MINUTES OF CONVOCATION

Thursday, 24th November, 2005
8:00 a.m.

PRESENT:

The Treasurer (George D. Hunter), Aaron, Alexander, Backhouse, Banack, Bobesich, Boyd, Campion, Carpenter-Gunn, Chahbar, Cherniak, Chilcott, Coffey, Copeland, Crowe, Curtis, Dickson, Doyle, Dray, Eber, Feinstein, Finkelstein, Finlayson, Gotlib, Gottlieb, Harris, Heintzman, Krishna, Lawrence, Legge, MacKenzie, Manes, Millar (by telephone), Murray, Pawlitza, Porter, Potter, Robins, Ruby, St. Lewis, Sandler, Silverstein, Swaye, Topp, Wardlaw, Warkentin and Wright.

.....

Secretary: Katherine Corrick

The Reporter was sworn.

.....

IN PUBLIC

.....

TREASURER'S REMARKS

The Treasurer, on behalf of Convocation, congratulated former Treasurer Frank Marrocco on his appointment to the Superior Court of Justice.

Congratulations were extended to William Simpson who was appointed Chair of the Ontario Public Accountants Council and to Vern Krishna who was appointed a member of the Council.

Congratulations were also extended to Marion Boyd and Abdul Chahbar who were named among "The 150 People who Define London" by the London Free Press.

The Treasurer commented on the recent articles that have appeared in the Toronto Star.

Convocation was briefed on the Thomson Report and the recommendation that an independent appeal body be established.

The Treasurer met with the Bahamian Bar Council in the Bahamas last week on issues related to money laundering. The Treasurer also gave a speech on the independence of the profession at the Advocate's Society meeting.

It was agreed that the minutes of the November 9th meeting of the Chairs and Vice-Chairs would go on Benchernet.

The Treasurer reported that a number of matters were being examined by the Federation of Law Societies of Canada, including appointments to the judiciary and money laundering. Mr. Heins has taken over as Chief Executive Officer of the Federation and the Treasurer intends to have the Federation establish a strategic plan of its operations at its meeting in Montreal in 2006.

This past week the Treasurer visited the Frontenac Law Association in Kingston.

BENCHER REMUNERATION

Professor Backhouse informed Convocation that the LAWPRO Board met on November 15, 2005 and amended By-Law 13 to read:

> With regard to lawyer benchers, on or after November 15, 2005, all remuneration shall be paid to the Law Society of Upper Canada or as directed.

It was moved by Mr. Copeland, seconded by Mr. Banack, that Convocation direct the Treasurer to ratify this By-Law.

Not Put

The following motions were deferred from September 22, 2005:

Finance & Audit Committee

Secretary's Report to Convocation
November 24, 2005

Bencher Remuneration

Purpose of Report: Information

Prepared by Katherine Corrick

BENCHER REMUNERATION

Motions Before Convocation on November 24, 2005

1. Original Motion from the Finance and Audit Committee

A bencher appointed to an external organization who is remunerated by that external organization will not be eligible for remuneration by the Law Society for the time spent, nor will the time spent on the external organization's business count toward the 26-day deductible.

2. MacKenzie/Wright Motion to Amend

A bencher shall not accept compensation from an external organization to which he or she is appointed as a bencher or otherwise accept compensation as a bencher except in accordance with this policy.

Background

3. On September 22, 2005, Convocation considered the following motion put forward by the Finance and Audit Committee to implement Convocation's decision to remunerate benchers:

That Convocation approves the definitions, processes, and reporting that will be used for the administration of bencher remuneration as summarized below.

A. Elected benchers, former treasurers and ex-officio benchers will be remunerated for eligible activities.

B. Remuneration at $300 per half day and $500 per full day will be made with an annual inflation adjustment or adjustment after review by the Finance & Audit Committee.

C. Half and Full Days
   i. Inside Toronto Benchers: A half day will be work up to 3 hours in a 24 hour period. A full day constitutes work for more than 3 hours in a 24 hour period. Any work on eligible activity in another area, e.g. Ottawa, will comprise a full day.
   ii. Outside Toronto Benchers: Any work on eligible activity in Toronto will comprise a full day.
   iii. For work on eligible activity in the bencher's office area, a half day will be work up to 3 hours in a 24 hour period. A full day constitutes work for more than 3 hours in a 24 hour period.

D. There will be an annual deductible of 26 days before benchers can be remunerated for their time. For purposes of calculating the deductible of 26 days, half days and full days will all count as one day of attendance until the deductible of 26 days is exceeded.

E. The remuneration cycle will be based on the bencher year (June 1 to May 31) not calendar year.

F. Eligible activities will include:

   (i) Convocation, meeting of committees, task forces, and working groups, special convocations, calls to the bar, bencher information sessions, mandatory bencher education sessions,

(ii) hearing panels, appeal panels, pre-hearing conferences
(iii) meetings attended as the Law Society's official representative at the direction of the Treasurer or Convocation as well as
(iv) time spent as the Law Society's appointed representative to boards of external organizations, and other roles in external organizations where that external organization permits remuneration.

G. A bencher appointed to an external organization who is remunerated by that external organization will not be eligible for remuneration by the Law Society for the time spent, nor will the time spent on the external organization's business count toward the 26-day deductible.

H. Attending a meeting by telephone is an eligible activity.

I. Questions relating to specific attendance and eligible activity issues can be directed to the Chief Executive Officer. Changes to these guidelines must be approved by the Finance & Audit Committee.

J. Benchers who opt for remuneration must submit quarterly activity sheets on the prescribed form. Benchers will certify this form.

K. Payment of remuneration will only be made directly to individual benchers or their firm.

L. The Finance Department will report on attendance, remuneration and expense reimbursement paid to individual benchers to the Audit Sub-Committee. Total amounts paid for bencher remuneration and expense reimbursements will be reported to the Finance & Audit Committee and Convocation on a quarterly basis. In addition, remuneration will be reported in total in the Annual Report.

2. During the debate of that motion, Mr. MacKenzie moved the following amendment to that motion, seconded by Mr. Wright:

A bencher shall not accept compensation from an external organization to which he or she is appointed as a bencher or otherwise accept compensation as a bencher except in accordance with this policy.

3. Convocation voted to adjourn debate on the MacKenzie/Wright amendment until November.

4. The motion brought by the Finance and Audit Committee was approved by Convocation, with the exception of paragraph "G," which was deferred to Convocation's meeting in November.

5. As a result, the following two motions are before Convocation on November 24, 2005:

MacKenzie/Wright Motion

A bencher shall not accept compensation from an external organization to which he or she is appointed as a bencher or otherwise accept compensation as a bencher except in accordance with this policy.

Original Motion from the Finance and Audit Committee

G. A bencher appointed to an external organization who is remunerated by that external organization will not be eligible for remuneration by the Law Society for the time spent, nor will the time spent on the external organization's business count toward the 26-day deductible.

November 10, 2005 Information Session

6. Material was distributed to benchers in preparation for an information session that was held on November 10, 2005. Included in the material was the following chart, which sets out the external organizations to which the Law Society appoints benchers, and some detail about the organization's remuneration policy.

Organization	Permits Remuneration	Amount Paid	Prohibits Remuneration	Does not remunerate
Bar-eX Board of Directors				√
Canadian National Exhibition Association				√
CanLII Board of Directors			√	
Civil Rules Committee				√
Criminal Rules Committee				√
Dianne Martin Medal for Social Justice Through Law Selection Committee				√
E-Reg Committee (Joint LSUC/OBA Committee for the Electronic Registration of Title Documents)				√
Family Rules Committee				√
Federal Judicial Advisory Committee				√
Federation of Law Societies of Canada Council			√	
Judicial Appointments Advisory Committee	√	$100 per meeting $300 preparation time per meeting		
Law Foundation of Ontario Board of Trustees			√	
Law Society Foundation				√
Legal Aid Board of Directors[1]	√	$375 per diem or, if 3 hours or less, $187.50		
LibraryCo Board of Directors				√
LINK Board of Directors				√
Ontario Bar Assistance Program Board of Directors			√	
Ontario Bar Association Council				√
Ontario Centre for Advocacy Training Board of Directors				√
Ontario Judicial Council				√
Ontario Justice Education Network			√	
LAWPRO	√	Retainer: $12, 000/ annum		

[1] The Law Society puts forth the names of people to sit on the Board of Legal Aid Ontario, however the Attorney General makes the appointment.

		Attendance at Board meetings: $1, 250 Attendance at committee meetings: $750 Retainer for each director elected to a committee: $3, 000/annum Retainer for Committee Chair: $5, 000/annum Retainer for positions of Chairman and Vice-Chairman: $5, 000/annum		

Original Motion from the Finance & Audit Committee

A bencher appointed to an external organization who is remunerated by that external organization will not be eligible for remuneration by the Law Society for the time spent, nor will the time spent on the external organization's business count toward the 26-day deductible.

MacKenzie/Wright Motion to Amend

A bencher shall not accept compensation from an external organization to which he or she is appointed as a bencher or otherwise accept compensation as a bencher except in accordance with this policy.

It was moved by Mr. Swaye, seconded by Mr. Dray, that the MacKenzie/Wright Motion to Amend be amended as follows:

> "A bencher, other than a bencher appointed by the provincial government ... ."

Carried

ROLL-CALL VOTE

Aaron	Against	Harris	Against
Alexander	Against	Heintzman	Against
Backhouse	For	Krishna	For
Banack	For	Legge	For
Carpenter-Gunn	For	MacKenzie	Against
Chahbar	For	Manes	For
Cherniak	Against	Millar	For
Chilcott	Against	Murray	Against

Coffey	For	Pawlitza	For
Copeland	For	Porter	For
Crowe	For	Potter	Against
Curtis	Against	Robins	For
Doyle	Against	Ruby	Against
Dray	For	St. Lewis	For
Eber	For	Sandler	For
Feinstein	Against	Silverstein	Against
Finkelstein	For	Swaye	For
Gotlib	Abstain	Topp	Against
		Warkentin	For
		Wright	Against

Vote: 21 For; 16 Against; 1 Abstention

The MacKenzie/Wright Motion was voted on as amended.

Carried

ROLL-CALL VOTE

Aaron	For	Heintzman	For
Alexander	Against	Krishna	For
Backhouse	For	Legge	For
Banack	For	MacKenzie	For
Campion	For	Manes	For
Carpenter-Gunn	For	Murray	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	For
Chilcott	For	Potter	For
Coffey	For	Robins	For
Copeland	For	Ruby	For
Crowe	For	St. Lewis	For
Curtis	For	Sandler	For
Dickson	For	Silverstein	For
Doyle	For	Swaye	For
Dray	For	Topp	For
Eber	For	Warkentin	For
Feinstein	For	Wright	Abstain
Finkelstein	For		
Gotlib	Abstain		
Gottlieb	For		
Harris	For		

Vote: 37 For; 1 Against; 2 Abstentions

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of October 20, 2005 were confirmed.

POTTER/MACKENZIE MOTION

The purpose of this motion is to summarize an alternative proposal for bencher compensation that is designed to enhance collegiality and to minimize the inequities and administrative costs of the proposals that have been put forward to date. It strives to accord with the spirit of the proposal approved by the profession in the referendum.

The proposal is as follows:

1. All eligible benchers would be required to devote 26 days to the Law Society before becoming eligible to receive compensation.

2. All benchers who devote more than 26 days to the Law Society during the year would receive the same payment.

3. The amount of the payment would be based on Convocation's best estimate of the average number of days in excess of 26 that benchers devote to the Law Society.

4. All benchers would be prohibited from receiving additional compensation from external organizations to which benchers are appointed by the Law Society.

Mr. MacKenzie presented the motion with two amendments as follows:

(1) That a new paragraph 5 be added as follows: -

The Treasurer may authorize additional remuneration to a bencher in recognition of extraordinary contribution of time devoted to bencher responsibilities in any given year.

(2) That paragraph 4 be deleted.

Lost

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

It was moved by Mr. MacKenzie, seconded by Professor Backhouse that the Report of the Director of Professional Development and Competence with the names of the candidates for Call to the Bar be adopted.

Carried

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

The Director of Professional Development and Competence reports:

B.

ADMINISTRATION

B.1. CALL TO THE BAR AND CERTIFICATE OF FITNESS

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 24th, 2005:

Anjana Allen	Bar Admission Course
Jacqueline Andrea Barrett-Prescod	Bar Admission Course
Marie-José Beauplan-Mann	Bar Admission Course
Parminder Kaur Brar	Bar Admission Course
Keith Douglas Cameron	Bar Admission Course
Pauline Cormier	Bar Admission Course
Elaine Catherine Craig	Bar Admission Course
Kulwant Singh Deol	Bar Admission Course
Lori Ann Di Pierdomenico	Bar Admission Course
Julie Marie Micheline Dufour	Bar Admission Course
Richard James Finn	Bar Admission Course
Gil Itzchak Fischler	Bar Admission Course
Christine Simone Fletcher	Bar Admission Course
Nicole Patricia Giles	Bar Admission Course
Karine Rita Hajje	Bar Admission Course
Steven James Hennig	Bar Admission Course
Céline Brigitte Henry	Bar Admission Course
Aimee Irene Jurkowitz	Bar Admission Course
Miriam Ruth Kalin	Bar Admission Course
Antonios Karalis	Bar Admission Course
Devon Thomas Kinch	Bar Admission Course
Maria Korogiannis	Bar Admission Course
Leigh Andrew Lampert	Bar Admission Course
Christine Ann Lund	Bar Admission Course
Ilana Dodi Luther	Bar Admission Course
Robert Francis Madden	Bar Admission Course
Bridget Pui Kay Mak	Bar Admission Course
Lisa Susanne Marcus	Bar Admission Course
Carlson Ng	Bar Admission Course
Ryan Gerard O'Neill	Bar Admission Course
Malcolm Brock Ritchie Pellettier	Bar Admission Course
Sriyantha Saliya Bandara Pinnawala	Bar Admission Course
Stamatia Amy JoannaPiper	Bar Admission Course
Anoop Singh Rangi	Bar Admission Course
Caroline Marie Andrée Suzanne Richard	Bar Admission Course
Patricia Rodriguez	Bar Admission Course
Mandeep Sandhu	Bar Admission Course
Steven Josef Raymond Seiferling	Bar Admission Course

Doreen Ethel Snelling	Bar Admission Course
Jacklin Tabar	Bar Admission Course
Melvin Seng Kian Tan	Bar Admission Course
Donna Liza Tiqui-Shebib	Bar Admission Course
Myrna Tulandi	Bar Admission Course
Pryamvada Yasomatee Varma	Bar Admission Course
Waleska Anne Vernon	Bar Admission Course
Herbert Patrick Wells	Bar Admission Course
Marcia Dawne Zuly	Bar Admission Course

B.1.3. (b) Transfer from another Province - Section 4

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 24th, 2005:

Michel Castillo	Province of Alberta
Swapna Chandra	Province of Manitoba
Charlena Tamara Claxton	Province of Nova Scotia
Joel Skillman Friley	Province of Alberta
Conni Margo Gibson	Province of Alberta
SandraAnn Gogal	Province of Newfoundland
Alison Theresa Keagan	Province of British Columbia
David Anthony James McCarthy	Province of Newfoundland
Lisa Michelle Melanson	Province of Nova Scotia
Anu Sandhu	Province of British Columbia
Monika Justyna Surma	Province of British Columbia

B.1.5. (c) Transfer from another Province - Section 4.1

B.1.6. The following candidates have completed successfully the transfer examinations or the academic phase of the Bar Admission Course, filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, November 24, 2005:

Patrick-James Blaine	Province of Quebec
Jean-Simon Cléroux	Province of Quebec
Randy Stuart Kramer	Province of Quebec
Dah Yoon Min	Province of Quebec

ALL OF WHICH is respectfully submitted

DATED this the 24th day of November, 2005

CALL TO THE BAR (Convocation Hall)

The candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar, with the exception of

Sryantha Saliya Bandara Pinnawala. Mr. Swaye then presented the candidates to Mr. Justice Peter A. Cumming to sign the rolls and take the necessary oaths.

Anjana Allen	Bar Admission Course
Jacqueline Andrea Barrett-Prescod	Bar Admission Course
Marie-José Beauplan-Mann	Bar Admission Course
Parminder Kaur Brar	Bar Admission Course
Keith Douglas Cameron	Bar Admission Course
Pauline Cormier	Bar Admission Course
Elaine Catherine Craig	Bar Admission Course
Kulwant Singh Deol	Bar Admission Course
Lori Ann Di Pierdomenico	Bar Admission Course
Julie Marie Micheline Dufour	Bar Admission Course
Richard James Finn	Bar Admission Course
Gil Itzchak Fischler	Bar Admission Course
Christine Simone Fletcher	Bar Admission Course
Nicole Patricia Giles	Bar Admission Course
Karine Rita Hajje	Bar Admission Course
Steven James Hennig	Bar Admission Course
Céline Brigitte Henry	Bar Admission Course
Aimee Irene Jurkowitz	Bar Admission Course
Miriam Ruth Kalin	Bar Admission Course
Antonios Karalis	Bar Admission Course
Devon Thomas Kinch	Bar Admission Course
Maria Korogiannis	Bar Admission Course
Leigh Andrew Lampert	Bar Admission Course
Christine Ann Lund	Bar Admission Course
Ilana Dodi Luther	Bar Admission Course
Robert Francis Madden	Bar Admission Course
BridgetPui Kay Mak	Bar Admission Course
Lisa Susanne Marcus	Bar Admission Course
Carlson Ng	Bar Admission Course
Ryan Gerard O'Neill	Bar Admission Course
Malcolm Brock Ritchie Pellettier	Bar Admission Course
Stamatia Amy Joanna Piper	Bar Admission Course
Anoop Singh Rangi	Bar Admission Course
Caroline Marie Andrée Suzanne Richard	Bar Admission Course
Patricia Rodriguez	Bar Admission Course
Mandeep Sandhu	Bar Admission Course
Steven Josef Raymond Seiferling	Bar Admission Course
Doreen Ethel Snelling	Bar Admission Course
Jacklin Tabar	Bar Admission Course
Melvin Seng Kian Tan	Bar Admission Course
Donna Liza Tiqui-Shebib	Bar Admission Course
Myrna Tulandi	Bar Admission Course
Pryamvada Yasomatee Varma	Bar Admission Course
Waleska Anne Vernon	Bar Admission Course
Herbert Patrick Wells	Bar Admission Course
Marcia Dawne Zuly	Bar Admission Course
Michel Castillo	Transfer, Province of Alberta
Swapna Chandra	Transfer, Province of Manitoba

Charlena Tamara Claxton	Transfer, Province of Nova Scotia
Joel Skillman Friley	Transfer, Province of Alberta
Conni Margo Gibson	Transfer, Province of Alberta
Sandra Ann Gogal	Transfer, Province of Newfoundland
Alison Theresa Keagan	Transfer, Province of British Columbia
David Anthony James McCarthy	Transfer, Province of Newfoundland
Lisa Michelle Melanson	Transfer, Province of Nova Scotia
Anu Sandhu	Transfer, Province of British Columbia
Monika Justyna Surma	Transfer, Province of British Columbia
Patrick-James Blaine	Transfer, Province of Quebec
Jean-Simon Cléroux	Transfer, Province of Quebec
Randy Stuart Kramer	Transfer, Province of Quebec
Dah Yoon Min	Transfer, Province of Quebec

MOTION - TASK FORCE ON THE RULE OF LAW AND THE INDEPENDENCE OF THE BAR

Mr. Finkelstein presented the Motion on the Task Force on the Rule of Law and the Independence of the Bar.

Report to Convocation
November 24, 2005

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

Purpose of Report: Decision

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

MOTION

1. That Convocation approves the following terms of reference and membership of the Task Force on the Rule of Law and the Independence of the Bar:

   a. The Task Force on the Rule of Law and the Independence of the Bar will produce a report, under the auspices of the Law Society of Upper Canada, authored by leading members of the legal profession and based upon comprehensive research by Canada's leading academics, which legislators and courts will recognize and rely upon to resist inappropriate incursions into the independence of the bar.

   b. The Task Force will report to Convocation by September 30, 2006.

c. The budget for the Task Force will be $150,000.

d. The proposed members of the Task Force are:

Neil Finkelstein (Co-Chair)
Earl Cherniak, Q.C. (Co-Chair)
Professor Constance Backhouse
The Honourable Jack Major
The Honourable Michel Proulx
Sheila Block
Jack Giles, Q.C.
David Scott, Q.C.
Other members of the profession to be confirmed

Background

2. There is no current comprehensive statement of reasons why an independent bar is a necessary corollary to the rule of law. Lawyers reflexively adopt the concept as a fundamental principle, but do not often articulate the reasons for it. Although the principle of an independent bar is not controversial, incursions into the independence of the bar by legislators and courts, left unchecked, threaten the rule of law itself. Examples include money laundering legislation that imposes a duty to report certain client information under threat of penal sanction; the erosion of aspects of solicitor-client confidentiality; and the security certificate process under the Immigration and Refugee Protection Act in which the detainee has no effective counsel while the court makes its decision on evidence presented only by the Crown.

3. At Convocation on October 20, 2005, the Treasurer advised that he would be establishing a Task Force to produce a report to be used by legislators and the courts, examining the interdependence of an independent bar and the rule of law.

4. On November 10, 2005, the Finance and Audit Committee reviewed the proposed budget of $150,000 for the work of the Task Force. The Task Force's budget reflects the need for comprehensive research to be undertaken by senior Canadian academics and includes a retainer for a research coordinator who will assist in drafting the report. The budget also allows for Task Force members from Vancouver, Montreal and Ottawa to travel to Toronto to attend three Task Force meetings: the first, to plan its work; the second, to discuss the research papers and plan the report; and the third, to finalize the report. The Finance and Audit Committee will be recommending the budget to Convocation in November.

