.16 (1) The Commissioner may in writing delegate any of his or her powers or duties to members of his or her staff or to employees of the Society holding offices designated by the by-laws. 1998, c. 21, s. 21.

### Terms and conditions

(2) A delegation under subsection (1) may contain such terms and conditions as the Commissioner considers appropriate. 1998, c. 21, s. 21.

### Identification

49.17 On request, the Commissioner or any other person conducting an investigation under subsection 49.15 (2) shall produce identification and, in the case of a person to whom powers or duties have been delegated under section 49.16, proof of the delegation. 1998, c. 21, s. 21.

### Confidentiality

49.18 (1) The Commissioner and each member of his or her staff shall not disclose,  
(a) any information that comes to his or her knowledge as a result of an investigation under subsection 49.15 (2); or  
(b) any information that comes to his or her knowledge under subsection 49.15 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12. 1998, c. 21, s. 21.

### Exceptions

(2) Subsection (1) does not prohibit,  
(a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;  
(b) disclosure required in connection with a proceeding under this Act;  
(c) disclosure of information that is a matter of public record;  
(d) disclosure by a person to his or her counsel; or  
(e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure. 1998, c. 21, s. 21.

### Testimony

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1). 1998, c. 21, s. 21.

### Decisions final

49.19 A decision of the Commissioner is final and is not subject to appeal. 1998, c. 21, s. 21.

Appendix 2

BY-LAW 11  
Made: May 1, 2007  
Amended: June 28, 2007  
September 20, 2007 (editorial changes)  
October 25, 2007 (editorial changes)  
February 21, 2008

REGULATION OF CONDUCT, CAPACITY AND  
PROFESSIONAL COMPETENCE

PART I  
COMPLAINTS RESOLUTION COMMISSIONER

GENERAL

Definitions

1. In this Part,

“complainant” means a person who makes a complaint;

“complaint” means a complaint made to the Society in respect of the conduct of a licensee;

“Commissioner” means the Complaints Resolution Commissioner appointed under section 49.14 of the Act;

“reviewable complaint” means a complaint that may be reviewed by the Commissioner under subsection 6 (1).

Provision of funds by Society

2. (1) The money required for the administration of this Part and sections 49.15 to 49.18 of the Act shall be paid out of such money as is budgeted therefor by Convocation.

Restrictions on spending

(2 In any year, the Commissioner shall not spend more money in the administration of this Part and sections 49.15 to 49.18 of the Act than is budgeted therefor by Convocation.

Annual report

3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.

REVIEW OF COMPLAINTS

Reviewable complaints

4. (1) A complaint may be reviewed by the Commissioner if,
- (a) the merits of the complaint have been considered by the Society;
  - (b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
  - (c) the complaint has not been previously reviewed by the Commissioner; and
  - (d) the Society has notified the complainant that it will be taking no further action in respect of the complaint.



### Same

- (2) A complaint may not be reviewed by the Commissioner to the extent that, in the opinion of the Commissioner, it concerns only the following matters:
1. Quantum of fees or disbursements charged by a licensee to a complainant.
  2. Requirements imposed on a licensee under By-Law 9 [Financial Transactions and Records].
  3. Negligence of a licensee.

Interpretation: "previously reviewed"

- (3) For the purposes of this section, a complaint shall not be considered to have been previously reviewed by the Commissioner if the complaint was referred back to the Society for further consideration under subsection 7 (1).

### Right to request referral

5. (1) A complainant may request the Society to refer to the Commissioner for review a reviewable complaint.

### Request in writing

- (2) A request to refer a reviewable complaint to the Commissioner for review shall be made in writing.

### Time for making request

- (3) A request to refer a reviewable complaint to the Commissioner for review shall be made within 60 days after the day on which the Society notifies the complainant that it will be taking no further action in respect of the complaint.

### When notice given

- (4) For the purposes of subsection (3), the Society will be deemed to have notified the complainant that it will be taking no further action in respect of the complaint,
- (a) in the case of oral notification, on the day that the Society notified the complainant; and
  - (b) in the case of written notification,
    - (i) if it was sent by regular lettermail, on the fifth day after it was mailed, and
    - (ii) if it was faxed, on the first day after it was faxed.

### Referral of complaints

6. (1) The Society shall refer to the Commissioner for review every reviewable complaint in respect of which a complainant has made a request under, and in accordance with, section 5.

## Notice

(2) The Society shall notify in writing the licensee who is the subject of a complaint in respect of which a complainant has made a request under, and in accordance with, section 5 that the complaint has been referred to the Commissioner for review.

## Fresh evidence

7. (1) When reviewing a complaint that has been referred to the Commissioner for review, if the Commissioner receives or obtains information, which in the Commissioner's opinion is significant, about the conduct of the licensee who is the subject of the complaint that was not received or obtained by the Society as a result of or in the course of its consideration of the merits of the complaint, the Commissioner shall refer the information and complaint back to the Society for further consideration.

## Disposition of complaint referred for review

(2) After reviewing a complaint that has been referred to the Commissioner for review, the Commissioner shall,

- (a) if satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, so notify in writing the complainant and the Society; or
- (b) if not satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, refer the complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and so notify in writing the complainant.

## Disposition of complaint referred for review: notice

(3) The Society shall notify in writing the licensee who is the subject of a complaint reviewed by the Commissioner of the Commissioner's disposition of the complaint.

## Referral back to Society: notice

(4) If the Commissioner refers a complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, the Society shall consider the recommendation and notify in writing the Commissioner, complainant and licensee who is the subject of the complaint of whether the Society will be following the recommendation.