5. The budget for the Task Force is as follows:

a. Research Coordinator, Prof. Lorne Sossin (confirmed subject to Convocation's approval of the project)	$ 25,000
b. Research Papers	
(5 x $15,000)	$ 75,000
Total Research	$100,000
c. Travel	$ 45,000

(3 meetings x $ 15,000)

d. Miscellaneous	$ 5,000
TOTAL	$150,000

6. Dean Patrick Monahan of Osgoode Hall Law School, a well-respected Canadian constitutional scholar who has conducted past research for the Law Society of Upper Canada, has confirmed his interest in preparing a research paper on a relevant topic to be included in the report. Other academics who may be invited to submit research papers for the project are Professors Peter Hogg (Osgoode Hall) and Kent Roach (University of Toronto).

7. The new Task Force, in accordance with its terms of reference, will commission academic research papers and produce a report on the rule of law and the independence of the bar to be presented to Convocation by September 30, 2006. This document, which will report on the rationale for, and the importance of the independence of the bar, will be recognized as a definitive resource for those entrusted with the responsibility of resisting incursions on the independence of the bar and upholding the rule of law.

.....

Convocation voted on and approved the following motion.

1. That Convocation approves the following terms of reference and membership of the Task Force on the Rule of Law and the Independence of the Bar:

   a. The Task Force on the Rule of Law and the Independence of the Bar will produce a report, under the auspices of the Law Society of Upper Canada, authored by leading members of the legal profession and based upon comprehensive research by Canada's leading academics, which legislators and courts will recognize and rely upon to resist inappropriate incursions into the independence of the bar.

   b. The Task Force will report to Convocation by September 30, 2006.

   c. The budget for the Task Force will be $150,000.

   d. The proposed members of the Task Force are:

      Neil Finkelstein (Co-Chair)
      Earl Cherniak, Q.C. (Co-Chair)
      Professor Constance Backhouse
      The Honourable Jack Major
      The Honourable Michel Proulx
      Sheila Block
      Jack Giles, Q.C.
      David Scott, Q.C.
      The Honourable Sydney Robins

David Jackson
Professor Richard Simeon
Other members of the profession to be confirmed.

MOTION - TASK FORCE ON TRIBUNALS COMPOSITION

Mr. MacKenzie presented the Motion on the Task Force on Tribunals Composition.

Report to Convocation
November 24, 2005

Task Force on Tribunals Composition

Purposes of Report: Decision

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

TASK FORCE ON TRIBUNALS COMPOSITION

TERMS OF REFERENCE AND MEMBERSHIP

MOTION

1. That Convocation approves the following terms of reference and membership of the Task Force on Tribunals Composition:

   a. The Task Force on Tribunals Composition will undertake an examination of the five tribunal models identified by the Tribunals Task Force in its April 28, 2005 report to Convocation, and any variations on these models that it considers worthy of consideration, and will make recommendations to Convocation regarding the composition of Law Society tribunals that are designed to promote the Law Society's mandate to govern the profession in the public interest.

   b. The Task Force anticipates reporting to Convocation in May 2006.

   c. The proposed members of the Task Force are:

      Gavin MacKenzie (Chair)
      Larry Banack
      Carole Curtis
      Anne-Marie Doyle
      Allan Gotlib
      Mark Sandler
      Bradley Wright
      Bonnie Warkentin

S. Ron Ellis, Inaugural Chair and former CEO, Workplace Safety and Insurance Appeals Tribunal
Bryan Finlay, Partner, WeirFoulds LLP
Professor Lorne Sossin, Associate Dean, University of Toronto, Faculty of Law

Background to the Terms of Reference

2. On April 28 2005, Convocation adopted the following recommendation in the Tribunals Task Force final report:

[that] Convocation undertake an examination of the different models for the composition of the Law Society Tribunals, as described in Part II of this report.

3. In Part II of its report, the Tribunals Task Force described five possible models for tribunal composition, and identified certain issues raised by each model. The five possible models are as follows:

a. The continuation of the current Law Society model.

b. A tribunal model made up of elected benchers, lay benchers and non-bencher lawyers, the latter either for general participation on panels or for selected cases.

c. A tribunal model with a permanent Chair and one or two permanent Vice-Chairs who occupy one seat on every panel; the remaining members of each panel to be either elected lawyer benchers or non-bencher lawyers (or both), and lay benchers.

d. A model that establishes a tribunals unit within the Law Society made up entirely of non-bencher lawyers and lay people.

e. A model that establishes a tribunal that is completely independent of the Law Society.

4. At October 20, 2005 Convocation, the Treasurer advised that he would be establishing a Task Force on tribunals composition arising from the Tribunals Task Force report.

5. The new Task Force, in accordance with its terms of reference, will examine the five models noted above, and others as appropriate, and make its recommendations to Convocation on the composition of Law Society tribunals.

It was moved by Mr. MacKenzie, seconded by Dr. Gotlib,

That Convocation approves the following terms of reference and membership of the Task Force on Tribunals Composition:

a. The Task Force on Tribunals Composition will undertake an examination of the five tribunal models identified by the Tribunals Task Force in its April 28, 2005 report to Convocation, and any variations on these models that it considers worthy of consideration, and will make recommendations to Convocation

regarding the composition of Law Society tribunals that are designed to promote the Law Society's mandate to govern the profession in the public interest.

b. The Task Force anticipates reporting to Convocation in May 2006.

c. The proposed members of the Task Force are:

Gavin MacKenzie (Chair)
Larry Banack
Carole Curtis
Anne-Marie Doyle
Allan Gotlib
Mark Sandler
Bradley Wright
Bonnie Warkentin
S. Ron Ellis, Inaugural Chair and former CEO, Workplace Safety and Insurance Appeals Tribunal
Bryan Finlay, Partner, WeirFoulds LLP
Professor Lorne Sossin, Associate Dean, University of Toronto, Faculty of Law

Carried

.....

IN CAMERA

.....

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

.....

IN PUBLIC

.....

REPORT OF THE GOVERNMENT RELATIONS & PUBLIC AFFAIRS COMMITTEE

Re: Federal Judicial Appointments Process

Mr. Porter presented the item in the Report on the Federal Judicial Appointments Process.

Report to Convocation
November 24, 2005

Government Relations & Public Affairs Committee

Committee Members

James Caskey (Co-Chair)
Julian Porter (Co-Chair)
Laurie Pawlitza (Vice-Chair)
Andrea Alexander
Marion Boyd
John Campion
Abdul Chahbar
Andrew Coffey
Allan Lawrence
Alan Silverstein
William Simpson
Michelle Strom

Purpose of Report: Decision
Information

Prepared by Policy Secretariat
(Julia Bass 416 947 5228)

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Committee met on November 9th 2005. Committee members in attendance were: James Caskey and Julian Porter (Co-Chairs), Laurie Pawlitza (Vice-Chair), Andrea Alexander, Marion Boyd (by teleconference), Abdul Chahbar, Andrew Coffey, Allan Lawrence (for the early part of the meeting only), Alan Silverstein, William Simpson and Michelle Strom. Members of the Access to Justice Committee attending as guests were Mary Louise Dickson, Dr Richard Filion and Bonnie Warkentin. Staff in attendance were Malcolm Heins, Katherine Corrick, Diana Miles, Elliot Spears, Sheena Weir and Julia Bass.

FOR DECISION

FEDERAL JUDICIAL APPOINTMENTS PROCESS

MOTION

2. That Convocation approve the submission on the federal judicial appointments process set out at Appendix 1.

3. If approved by all member law societies, this submission will be presented as the

position of the Federation of Law Societies of Canada ('FLSC'). If approved by Convocation but not by all other law societies, it will be submitted as the position of the Law Society of Upper Canada, or of as many law societies as have endorsed it. The submission has so far been approved by the Law Society of Newfoundland & Labrador and the Chambre des Notaires of Quebec.

Background

4. The House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness has established a Subcommittee to consider the subject of the process of appointment to the federal judiciary. The subcommittee was created pursuant to a motion passed in the House of Commons on June 7, 2005, partly in response to comments made by Mr. Justice Michel Robert, to the effect that it would be inappropriate to appoint a separatist to the bench. (Justice Robert's remarks were also the subject of a complaint to the Canadian Judicial Council). The motion read as follows:

That the House denounce the recent remarks made by Mr. Justice Michel Robert stating that it is acceptable to discriminate on the basis of political opinion when appointing candidates to the federal judiciary and that it call on the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to create a special subcommittee with the mandate to examine the process for appointments to the federal judiciary and make recommendations for reform, with the primary goal of eliminating political partisanship from the process, by October 31, 2005.

5. The deadline for the Subcommittee to report has since been postponed to December 15, 2005. However, the timing of the invitation has made it challenging to prepare a submission capable of being approved by all member law societies within the available time. The latest available date for an oral presentation was November 15th 2005, making it impossible for all law societies to approve a submission in time. The deadline for a written submission is November 28th, 2005 and the Federation hopes to be in a position to make a written submission by that time.

6. The Law Society of Upper Canada was also invited to appear, however, since this is a national issue, a presentation by the FLSC, on behalf of all law societies in Canada, is considered more appropriate.

7. The FLSC established a Working Group on Judicial Appointments chaired by Professor Vern Krishna to develop a position on this issue. In addition to Professor Krishna, the Law Society of Upper Canada is represented by the Treasurer, who is also the President of the FLSC. The other members are Ralston Alexander, President of the Law Society of British Columbia and Madeleine Lemieux, Bâtonnière of the Barreau du Québec.

Supreme Court of Canada Appointments Process

8. Interest in this issue arose following the debate on the appointments process to the Supreme Court of Canada. The new process for Supreme Court of Canada appointments is now in progress, to fill the vacancy created by Justice John Major's retirement. This will represent the first full operation of the process that the government tabled with the Standing Committee on Justice in April. (The appointments of Justices

Abella and Charron occurred while the process was still in development).

9. There are a number of positive features of the new Supreme Court appointment process, including the formalization of the initial consultation process and the creation of a widely based Advisory Committee. However, there remain a number of concerns:

   a. The government's right to prepare the initial 'long list'; it will not be possible for names to be added to the list without the government's agreement.

   b. The government's right to make an appointment from outside the short list in "exceptional circumstances". (The nature of these circumstances has not been clearly explained, but reference is made to possible 'confidentiality' problems). It could be argued that this detracts from the integrity of the process. Would it be preferable to require the minister to request further names from the committee, or to request the committee to consider further candidates chosen by the minister?

   c. The process whereby the minister of justice appears before the Standing Committee to explain the government's appointments after they have been made is not considered especially substantive. However, since this approach has already been followed in the case of the Abella and Charron appointments, it is unlikely to be changed.

10. The Canadian Bar Association, at its Annual General Meeting in July, expressed dismay at the exclusion of the CBA from the Advisory Committee on Supreme Court appointments (which includes law society representation).

11. The government is not seeking further comment on the Supreme Court of Canada appointments process.

Other Federal Judicial Appointments

12. Apart from the Supreme Court of Canada, the federal government is responsible for the appointment of about 850 judges, including the courts of appeal and superior courts of all provinces and territories, the Federal Court of Canada and the Tax Court.

13. Partly as a result of a 1985 Canadian Bar Association report on judicial appointments, Judicial Advisory Committees were introduced in 1989. They consist of members representing the appropriate law society, the Canadian Bar Association, the provincial Attorney General and three representatives of the federal minister of justice. The current process as described on the government's website is set out at Appendix 2. It includes:

   a. Candidates are assessed in confidence;
   b. Committees set their own agenda;
   c. Candidates are classified as 'recommended' 'highly recommended' or 'unable to recommend'. The results are confidential so that the candidate does not know the results.
   d. The minister may at his discretion seek further information on any candidate and has the right to request the reassessment of a candidate.

14. The advisory committees are generally thought to have reduced the possibility of

unqualified persons being appointed, however, there are concerns that political affiliation remains an advantage.

15. Some commentators believe that there are stronger protections in some of the provincial appointment processes. As an example, a description of the current Ontario process is attached at Appendix 3. Differences from the federal process include:

    a. Vacancies are advertised;
    b. Personal interviews are conducted (in confidence);
    c. The selected names are ranked in order of preference, rather than being classified into categories.

16. Most proposals for an appropriate appointments process involve some variation of the existing advisory committees providing names to the minister, although there are many possible variants within this general concept.

The Working Group's Deliberations

17. The Federation Working Group met by conference call on several occasions. They conducted an extensive review of the appointment practices in other common law jurisdictions. It was difficult to achieve consensus on all issues of detail, given the tight deadline and the Federation's requirement for unanimous decisions. The proposed submission therefore represents a reasonable compromise developed after considerable debate.

18. The Working Group was of the view that the work of the Judicial Advisory Committees should be concentrated on assessing the merit of candidates, and should not involve other important considerations such as geographic and demographic balance. Rather, these aspects should be left to the minister of justice to assess.

19. The Working Group was of the view that the judiciary should not be represented on the Judicial Advisory committees, as being contrary to the independence of the judiciary and the separation of powers, and leading to preference being given to barristers. However, at the Federation Council it was pointed out that this could create difficulties for very small jurisdictions in finding a sufficient number of lawyers to serve, and the submission was modified to take these concerns into account.

20. The Working Group endorsed two features of the current Ontario appointments process as beneficial and recommends their adoption in the federal process: the advertising of vacancies and the discretion to interview candidates.

21. The advertising of vacancies is regarded as having made the process more transparent and to have widened the pool of applicants. The ability to interview candidates is regarded as a valuable further means of assessing the suitability of candidates, and can be done while maintaining the confidentiality of the process.

22. The Working Group took the position that the number of categories should be reduced from three to two, to prevent the current practice of appointing a "Recommended" candidate in preference to a "Highly Recommended" candidate. To emphasize the importance of only the best candidates being selected, the two categories should be called "Highly Recommended" and "Not Recommended".

The Government Relations Committee's Deliberations

23. The Committee approved the proposed submission. The Committee was of the view that, if it proves impossible to obtain the necessary unanimous approval for the submission to be adopted by the Federation, it should be submitted as the position of the Law Society of Upper Canada.

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

(1) Copy of the submissions on the Federal Judicial Appointment Process – November 2005.

(Appendix 1, pages 9 – 12)

(2) Copy of the current process of judicial appointments as described on the government's website.

(Appendix 2, pages 13 – 16)

(3) Copy of the current process of appointment of Ontario Provincial Judges.

(Appendix 3, pages 17 – 19)

It was moved by Mr. Porter, seconded by Professor Krishna, that Convocation approve the submission on the federal judicial appointments process set out at Appendix 1.

Carried

Convocation directed that the submission could be presented as the submission of the Law Society of Upper Canada.

.....

IN CAMERA

.....

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

……

IN PUBLIC

……

REPORT OF THE FINANCE & AUDIT COMMITTEE

Mr. Ruby presented the Report of the Finance & Audit Committee.

Report to Convocation
November 24, 2005

Finance and Audit Committee

Committee Members:
Clayton Ruby, Chair
Abdul Chahbar, Vice-Chair
John Campion
Marshall Crowe
Mary Louise Dickson
Allan Gotlib
Holly Harris
Ross Murray
Alan Silverstein
Gerald Swaye
Beth Symes
Robert Topp

Purpose of Report: Decision

Prepared by the Finance Department

TABLE OF CONTENTS

FOR DECISION:

COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on November 10, 2005. Committee members in attendance were: Abdul Chahbar (vc.), John Campion, Marshall Crowe, Allan Gotlib, Holly Harris, Ross Murray, Gerald Swaye, Beth Symes. The Treasurer, George Hunter was also present.
   Staff present were: Wendy Tysall, Fred Grady and Andrew Cawse.

FOR DECISION

TREASURER'S TASK FORCE ON THE RULE OF LAW AND THE INDEPENDENCE OF THE BAR

MOTION

That Convocation approve the budget for the Task Force on the Rule of Law and the Independence of the Bar. Total costs are estimated to be $150,000 to be funded from the Contingency Account in 2006.

21. As noted by the Treasurer at Convocation in October, a separate motion is being put before Convocation this month seeking approval for the establishment of the Treasurer's Taskforce on the Rule of Law and the Independence of the Bar.

22. A budget for the Taskforce is summarized below. Incremental Law Society costs have not been added to the budget. If additional expenses are incurred such as translation and printing costs, or if existing program expense budgets for expenses like catering are insufficient, a further request for funding from the contingency account may be made.

BUDGET DESCRIPTION	COST
Research Coordinator	$25,000
Research Papers	$75,000
Travel	$45,000
Miscellaneous	$5,000
TOTAL COSTS	$150,000

23. The Task Force goal is to produce a Report by September 2006. The above expenses for 2006 were not included in the 2006 budget and would be funded from the contingency account, which has a budget of $1.2 million. At this stage of 2005, the 2006 contingency account has not been used, although funding for the Small Firm Task Force may be requested when this Task Force Report is returned to Convocation. The contingency may also be required to fund bencher remuneration if actual remuneration exceeds the $300,000 provided in the operating budget.

24. There are no other practical resources for financial support such as the Federation or other Law Societies, and the Law Society of Upper Canada intends to be proactive in developing this Report. The initiative is obtaining significant non-financial external support and the budget appears appropriate for the scale and objectives of the initiative.

FOR DECISION

CHEQUE SIGNATORIES

MOTION

That Convocation approve the changes to the authorized signing officers of the corporation to reflect the new Treasurer and the change in designated bencher from Derry Millar to John Campion.

25. The new composition of Convocation and the Finance and Audit Committee has necessitated changes with respect to signatories for banking purposes. The signatories appended to the Law Society's banking resolution must be updated to reflect the new Treasurer and designated bencher.

26. The Law Society's banking resolution names several individuals and staff positions as signatories for banking purposes. With respect to elected officials, the Treasurer, Chair and Vice Chair of Finance and Audit Committee and two designated benchers are to be signatories. Designated benchers are typically those individuals who have offices in close proximity to Osgoode Hall and are members of the Finance and Audit Committee.

27. Generally, a designated bencher is only called upon to sign cheques that exceed $100,000, however the cheques could be for any amount. Cheques for signature are primarily from the General Fund chequing account and Compensation Fund chequing account, but may also be from some of the other Law Society accounts. Supporting documentation is always provided so that it is clear that the payments are bona fide and have been properly requisitioned through the Law Society's system of internal control. Having two Designated Benchers who are accessible is vital to the ongoing financial operations of the Law Society. Currently, Beth Symes is the other approved Designated Bencher. With the change to the membership of the Finance and Audit Committee, John Campion as agreed to act as Designated Bencher in place of Derry Millar and needs to be added as a signatory.

Re: Cheque Signatories

It was moved by Mr. Ruby, seconded by Mr. Chahbar, that Convocation approve the changes to the authorized signing officers of the corporation to reflect the new Treasurer and the change in designated bencher from Derry Millar to John Campion.

Carried

Re: Budget for Treasurer's Task Force on the Rule of Law and Independence of the Bar

It was moved by Mr. Ruby, seconded by Mr. Chahbar, that Convocation approve the budget for the Task Force on the Rule of Law and the Independence of the Bar. Total costs are estimated to be $150,000 to be funded from the Contingency Account in 2006.

Carried

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve payments from the J. S. Denison Fund as set out in the Report.

Carried

GOVERNANCE TASK FORCE REPORT

Mr. Ruby presented the Report of the Governance Task Force.

Final Report to Convocation
November 24, 2005

Governance Task Force

NOTE:
DEFERRED FROM OCTOBER 20, 2005 CONVOCATION

Task Force Members
Clay Ruby, Chair
Andrew Coffey
Sy Eber
Abe Feinstein
Richard Filion
George Hunter
Vern Krishna
Laura Legge
Harvey Strosberg

Purpose of Report: Decision

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

FOR DECISION

GOVERNANCE TASK FORCE RECOMMENDATIONS

MOTION

That Convocation approves the following recommendations to improve the governance of the Law Society by Convocation:

1. RECOMMENDATION 1 - *The method by which members become benchers*

    a. That enhancements be made to the existing communications strategy for the bencher election, through appropriate Law Society and other media, to encourage more members to vote in the bencher election;

    b. That Law Society members who are candidates in the bencher election be educated through material produced by the Law Society to be sent to all candidates and published in the bencher election voters' guide on the subject of the Society's public interest mandate, the importance of a self-regulating legal profession and the role of a bencher, with a focus on the bencher's obligations as a fiduciary and as a representative of the public's, as opposed to the profession's, interests;

2. RECOMMENDATION 2 - *Electronic voting for bencher elections*

    a. That the Law Society begin the process to institute electronic voting for the next bencher election and future bencher elections, and

    b. That the Society pursue other improvements to the bencher election process that might reasonably be expected to increase voter participation.

3. RECOMMENDATION 3 - *The size of Convocation as a board*

    That rules of procedure for Convocation be adopted to assist the Treasurer and benchers in fulfilling the policy decision-making function of Convocation;

4. RECOMMENDATION 4 - *Benchers in the dual role of directors of a corporation and representatives in a forum similar to a legislature*

    a. That Convocation affirm the bencher's role as a fiduciary to the Law Society as an organization, whose mandate benchers must reflect in their discussions and decision-making;

    b. That Convocation affirm that a bencher in his or her role as a bencher cannot advocate a position in Convocation or elsewhere that places the profession's interest ahead of the public interest, and

    c. That Convocation affirm that when a bencher is appointed as a Law Society representative to the board of another organization, insofar as the issues the bencher addresses affect the Law Society's mandate, the bencher must strike a balance between duties as a Society representative and duties owed to the

board by virtue of the appointment, and, on occasion, may have to refrain from offering views or opinions if doing so places the bencher in a conflict with respect to those duties.

5. RECOMMENDATION 5 – *Increase efforts to encourage potential bencher candidates from all communities*

That the Society increase its efforts to encourage members from all communities within Ontario's legal profession to run for bencher, as the public whose interests the Society represents in its governance of the profession should be reflected in those who serve as governors.

Introduction and Terms of Reference

6. On September 23, 2004, Convocation established the Governance Task Force as part of an ongoing commitment to ensure that the Law Society's self-governance of the legal profession is sound and continues to focus on the public interest. The terms of reference for the Task Force approved by Convocation appear at Appendix 1.

7. The Law Society's effectiveness as a regulator is linked to its effectiveness at the board (Convocation) level. The Task Force focused on whether changes to improve the Society's corporate governance are needed, and if so, what those changes should entail. The Task Force recognized that the Law Society's governance structure is a functional response to its legislative mandate, and that any changes to the structure must be informed by and consistent with this mandate.

8. The Task Force also recognized that improvements in governance, if warranted, must be made in ways that acknowledge the value of the Law Society's unique history, culture and traditions, which have influenced its governance structure.

9. As reflected in its terms of reference, the Task Force took advantage of significant work that had previously been done by the Society on the subject of governance. The Task Force declined to explore governance theory and focused on practical considerations affecting governance.

10. The Task Force, which met on six occasions beginning in the fall of 2004, considered the following issues:

a. The method by which members become benchers and the size of Convocation as a board;

b. The role of the Treasurer as chair of the board (Convocation), the notion of an executive committee, priority planning, and the frequency and the procedural and substantive efficacy of Convocation;

c. Benchers in the dual roles of directors of a corporation and representatives in a forum similar to a legislature;

d. Benchers in the dual roles of policy makers and adjudicators; and

e. Electronic voting for bencher elections.

11. The Task Force received written submissions on governance issues from benchers Bradley Wright and Joanne St. Lewis, in her role as chair of the Equity and Aboriginal Issues Committee/Comité Sur L'Équité Et Les Affaires Autochtones.

12. This report discusses the above-noted issues and the Task Force's conclusions, which led to a series of recommendations that, in the Task Force's view, will enhance Convocation's ability to fulfill its obligations to govern the legal profession in the public interest.

The Starting Point: Governance and the Public Interest

13. In the Task Force's view, the historical basis for the Society's public interest mandate, how the public interest has been interpreted judicially and how that interpretation has informed the Society's governance of the profession is important to an understanding of the Law Society's purpose and, in relation to governance, the benchers' roles as directors and fiduciaries of the organization.

The Law Society's Role Statement

14. The Law Society's Role Statement, which was adopted by Convocation on October 27, 1994, reads as follows:

> The Law Society of Upper Canada exists to govern the legal profession in the public interest by:
> - ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and
> - upholding the independence, integrity and honour of the legal profession,
>
> for the purpose of advancing the cause of justice and the rule of law.

15. Through this language, the "public interest" informs the Law Society's governance obligations for the purpose of advancing the cause of justice and the rule of law.

The 1797 Statute

16. The creation of the Society presupposed a public interest foundation. The principles found in the Role Statement were embodied in the 1797 legislation that established the Law Society. It read as follows:

> "it shall and may be lawful for the persons now admitted to practise in the law, and practicing at the bar of any of his Majesty's courts of this province, to form themselves into a Society, to be called the *Law Society of Upper Canada*, as well for the establishing of order amongst themselves as for the purpose of securing to the Province and the profession a learned and honorable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province."

Judicial Consideration of the Public Interest Mandate

17. In *Attorney General of Canada v. Law Society of British Columbia*,[1] the Supreme Court of Canada explained the rationale for a self-governing body serving the public interest:

> The general public is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the *Legal Professions Act.*

18. The Court goes on to explain why regulation of the profession independent from government is necessary for the protection of the public:

> The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

19. Callahan, J. (as he then was) writing on behalf of the Ontario Divisional Court in *Re Klein and the Law Society of Upper Canada*[2] stated:

> The Law Society's mandate under the *Law Society Act* R.S.O. 1980, c. 233, is to regulate the affairs of the legal profession and the public interest… The Law Society is a statutory authority exercising its jurisdiction in the public interest…

20. This view was reiterated in the February 2000 decision of *Wilder v. Ontario Securities Commission*[3] , in which the Ontario Divisional Court stated:

> The Law Society and the Ontario Securities Commission both exercise public interest functions, but the public interests which they seek to protect are not the same. The Law Society has an important role to govern the legal profession in the public interest, and to ensure that members of the profession do not engage in professional misconduct or conduct unbecoming a barrister and solicitor.

21. On appeal (February 2001), the Ontario Court of Appeal agreed with the Divisional Court's analysis.

22. In June 2001, the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada* [4], referring to the mandate of the Law Society, said "The Law Society Act is geared for the protection of clients and thereby the public as a whole;"

---

[1] [1982] 2 S.C.R. 307
[2] (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.)
[3] (2000) 47 O.R. (3d) 361 (Ont. Div. Ct).
[4] [2001] 3 S.C.R. 562.

Applying the Public Interest Mandate in the Profession's Governance

23. The law is clear that self-regulatory organizations such as the Law Society are required to fulfill their mandates in the public interest. The competence, professional conduct, integrity and independence of the bar in the Ontario, as the Role Statement emphasizes, is fundamental to the public interest mandate of the Law Society.

24. It is against this background that the Task Force examined the Law Society's own governance through the benchers in Convocation.

The Issues

I. The Bencher Qualification Process and the Size Of Convocation as a Board

The Election Process

25. The Task Force considered whether the method by which members of the Law Society become benchers affects the effectiveness of Convocation as a board and thus the Society's effectiveness as a governing body.

Some "Pros and Cons" of the Election Process

A Democratic Process

26. Forty benchers are elected by the legal profession in Ontario every four years. The eligible voters are the 37,000 members of the Law Society. The bencher election provides lawyers in the province with a transparent, democratic process for electing their governors from the profession, who are required to govern the profession in the public interest.

Voter Participation - Does Convocation Reflect the Legal Profession in Ontario?

27. Despite increased efforts by the Society to encourage members to vote, a significant portion of the Society's membership does not vote in the bencher election. In recent bencher elections, the benchers have been elected by less than 50% of the eligible voters.[5] How this number might be improved is discussed later in this report.

28. The question for the Task Force, in light of this statistic, was whether the election results in a board of governors that sufficiently captures the choices of and reflects Ontario's legal profession.

The "Constituency" Issue

29. The bencher election prompts most candidates to mount some type of campaign. Campaigns are directed to the Society's membership as voters, and in some cases, judging from candidates' election statements, focus more on member's interests than the public interest. While this may be peculiar to this election process, the Task Force is

[5] See the chart on page 13 for data on past bencher elections.

discomforted by the notion that some bencher candidates do not appear to understand that the bencher's role, as a fiduciary of the organization, is that of a governor of lawyers in the public interest.

30. The election process in fact leads some bencher candidates to portray themselves as constituency representatives rather than representatives of the public constituency for the profession's governance. The issue of benchers as legislative representatives versus fiduciaries on a board is discussed in detail later in this report, but the question is whether a bencher who participates more as a constituency representative negatively impacts on Convocation's ability to fulfill the Society's public interest mandate. From time to time, some benchers have confused their role in this way.

The Value of An Election Process

31. Notwithstanding the above, the Task Force believes that the election of the governors by the profession's membership is a key aspect of self-governance of the profession in Ontario.

32. In the Law Society's process, the entire membership is able - and invited - to vote for the governors without restriction.[6] Through the vote, the members determine who governs the profession in Convocation, and to that extent, have the opportunity to influence the profession's governance. In the absence of an election process, the Society might well be criticized for failing to provide such an opportunity.

33. The election process is also free of any limitations on who may run as a candidate, including limitations that might be viewed as discriminatory or arbitrary. The election provides a level playing field in which any member who meets the requirements in the by-laws can choose to become a candidate.[7]

34. The Task Force considered whether the lack of specific qualifications for a bencher leaves the Society open to criticism about the quality of the elected bench or whether the "right" candidates are elected. The Task Force rejected this notion. There is no evidence to suggest any correlation between the quality of the benchers and the fact that they are elected, as opposed to qualifying through other methods.

---

[6] All members of the Society whose rights and privileges have not been suspended are entitled to vote (By-Law 5, s. 18).

[7] Section 15 of the *Law Society Act* provides that benchers are elected in accordance with the by-laws. By-Law 5 (Election of Benchers) provides as follows:

> 9.Every member, other than a temporary member, is qualified to be a candidate in an election of benchers if, at the time of signing a nomination form containing his or her nomination as a candidate, the member resides in Ontario and the member's rights and privileges are not suspended.
>
> 10(2). A candidate shall be nominated by at least ten members who are not temporary members and whose rights and privileges are not suspended at the time of signing the nomination form.

35. As an option to an elected board, the only other process noted by the Task Force by which a board could be constituted was an appointment process.[8] In this process, board members are selected typically on the basis of certain criteria and qualifications. John Carver said the following about recruiting board members:

> If a board is able to select its own members, it should start with a well-deliberated set of qualifications. If the members are selected by others, the board should enroll appointing authorities in using the board's desired qualifications whenever possible.
> …
> What qualifications are important?… For the degree of strategic leadership championed in these pages, five qualifications, among other, are necessary.
>
> 1. Commitment to the ownership and to the specific mission area:…
> 2. Propensity to think in terms of systems and context:…
> 3. Ability and eagerness to deal with values, vision, and the long term
> 4. Ability to participate assertively in deliberation:…
> 5. Willingness to delegate, to allow others to make decisions:… [9]

36. The Task Force did not consider the appointment process as a viable option for the Society. First, the process would be complex, with intricate considerations around the criteria and qualifications for appointment, who sets these standards, who should make the appointments and the term of the appointments. Second, the Task Force was not convinced that an appointment process or any process other than an election would ensure, or at a minimum enhance the ability to show, that the Society's governors represent the profession's choices. Third, an appointment process may give rise to claims of elitism or claims that the ability to govern in the public interest is compromised if there is a concern that those who appoint, and those who are appointed, have other agendas that are not centered on the public interest.

37. In short, the Task Force concluded that an appointment process would create more problems than it would solve. In comparison, the election process is a transparent and democratic method of populating Convocation that avoids the concerns of unfairness, favouritism or selectivity. The Society's history affirms this conclusion.

Lay Benchers

38. The Task Force considers the appointment process for lay benchers a separate issue, and is making no recommendations for changes or enhancements to that procedure. Lay benchers are appointed under s. 23 of the *Law Society Act*. Under this process, the Lieutenant Governor in Council may appoint eight lay benchers whose terms expire immediately before the first regular Convocation following the first election of benchers that takes place after the effective date of the appointment. Lay benchers are eligible for reappointment.

Conclusions on the Bencher Qualification Process

---

[8] This is distinguished from the current process for appointing lay benchers to Convocation under the *Law Society Act.*

[9] John Carver, *Boards That Make A Difference* (Jossey-Bass Inc.: 1990 pp. 201-203)

39. The Task Force is recommending no change to the process by which members become benchers. However, the Task Force believes the public interest mandate of the Law Society, the role of the bencher within that mandate, with a focus on the bencher's obligations as a fiduciary and as a representative of the public's, as opposed to the profession's, interests, and the importance of an independent self-regulating profession should be emphasized within the profession. More specifically, it should be emphasized among those who choose to run as candidates in a bencher election. To this end, the Task Force proposes that material produced by the Society on these subjects should be sent to each bencher candidate upon acceptance of the candidacy under By-Law 5.[10] This material should also be published in the voters' guide for the election to create awareness among the profession about these issues and to indicate that all bencher candidates have received the material.

40. The Task Force also believes that the bencher election process will be enhanced and the results more meaningful if a larger number of members vote in the election. The Task Force suggests that two matters be pursued.

41. The first matter relates to the profession's awareness of the bencher election. The Law Society already engages in extensive communications in advance of a bencher election [11], and the Task Force acknowledges the significant and worthwhile effort that is made through the Society's Communications Department to notify the membership of an upcoming election. The Task Force proposes that enhancements be made to this communications strategy, in the months prior to the bencher election, using available Law Society and other media, that would have the effect of focusing the profession's attention on the vote.

42. The second matter relates to the voting process. The Task Force believes that improvements to the election process, including the ease with which members may cast

---

[10] By-Law 5, s. 11 requires the Elections Officer to do the following:
Results of examination of nomination form
(3) he Elections Officer shall communicate the results of his or her examination of a nomination form to the candidate whose nomination is contained therein and,
(a) if the Elections Officer has accepted the nomination, he or she shall communicate to the candidate,
(i) the manner in which the candidate's name will appear on the election ballot; and
(ii) the electoral regions from which the candidate is eligible to be elected as bencher; or
(b) if the Elections Officer has rejected the nomination, he or she shall communicate to the candidate,
(i) the reasons why the nomination was rejected; and
(ii) the time by which the candidate, if eh or she wishes to be a candidate in the election of benchers, must submit to the Elections Officer a valid nomination.

[11] An elaborate communications plan entitled "Get the Vote Out" was instituted for the 2003 bencher election. It included notices in the *Ontario Reports* and local community newspapers, notices and articles in the *Ontario Lawyers Gazette*, posters distributed to county law libraries and legal organizations, a letter from the Treasurer sent separately to every member about the election and a link on the Society's website to a stand-alone site that included all election material and information.

their votes, may have the effect of increasing voter participation. Such improvements should be pursued. The Task Force focused on electronic voting for the bencher election as one such improvement, discussed in the next section of this report.

Electronic Voting For Bencher Elections

43. As noted above, the Task Force concluded that no change to the method by which members become benchers is required. However, an ongoing concern has been the level of voter participation in bencher elections. Voter turnout has been steadily declining over the last 40 years. In 1961, voter participation was 76% compared to 37% in 2003. [12]

44. The Task Force believes that an increase in voter participation is desirable primarily because Convocation will more solidly reflect the profession's choices for its governors.

45. To this end, the Task Force supports methods to streamline the election process that may also have the effect of increasing voter participation.

The Current Election Process and the Benefits of Electronic Voting

46. By-Law 5 (Election of Benchers) requires that the ballot and voting guide be mailed to members and that members return the ballot to the Law Society in Toronto by mail, courier or hand delivery. Apart from cost [13], the following systemic issues with the current process could be resolved by electronic or on-line voting:

    a. Mail delivery to members in the regions outside of Toronto, particularly the northern regions, usually takes longer than delivery in Toronto. Members outside of Toronto must also allow more time for return of their ballots to the Law Society. Some of these members will courier their ballots to ensure delivery, incurring

[12] Law Society Vote Turnout

Year	Total Eligible Votes	Total Ballots Cast	% Turnout	Trend
1961*	5,061	3846	76%	
1966*	5,655	4193	74%	-2%
1971*	6,905	5051	73%	-1%
1975*	9,007	6146	68%	-5%
1979*	12,296	8,237	71%	+3%
1983*	14,367	9,341	63%	-8%
1987	18,369	10,506	54%	-9%
1991	23,391	12,399	53%	-1%
1995	27,175	11,880	44%	-9%
1999	29,718	11,351	42%	-2%
2003	33,667	12,363	37%	-5%

*Source: Law Society Archives.

[13] Elections conducted by mail have very high administrative costs. The budget for the election in 2003 was $250,000. Of that, more than $180,000 was spent on printing and distribution of the election package. An additional $15,000 was spent on postage for return ballots. These costs will continue to increase with future elections. In 2007, the size of the membership will be almost 40,000 members.

charges that some Toronto members can avoid, for example, by hand delivering their ballots to the Law Society on the day voting closes.

b. A significant number of ballots are received by mail after voting has closed. In 1995, 1,332 ballots were received late, in 1999, 1,102 ballots were received late and in 2003, 508 ballots were received late. Electronic voting would eliminate the need for members to estimate the time for delivery of a paper ballot to the Law Society.

c. A paper system can result in invalid or spoiled ballots. When a mark on a paper ballot is unclear, scrutineers must determine whether the vote is valid. The number of spoiled ballots can be significant. In the 1995 bencher election, there were 462 spoiled ballots, in 1999 there were 40 spoiled ballots and in 2003 there were 159. Members cannot spoil a ballot when voting electronically.

47. On-line voting would provide equal access for members in all locations, provided that the member has access to the Internet. Election results would be generated almost instantaneously with on-line voting. Members who misplaced their ballot packages could vote on-line. An email could be sent to members to remind them to vote with a link to the log-in screen. They will no longer have to search for their ballot package or call the Law Society to request another ballot.

48. Electronic voting may also encourage younger members to vote, a group that statistically is underrepresented among members who vote. Many members who were born after 1970 are accustomed to using the Internet as a daily tool. Electronic voting may engage younger members of the Law Society in the governance of the profession by providing an easy and convenient voting method.

49. Currently, the Society can communicate with more than 70% of members by email. Law Society members are becoming more accustomed to conduct business with the Society electronically. More than 15,000 members e-filed the Member's Annual Report in 2004, compared to 10,754 in 2003, and 2,343 in 2002. LawPRO reports that of the 19,800 members who pay insurance, 16,200 or 80% file electronically.

50. The Law Society has already used electronic voting. The recent referendum on bencher remuneration was conducted by an electronic vote.[14]

---

[14] The following excerpt from the March 24, 2005 report on the referendum provides a summary of the experience with electronic voting:

Conduct of the Referendum

1. In October 2004 Convocation approved electronic voting as the means by which the referendum would be conducted. No paper ballots were accepted during the referendum. All voting was done over the telephone or the Internet.
2. The Law Society contracted with Computershare, a company in the business of conducting corporate shareholder voting processes. Computershare already had the electronic voting systems in place to conduct the referendum. Computershare manages shareholder voting for over 7,000 corporations with more than 60 million shareholders worldwide.
3. Computershare printed and distributed the referendum packages; conducted the electronic voting process; and generated the statistical reports following the referendum.

Conclusions on Electronic Voting for Bencher Elections

51. The Task Force recommends that electronic voting be instituted for the 2007 bencher election. While the hope is that such a method will improve voter participation, based on research completed after the last bencher election, there is no evidence to suggest that electronic voting increases voter participation. Reforms in other jurisdictions designed to make voting more convenient in broad based elections have had very little effect on voter participation. The studies that resulted in these conclusions suggest that information, motivation and mobilization are more powerful tools of influence than convenience.

52. The Task Force is hopeful that, within the smaller context of the bencher election, electronic voting as a means to increase the ease with which members may vote will translate into increased participation. However, the Task Force believes that even if electronic voting does not ultimately enhance voter participation, for the reasons outlined above, this method is a logical evolution of the election process, is reasonable as an application to facilitate the vote and will be an effective way to run the election.

53. The Task Force understands that initial costs for electronic voting would likely be high in the short term, until the infrastructure for on-line voting is in place. The Task Force also learned that overall costs may not decrease until there is a way to distribute the election material, including the lengthy voter's guide, by a means other than mail. The Law Society would also have to accommodate members who do not use the Internet. Eventually, the Society could move to electronic voting only. Determining the costs of a move to and maintaining an electronic election process will be part of the work to be done if Convocation agrees to pursue this proposal.

---

4. Voting closed at 7:00 p.m. EST on February 28, 2005. Computershare advised the Law Society of the results at 9:00 a.m. on March 1, 2005. The results were posted on the Law Society's web site after benchers were advised of them.
5. The referendum was conducted between February 4, 2005 and February 28, 2005. A notice to the profession first appeared in the January 7, 2005 edition of the *Ontario Reports*. Six notices in total were published in the *Ontario Reports* between January 7 and February 18, 2005.
6. In addition to notifying the profession through the *Ontario Reports*, notices appeared on the Law Society's web site, in an e-bulletin distributed by the Professional Development & Competence Department to 24,942 members, and in the *Ontario Lawyers Gazette*.
7. One week prior to the close of voting, a reminder e-mail was sent to every member for whom the Law Society has an e-mail address (27,239 members).
8. Referendum packages were mailed to all eligible voter on February 4, 2005. The packages consisted of the referendum question and background information, as well as a Voting Instruction Form...
9. All referendum material and notices to the profession were distributed in French and English.
10. Three members who have visual impairments have asked the Law Society to distribute all information to them electronically. The Elections Officer communicated directly with these members, and they received the referendum package from Computershare in a format that was accessible to them.

54. Apart from electronic voting, the Task Force has no other specific recommendations on improving the election process, but requests that Convocation encourage the Society's staff to pursue other improvements that might reasonably be expected to increase voter participation.

Size of Convocation as a Board

55. As noted above, there are 40 elected benchers in Convocation. The total number of benchers who make up Convocation, however, is greater. Currently, in addition to the elected benchers, there are eight lay benchers and 29 *ex officio* benchers, who include former Treasurers, current and former Attorneys-General and life benchers, for a total of 77. The *Law Society Act* determines the composition of Convocation.

56. For the size of the organization, the board of directors (Convocation) is large. The Task Force considered whether there was some relationship between the size, the ability to set priorities and timely and effective decision-making.

57. As a subject for review, the size of Convocation is not a new issue. It was discussed in the Strategic Plan of 2000, which proposed that the size and composition of Convocation be reviewed to determine whether it could be structured to be more effective in its policy decision-making. The Strategic Planning Committee's report of January 2001 included the following:

A. Size of Convocation

The Committee considered reducing the size of Convocation as a means of making the decision-making process more efficient. Several members of the Committee were of the view that the size of Convocation should be reduced, and that the reduction should be substantial. At the same time, the Committee recognized that any reduction in the size of Convocation would have to take into account the effect of such a measure on diversity and regional representation.

A reduction in the size of Convocation would require legislative amendment. Given how lengthy and resource intensive a process legislative change is, the Committee recommends the implementation of a number of other measures to improve Convocation's efficiency prior to embarking on a course of legislative amendment.

The measures being suggested for immediate implementation to improve the efficiency of Convocation include,

(a) the development and enforcement of rules of procedure for Convocation, and

(b) the establishment of the Treasurer's Advisory Committee.