## Same

(5) If the Commissioner refers a complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and the Society determines not to follow the recommendation of the Commissioner, the Society shall provide the Commissioner, complainant and licensee who is the subject of the complaint with a written explanation for the determination.

## Procedure

8. (1) Subject to this Part, the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

## Meeting

(2) The Commissioner shall, where practicable, meet with each complainant whose complaint has been referred to the Commissioner for review, and the Commissioner may meet with the complainant by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

## Participation in review: Society

(3) Other than as provided for in subsections (5) and (6), or unless otherwise expressly permitted by the Commissioner, the Society shall not participate in a review of a complaint by the Commissioner.

## Participation in review: licensee

(4) The licensee who is the subject of a complaint that has been referred to the Commissioner for review shall not participate in a review of the complaint by the Commissioner.

## Description of consideration, etc.

(5) At the time that the Society refers a complaint to the Commissioner for review, the Society is entitled to provide the Commissioner with a description of its consideration of the complaint and an explanation of its decision to take no further action in respect of the complaint.

## Requirement to answer questions

(6) The Commissioner may require the Society to provide information in respect of its consideration of a complaint that has been referred to the Commissioner for review and its decision to take no further action in respect of the complaint, and the Society shall provide such information.

## RESOLUTION

## Discretionary referral of complaints

9. (1) The Society may refer a complaint to the Commissioner for resolution if,

- (a) the complaint is within the jurisdiction of the Society to investigate;
- (b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
- (c) the complaint has not been referred to the Proceedings Authorization Committee;
- (d) no resolution of the complaint has been attempted by the Society; and
- (e) the complainant and the licensee who is the subject of the complaint consent to the complaint being referred to the Commissioner for resolution.

## Parties

10. The parties to a resolution of a complaint by the Commissioner are the complainant, the licensee who is the subject of the complaint and the Society.

## Outcome of Resolution

11. (1) There shall be no resolution of a complaint by the Commissioner until there is an agreement signed by all parties agreeing to the resolution.

## No resolution

(2) If there is no resolution of a complaint by the Commissioner, the Commissioner shall so notify in writing the parties and refer the complaint back to the Society.

## Enforcement of resolution

(3) A resolution of a complaint by the Commissioner shall be enforced by the Society.

## Confidentiality: Commissioner

12. (1) Subject to subsection (2), the Commissioner shall not disclose any information that comes to the Commissioner's knowledge during the resolution of a complaint.

## Exceptions

(2) Subsection (1) does not prohibit disclosure required of the Commissioner under the Society's rules of professional conduct.

## Without prejudice

(3) All communications during the resolution of a complaint by the Commissioner and the Commissioner's notes and record of the resolution shall be deemed to be without prejudice to any party.

## Procedure

13. Subject to this Part, the procedures applicable to the resolution of a complaint referred to the Commissioner shall be determined by the Commissioner.

Appendix 3

BY-LAW 20

Made: January 28, 1999

Amended:

May 28, 1999

April 26, 2001

January 24, 2002  
Revoked and Replaced: December 9, 2005

## REVIEW OF COMPLAINTS

### Complaints Review Commissioners

1. Each lay benchers is a Complaints Review Commissioner.

### Function

2. (1) Subject to subsection (2), the function of a Complaints Review Commissioner is to review the Society's disposition of a complaint against a member.

### Same

- (2) A Complaints Review Commissioner shall not review the disposition of a complaint against a member by,
  - (a) the chair and vice-chairs of the Discipline Committee as it was constituted before February 1, 1999;
  - (b) a committee of benchers acting under section 33 of the Act as that section read before February 1, 1999;
  - (c) Convocation acting under section 33 of the Act as that section read before February 1, 1999;
  - (d) The Proceedings Authorization Committee;
  - (e) The Hearing Panel; or
  - (f) The Appeal Panel.

### Request to review disposition of complaint

3. (1) A complainant who is dissatisfied with the Society's disposition of his or her complaint against a member may request the Society to refer the disposition of the complaint to a Complaints Review Commissioner for review.

### Referral of disposition of complaint to Commissioner

- (2) If a request is made under subsection (1), unless a complaint was disposed of by the persons or body mentioned in subsection 2 (2), the Society shall refer the disposition of a complaint to a Complaints Review Commissioner for review.

### Review by Commissioner of disposition of complaint

4. (1) A Complaints Review Commissioner shall review every disposition of a complaint referred to him or her under subsection 3 (2) and shall decide whether the Society's disposition of a complaint was appropriate.

### Referral to Society for further investigation

- (2) A Complaints Review Commissioner may, before or after deciding whether the Society's disposition of a complaint was appropriate, refer a complaint to the Society and direct the Society to investigate the complaint further.

Procedure on review

5. The procedure applicable to a review by a Complaints Review Commissioner of the Society's disposition of a complaint shall be determined by the Complaints Review Commissioner and, without limiting the generality of the foregoing, the Complaints Review Commissioner may decide who may make submissions to him or her, when and in what manner.

Independent counsel

6. The Complaints Review Commissioners may retain independent counsel on such terms and conditions as they consider appropriate to provide them with advice on the performance of their duties and the exercise of their duties under this By-Law.

Two or more Commissioners may review disposition of complaint

7. Despite any provision in this By-Law, two or more Complaints Review Commissioners may sit together to review the Society's disposition of a complaint and sections 2, 4 and 5 apply, with necessary modifications, to the review of the Society's disposition of a complaint by two or more Commissioners.

Commencement

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

Appendix 4

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

Copy of the Complaints Resolution Commissioner Information Sheet.

(Appendix 4, pages 37 – 38)

CONVOCATION ROSE AT 12:30 P.M.

Confirmed in Convocation this 24<sup>th</sup> day of April, 2008

Treasurer