58. With respect to (a) above, the Task Force agrees that there is merit to examining procedures that govern Convocation. The Task Force is aware that the Professional Regulation Committee has completed a review of proposed rules of procedure for Convocation that were before Convocation in June 2004, and that the Treasurer has reviewed the report and the proposals. The Treasurer indicated his intention to conduct

the affairs of Convocation in accordance with the proposed rules for a period of six months, beginning in September 2005, during which Convocation may assess their appropriateness. The Treasurer has proposed that toward the end of that period, he will seek Convocation's disposition regarding the adoption of these rules.

59. With respect to (b) above, the matter of an Executive Committee or Treasurer's Advisory Committee is discussed later in this report.

60. Beyond these two issues, the Task Force concluded that the large size of Convocation does not translate into an unwieldy forum for decision-making. While a smaller board may be more efficient in moving through the business of Convocation, the current size is not an impediment to accomplishing the Society's business. Many factors affect whether efficient decisions can be made at Convocation, but the size of the board has never determined whether a required decision was made or not made.

61. Further, reducing the size of Convocation may lessen the ability of Convocation to reflect the diversity of Ontario's legal profession. As noted above, the Task Force determined that continuing with an election process and increasing efforts to encourage the vote should help to enhance this aspect of Convocation. Given that conclusion, it would be inappropriate to suggest that Convocation's size be reduced.

62. If improvements can be made in Convocation's governing procedures through rules of procedure, this should assuage any current concerns about inefficiency.

Conclusions on the Size of Convocation as a Board

63. The Task Force makes no recommendation to reduce the size of Convocation.

64. With respect to ways to improve the effectiveness and efficiency of decision-making in Convocation, the Task Force proposes that rules of procedure for Convocation be adopted to assist the Treasurer and benchers in fulfilling the policy decision-making function of Convocation.

II. Role Of The Treasurer as the Chair of the Board, the Notion of an Executive Committee, Priority Setting, and the Frequency and Procedural and Substantive Efficacy of Convocation

65. As the Task Force began review of the issues noted in the above title, the link between them became apparent. They all focus on Convocation's agenda and in a broader sense, how governance priorities are set and how planning for Convocation's agenda unfolds.

The Treasurer

66. The Treasurer is "the president and head of the Law Society". [15], and as the chair of Convocation, is responsible for running Convocation. The Task Force's interest in the Treasurer's role was the extent of the Treasurer's authority and, in relation to the governance process, whether its scope should be reconsidered.

[15] *Law Society Act*, s. 7

Overview of the Treasurer's Duties

67. The Task Force could not improve on the following narrative description provided by bencher Ron Manes, transcribed from Convocation's discussion of the Strategic Planning Report on January 25, 2001:

> …when it comes to defining what the Treasurer does, it's important we understand the scope of the Treasurer's job and how it has evolved from what historically may be termed a largely ceremonial position to what is now a real integral function to the internal operations of the Law Society and to Convocation.
>
> The Treasurer, it is true, presides over Convocation, presides over our agenda to ensure that what comes before us is properly before us, and, of course, regulates the debate. The Treasurer oversees all committees, all task forces, and all working groups to ensure that they all achieve their objective.
>
> The Treasurer is responsible for coordinating. The Treasurer is an ex officio member of all of those committees, task forces, and working groups, and in our experience with our present Treasurer, attends many of these committee meetings, task force meetings, et cetera.
>
> The Treasurer, in addition to that, monitors the CEO. We have decided that now. It is clear to us that the Treasurer is going to be accountable to us to monitor the performance of the CEO. Now, this entails, just so we understand, not only defining for the CEO or translating what we have defined for the CEO what the CEO's objectives are, but also measuring the CEO against those objectives.
>
> Now, anyone who knows that responsibility knows how onerous it is, and it is not a responsibility that in our view the Treasurer can possibly discharge on his own. And then he comes to recommend to us, in a formal way, what we or how we assess the performance of the CEO.
>
> The Treasurer, in addition to that oversight and in addition to his responsibilities here at Convocation, must liaise with the public, must liaise with the profession, must liaise with the bench, liaise with the press, deal with interest groups and constantly write letters to the Globe and Mail.
> …
>
> The Treasurer is the face of Convocation. Yes, it is a ceremonial job. It is a huge job. He represents us at a substantial number of functions, more functions than we can possibly count or comprehend."

68. The Treasurer's formal authority is found in the *Law Society Act*, the regulations and the by-laws. Policies have also developed around the role of the Treasurer. Certain practices connected with the office of the Treasurer are also followed. The following discusses the provisions that relate to governance.

Law Society Act

69. The Treasurer is part of the corporation of the Society. Section s. 2(2) says that the Society "is a corporation without share capital composed of the Treasurer, the benchers

and the other members from time to time." The Treasurer is the president and head of the Society (s. 7). Benchers, not the membership, elect the Treasurer annually, who ceases to be an elected bencher (s. 25).

70. The Act includes by-law-making authority for matters related to the office of the Treasurer. Section 62 (1) 7. says that by-laws may be made " governing the election of and removal from office of the Treasurer, the filling of a vacancy in the office of Treasurer, the appointment of an acting Treasurer to act in the Treasurer's absence or inability to act, and prescribing the Treasurer's duties".

The By-Laws

71. The By-Laws include the following:

a. By-Law 1 (By-laws): the Treasurer has the authority to call a special meeting of Convocation to vote on making, amending or revoking a by-law when that vote has been deferred (s. 1(3)).

b. By-Law 5 (Election of Benchers): Generally, the Treasurer presides over the election of benchers.[16] The Treasurer can intervene to fill certain positions (e.g. assistant or scrutineer) related to the election (s. 7).

c. By-Law 6 (Treasurer): Most of this by-law focuses on the election of the Treasurer. The last part of the by-law deals such things as term of office, vacancy and who acts when the Treasurer is unable to act (s. 16 and 17). For example:

i. Subject to removal of a Treasurer from office, he or she remains in office until his or her successor takes office;

ii. If a Treasurer resigns, is removed from office or cannot continue to act, Convocation must elect an elected bencher to fill the office of Treasurer until the next Treasurer election;

iii. If a Treasurer is temporarily unable to act, or if there is a vacancy in the office, the chair of the standing committee of Convocation responsible for financial matters, or if he or she cannot act, the chair of the standing committee of Convocation responsible for admissions matters, acts as Treasurer until the Treasurer is able to act or another election is held.

---

[16] 4. (1) Subject to subsection (4), an election of benchers shall be presided over by the Treasurer.
(2) The Treasurer may appoint a member who is not a candidate in an election of benchers to assist the Treasurer in exercising the powers and performing the duties of the Treasurer under this By-Law.
(3)The Treasurer shall appoint a member who is not a candidate in an election of benchers to exercise the powers and perform the duties of the Treasurer under this By-Law whenever the Treasurer is unable to act.
(4)If the Treasurer is a candidate in an election of benchers, Convocation shall, as soon as practicable after the Treasurer's nomination as a candidate is accepted, appoint a member to preside over the election and to exercise the powers and perform the duties of the Treasurer under this By-Law.

d. By-Law 8 (Convocation) details the Treasurer's authority and responsibility in Convocation. This is the by-law which is the subject of the motion (June 2004) to adopt rules of procedure for Convocation. In particular,

i. The Treasurer may vary the dates of regular Convocation (s. 1);

ii. The Treasurer may call a special Convocation (s. 2(1)) at any place (s. 3(2)) but must do so on the written request of 10 benchers (s. 2(2));

iii. The Treasurer presides over all Convocations (s. 4);

iv. In addition to Convocation's decision to meet *in camera* according to the criteria in By-Law 8, Convocation will meet *in camera* to consider "any matter at the instance of the Treasurer" (s. 5(3)5);

v. The Treasurer can vary the usual order of business at Convocation (s. 6(1)).

Policy

72. Convocation has adopted Governance Policies that also define to the Treasurer's role. Reproduced below is Section D of the Governance Policies (amended to April 30, 1999), which provides the Treasurer's "job description". This description repeats some of the Treasurer's duties described in the Act and by-laws.

D. Treasurer's Job Description

1. The Treasurer is the president and head of the Law Society.

2. The Treasurer shall adhere to the Policy Governance Model.

3. The responsibilities of the Treasurer shall be,

a) to be the public and ceremonial representative of the Law Society of Upper Canada and the only person authorized to speak for Convocation;

b) to chair meetings of Convocation in accordance with the Policy Governance Model;

c) to prepare Convocation's agenda on the advice of Convocation;

d) to develop for Convocation's approval, priorities for the Law Society for the upcoming year in consultation with benchers and senior staff;

e) to coordinate, in consultation with staff and committee chairs, the work and responsibility of committees and to ensure policy issues are assigned to appropriate committees;

f) to appoint chairs and vice-chairs and members of committees subject to ratification by Convocation;

g) to be an *ex officio* member of all committees and task forces; and

h) to provide such reports and evaluations as Convocation may request, including an evaluation of the performance of the Chief Executive Officer.

The Treasurer's Role in Setting Convocation's Agenda and Priority Planning

73. The Treasurer's responsibility for Convocation's agenda has developed as a matter of practice, but to the extent that it has been codified, Governance Policies D.3.c) through f) above generally reflect the process.[17] Simply put, the Treasurer controls Convocation's agenda, and no item will appear on the agenda unless the Treasurer has approved it for the agenda.

74. That said, an informal consultation between the Treasurer and other key individuals, including the Chief Executive Officer (CEO) and committee or task force chairs, occurs prior to Convocation. As noted above, these chairs are the appointees of the Treasurer and Convocation, and in a practical sense, their input has a significant impact on the business of Convocation.

75. This consultation is required because the Treasurer must ensure that items that appear on the agenda have been fully developed, consulted upon and properly presented in writing. Beyond the CEO and committee chairs, the Treasurer will also consult with the Director of Policy and Tribunals with respect to Convocation's agenda.

76. At another level, the Treasurer will respond to the initiatives of benchers, external bodies and other stakeholders to have matters considered by Convocation. These "ad hoc" initiatives will generally be accommodated to the extent that they relate to the governance of the profession. The Treasurer's accommodation also helps him or her to manage the political aspects of Convocation, which are a function of its structure, size and the relationships that arise within it.

77. The above process relates to the whether an executive committee would be a useful addition to the Society's governance processes.

The Notion of an Executive Committee

78. The suggestion that the Society explore establishing an executive committee has arisen from time to time in discussions about priorities and planning for Convocation. In particular, the executive or advisory committee has been characterized as a way to assist Convocation in effectively and efficiently sorting out priorities and planning Convocation's policy agenda.

79. The issue dates back to at least the early 1990s. A 1991 Research and Planning Committee report referenced a subcommittee report's findings on the idea of an executive committee:

[17] In the Task Force's view, the Treasurer's receipt of the "advice of Convocation" described in Governance Policy D.3 c), operates primarily as a "reverse" consultation in practice, in that benchers will raise issues with the Treasurer they feel should appear on the agenda. Under By-Law 8, 10 benchers also have the right to require a special Convocation to deal with an issue.

> When agreement has been reached on the limits of the proper role of the Law Society, a further study should be undertaken into the respective roles of benchers and staff to determine whether there are ways in which bencher workload might be reduced, …
>
> …Consideration should be given as to whether the problem might be alleviated by the establishment of an Executive Committee of Convocation.
>
> The proposal that the establishment of an Executive Committee should be studied coincides with your Committee's earlier thinking in response to the request from the Finance and Administration Committee to consider how the Society should respond to proposals for new programmes in times of fiscal restraint.
>
> The further consideration of these matters will be recommended to the Research and Planning Committee which takes office after the 1991 bencher election.

80. A subsequent report from this Committee to July 10, 1992 Convocation included the following:

> The following questions were posed for consideration [by the Committee]:
>
> Should the Research and Planning Committee develop a statement for Convocation, defining the limits of the proper role of the Law Society, the statement to serve as a standard against which all activities of the Law Society, and all proposals for new activities, can be measured to determine their respective priorities?
>
> Should the Research and Planning Committee recommend to Convocation that the Rules of the Law Society be amended to provide for an Executive Committee which will be responsible for determining the political and financial priorities of the Law Society?
>
> Should the Research and Planning Committee prepare a proposal for Convocation setting out the respective responsibilities of the Treasurer, Convocation, the Executive Committee, Standing Committees, benchers and staff?
>
> At its meeting on May 15, your Committee debated the first two questions at length and decided to consider, at its June meeting, proposals
>
> - for developing a statement on the role of the Law Society and,
> - for studying an appropriate structure for the determination of Law Society priorities.

81. The first question noted above lead to the adoption of the Society's Role Statement in 1994. In its report to September 24, 1992 Convocation, the Committee indicated the following with respect to the second question:

DETERMINATION OF LAW SOCIETY PRIORITIES

A further consequence of the discussions last year concerning the responsibilities of benchers, staff and committees was a decision to appoint a subcommittee to recommend a structure for the determination of Law Society priorities. The project is dependent upon the definition of the role of the Law Society, mentioned in the previous paragraph; it also overlaps with steps that are being undertaken by the Finance and Administration Committee. The Research and Planning Committee will therefore proceed only when it seems appropriate to do so in light of these other initiatives.

82. In the fall of 1992, the Committee formed a sub-committee to deal with this issue and its February 26, 1993 report to Convocation indicated that this matter would "wait until after the 1993-1994 budget process has been completed". There is no record of further reports from the Committee to Convocation with respect to this matter or recommendations for an executive committee.

83. The most recent comprehensive treatment given to the issue was in the 2000 Strategic Plan, which recommended that an executive committee be formed "for managing and streamlining Convocation's agenda and advising the Treasurer". The Strategic Planning Committee's January 2001 report to Convocation included the following section on the establishment of a Treasurer's Advisory Committee.

C. Treasurer's Advisory Committee

29. There is currently no formal mechanism in place to plan Convocation's agenda; to determine when issues are ready for Convocation's consideration; to advise the Treasurer between meetings of Convocation; to ensure that the Chairs of the major policy-making committees are apprised of the issues being dealt within each committee; to consistently and effectively monitor the implementation of Convocation's policies; to review the Law Society's governance policies to ensure they meet the Law Society's current needs; and to generally assist the Treasurer in the exercise of the Treasurer's duties.

30. The Committee is of the view that a formal process must be developed to accomplish these objectives if Convocation is to become more efficient. Too often, matters are before Convocation prematurely, the consequences of a course of action have not been fully examined, financial ramifications are not detailed, or further consultation with other committees, staff, or external organizations is required. Bringing such matters before Convocation results in time wasted on debate when the matter is eventually sent back to committee for further study, or decisions are made by Convocation on the basis of inadequate information.

31. Convocation has not always effectively monitored the implementation of the policies it sets. Once the policy is passed by Convocation, there is no formal mechanism for monitoring its implementation or its achievement of Convocation's goals.

32. In addition, the Committee is of the view that our governance policies, including the executive limitations, must be reviewed to ensure they are appropriate for the current circumstances of the Law Society. There is no formal mechanism to accomplish this.

33. The Committee recommends that a Treasurer's Advisory Committee be established to oversee the work of committees, task forces and working groups, to ensure that issues are channelled to the appropriate committee, that the work of the committees is progressing and finding appropriate space on Convocation's agenda, that the work of the committees is co-ordinated to avoid duplication of effort, that Convocation's policies are implemented by maintaining close liaison with the Chief Executive Officer, and that appropriate monitoring mechanisms are developed. The Treasurer's Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

34. The Treasurer's Advisory Committee would not acquire any of the decision-making powers vested in Convocation by section 10 of the *Law Society Act*, which reads as follows:

    The benchers shall govern the affairs of the Society, including the call of persons to practise at the bar of the courts of Ontario and their admission and enrolment to practise as solicitors in Ontario.

35. As always, all policy decisions would be made in Convocation. The Treasurer should be responsible for keeping Convocation apprised of the committee's activities, for example, by circulating agendas and minutes of the committee's meetings.

36. For maximum efficiency, the Treasurer's Advisory Committee should be small. The committee would be composed of the Treasurer and the chairs of those committees responsible for developing policy on matters related to the core mandate of the Law Society - bar admissions, professional regulation, professional development and competence - as well as the chair of the Finance and Audit Committee and the Chief Executive Officer. In addition, the Treasurer should have the option of adding two further benchers to the Treasurer's Advisory Committee. Other benchers may be invited to attend committee meetings for specific purposes.

    Recommendation to Convocation

37. That a Treasurer's Advisory Committee be established with the mandate to ensure that,
    (a) the work of committees, task forces and working groups is overseen;

    (b) issues are channelled to the appropriate committee;

    (c) the work of the committees is progressing and finding appropriate space on Convocation's agenda;

(d) the work of the committees is co-ordinated to avoid duplication of effort;

(e) Convocation's policies are implemented by maintaining close liaison with the Law Society's Chief Executive Officer;

(f) appropriate monitoring mechanisms are established; and

(g) the Law Society's governance policies meet the current needs of the Law Society.

The Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

38. The Treasurer's Advisory Committee is to be composed of the Treasurer, the Chairs of the Admissions, Professional Regulation, Professional Development and Competence, and Finance and Audit Committees, the Chief Executive Officer and up to two other benchers to be appointed at the option of the Treasurer.

39. The Treasurer shall keep Convocation apprised of the Committee's activities.

84. The above recommendation was defeated in Convocation by a vote of 20 to 12.

85. As noted above, in the absence of an executive or advisory committee, the priorities and planning functions for Convocation do not devolve to Convocation as a whole. Consultations occur among the chairs of committees and senior staff, who bring issues forward as required to the Treasurer and the CEO. The Treasurer then sets Convocation's agenda.

86. As boards usually set the policy agenda for an organization, one argument in favour of an executive committee is that a large board could benefit from the work of a smaller group of its members who can focus on the groundwork for a policy agenda. The authority given to an executive committee, however, may be broader. Task Force reviewed the mandates of the executive committees of a diverse group of organizations and found the following common particulars:

a. To perform the duties and exercise the powers delegated to it by the board;

b. To expedite the administration and affairs of the organization between board meetings on important matters arising between board meetings that cannot be postponed until the next scheduled meeting of the board;

c. To exercise all the powers delegated to it by the board when the board is not in session and, in the judgment of the committee, calling an in-person or telephonic special board meeting is impractical or unnecessary;

d. To act as a sounding board for general management issues and/or matters that affect the organization as a whole;

e. To conduct an annual performance evaluation of the committee;

f. To report to the board on a regular basis so that the board can monitor the committee's performance and take any corrective action.

87. There are critics of the executive committee, but the criticism is linked to the larger issue of whether or not a board is exercising good governance. John Carver, in a 1994 article on board leadership, discussed how many boards, as noted above, give their executive committees the power to make board decisions between board meetings. He then says that the only excuse for a board to authorize an executive committee to make such decisions is if the board is too awkward to do its own job. Ultimately, he concludes that executive committees are entirely optional, and that giving such a committee the authority commonly given either to the board or the CEO reflects important flaws in the existing governance.

88. The theory of Carver's policy governance model is that if a board is properly constituted, knows its role, and governs effectively, an executive committee is likely superfluous.

Conclusions on the Treasurer's Role and an Executive Committee

89. The Task Force saw no reason to disturb the process by which the Treasurer controls Convocation's agenda by suggesting any limitation on his or her role or institutionalizing the Treasurer's current and effective consultative process.

90. In the Task Force's view, the Treasurer should be free to seek and receive advice from those from whom he or she wishes to hear. He or she should be able to seek that advice, in confidence if necessary, outside of a formal process, such as an executive committee, that would require structure, agendas and minutes. An executive or advisory committee would impose another layer of bureaucracy, and may politicize the Treasurer's consultations, for no great benefit.

91. With respect to some of the findings documented in the Strategic Planning Committee's report, the Task Force notes that since 2001, improvements in planning Convocation's policy agenda have been made, including the following:

a. Committees and task forces are better at preparing the necessary information for Convocation's decision-making function, including the financial impact, the impact on stakeholders and how the decisions are to be implemented operationally;

b. Through the budget planning process, a systematic review of operations includes information on the implementation status of Convocation's policies, which will also inform the need for new initiatives that Convocation should consider[18] ;

[18] The following is from the Finance Committee's report to May 2005 Convocation on the budget planning process for the 2006 budget:

> Convocation, in the course of its regular business, receives regular program reports from the Society's various standing committees as well as periodic updates from the CEO on how the policy objectives of Convocation are being implemented and the relative merits and progress of the various initiatives and programs undertaken during the course of the year.

c. The work of the committees is co-ordinated to a large extent through the Policy Secretariat within which regular briefings are held on committee activities; efforts are made to avoid duplicated work;

d. In consultation with the Policy Secretariat, the CEO informally monitors the progress and completion of policy issues before the standing committees and task forces.

92. As a final matter, the process of electing the Treasurer is in one respect part of the long-range planning for Convocation's agenda. Each candidate for Treasurer espouses priorities that he or she would pursue upon election as Treasurer. This informal advice to benchers is in reality an institutionalized method of informing benchers about proposed priorities, broadly speaking, for the next two years. The benchers' vote for their candidate of choice is effectively an endorsement of a broad-based policy agenda for that period.

93. The Task Force concludes that the decision in 2001 to reject establishing the Treasurer's advisory committee was the right one. The Task Force does not propose that an executive committee or advisory committee be established, nor does it propose any changes to limit the role of the Treasurer.

Frequency and Substantive and Procedural Efficacy of Convocation Meetings

Frequency of Convocation

94. The Task Force determined that an in-depth examination of Convocation's meeting schedule was not warranted. The Task Force could not see how the integrity of Convocation's governance functions is negatively affected because of the frequency of Convocation's meetings, which generally occur once a month. Typically, at each meeting, there is important business to conduct and decisions to be made.

Procedure for and Efficacy of Convocation's Decision-Making

95. The Task Force concluded earlier in this report that there is merit to adopting appropriate rules of procedure for Convocation, and noted that the Treasurer has indicated his intention to apply proposed rules of procedure prepared through the Professional Regulation Committee for a period of six months beginning in September 2005. The Task Force will await Convocation's disposition after the six-month period regarding the adoption of these rules.

96. The Task Force repeats its recommendation above with respect to the use of rules of procedure for Convocation as a way to increase the effectiveness of its decision-making.

A comprehensive system of program review linked to the budget is also in place. It was approved by Convocation in January 2002 and has been carried out for the last three (the 2003, 2004 and 2005 budgets). With Convocation's concurrence, it is staff's intention to continue the review program for the 2006 budget.

III. Benchers in the Dual Roles of Directors of a Corporation and Representatives in a Forum Similar to a Legislature

97. As members of a board of an organization, benchers have fiduciary duties as directors to the Law Society. However, benchers become directors through an election process in which they seek the vote of the membership. This dynamic creates what the Task Force calls the dual nature of benchers' participation in Convocation, that is, benchers as fiduciaries and benchers as participants in a forum similar to a legislature.

98. The dual nature is a function of structure, tradition and culture. It is influenced by factors such as:

a. Regional participation as part of the design of the bencher election process, including the designation of a regional bencher,

b. Benchers choosing to identify themselves as representatives of particular constituencies within the profession, and

c. Convocation's "debates" unfolding more like proceedings in a legislature than at a board meeting.

99. A key question for the Task Force was whether benchers' fidelity to the organization as board members can co-exist with the historical expectation that benchers will speak freely on a particular issue affecting the profession. Convocation is mandated to oversee the governance of the legal profession in the public interest. If a bencher approaches his or her participation in Convocation as a representative of a particular legal constituency, does that negatively impact on the ability of Convocation to make a decision consistent with the public interest?

Benchers as Fiduciaries

100. As Treasurer, Vern Krishna discussed with Convocation its function as a board of directors, and highlighted the fiduciary duties of benchers to the organization. The following excerpts from Convocation proceedings illustrate his thinking on the issue:

> We are here as fiduciaries to Convocation and we run and want to run a democratic Convocation, but a democratic and efficient Convocation. This is a decision-making body, it is not a debating society, and I want the focus of Convocation to be on decisions.
>
> July 26, 2001

> Section 2 of the Law Society Act says we are a corporation, and every bencher sitting around this room is a director of that corporation and a fiduciary of that corporation. … This is not a legislative assembly or a parliamentary body.
>
> February 13, 2003

> …you are fiduciaries to the corporation not to the shareholders and not the members. … And that fiduciary obligation that is on us requires us to govern in the best interest of this Society in the public interest. And sometimes we have to pull ourselves up and say, is what I am doing in the best interest of the society?

> Is the speech that I am making in the best interest of the society? Or is it in some other interest?
>
> May 22, 2003

101. The question of in whose interests the Society governs (public *versus* profession) is not a new issue for the Society and has spawned a number of debates about whether the interests of the profession can be considered - and if so, to what extent - when the Society governs in the public interest. The debates have generally been resolved by concluding that often the interests of the public and the profession meet, but when a conflict between the two interests arises, the interests of the public must take precedence.[19]

102. Legal regulators in jurisdictions in which this line is blurred have suffered the consequences. Recent developments in England and Wales and some Australian states illustrate how entities that included both a regulatory and representative function fell into disrepute with the government because of the perception, in some cases supported by fact, that the regulatory function in the public interest was not being pursued as robustly as required. The result led to reforms in New South Wales, Australia to create an entity separate from the Law Society to control the investigation of complaints about solicitors.[20] In England and Wales, a proposal currently before the government will create a Legal Services Board to oversee the legal services sector, will remove complaints investigation authority from the Law Society of England and Wales, and will empower an independent entity created by the government to oversee these functions.[21]

---

[19] This is articulated in Commentary 3 to the Law Society's Role Statement as follows:

> It is sometimes assumed that the public interest must necessarily be opposed to the interest of the profession and that, in fulfilment of its duty to govern in the public interest, the Law Society can give no consideration to the interest of the profession. This is not so. Ideally, what is in the public interest will also be in the interest of the profession. It is only when the two interests conflict that the Law Society must subordinate the interest of the profession to that of the public.

[20] In 1994, the New South Wales government established an independent statutory office called the Legal Services Commissioner, pursuant to sections 134 and 135 of the *Legal Services Act 1987*, responsible for receiving all complaints and monitoring investigations conducted by the Law Society and Bar Council, and established a Legal Services Tribunal, responsible for hearing misconduct complaints. The Commissioner reports to Parliament through the Attorney General, and co-regulates legal practitioners and licensed conveyancers with the Law Society, the Bar Association and the Office of Fair Trading.

[21] The proposal is to create a single independent complaints organization, covering all the "front-line" regulatory bodies, under the general supervision of the Legal Services Board (LSB). The LSB, as a legislatively created body, would be granted regulatory powers and would have the authority to delegate day-to-day regulatory operatons to the recognized front-line bodies, like the Law Society of England and Wales, where such bodies satisfy the LSB that they are competent to handle the regulatory functions and have appropriate governance arrangements to deal with such functions without conflict. The model from which the LSB came would require the separation of the Law Society's regulatory and representative functions.

In his March 21, 2005 speech to the Legal Services Reform Conference, Lord Falconer, Constitutional Affairs Secretary and Lord Chancellor said: "...I will create an Office for Legal

A Bencher's Duty as a Fiduciary

103. As neither the *Law Society Act* nor the *Corporations Act,* which applies to the Law Society as a corporation without share capital, describe the fiduciary duty of a director, reliance is placed on the common law to determine the nature of a bencher's fiduciary duty. In general terms, a director's common law fiduciary duty requires the director to act honestly, in good faith and with a view to the best interests of the corporation.[22]

The Notion of the Bencher as Constituency Representative

104. In discussing benchers' fiduciary duties, Vern Krishna as Treasurer said the following:

> We…are elected by various constituencies and by various regions. But when we arrive here, we are not here as spokespeople for those constituencies. We are not here to serve regional interest. We are here to serve the common interest of the entire profession of which you can take into account those regional constituencies. But you are not here to serve on one constituency. You are here to serve all…. We formally adhere to the rules of the legislative assembly, but we are not a legislature. We adhere to some rules of the corporate governance, and we are not completely a corporation in the sense of a traditional, private corporation.
>
> Convocation, May 22, 2003

105. This quote captures the dichotomy of the dual nature of Convocation, which ultimately affects the bencher's approach to his or her role in Convocation.

Complaints. I reject the view that centralisation will lead to a slower service for consumers.... A single complaints body means consistent, fair and professional handling of cases for all complainants....As with the Legal Services Board, the Office for Legal Complaints will be led by a board with a lay Chair and lay majority, and appointments will be made on merit, by the Legal Services Board. The different responsibilities of the Legal Services Board, the Office for Legal Complaints and the various professional bodies will be clearly defined....Removing complaints handling from the professional bodies will in no way reduce their responsibility to ensure that their members operate to the highest professional and ethical standards at all times. I acknowledge the serious and constant efforts the professional bodies make in this regard. The Office for Legal Complaints will help, not hinder....

[22] In remarks he prepared for bencher orientation, Vern Krishna, after a review of the applicable law, provided the following summary of the bencher's fiduciary responsibility:

> The Law Society is a corporation without share capital and the Benchers are its directors. As directors, Benchers are responsible for "govern[ing] the affairs of the Society". Since Benchers act as agents for the Law Society, they are not separate from the Law Society, but effectively *are* the Law Society. Thus, in all matters related to their agency, the interests of the Law Society must be the very interests of the Benchers.
>
> Benchers have a fiduciary responsibility to act faithfully and loyally in the best interests of the Law Society. This fiduciary duty is owed directly to the Law Society rather than to its members who are merely "shareholders" of the corporation. Thus, in all matters relating to their undertaking of trust and confidence as directors of the Law Society, Benchers must act solely in the best interests of the Law Society.

106. In Task Force's view, benchers must understand that they are not constituency representatives or parliamentarians. It may be that the role of bencher as a fiduciary does not come intuitively. In such an environment, the education discussed earlier in this report is important.

107. Directors' duties to an organization are informed by the organization's mandate. For the Law Society, this means that the benchers' decision-making function and activities related to it must be based on the public interest, as the Society governs the legal profession in the public interest. Decisions cannot be based on the interests of shareholders (i.e. the members of the Society) or a particular legal constituency.

108. Benchers' actions in addressing a particular constituency or advocating a position for the profession instead or at the expense of the public interest may effectively operate as a challenge to the mandate. Ultimately, this may amount to a conflict for the bencher.

109. The Bencher Code of Conduct includes a brief statement on conflicts of interest. The entire code reads:

> 1.0 The benchers commit themselves to ethical conduct.
>
> 1.1 Benchers must declare conflicts of interest and act in accordance with Convocation's policy on conflicts of interest.
>
> 1.2 Benchers must not use their positions to obtain employment or preferential treatment for themselves, family members, friends or associates.
>
> 1.3 No bencher shall purport to speak for Convocation or the Law Society unless designated by the Treasurer.
>
> 1.4 When exercising adjudicative powers, benchers shall behave in a judicial manner.
>
> 1.5 Benchers shall observe Convocation's policy regarding confidentiality.
>
> 1.6 Benchers sitting as members of the hearing panel must adhere to the provisions set out in the guidelines for applications to proceed in camera and must strictly maintain the confidentiality of all matters subsequently heard in camera.

110. The Bencher Code of Conduct is part of the Law Society's Governance Policies, and to the extent that it addresses conflicts issues, the Code should continue to be observed.[23] Initially, the Task Force identified the Bencher Code of Conduct as a topic for review. However, after considering the Code in the context of specific bencher behaviour, as noted above, the Task Force determined that a separate examination of the Code was

[23] With respect to compliance with the Governance Policies, the Law Society's *Rules of Professional Conduct* impose certain duties on lawyers, in whatever capacity they serve. It is possible that a serious breach by a bencher of his or her duties *qua* bencher may amount to professional misconduct or conduct unbecoming a lawyer deserving of sanction.

not warranted, and that the current environment in which the Code is observed does not call for additional instruments for regulation of bencher conduct.[24]

Conclusions on the Bencher's Role

111. The Task Force concluded that consistent with the Society's current policy on conflicts of interest[25] , a bencher as a fiduciary cannot act against the interests of the Society as an organization. This means that actions of the benchers as directors must be and must be seen to be consistent with the purposes of the Society and not in derogation of its mandate to govern in the public interest.

112. The Task Force also believes that when a bencher is appointed as a Law Society representative to the board of another organization, insofar as the issues the bencher addresses affect the Law Society's mandate, a balance must be struck between the bencher's duties as a Society representative and the duties the bencher owes to the board by virtue of the appointment. On occasion, a bencher may have to refrain from offering views or opinions if doing so places the bencher in a conflict with respect to those duties.

113. With respect to the bencher's role as a fiduciary, the Task Force believes, similar to an earlier recommendation in this report, that Convocation should affirm the bencher's role as a fiduciary to the Law Society as an organization, whose mandate benchers must reflect in their discussions and decision-making. In particular, Convocation should affirm that benchers in the role of benchers cannot advocate a position in Convocation or elsewhere that places the profession's interest ahead of the public interest.

IV. Benchers in the Dual Role of Policy Makers and Adjudicators

114. The Task Force considered whether the benchers' role in setting both policy and adjudicating matters on the basis of that policy affects their governance responsibilities.

115. According to section 49.21(2) of the *Law Society Act*, all benchers except for members of the Proceedings Authorization Committee and *ex officio* benchers who are the Minister of Justice and Attorney General for Canada, the Solicitor General for Canada and current and former Attorneys General of Ontario are members of the Hearing Panel. The Hearing Panel adjudicates applications with respect to the conduct, competence

---

[24] Other reasons for foregoing a detailed review of the Code include the following:

- Egregious misconduct of an elected bencher would likely amount to a breach of the *Rules of Professional Conduct* and would be dealt with through the investigations stream at the instance of the Treasurer through provisions in the *Law Society Act*, and
- If the issue about the bencher's conduct relates to procedural matters in Convocation, the proposed rules of procedure for Convocation, discussed earlier in this report, should address those concerns.

[25] In March 1995, Convocation adopted the final report of the Special Committee on Conflicts of Interest, which provides the current policy on bencher conflicts in a number of areas (see Appendix 2). It would appear that this is the policy to which paragraph 1.1 of the Bencher Code of Conduct refers.

and capacity of members of the Law Society and hears readmission and student member good character applications.

116. The Task Force is aware that other tribunal models exist. One is that of the chartered accountants in Ontario, through their regulator, the Institute of Chartered Accountants of Ontario (ICAO). The ICAO discipline committee's members are appointed by the 20-member Council (16 elected members, four lay appointees) and consist of Institute members and public representatives.

117. The Law Society in the past considered non-bencher involvement on Law Society committees, including the discipline function. In 1989, Convocation adopted the report of the Special Committee on Voting and Non-Bencher Appointments that recommended the appointment of non-benchers (both lawyers and lay persons) to standing committees. A 1990 Special Committee on Bencher Elections report included this comment as a related matter:

NON-BENCHER INVOLVEMENT

> Whether or not the number of benchers is to be increased, your Committee is persuaded that a greater reliance on non-bencher members would be of considerable assistance to benchers in the discharge of their responsibilities. In particular, your Committee favours a greater involvement of non-bencher lawyers in the discipline process: it notes, however, that this is a matter falling within the mandate of the Special Committee on Discipline Procedures.
>
> Non-bencher involvement was favoured by 72% of the respondents.
>
> It was suggested by a number of respondents that the benchers restrict themselves to policy matters and place greater reliance on Law Society staff in administration.
>
> Your Committee recommends that:
> Rather than increasing the number of benchers, the Society should look to its membership for assistance in committee work of all kinds.

118. According to a 1991 Research and Planning Committee report, Convocation approved the following:

a. That greater numbers of persons who are not benchers (both lawyers and lay persons) should be appointed to committees of the Law Society; and

b. That members who run for election as benchers but who are not elected should be considered for membership of committees.

119. In the early to mid-1990s, non-bencher lawyers participated on standing committees. This practice was discontinued, largely it is thought because the non-benchers, for undetermined reasons, felt constrained to fully participate with the benchers on the committees.

120. Discipline has always been a key responsibility of the benchers and is taken seriously. The Tribunals Task Force noted the importance of the Society's adjudicative

responsibilities in its report to May 26, 2005 Convocation. In Part II of its report, the Task Force discussed its examination of alternatives to the current adjudicative structure and the composition of the Hearing Panel. The Task Force began by noting the following factors or concerns that are relevant to the consideration of which model to adopt:

a. Whether there is an inherent conflict of interest where the regulatory adjudicators are also the regulatory policy makers. This concern may be countered by the view that in a self-regulatory system, those most able to render relevant and meaningful decisions are the governors who understand the intricacies of that system;

b. Whether there are increasing perceptions of systemic bias in a tribunals structure, even where there is no evidence of actual bias, which may be a drawback to the effectiveness of the process[26] ; and

c. Possible limitations of a large volunteer adjudicative body whose members have different levels of adjudicative knowledge, skill, experience, writing ability and availability to sit on panel hearings and appeals.

121. The Tribunals Task Force identified five models (and in its report comprehensively explained the issues with respect to each model), as follows:

a. the continuation of the current Law Society model …Within this model, the decision could be made to make no changes to the process and procedures (the status quo) or to enhance them to make the tribunals composition more effective…;

b. a tribunal model made up of elected benchers, lay benchers and non-bencher lawyers, the latter either for general participation on panels or for selected cases;

---

[26] This was an issue for the Ontario Securities Commission, as discussed in the *Report of The Fairness Committee to David A. Brown, Q.C. Chair Of The Ontario Securities Commission*, March 5, 2004, by The Honourable Coulter A. Osborne, Q.C., Professor David J. Mullan and Bryan Finlay, Q.C. (The Osborne Report). The report notes that as the Commission engages in policy-setting, rulemaking, investigation, prosecution and adjudication under one corporate, statutorily established, umbrella, this arguably creates a perception of bias at the level of the Commission's adjudicative function, even though a Commissioner involved in an investigation of a matter cannot act as an adjudicator in the same matter without written consent. The report says that critics of the structure contend that the perception of bias erodes the credibility of the Commission. The report concluded that:

> ...the case has been made for the separation of the Commission's adjudicative function from its other functions, as related only to proceedings in which sanctions against respondents are sought. In our view, this separation will resolve the perception problem to which we have referred in this report and will thus end what we view as an erosion of the Commission's institutional credibility. Hiving off the Commission's adjudicative function will also permit the Commissioners to take a more proactive role in the oversight of Enforcement. The Commissioners' monitoring of enforcement matters will also enhance the Commission's credibility.

c. a tribunal model with a permanent Chair and one or two permanent Vice-Chairs who occupy one seat on every panel; the remaining members of each panel to be either elected lawyer benchers and/or lawyer members, and lay benchers;

d. a model that establishes a tribunals unit within the Law Society made up entirely of non-bencher lawyers and lay people; and

e. a model that establishes a tribunal that is completely independent of the Law Society.

122. The Tribunals Task Force recommended that "Convocation undertake an examination of the different models for the composition of the Law Society tribunals, as described in Part II of this report." Convocation approved this recommendation.

123. As the Tribunals Task Force carefully considered these issues and Convocation approved the above recommendation, the Task Force makes no recommendations on this subject.

V. Other Governance Issues Raised By Members Of Convocation

Equity And Diversity Issues

124. Joanne St. Lewis, chair of the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones, referred the following three issues to the Task Force.

Representation of Francophones at Convocation

125. Section 49.24 (1) of the *Law Society Act* provides that "A person who speaks French who is a party to a proceeding before the Hearing Panel may require that any hearing in the proceeding be heard by panelists who speak French". In order to satisfy section 49.24(1), the Law Society must provide panelists who speak French.

126. Ms. St. Lewis's view is that the Law Society should ensure that Francophone or bilingual (French/English) elected benchers with knowledge of the Law Society's processes are available to sit on the Hearing Panel for a bilingual proceeding.

127. The *Law Society Act* provides a mechanism for the appointment of Francophone members of the Law Society for bilingual proceedings in cases where it is not practical to assign benchers. Section 49.24 (2) provides that "If a hearing before the Hearing Panel is required to be heard by panelists who speak French and, in the opinion of the chair of the Panel, it is not practical to assign the required number of French-speaking benchers to the hearing, he or she may appoint one or more French-speaking members as temporary panelists for the purposes of that hearing".

128. Ms. St. Lewis believes that the Law Society should ensure that at least one elected bencher is Francophone. Under this proposal, members of the Society who satisfy bilingualism criteria established by AJEFO[27] should be encouraged to run in the bencher election. The bencher candidate who satisfies the bilingualism criteria and has

[27] 'l'Association des juristes d'expression française de l'Ontario

the most votes would be elected as a bencher regardless of his or her ranking in the election. Ms. St. Lewis suggests that this bencher seat be designated in the pool of candidates who run for election outside of Toronto.

129. Ms. St. Lewis's view is that this procedure would ensure that the Law Society always has French language capability for hearings. She does not see this as the "thin edge of a wedge" to have designated bencher seats for other equality-seeking communities, as the *Law Society Act* already allows for bilingual French/English hearings, which must be held when requested.

The Task Force's Views

130. The Task Force recognizes the importance of ensuring French-language capability for Law Society hearings. However, the Task Force does not agree with guaranteeing a seat for a Francophone bencher, for the following reasons.

131. First, one guaranteed seat for a Francophone bencher will not resolve the issue of sufficient numbers of Francophone benchers for hearings. A larger pool is required. The current system, which draws on benchers who are capable of conducting a hearing in French and permits the selection of qualifed non-bencher Hearing Panel members, is successful in filling necessary positions on the Hearing Panel. Enhancements should be made if necessary, and the Task Force understands that the Society has consulted with AJEFO as required when a Francophone hearing panel member is required. This consultation should be encouraged.

132. Second, fixing a seat for a particular group may set a precedent that could have serious consequences for the Society. In the current environment, although certain constituencies in the profession may consider that they are "represented" by a bencher (as discussed earlier in this report), generally, candidates do not run and are not encouraged to run for election on a specific platform for an identifiable group of members. A guaranteed Francophone bencher seat could affect this dynamic, and increase the politicization of the election process at a time when it is important to emphasize that benchers represent the public interest, not the interests of the profession, or groups within the profession. The perception associated with a guaranteed seat, in spite of what may be valid reasons for it, could have the effect of undermining the Society's mandate.

133. Third, the fact is that the membership usually elects at least one Francophone bencher, or a bencher who is capable of conducting a hearing in French.

134. In the past, the Society has encouraged members of the Francophone community to run for bencher, and this will continue.[28] The Society should not only devote more effort to

[28] Bicentennial Report Working Group in its 2004 report *Bicentennial Implementation Status Report and Strategy* noted this type of effort during the 2003 bencher election:

> In 2003, the Law Society encouraged members from equality-seeking communities, Francophone and Aboriginal members to run for election. During the 2003 Bencher Election process, an information session for members of equality-seeking, Francophone and Aboriginal communities was held. There was wide publication of the election process including the development of a web site solely for the bencher election. Every

encouraging candidates from the Francophone community to run in the election, but expand this initiative to other communities. The diversity of communities represented in Convocation in recent years has increased substantially, and Convocation is better for it.

135. While the Task Force does not recommend a guaranteed Francophone bencher seat, it proposes that the Society increase its efforts to encourage members from all communities represented in Ontario's legal profession to run for bencher, as the public whose interests the Society represents in its governance of the profession should be reflected in those who serve as governors.

Equality Template

136. Ms. St. Lewis requested that the Governance Task Force support the use of the equality template and the definitions of equality and diversity as approved on March 10, 2005 by the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones ("the Committee"). The template was reported to March 24, 2005 Convocation for information. Law Society staff, including the Senior Management Team and the policy advisors, will use the equality template in their work. The relevant excerpt from the March 24 report and a copy of the template appear at Appendix 3.

137. Ms. St. Lewis has asked that the Governance Task Force consider requesting that Convocation and all bencher committees apply the template and definitions to Law Society related work.

The Task Force's Views

138. As the Committee's report indicates, the equality template will be used in decision-making processes, policy development activities, implementing policies, development of programs and initiatives and in consultations undertaken by the Society. This broad application, which the Task Force endorses, means that all policy matters that eventually reach Convocation's agenda will have been informed by use of the template. As such, the Task Force's view is that Ms. St. Lewis's suggestion will have been effectively implemented once the template is applied.

The Equity Advisory Group's Membership on the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones

139. The Bicentennial Report Working Group suggested in its 2004 report *Bicentennial Implementation Status Report and Strategy* that the Equity Advisory Group (EAG) be permanently represented as a voting member on the Equity and Aboriginal Issues Committee/Comité Sur L'équité et les Affaires Autochtones ("the Committee"). Ms. St. Lewis requested that the Task Force consider this issue.

140. The mandate of the EAG is to assist the Committee in the development of policy options for the promotion of equality and diversity in the legal profession by:

---

member of the profession was encouraged to run through a letter written by the Treasurer.

a. identifying and advising the Committee on issues affecting equality communities, both within the legal profession and relevant to those seeking access to the profession;

b. providing input to the Committee on the planning and development of policies and practices related to equality, both within the Law Society and the profession; and

c. commenting to the Committee on Law Society reports and studies relating to equality issues within the profession.

141. The EAG is composed of up to 22 members of the legal profession (including organizational members) who have direct experience with or commitment to access and equality for Aboriginal, Francophone and/or equality seeking communities, including but not limited to communities of ethno racial people, people of colour, immigrants and refugees, people with disabilities, gays, lesbians, bisexuals, transgender persons, Francophones, Aboriginal people and women. Such experience is in areas of employment equity, access to the legal system and to justice, human rights, anti racism and anti oppression, equity and diversity training or social justice issues. The membership reflects gender parity and balance among the various equity seeking communities.

142. Given the EAG's mandate as a Law Society advisory group to the Committee and the fact that the EAG is composed of a diversity of experts in the area of equality and diversity, Ms. St. Lewis requested that the Task Force consider recommending that the EAG become a permanent and voting member of the Committee.

The Task Force's Views

143. The Task Force supports the role fulfilled by the EAG as described above, but does not agree that it should become a permanent and voting member of the Committee, for the following reasons.

144. The EAG is structured as an advisory group, and its input is valued. The EAG need not be a member of the Committee to fulfil this advisory function.

145. The risk in extending membership on the Committee to advisory groups like the EAG is that other groups may make requests to join the Committee once the precedent is set. Input from various communities helps to inform the work of the Committee, but membership of such representative groups on the Committee could be counter-productive to its decision-making on policy issues. Managing expectations and requests of the various groups and arriving at consensus on issues could be a difficult and delicate task. The Committee's current practice of receiving advice from and consulting with these groups provides the necessary input on the issues and concerns of the representatives, but permits the Committee to make recommendations, including those that relate to the profession's governance, that collectively account for equity and diversity issues of the broad range of communities, in keeping with the Committee's mandate.[29]

[29] By-Law 9, s. 16.1 reads:
The mandate of the Equity and Aboriginal Issues Committee is,

146. The Committee, as a standing committee of Convocation, is composed of elected and lay benchers who are required to make policy recommendations in the public interest for Convocation's consideration and who have fiduciary responsibilities to the Law Society as an organization. A group like the EAG is not bound by these obligations, and indeed, should not be. But because of that, it would be inappropriate to make it a voting member of the Committee.[30]

147. For these reasons, the Task Force does not recommend that the EAG be made a permanent and voting member of the Committee.

Entrenchment of the Independence of the Chief Financial Officer

148. Bradley Wright requested that the Task Force consider entrenching the independence of the Law Society's Chief Financial Officer (CFO) in the by-laws.

149. The Task Force acknowledged that ensuring the independence of the CFO is an important aspect of corporate governance. However, the Task Force did not see the need to codify various aspects of and protections for the CFO's office in the by-laws, for the following reasons.

150. First, the CFO's employment contract covers all necessary aspects of her role within the Society's management, including protections for her independence.

151. Second, the Task Force was of the view that the general issues of independence and the ability to address compliance issues are not unique to the CFO position, but extend to all senior managers, and perhaps even middle managers. The Task Force concluded that it is not necessary and may be undesirable to include in a by-law obligations of managers that are more appropriately the subject of an employment contract.

152. Third, the Law Society has adopted a Business Conduct Policy (November 2004, superseding an initial 1997 policy) to which all staff must adhere that addresses a variety of circumstances relating to employment, including corporate compliance.

153. The section of the Policy entitled "Compliance With Laws" states that honesty and fairness must characterize the Society's activities with the public and the profession, and that the Society strives to comply with applicable laws, regulations and internal policies. The section provides that if any Society employee is concerned that the Society is not operating in compliance with applicable laws, regulations or established policies, the employee should immediately report the concern to a superior or, if necessary, to the

---

(a)to develop for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession and for addressing all matters related to Aboriginal peoples and French-speaking peoples; and

(b)to consult with the Treasurer's Equity Advisory Group, Roti io' ta'-kier, AJEFO, women and equity-seeking groups in the development of such policy options.

[30] There may also be a legal impediment – *quaere* whether the fiduciary obligation of a bencher can be delegated to a non-fiduciary.

Chief Executive Officer. The section also provides that the reporting employee is fully protected against recrimination.

154. Another section entitled "Reporting To Management And Auditors" requires a Law Society employee who has knowledge of a matter which he or she believes might adversely affect the Law Society's reputation or operations to bring such knowledge promptly to the attention of senior management. Similarly, an employee must not conceal such information from the Society's auditors.

155. For these reasons, the Task Force does not recommend by-law amendments with respect to the office of the CFO.

APPENDIX 1

TERMS OF REFERENCE

(approved by Convocation November 25, 2004)

a. The Task Force will study specific issues related to governance, including the following:

i. The bencher qualification process and how Convocation is constituted;
ii. The size of Convocation as a board;
iii. The role of the Treasurer as chair of the board (Convocation);
iv. The notion of an executive committee;
v. The frequency and the procedural and substantive efficacy of Convocation, including the process of setting priorities for Convocation;
vi. Benchers in the dual roles of directors of a corporation and representatives in what has been characterized as a parliamentary assembly;
vii. Benchers in the dual roles of policy makers and adjudicators;
viii. A bencher code of conduct.

The Chair invites benchers to advise him within the next month of any other discrete issues that should be included in the Task Force's study.

b. As the Society has received a number of reports on governance based on previous studies and reviews, the Task Force will use these existing reports in its study and does not propose to commission further reports for its use on the subject of Law Society governance.

c. If necessary, the Task Force will conduct additional research and consultation on the issues it has identified for study. This may include consultation with other benchers and non-benchers, as appropriate, to obtain the views of those who have an interest in and are able to contribute to the Task Force's study.

d. The Task Force anticipates that its expenses for research or consultation will be such that funds allocated for such purposes within the budget of Policy and Tribunals ($100,000 annually) will be sufficient.

e. The Task Force will provide interim reports to Convocation as needed.

f. The Task Force will aim to conclude its work and prepare a final report to Convocation by June 2005.

APPENDIX 2

REPORT OF THE SPECIAL COMMITTEE ON CONFLICTS OF INTEREST
MARCH 24, 1995

AS AMENDED BY CONVOCATION ON FEBRUARY 24TH, 1995

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

The SPECIAL COMMITTEE ON CONFLICTS OF INTEREST begs leave to report:

The Special Committee on Conflicts of Interest was struck on March 25, 1994 to consider the issue of conflicts of interest with respect to benchers and bencher firms; its members being Arthur Scace (Chair), Lloyd Brennan, Kevin Carroll, Maurice Cullity, Carole Curtis, Susan Elliott, Marie Moliner, Ross Murray and Hope Sealy.

Your Committee has met on April 21st, August 10th, September 7th, November 9th and November 25th, 1994 and January 26th and February 10th, 1995.

I Background

This Committee was created as a result of the debate in Convocation concerning the report of the Special Committee on Lawyers' Fees. That Special Committee was charged with recommending guidelines for the selection and compensation of counsel to represent the Law Society in a variety of matters. When its report came before Convocation, a lively debate ensued in which the need for a comprehensive policy for benchers and their firms on conflicts of interest vis a vis the Law Society was identified. Convocation voted to establish this special committee for that purpose.

Your Committee has explored various approaches to the problem of conflicts of interest which arise by virtue of the bencher's role.

In so doing your Committee has examined in some detail the different functions that benchers perform and the nature and context of the problems that arise in each of those roles.

At the outset your Committee recognized that there is an enormous variety and number of conflicts arising out of the bencher role. It is acknowledged that it is not practical to attempt to deal with every such conflict. Accordingly your Committee has limited its consideration to those conflicts which are significant.

II Discussion

As a general principle, it is acknowledged that benchers are elected precisely because of the combination of interests, talents and experience which they as individuals can bring to the work of Convocation. Furthermore, your Committee feels that benchers have an obligation to carry those attributes into Convocation.

In addition, your Committee recognizes that there are certain conflicts of interest which are inherent in any self-governing body. Every elected bencher is by definition also a member of the Law Society and therefore has a self-interest in the matters coming before Convocation. That self-interest is, however, essential to the effective governance of the profession. The question your Committee has focused on is, "At what point does an individual bencher's self-interest become so significant that a conflict of interest arises which interferes with that bencher's ability to make a decision in the best interest of the Law Society and the public?".

There is a clear distinction between voting on issues which affect the profession as a whole and necessarily affect benchers as members and voting on issues where the bencher is in a position to benefit, either financially or otherwise, in a fairly specific and direct way from a particular decision of Convocation.

Further, there may well be instances where a bencher not only ought not to vote on an issue but ought not to speak or even attend in Convocation while certain issues are considered.

The Committee has attempted to formulate a general statement of principle by which individual benchers may govern themselves. As well, it has tried, where possible, to enumerate specific rules and guidelines for particular situations. The Committee recognizes that the problem is complex and does not lend itself to a simple straightforward solution. In any solution proposed, there will be areas of disagreement. That this is necessarily so was evident from the discussion in the Committee. There are some situations which will be resolved ultimately by the exercise of the personal judgment of the bencher involved.

III Sample Issues

In order to provide Convocation with a sense of the scope of the issues that the Committee identified, a sampling of some of the questions posed during the course of the Committee's deliberations is included here:

1. May a bencher whose firm acts for LPIC in insurance defense matters participate in debate or decisions concerning such matters as
(a) an increase or decrease in the schedule of rates for counsel to LPIC;
(b) changes to the amount and structure of the member's deductible; or
(c) changes to the coverage provided by LPIC.

2. May a bencher whose practice includes a substantial proportion of legally aided clients participate in debate or decisions involving such matters as:
(a) Legal Aid service cuts in the area of law in which the bencher primarily practises;
(b) changes to the Legal Aid Tariff which would affect the bencher's practice;
(c) funding of disbursements by Legal Aid where the bencher's practice would be affected; or
(d) the introduction of a staff delivery model for services in the bencher's area of practice.

3. To what extent may a bencher who is employed by the provincial government participate in debate or decisions involving:
(a) any matters concerning the Legal Aid Plan;
(b) negotiations with the government; or
(c) proposals for amendments to the Law Society Act which would materially affect the relationship between the Law Society and the government.

These examples serve to illustrate the kinds of issues that were considered by the Committee which went beyond the conflicts usually identified in relation to benchers, such as, direct retainer by the Society or involvement in the discipline process.

Your Committee struggled to answer these and other questions and could not in every case provide a complete response that was acceptable to all Committee members. In some instances, however, the Committee, after a thorough analysis of the issue, reached a consensus on the response. It is important to state, however, that even in those cases where the Committee reached agreement that in the particular circumstances a bencher ought not to be prohibited from participating, it at the same time recognized that individual benchers might well, in the exercise of their personal judgment, decide they ought not to participate. In other words, the fact that there is no absolute prohibition does not necessarily settle the matter. Benchers must be aware of and alert to situations which require them to exercise independent judgment.

For example, as to the matters outlined in question #2, the Committee initially felt that there are special considerations surrounding Legal Aid which bear on the issue of who may vote. Perhaps the most significant of these is that Convocation's authority with respect to the Legal Aid Plan differs somewhat from its authority over many of the other programs administered by the Law Society. This difference arises by virtue of the fact that funding for the Ontario Legal Aid Plan is provided primarily by the government of Ontario. Thus the conflicts may not be as direct and immediate as they might seem to be at first. Taking this into account, your Committee concluded that there should be no absolute prohibition against any bencher voting on all the issues outlined in question #2. Each bencher must assess their own personal situation and decide whether or not to participate. After exploring the Legal Aid issues further, however, the Committee concluded that while there are some special considerations surrounding Legal Aid, on balance, there should not be a different standard applied to conflicts arising in a Legal Aid context than would be applied in any other context.

IV Types of Conflicts

The Committee identified a number of different situations in which conflicts or potential conflicts needed to be addressed. To the extent possible, this report will describe each of them and suggest an approach for dealing with them.

A. Proceedings involving an individual member's rights and privileges - benchers acting in a quasi-judicial capacity

This category includes:
Discipline, incapacity, admission, readmission and competency proceedings and any other proceeding involving an individual member's rights and privileges.
The Committee is of the view that even the slightest perception of a conflict of interest in these proceedings must be scrupulously avoided at every stage in the proceeding.

Accordingly, your Committee suggests the following specific rules:

1. Bencher prohibited from appearing as counsel

A bencher may not appear as counsel before a Committee of benchers or Convocation in a discipline, incapacity, admission, readmission, or competency hearing or any other matter involving an individual member's rights and privileges.

2. Member of bencher firm appearing as counsel

A member of a bencher firm may appear as counsel before a Committee of benchers or Convocation in a discipline, incapacity, admission, readmission, or competency hearing or any other matter involving an individual member's rights and privileges, provided the bencher in question does not in any way participate in the matter.

3. Member of bencher firm providing evidence

Where a member of a bencher firm provides evidence (other than a written testimonial) in any hearing or other matter before a Committee of benchers or Convocation involving an individual member's rights and privileges, the bencher in question will be excluded from all deliberations.

4. Bencher participating who knows member

It is a matter of individual judgment whether a bencher who knows a member either personally or professionally should participate as a bencher in any stage (e.g. investigation, authorization, pre-hearing, hearing) of the process in respect of a discipline, incapacity, admission, readmission or competency hearing or any other matter involving that member's rights and privileges, subject to the usual considerations governing bias or reasonable apprehension of bias in proceedings before an administrative tribunal.

In this context your Committee considered one example of a fairly common situation ie: where the bencher is on a discipline panel and a member is before the panel who is known to the bencher. In this particular instance the following steps are suggested, assuming that the bencher concludes that he or she can continue to participate:

The bencher should:

(l) state on the record that the bencher knows the member and provide particulars of the circumstances;

(2) indicate on the record that the bencher does not feel that he or she is unable to continue to participate by virtue of the knowledge or relationship;

(3) invite the member to take a few moments to consider whether he or she wishes to raise any objection to the bencher's continued involvement.

The advantage of this approach is that the panel is then able to deal with the issue at the outset and where the member raises no objection, he or she will, in most cases, be precluded from raising it at some later date, as, for example, a ground for appeal.

5. Bencher as witness

It is a matter of individual judgment whether a bencher who knows a member either personally or professionally should participate as a witness or in some other capacity in support of the member in respect of a discipline, incapacity, admission, readmission or competency hearing or any other matter involving that member's rights and privileges.

Your Committee in formulating these rules suggests that benchers should be alert to the consequences both for them as individuals and for Convocation and the Society's admissions and discipline process, should they or members of their firm provide character evidence on behalf of an individual member in a proceeding before Convocation or a hearing panel. Your Committee urges benchers to weigh carefully any request for their participation on behalf of an individual member, bearing in mind the need to ensure that a sufficiently large and diverse pool of benchers is maintained for hearings in Committee and Convocation.

B. Direct Retainer by the Law Society or the Lawyers' Professional Indemnity Company of a bencher or a bencher firm

In considering the elements which should be included in this policy, your Committee, after some discussion, concluded that it was not in the best interests of the Law Society or LPIC to exclude benchers and bencher firms from the pool of counsel eligible for selection. The Committee felt that some of these individuals and firms possess substantial expertise in the area of solicitor's negligence, which expertise the LSUC and LPIC have made a significant investment in developing. To exclude them would, in effect, be throwing away that investment as well as denying LPIC access to experienced counsel. Accordingly, your Committee does not recommend that Convocation adopt a policy under which the Society or LPIC would be prohibited from directly retaining benchers or members of bencher firms.

Instead, the following guidelines are proposed for the retaining of counsel generally by the Society or LPIC. The Committee made the observation that in the vast majority of instances, counsel will be selected and retained by senior Law Society or LPIC staff and not by Convocation. The guidelines have been prepared with this in mind.

1. The Law Society or LPIC should establish criteria for the selection of counsel having regard to the following goals:
(a) To ensure that the Society or LPIC is represented by counsel who will provide competent and cost effective legal services and, in particular, to ensure that the services are provided by individuals whose skills, training and experience are most appropriate to the task.
(b) To ensure that the Society's or LPIC's work is distributed as equitably as possible having regard to considerations of specific expertise, geographic location, gender, equity and resources.

2. In each instance where the Society or LPIC retains counsel, there should be a written notation confirming that the selection criteria have been applied and setting out in brief terms the justification for the particular choice.

3. There should also be an independent review of the selection process on a periodic basis.

4. There should be a semi-annual report to Convocation of all law firms retained during the preceding six months, specifying the amounts billed for fees and disbursements by firm.

It is also suggested that LPIC avoid, wherever possible, retaining a bencher to represent LPIC and a member in an insurance matter where that matter is also the subject of a Law Society complaints investigation.

C. Policy Issues Considered by Committees or Convocation

For the balance of matters considered in Committee or Convocation, it is suggested that it is up to the individual bencher to decide whether or not to participate in the decision.

On a very simplistic basis, it is recognized that each bencher brings to their work at the Society a unique combination of personal and professional experience which will affect their approach to and ultimately their decisions upon the matters before Convocation. It is both understood and expected that this is the case. To require individual benchers to declare a conflict of interest by virtue of the fact that some aspect of their personal or professional experience impinges upon or

in some way relates to the issue before Convocation, would significantly impair not only the individual bencher's freedom to participate but also Convocation's ability to deal with business.

The Committee wrestled with how to offer useful guidance to benchers in reaching a decision.

Two situations were raised by way of example to illustrate instances where, in the Committee's view, benchers ought to refrain from participating.

1. Solicitor-Client Relationship

A bencher ought not to participate in a matter where:

1. the bencher or the bencher's firm acts for a client whose interests will be significantly affected by Convocation's decision, or
2. the bencher or the bencher's firm is, by virtue of a solicitor-client relationship, in possession of confidential information pertaining to the issue under consideration which may tend to influence the bencher's decision on the matter.

2. Employment Relationship

Where a bencher is an employee, the bencher ought not to participate in a matter where:

1. the bencher's employer has a significant interest, which is distinct from the interest of the profession at large, in a matter before Convocation, or
2. the bencher, by virtue of his or her employment, is in possession of confidential information pertaining to the issue under consideration which may tend to influence the bencher's decision on the matter.

V Rulings by Convocation

Lastly, your Committee considered whether there should be some procedures introduced to assist benchers in recognizing and dealing appropriately with conflicts of interest. There was unanimous support for this proposal. Accordingly, your Committee recommends as follows:

1. Benchers are invited to consult informally with the Treasurer to seek guidance in situations involving the appearance of, or a potential or actual conflict of interest relating to their responsibilities as benchers.

2. Benchers may also seek a ruling by Convocation on any situation involving the appearance of, or a potential or actual conflict of interest relating to their own or any other person's responsibilities as bencher.

3. Where a ruling is sought, Convocation may rule that the bencher or benchers who are the subject of the ruling:

(a) be required to withdraw from Convocation while the matter in question is under consideration;

(b) may remain in Convocation and be available to inform Convocation but may not otherwise participate in the debate or decision on the matter in question;

(c) may remain in Convocation and participate in the debate but may not vote on the matter in question; or

(d) may participate fully in the debate and decision on the matter in question.

4. Convocation shall maintain a record of such rulings as are made and where appropriate, such advice as is given, so that it is available for reference as required.

All of which is respectfully submitted
Arthur Scace, Chair

It was moved by Mr. Scace, seconded by Ms. Sealy that the amended Report of the Special Committee on Conflicts of Interest be adopted.
Carried

THE REPORT WAS ADOPTED

APPENDIX 3

EXCERPT FROM MARCH 24, 2005 REPORT TO CONVOCATION FROM THE EQUITY AND ABORIGINAL ISSUES COMMITTEE/
COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES

INFORMATION
EQUALITY TEMPLATE, DEFINITIONS OF EQUALITY AND DIVERSITY AND RECOGNITION OF ABORIGINAL AND FRANCOPHONE COMMUNITIES

1. In 1997 the Law Society adopted the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession (the Bicentennial Report)*, which made sixteen recommendations seeking to provide a coherent approach to advancing new policies and enhancing the implementation of existing policies directed at advancing the goals of equality and diversity within the legal profession.

2. The recommendations were grouped under the following categories: policy development, advancement of equality and diversity policies, governance, education, regulation and employment/contracting for legal services.

3. In 2003 Convocation established the Bicentennial Report Working Group to review and report on the implementation status of the recommendations contained in the *Bicentennial Report*. The Bicentennial Report Working Group noted in its 2004 *Bicentennial Implementation Report* that,

> Advancing equality requires effective tools of measurement and analysis. The Law Society has an impressive array of initiatives but no coherent standards by which to measure their effectiveness and mark their progress. It is for this reason the Working Group has highlighted the need for an equity template that would include definitions of the terms "equity" and "diversity". Staff, bencher committees and Convocation would use the template to analyze the impact of policies on persons from equality-seeking, Aboriginal and Francophone communities.

4. The Bicentennial Report Working Group proposed that a definition of "equality" and "diversity" be developed and an equality decision-making template be formulated to guide the Law Society in its policy development activities.

Definitions of "Equality" and "Diversity" and Recognition of Aboriginal and Francophone Communities

5. In 1997 the Law Society confirmed its commitment to the promotion of "equity" or "equality" and "diversity" in the legal profession without providing a definition of those

terms. The Bicentennial Report Working Group proposed that a definition of "equity" or "equality" and "diversity" be developed to provide consistency and to guide the Law Society in its policy and program development activities.

6. There has been much debate over the preference between "equity" and "equality" to characterize initiatives aimed at promoting diverse community representation and access to various spheres of the legal profession. The term "equity" focuses on treating people fairly by recognizing that different individuals and groups require different measures to ensure fair and comparable results.

7. "Equality" advocates on the other hand, focus on equality of result, access and opportunity – all of which translate to substantive equality. Equality does not mean sameness. The attainment of equality demands that equal consideration, deference and respect ought to be given to diverse perspectives, experiences and positions. In order to assess whether equality is reflected in the decision-making and policy-making activities of the Law Society, one must be concerned not only with equality of the end result (in that the final decision or policy can be fairly applied to all), but also with equality in the process. At all stages, there should be, and should be seen to be diversity in the consultation, access and end result.

8. Diversity by definition takes into account the different perspectives and positions that individuals occupy in society. However, this difference should not be interpreted as inequality – for each perspective is given equal acknowledgement and consideration. Diversity does not mean that all identifiable groups must directly participate, but rather that the development of the policy or the decision reflects a consideration of all identifiable groups and their possible intersections.

9. A comprehensive definition of "equality" and "diversity" must take intersectionality into account. Intersectionality has been defined as "intersectional oppression that arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone".[31] Intersectionality recognizes the unique experience of an individual based on the simultaneous membership in more than one group. For example, a Black woman who has been the victim of harassment by colleagues will experience the harassment in a completely different way than Black men or White women. This is because groups often experience distinctive forms of stereotyping or barriers based on a combination of race and gender, and not on race or gender separately. Another example would be the experience of a Muslim woman who is the victim of discrimination. Her experience would likely be different than the experience of a Muslim man victim of discrimination, and it is unlikely that the Muslim woman could categorize the discrimination as based on gender only, separately from race or religion. An intersectional analysis uses a contextual approach by taking into account the simultaneous membership in more than one group, instead of categorizing each ground separately.[32]

10. Aboriginal communities hold a unique and distinct position within society and the legal profession. The *Charter of Rights and Freedoms* entrenches Aboriginal and treaty rights

[31] See Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims, Discussion Paper* (Toronto: Ontario Human Rights Commission, October 2001) at 3.
[32] *Ibid*.

as distinct from equality rights recognized in the Charter. The Law Society recognizes and respects that Aboriginal communities are distinct from equality-seeking communities.

11. The *Canadian Charter of Rights and Freedoms*[33] also recognizes the unique position of Francophone communities within Canada. The Charter provides that English and French are the official languages of Canada. Both languages have equal status, rights and privileges as to their use in all institutions of the federal and New Brunswick governments. In Ontario, the *French Language Services Act*[34] guarantees each individual the right to receive provincial government services in French in the designated areas of the province. Also, the *Court of Justice Act*[35] provides that the official languages of the courts of Ontario are English and French. The Law Society recognizes and respects that Francophone communities are distinct from equality-seeking communities.

12. On March 10, 2005, the Committee adopted the following definitions of "equality" and "diversity" to be applied by the Law Society. The Committee also recognized the unique position of Aboriginal and Francophone communities.

> "Diversity": Diversity recognizes, respects and values individual differences to enable each person to maximize his or her own potential. The Law Society acknowledges the diversity of the community of Ontario, respects the dignity and worth of all persons and promotes the right of all persons and communities to be treated equally without discrimination.
>
> "Equality": Equality means equality of substantive access, opportunity nad result without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.
>
> The Law Society recognizes and respects the uniqueness of the Aboriginal and Francophone communities and is committed to the promotion of rights for Aboriginal and Francophone communities.
>
> The Law Society recognizes that individuals may experience discrimination due to their membership in one or more of the identified grounds, groups or communities.

Application of template

13. A general Equality Template has been developed and is presented at Appendix 2. The questions included in the Equality Template have also been integrated within the Senior Management Team Initiative Proposal Form and the Policy Secretariat Policy Development Template. This ensures that equality considerations will be given to

---

[33] Part of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Canadian Charter*).
[34] R.S.O. 1990, c. F. 32.
[35] R.S.O. 1990, c. C. 43.

projects and initiatives considered for approval by the Senior Management Team and in policy development activities undertaken by the Law Society.

14. The Equality Template does not attempt to determine whether an initiative, project or policy should proceed. It assists in identifying the potential impact, positive or negative, of policies and initiatives on Aboriginal, Francophone and equality-seeking communities. The instrument is also useful to determine whether there are alternative ways to proceed that would alleviate negative impacts on Aboriginal, Francophone and equality-seeking communities and promote equality.

15. The Equality Template will be used in decision-making processes, policy development activities, implementation of policies, development of programs and initiatives, and in consultations undertaken by the Law Society. For example, the template may be used in:
    a. Senior Management Team's decision making processes;
    b. Policy development activities;
    c. Implementation of programs;
    d. Development and management of projects;
    e. Development of resources and tools; and
    f. Training and education programs.

16. The questions outlined in the general Equality Template may be integrated within already existing processes, or may be used as an Equality Template to be applied on its own.

17. The Senior Management Team will be responsible for the implementation of this initiative and the application of the template. The Senior Management Team has approved the proposed template.

18. A glossary of terms has also been developed for the Law Society and is presented at Appendix 3.

Appendix 2
Equality Template

The Equality Template does not attempt to determine whether an initiative, project or policy should proceed. It assists in identifying the potential impact, positive or negative, of initiatives, projects and policies on Aboriginal, Francophone and equality-seeking communities. The instrument is also useful to determine whether there are alternative ways to proceed that would alleviate negative impacts or that would accentuate the positive impacts on Aboriginal, Francophone and equality-seeking communities and promote equality.

The Law Society recognizes and respects the uniqueness of the Aboriginal and Francophone communities and is committed to the promotion of rights for Aboriginal and Francophone communities. In addition, the Law Society is committed to the promotion of rights of members of equality-seeking communities. The Law Society defines members of "equality-seeking communities" as people who consider themselves a member of such a community by virtue of, but not limited to, ethnicity, ancestry, place of origin, colour, citizenship, race, religion or creed, disability, sexual orientation, marital status, same-sex partnership status, age, family status

and/or gender. The Law Society also recognizes that people may be more vulnerable due to their membership in more than one of the identified groups or communities.

Managers and project leads should apply the instrument to initiatives, projects or policy development such as the development of internal policies and guidelines and significant projects and initiatives.

The questions outlined below may be integrated within already existing processes, or may be used as an equality template to be applied on its own.

1. What are the potential benefits for Aboriginal, Francophone and equality-seeking communities?

_____
_____
_____

2. What are the potential risks that may affect members of Aboriginal, Francophone or equality-seeking communities?

_____
_____

3. What are potential hurdles/barriers that may affect members of Aboriginal, Francophone and equality-seeking communities?

_____
_____

4. What is the foreseeable impact on members of Aboriginal, Francophone and equality-seeking communities?

_____
_____
_____

5. If foreseeable impact on members of Aboriginal, Francophone and equality-seeking communities, how could the initiative, project or policy be modified to eliminate or reduce negative impact, or create or accentuate positive impact?

_____
_____
_____

6. What, if any, additional research or consultation is desirable or essential to better appreciate the impact of the initiative, project or policy on diverse groups?

_____
_____
_____

7. Have issues of accessibility for persons with disabilities been considered?

_____
_____
_____

8. What, if any, aspects of the initiative, project or policy should be undertaken in both official languages?

_____
_____
_____

9. What benchmarks and measures can be used to assess the success and impact of the initiative, project or policy on members of Aboriginal, Francophone and equality-seeking communities?

_____
_____
_____

10. Is there an intended or unintended impact with respect to equality or diversity?
Yes □ No □

Appendix 3
Glossary of Terms

· *Aboriginal Peoples of Canada* – is defined in the *Constitution Act, 1982*[36] as including the Indian, Inuit and Métis peoples of Canada. The use of the term Indian is preferably restricted to the *Indian Act* and is usually viewed as inappropriate. The names of Aboriginal organizations and associations in Canada are often a reflection of the period of incorporation. We find names such as the Indigenous Bar Association, the Assembly of First Nations and the Native Women's Association of Canada. The reader is encouraged to seek to determine the preferred terminology used by the community or organization as a fundamental component of the dignity and respect that is encompassed in an equality commitment.

  o *Aboriginal Rights* - The *R. v. Van der Peet*[37] case is the leading case in establishing the test that must be satisfied to successfully prove the existence of an Aboriginal right. The Aboriginal claimant must prove that an activity, custom or tradition was integral to the distinctive culture of the Aboriginal community prior to European contact.

  o *Métis Peoples* – has been defined by the Supreme Court of Canada as not encompassing all individuals with mixed Indian and European heritage. Rather it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.

· *Age* – is defined in the Ontario *Human Rights Code* to mean an age that is eighteen years or more, except in the context of employment where age means an age that is

[36] Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
[37] [1996] 2 S.C.R. 507.

eighteen years or more and less than sixty-five years. Until the *Ontario Human Rights Code* is amended, it is not contrary for employers to require employees to retire at age 65 or older. Similarly, workers who remain employed past age 65 cannot complain if their employer treats them differently (for example in terms of remuneration, benefits, hours, vacation) because of their age.

- *Creed or Religion* – means a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single Supreme Being or deity is not a requisite. The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed. The Supreme Court of Canada defined "freedom of religion" in *Syndicat Northcrest v. Amselem*[38] as "the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection"

- *Discrimination* - occurs when a law, program or policy – expressly or by effect – creates a distinction between groups of individuals which disadvantages one group based on shared personal characteristics of members of that group in a manner inconsistent with human dignity.

    - *Direct Discrimination* – involves a law, rule or practice which on its face creates harmful differential treatment on the basis of particular group characteristics.

    - *Adverse Effect Discrimination* – occurs when the application of an apparently neutral law or policy has a disproportionate and harmful impact on individuals on the basis of particular group characteristics. It is also referred to as "indirect" discrimination or "disparate impact" discrimination

    - *Systemic Discrimination* – occurs when problems of discrimination are embedded in institutional policies and practices. Although the institution's policies or practices might apply to everyone, they create a distinction between groups of individuals, which disadvantage one group based on shared personal characteristics of members of that group in a manner inconsistent with human dignity. Systemic discrimination is caused by policies and practices that are built into systems and that have the effect of excluding women and other groups and/or assigning them to subordinate roles and positions in society or organizations. Although discrimination may not exclude all members of a group, it will have a more serious effect on one group than on others.

- *Disability* – The definition of disability is not fixed, static or universal. Disability is a multi-dimensional concept with both objective and subjective characteristics. When it is

[38] [2004] S.C.J. No. 46.

interpreted as an illness or impairment, disability is seen to be located in an individual's mind or body. When it is interpreted as a social construct, disability is seen in terms of the socio-economic, cultural and political disadvantages resulting from an individual's exclusion.[39] Disability is a functional limitation that is experienced by individuals because of the economic and social environment (or because of society's reaction to the limitation)

- *Diversity*: The presence of members from Ontario's communities at all levels of the social, economic and political structures which includes their meaningful participation at the decision and policy making levels.[40]

- *Equality* – is difficult to define because it represents a continuum of concepts. In various contexts it can mean equality of opportunity, freedom from discrimination, equal treatment, equal benefit, equal status and equality of results

    - *Formal Equality* – prescribes identical treatment of all individuals regardless of their actual circumstances

    - *Substantive Equality* – requires that differences among social groups be acknowledged and accommodated in laws, policies and practices to avoid adverse impacts on individual members of the group. A substantive approach to equality evaluates the fairness of apparently neutral laws, policies and programs in light of the larger social context in equality, and emphasizes the importance of equal outcomes which sometimes require equal treatment and sometimes different treatment.

- *Equity* – focuses on treating people fairly by recognizing that different individuals and groups require different measures to ensure fair and comparable results.

- *Equity Programs* – are proactive, planned programs designed to remedy group-based problems of systemic discrimination. They are premised on the recognition of the need to take positive steps to redress institutionalized discrimination and persistent social inequalities. Equity initiatives are also referred to in the United States as "affirmative action" programs.

- *Gender* - is the culturally specific set of characteristics that identify the social behaviour of women and men, the relationship between them and the way it is socially constructed. Gender is an analytical tool for understanding social processes. Gender may refer to male or female.

    - *Gender Equity* – is the process of being fair to women and men. To ensure fairness, measures must often be available to compensate for historical and social disadvantages disproportionately experienced by women. Equity leads to equality.

---

[39] Government of Canada, Defining Disability as a Complex Issue (Gatineau: Office for Disability Issues, Human Resources Development Canada, 2003)

[40] Adapted from Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Profession* (Ottawa: Canadian Bar Association, February 1999).

- *Gender Equality* – will be achieved when women and men contribute equally to – and benefit equally from – political, economic, social and cultural development; and society equally values the different contributions they make.

- *Gender Equality Analysis* – is a process to help identify and remedy problems of gender inequality that may arise in policy, programs and legislation. It is premised on an understanding of the continuing reality of women's inequality in Canadian society; and a recognition that our legal rules have historically been founded on explicit or implicit assumptions about appropriate gender roles that restrict women's choices and actions. The object of gender equality analysis is to replace those assumptions with a consideration of the specific situations of women in the labour market, in the household and in the community, and thus shape laws, policies and programs that reflect and respond to women's needs and priorities.

· *Gender Identity* – refers to those characteristics that are linked to an individual's intrinsic sense of self that is based on attributes reflected in the person's psychological, behavioural, and/or cognitive state. Gender identity may also refer to one's intrinsic sense of being male or female. It is fundamentally different from and not determinative of, sexual orientation.[41]

· *Racialized* – refers to persons whose social experiences may be determined by their presumed membership in a race. It identifies their vulnerability to different treatment or the denial of rights or privileges by individuals and institutions who believe that race should factor into their decisions-making.[42]

- *Race* – is the idea of observable physical differences as the basis for categorizing people. This idea has been around for some time though it has lost its scientific validity. The selection of characteristics that define people into racial groups has been arbitrary. Skin colour has been seen as very significant where ear shape of the length of arms and legs have not. Once the person has these characteristics they are assumed to share certain cultural attributes.

- *Systemic Racism* – Systemic or institutional discrimination consists of patterns of behaviour that are part of the social and administrative structures of the workplace, and that create or perpetuate a position of relative disadvantage for some groups and privilege for other groups, or for individuals on account of their group identity. This definition focuses attention on patterns of behaviour, not attitudes, on the assumption that ridding the workplace of racism begins (though does not end) with changing discriminatory behaviours.[43]

---

[41] This definition is a modification of that found in the Ontario Human Rights Commission *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

[42] Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Profession* (Ottawa; Canadian Bar Association, February 1999).

[43] Carol Agocs, *Surfacing Racism in the Workplace: Qualitative and Quantitative Approaches to Identifying Systemic Discrimination,* September 2004, Prepared for The Race Policy Dialogue, Association for Canadian Studies and Ontario Human Rights Commission.

- *Sexual Orientation* – is more than simply a status that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity, including innate sexual attraction. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations.[44]

- *Special Programs* - a right to equality without discrimination is not infringed by the implementation of special programs designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of discrimination. Such affirmative action programs have sometimes been referred to as "reverse discrimination".[45] However, the Ontario *Human Rights Code* and relevant case law clearly indicate that those programs are not discriminatory, but are established to provide substantive equality for disadvantaged groups. Section 15(2) of the *Canadian Charter of Rights and Freedoms*[46] also states that the right to equality "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

It was moved by Mr. Ruby, seconded by Professor Krishna, that Convocation approves the following recommendations to improve the governance of the Law Society by Convocation:

1. RECOMMENDATION 1 – *The method by which members become benchers*

    a. That enhancements be made to the existing communications strategy for the bencher election, through appropriate Law Society and other media, to encourage more members to vote in the bencher election;

    b. That Law Society members who are candidates in the bencher election be educated through material produced by the Law Society to be sent to all candidates and published in the bencher election voters' guide on the subject of the Society's public interest mandate, the importance of a self-regulating legal profession and the role of a bencher, with a focus on the bencher's obligations as a fiduciary and as a representative of the public's, as opposed to the profession's, interests.

2. RECOMMENDATION 2 – *Electronic voting for bencher elections*

    a. That the Law Society begin the process to institute electronic voting for the next bencher election and future bencher elections, and

    b. That the Society pursue other improvements to the bencher election process that might reasonably be expected to increase vote participation.

---

[44] This definition combines elements of that used by the Ontario Human Rights Commission and that used by the National Lesbian and Gay Journalists Association.
[45] Section 14 of the Ontario *Human Rights Code*, R.S.O. 1990, chap. H.19.
[46] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3. RECOMMENDATION 3 – *The size of Convocation as a board*

That rules of procedure for Convocation be adopted to assist the Treasurer and benchers in fulfilling the policy decision-making function of Convocation.

4. RECOMMENDATION 4 – *Benchers in the dual role of directors of a corporation and representatives in a forum similar to a legislature*

a. That Convocation affirm the bencher's role as a fiduciary to the Law Society as an organization, whose mandate benchers must reflect in their discussions and decision-making;

b. That Convocation affirm that a bencher in his or her role as a bencher cannot advocate a position in Convocation or elsewhere that places the profession's interest ahead of the public interest, and

c. That Convocation affirm that when a bencher is appointed as a Law Society representative to the board o another organization, insofar as the issues the bencher addresses affect the Law Society's mandate, the bencher must strike a balance between duties as a Society representative and duties owed to the board by virtue of the appointment and, on occasion, may have to refrain from offering views or opinions if doing so places the bencher in a conflict with respect to those duties.

5. RECOMMENDATION 5 – *Increase efforts to encourage potential bencher candidates from all communities*

That the Society increase its efforts to encourage members from all communities within Ontario's legal profession to run for bencher, as the public whose interests the Society represents in its governance of the profession should be reflected in those who serve as governors.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb, that the words "or elsewhere" be deleted from Recommendation 4b.

Withdrawn

It was moved by Mr. Swaye, seconded by Mr. Bobesich, that Recommendation 4b be deleted.

The Swaye/Bobesich motion was accepted as a friendly amendment.

The debate on the Governance Task Force Report is adjourned to a Special Convocation in December 2005.

REPORT OF THE PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Mr. MacKenzie presented the Report of the Professional Development, Competence & Admissions Committee.

Report to Convocation
November 24, 2005

Professional Development, Competence & Admissions Committee

Committee Members
William Simpson (Chair)
Constance Backhouse (Vice-Chair)
Gavin MacKenzie (Vice-Chair)
Peter Bourque
Kim Carpenter-Gunn
James Caskey
Sy Eber
Gary Lloyd Gottlieb
Thomas Heintzman
Vern Krishna
Laura Legge
Bonnie Warkentin
Bradley Wright

Purpose of Report: Decision
Information

Policy Secretariat
(Sophia Sperdakos 416-947-5209)

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Committee met on November 10, 2005. Committee members William Simpson (Chair), Constance Backhouse (Vice-Chair), Gavin MacKenzie (Vice-Chair), Peter Bourque, Kim Carpenter-Gunn, James Caskey, Sy Eber, Gary Lloyd Gottlieb, Laura Legge, Bonnie Warkentin and Bradley Wright attended. Staff members Diana Miles, Dulce Mitchell and Sophia Sperdakos also attended.

FOR DECISION

CONSULTATION ON PROPOSED REAL ESTATE TRANSACTION GUIDELINES AND AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT (JOINT MOTION OF THE PROFESSIONAL DEVELOPMENT & COMPETENCE AND PROFESSIONAL REGULATION COMMITTEES)

MOTION

2. That Convocation approves consultation with the profession as outlined in Appendix 4 of Tab B of the Professional Regulation Committee's Report to Convocation with respect to proposed residential real estate guidelines and amendments to the *Rules of Professional Conduct* relating to real estate issues appearing in Appendices 1, 2 and 3 of that Report.

Introduction and Background

3. This is a joint motion with the Professional Regulation Committee. The detailed report and presentation of the motion to Convocation is set out in the Professional Regulation Committee's Report to Convocation.

4. In the spring of 2005, through the efforts of the Chief Executive Officer, the Working Group on Real Estate Issues was created to focus on issues arising in real estate practice that relate to the Law Society's regulatory responsibilities. Mortgage fraud, standards of practice and facilitating the public's access to lawyers knowledgeable about real estate law are examples of the issues being addressed in this forum. The aim is to deal with these matters in a more comprehensive way through the united efforts of the organized bar and the Law Society. The Working Group includes benchers, representatives from the Ontario Bar Association (OBA) Real Property Section and the County and District Law Presidents' Association (CDLPA) and relevant Law Society staff. [1]

5. In a series of meetings beginning in April 2005, the working group has been focusing on two issues: practice guidelines for residential real estate transactions and new *Rules of Professional Conduct* intended to assist in preventing mortgage fraud.

[1] Members of the Working Group are Bradley Wright, Alan Silverstein, Ray LeClair (OBA), Clare Brunetta (CDLPA), Syd Troister (Counsel to the Society on real estate issues), Malcolm Heins, Zeynep Onen and staff from the Professional Regulation Division, Professional Development & Competence Department and Policy and Tribunals.

6. A third issue referred to the Society from the OBA some time ago has also been discussed at the working group. It involves a proposal to amend the Rules that require a written consent or written confirmation of an oral consent from an institutional lender in a joint retainer involving a borrower and the lender.

7. The Working Group determined that these proposals, which are described in the Professional Regulation Committee's report, should be the subject of consultation with the real estate bar before further steps are taken to implement them within the Law Society's regulatory scheme. Following a joint report to the Committee and the Professional Regulation Committee on the work of the Working Group, the Committees agreed with the Working Group's proposals and seek Convocation's approval to engage in the consultations. A plan for consultations with the profession is outlined at Appendix 4 of the Professional Regulation Committee's report.

8. In a broad sense, the Committees believe that the problems on which the Working Group's regulatory proposals focus are linked to concerns about access to legal services. Using mortgage fraud as an example, if efforts to address these frauds are seen as being ineffective, the risk is that lenders will eventually use selected large law firms for all mortgage work in the province. Alternatively they may use in-house counsel. Given the importance of real estate and mortgage work to many lawyers in smaller firms outside of the greater Toronto area, large-scale reductions in the availability of work will have a large impact on their practice. If this work is no longer available, the viability of these firms will be threatened and the communities they served could lose their local services in all areas of practice. In the Committees' view, the proposals should help to address these concerns.

NEW LICENSING PROCESS – PROPOSED BY-LAW AMENDMENTS

MOTION

9. That the by-laws made by Convocation under subsection 62(0.1) and (1) of the *Law Society Act* in force on November 24, 2005 be amended as follows:

BY-LAW 8
[CONVOCATION]

1. Subsection 6 (1) of By-Law 8 [Convocation] is deleted and the following substituted:

Order of business

6. (1) Unless otherwise directed by the Treasurer, the order of business at a regular meeting of Convocation shall be as follows:

1. Minutes of last regular meeting of Convocation and of all intervening special meetings of Convocation.

2. Election of benchers to fill vacancies.

3. Business carried forward from last regular meeting of Convocation or from any intervening special meeting of Convocation.

4. Reports of standing committee.

5. Reports of committees other than standing committees.

6. Correspondence.

7. New Business.

Ordre des travaux

6. (1) Sauf décision contraire du trésorier ou de la trésorière, l'ordre des travaux, aux réunions ordinaires du Conseil, se déroule comme suit :

1. l'adoption du procès-verbal de la dernière réunion ordinaire du Conseil et de toutes les réunions extraordinaires du Conseil tenues dans l'intervalle;

2. l'élection de conseillers et de conseillères pour combler les postes vacants;

3. les affaires reportées lors de la dernière réunion ordinaire du Conseil ou de toutes les réunions extraordinaires du Conseil tenues dans l'intervalle;

4. les rapports des comités permanents;

5. les rapports d'autres comités;

6. la correspondance;

7. les affaires nouvelles.

BY-LAW 11
[CALL TO THE BAR AND ADMISSION AND ENROLMENT AS SOLICITOR]

2. Section 2 of By-Law 11 [Call to the Bar and Admission and Enrolment as Solicitor] is amended by adding the following:

Application form

(1.1) Every application under subsection (1) shall be contained in a form provided by the Society.

Formulaire de demande

(1.1) Quiconque désire déposer la demande prise en application du paragraphe (1) remplit le formulaire prescrit par le Barreau.

3. Subsection 6 (1) of the By-Law is deleted and the following substituted:

When person may be called to bar and admitted and enrolled as solicitor

6. (1) A person who is entitled to be called to the bar and admitted and enrolled as a solicitor may be called and admitted and enrolled on any day on which the Treasurer has called a special meeting of Convocation for the purpose of calling persons to the bar and admitting and enrolling them as solicitors.

Moment de la réception au barreau et de l'admission comme procureur

6. (1) Quiconque a le droit d'être reçu au barreau et d'être admis comme procureur peut, pour ce faire, se présenter à l'une des réunions extraordinaires du Conseil convoquées par le trésorier ou la trésorière aux fins de réception au barreau des requérants et de leur admission à titre de procureurs.

4. Subsection 6 (3) of the By-Law is amended by,

(a) deleting "a meeting" / "réunion" and substituting "the special meeting" / "réunion extraordinaire"; and

(b) deleting "an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of so doing" / "le conseiller ou la conseillère ou la personne que le directeur général ou la directrice générale charge de ce faire" and substituting "a Society official" / "la ou le responsable du Barreau".

5. Subsection 6 (4) of the By-Law is amended by deleting "a meeting" / "réunion" and substituting "the special meeting" / "réunion extraordinaire".

6. The By-Law is amended by adding the following:

DEEMED CALL

Application

7. (1) This section applies to a person who,

(a) is qualified under section 4 or 4.1 to be called to the bar and admitted and enrolled as a solicitor, is entitled to be called and admitted and enrolled and elects not to participate in call day under section 6; or

(b) otherwise is qualified to be called to the bar and admitted and enrolled as a solicitor, is entitled to be called and admitted and enrolled and is excused from participating in call day under section 6.

Excused from participating in call day

(2) For the purpose of this section, a person is excused from participating in call day under section 6 if the person establishes, to the satisfaction of the Society official, exceptional circumstances.

Deemed called to the bar and admitted and enrolled as solicitor

(3) The person to whom this section applies shall be deemed to be called to the bar and admitted and enrolled as a solicitor when the person, to the satisfaction of the Society official,

(a) has completed the form provided by the Society; and

(b) has taken the Barristers Oath and Solicitors Oath and, if the person so wishes, the Oath of Allegiance as set out in subsection 6 (6).

PRÉSOMPTION D'ADMISSION

Application

7. (1) Le présent article s'applique aux personnes suivantes :

a) quiconque, en vertu de l'article 4 ou du paragraphe 4.1, possède les qualités requises pour être reçu au barreau et être admis comme procureur et a le droit d'être reçu au barreau et d'être admis comme procureur, mais qui s'abstient de se présenter à la cérémonie visée à l'article 6;

b) quiconque, en tout état de cause, possède les qualités requises pour être reçu au barreau et être admis comme procureur et qui a le droit d'être reçu au barreau et d'être admis comme procureur, mais qui est dispensé de se présenter à la cérémonie visée à l'article 6.

Exonération de se présenter à la cérémonie d'assermentation

(2) Aux fins du présent article, une personne est dispensée de se présenter à la cérémonie d'assermentation visée à l'article 6 si elle établit, de l'avis de la ou du responsable du Barreau, que des circonstances exceptionnelles l'empêchent de s'y rendre.

Présomption de réception au barreau et d'admission comme procureur

(3) Toute personne visée par le présent article est réputée avoir été reçue au barreau et avoir été admise comme procureur si elle a, de l'avis de la ou du responsable du Barreau,

a) dûment rempli le formulaire prescrit par le Barreau;

b) prêté les serments d'avocat-plaideur/d'avocate-plaideuse et de procureur/procureure et, si elle le souhaite, le serment d'allégeance selon la formule énoncée à l'alinéa 6 (6).

BY-LAW 12
[BAR ADMISSION COURSE]

7. By-Law 12 [Bar Admission Course] is revoked and the following substituted:

BY-LAW 12

BAR ADMISSION COURSE

PART I
GENERAL

Definitions

1. In this By-Law,

"academic year" means a period running from May 1 in a year to April 30 of the following year;

"Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this By-Law.

Bar Admission Course continued

2. (1) The Bar Admission Course that was conducted by the Society immediately before the day this By-Law comes into force is continued as the Bar Admission Course.

Bar Admission Course to be conducted by Society

(2) The Society shall conduct the Bar Admission Course.

Exercise of powers by committee

(3) The performance of any duty, or the exercise of any power, given to the standing committee of Convocation responsible for admissions matters under this By-Law is not subject to approval by Convocation.

PART II
BAR ADMISSION COURSE

Content of Bar Admission Course

3. (1) The Bar Admission Course consists of,

(a) a class component;

(b) articles of clerkship served for a period of ten months; and

(c) an independent study component.

Order of components of Bar Admission Course

(2) The class component mentioned in clause (1) (a) shall be completed before the commencement of service under articles of clerkship mentioned in clause (1) (b).

Modification of contents of Bar Admission Course

(3) A Society official, in accordance with policies established by the standing committee of Convocation responsible for admissions matters, may, for an individual student-at-law, vary any aspect of the Bar Admission Course.

Definition: "credit"

4. (1) In this section, "credit" means successful completion of the class component of the Bar Admission Course, successful completion of the solicitor examination of the independent study component of the Course or successful completion of the barrister examination of the independent study component of the Course.

Expiration of Bar Admission Course credits

(2) Subject to subsections (3) and (4), a credit obtained by a student-at-law in an academic year of the Bar Admission Course is valid for a period of two years from the end of the academic year in which the student-at-law was admitted to the Course.

Same

(3) If a student-at-law ceases to be a student-at-law in the Bar Admission Course under section 9, any credit obtained by the student-at-law prior to ceasing to be a student-at-law in the Course is revoked.

Same

(4) If a student-at-law withdraws from the Bar Admission Course pursuant to an obligation to withdraw under subsection 10 (2), any credit obtained by the student-at-law prior to withdrawing from the Course is valid for a period of one year from the end of the academic year in which the student-at-law was admitted to the Course.

Issue of certificate

5. (1) If a student-at-law successfully completes the Bar Admission Course, the Society official shall issue to the student-at-law a certificate of successful completion of the Course.

Withholding of certificate

(2) Despite subsection (1), if a student-at-law successfully completes the Bar Admission Course but fails to pay a fee required to be paid under this By-Law, the Society official may withhold the issue to the student-at-law of a certificate of successful completion of the Course.

PART III
ADMISSION TO BAR ADMISSION COURSE

Academic requirements for admission to Bar Admission Course

6. A person may be admitted to the Bar Admission Course as a student-at-law if the person has,

(a) graduated from a law course that is offered by a university in Canada and is approved by Convocation;

(b) completed all the requirements to graduate, has not graduated but, within four months of the beginning of the academic year in which the student-at-law is admitted to the Course, expects to graduate from a law course that is offered by a university in Canada and is approved by Convocation;

(c) received a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans; or

(d) completed all the requirements to receive, has not received but, within seven months of the beginning of the academic year in which the student-at-law is admitted to the Course, expects to receive a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans.

Procedure for admission to Bar Admission Course

7. (1) A person who wishes to be admitted to the Bar Admission Course as a student-at-law shall apply to the Society.

Application form

(2) An applicant for admission to the Bar Admission Course as a student-at-law shall complete an application form provided by the Society.

Application fee

(3) Every application made under subsection (1) shall be accompanied by an application fee in an amount determined by Convocation from time to time.

Admission to Bar Admission Course

(4) An applicant who meets the academic requirements for admission to the Bar Admission Course, completes an application form to the satisfaction of the Society official and pays the application fee shall be admitted to the Course as a student-at-law.

Supporting documents

(5) A student-at-law shall file with the Society official, at a time specified by the Society official in the academic year in which the student-at-law was admitted to the Bar Admission Course,

(a) a certificate of graduation from a law course that is offered by a university in Canada and is approved by Convocation or a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans;

(b) a certified copy of all law course records of the student-at-law;

(c) executed articles of clerkship; and

(d) any other evidence of compliance with this By-Law that the Society official requires.

Same

(6) Despite subsection (5), a student-at-law shall file with the Society official the document mentioned in clause (5) (a),

(a) if the student-at-law was admitted to the Bar Admission Course having met the academic requirement mentioned in clause 6 (b), within five months of the beginning of the academic year in which the student-at-law was admitted to the Course; and

(b) if the student-at-law was admitted to the Bar Admission Course having met the academic requirement mentioned in clause 6 (d), within eight months of the beginning of the academic year in which the student-at-law was admitted to the Course.

Notice to Society

(7) Every student-at-law shall notify the Society official immediately there is any change in the information provided by the student-at-law to the Society under this By-Law.

PART IV
FEES

Fees

8. (1) Every student-at-law shall pay a tuition fee for the class component mentioned in clause 3 (1) (a) and a fee for each sitting of each examination in the independent study component mentioned in clause 3 (1) (c), and each fee shall be paid on or before a day specified by the Society official.

Amount of fees

(2) The amount of fees mentioned in subsection (1) shall be determined by Convocation from time to time.

PART V
CEASING TO BE A STUDENT-AT-LAW

Cease to be a student-at-law in Bar Admission Course

9. (1) A student-at-law ceases to be a student-at-law in the Bar Admission Course immediately the student-at-law fails to file any document required to be filed under this By-Law.

Notice

(2) The Society shall give to the student-at-law notice that the student-at-law has ceased to be a student-at-law in the Bar Admission Course under this section.

Withdrawal from Bar Admission Course

10. (1) A student-at-law in the Bar Admission Course may withdraw from the Course by completing and submitting to the Society official a request to withdraw form provided by the Society.

Same

(2) A student-at-law in the Bar Admission Course shall withdraw from the Course if the student-at-law,

(a) was admitted to the Course as a student-at-law having met the academic requirement mentioned in clause 6 (b) and has not graduated within four months of the beginning of the academic year in which the student-at-law was admitted to the Course; or

(b) was admitted to the Course as a student-at-law having met the academic requirement mentioned in clause 6 (d) and has not received a certificate of qualification within seven months of the beginning of the academic year in which the student-at-law was admitted to the Course.

Documents, explanations, releases, etc.

(3) The student-at-law shall provide to the Society official any document and explanation as may be required.

Effective date of withdrawal

(4) A student-at-law who withdraws from the Bar Admission Course under this section ceases to be a student-at-law in the Course on the day on which the Society official approves the withdrawal.

Notice

(5) The Society shall give to the student-at-law notice that the request to withdraw has been approved.

PART VI
TRANSITION

Definitions

11. In this Part,

"amendment day" means the day this By-Law comes into force;

"assessment day" means the day on which a person is admitted to the Bar Admission Course under this By-Law;

"start day" means May 1, 2006.

Existing student-at-law

12. (1) A person who is a student-at-law in the Bar Admission Course under this By-Law as it read immediately before the amendment day continues, on the amendment day, to be a student-at-law in the Course under this By-Law as it read immediately before the amendment day.

Application of former By-Law

(2) The provisions of this By-Law as it read immediately before the amendment day continue to apply to the person mentioned in subsection (1).

Deemed student-at-law

13. (1) Despite section 12, a person who is a student-at-law in the Bar Admission Course under this By-Law as it read immediately before the amendment day shall, on the start day, be deemed to be a student-at-law in the Bar Admission Course under this By-Law.

Application of By-Law

(2) The provisions of this By-Law apply to the person mentioned in subsection (1).

Deemed successful completion of class component

14. (1) If, immediately before the start day, a student-at-law under section 13 has successfully completed all the assessments in the civil litigation module, criminal law module and real estate module, and has successfully completed the professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the start day, be deemed to have successfully completed the class component of the Bar Admission Course under this By-Law.

Deemed successful completion of solicitor examination

(2) If, immediately before the start day, a student-at-law under section 13 has successfully completed the examination of the real estate module, and has successfully completed the business law examination, estate planning examination and professional

responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the start day, be deemed to have successfully completed the solicitor examination of the independent study component of the Bar Admission Course under this By-Law.

Deemed successful completion of barrister examination

(3) If, immediately before the start day, a student-at-law under section 13 has successfully completed all the examinations in the civil litigation module and criminal law module, and has successfully completed the family law examination, professional responsibility examination and public law examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the start day, be deemed to have successfully completed the barrister examination of the independent study component of the Bar Admission Course under this By-Law.

Expiration of existing Bar Admission Course credits

(4) Despite subsection 4 (2), any credit deemed successfully completed under subsections (1), (2) or (3) are valid for a period of two years from the start day.

Former student-at-law

15. If a person ceased to be a student-at-law in the Bar Admission Course under section 6 of this By-Law as it read immediately before the amendment day and is admitted as a student-at-law in the Bar Admission Course under this By-Law,

(a) if, immediately before the assessment day, the person has successfully completed all the assessments in the civil litigation module, criminal law module and real estate module, and has successfully completed the professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the assessment day, be deemed to have successfully completed the class component of the Bar Admission Course under this By-Law;

(b) if, immediately before the assessment day, the person has successfully completed the examination of the real estate module, and has successfully completed the business law examination, estate planning examination and professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the assessment day, be deemed to have successfully completed the solicitor examination of the independent study component of the Bar Admission Course under this By-Law; and

(c) if, immediately before the assessment day, the person has successfully completed all the examinations in the civil litigation module and criminal law module, and has successfully completed the family law examination, professional responsibility examination and public law examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the assessment day, be deemed to have successfully completed the barrister examination of the independent study component of the Bar Admission Course under this By-Law.

Application of former subs. 2 (5)
16. For the purposes of subsections 14 (1), 14 (2) and 14 (3) and section 15, a person shall not be considered to have successfully completed any assessment of any module, any examination of any module or any examination of the Bar Admission Course under this By-Law as it read immediately before the amendment day if, under subsection 2 (5) of this By-Law as it read immediately before the amendment day, the person would not have been considered to have successfully completed the assessment or examination.

RÈGLEMENT ADMINISTRATIF NO 12

LE COURS DE FORMATION PROFESSIONNELLE

PARTIE I
GÉNÉRAL

Définitions
1. Les définitions qui suivent s'appliquent au présent règlement administratif.

« année académique » La période qui s'écoule du 1er mai d'une année au 30 avril de l'année suivante.

« responsable du Barreau » Dirigeant, dirigeante, employé ou employée du Barreau que le directeur général ou la directrice générale charge d'appliquer les dispositions du présent règlement administratif.

Maintien du Cours de formation professionnelle
2. (1) Le Cours de formation professionnelle qui était offert par le Barreau immédiatement avant l'entrée en vigueur du présent règlement administratif est reconduit.

Responsabilité du Barreau face au Cours de formation professionnelle
(2) Le Barreau est responsable du Cours de formation professionnelle.

Exercice des pouvoirs d'un comité
(3) L'exercice des fonctions ou des pouvoirs conférés au Comité permanent du Conseil chargé des questions d'admission conformément au présent règlement administratif n'est pas assujetti à l'approbation du Conseil.

PARTIE II
COURS DE FORMATION PROFESSIONNELLE

Contenu du Cours de formation professionnelle
3. (1) Le Cours de formation professionnelle comporte les trois éléments suivants :

a) une session d'enseignement;

b) un stage d'une durée de 10 (dix) mois;

c) des études personnelles.

Ordre des éléments du Cours de formation professionnelle

(2) Avant d'entreprendre le stage de l'alinéa (1) b) précédent, il incombe aux étudiantes et aux étudiants du Cours de formation professionnelle de terminer la session d'enseignement mentionnée à l'alinéa (1) a).

Modification du contenu du Cours de formation professionnelle

(3) Conformément aux politiques énoncées par le Comité permanent du Conseil chargé des questions d'admission, la ou le responsable du Barreau peut, pour répondre aux besoins uniques d'une étudiante ou d'un étudiant au barreau, adapter le contenu du Cours de formation professionnelle.

Définitions de « crédit »

4. (1) Aux fins du présent article, s'entend de « crédit » la réussite de la session d'enseignement du Cours de formation professionnelle, de l'examen de procureur de la partie des études personnelles du Cours ou de celui de l'avocat-plaideur de la partie des études personnelles.

Expiration des crédits du Cours de formation professionnelle

(2) Sous réserve des paragraphes (3) et (4), un crédit du Cours de formation professionnelle obtenu par une étudiante ou un étudiant au barreau lors d'une année académique donnée n'est valide que pendant deux ans à compter de la fin de l'année académique au cours de laquelle l'étudiante ou l'étudiant a été admis au Cours.

Idem

(3) Aux termes de l'article 9, les crédits accumulés par une étudiante ou un étudiant au barreau avant son retrait du Cours de formation professionnelle seront invalidés.

Idem

(4) À la lumière du paragraphe 10 (2), si une étudiante ou un étudiant au barreau doit se retirer du Cours de formation professionnelle, tout crédit accumulé avant son retrait du Cours sera valide pendant un an à compter de la fin de l'année académique au cours de laquelle elle ou il a été admis au Cours.

Émission du certificat

5. (1) Si une étudiante ou un étudiant au barreau réussit le Cours de formation professionnelle, la ou le responsable du Barreau lui remet un certificat de réussite.

Refus d'émission du certificat

(2) Nonobstant les dispositions du paragraphe (1), si une étudiante ou un étudiant au barreau réussit le Cours de formation professionnelle mais néglige d'acquitter des frais requis selon le présent règlement, la ou le responsable du Barreau peut refuser d'émettre le certificat de réussite.

PARTIE III
ADMISSION AU COURS DE FORMATION PROFESSIONNELLE

Exigences académiques d'admission au Cours de formation professionnelle

6. Peut être admis au Cours de formation professionnelle à titre d'étudiante ou d'étudiant au barreau la personne qui remplit les conditions suivantes :

a) elle ou il obtient l'attestation d'un diplôme de droit, approuvé par le Conseil, délivré par une université canadienne;

b) elle ou il répond à toutes les exigences d'obtention du diplôme de droit, n'a toutefois pas encore obtenu ce dernier, mais s'attend, dans les quatre mois à compter du début de l'année académique pour laquelle elle ou il a été admis au Cours de formation professionnelle, à obtenir un tel diplôme décerné par une université canadienne, approuvé par le Conseil;

c) elle ou il a reçu un certificat de compétence délivré par le Comité national sur les équivalences des diplômes de droit, constitué par la Fédération des professions juridiques du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada;

d) elle ou il répond à toutes les exigences d'obtention du certificat de compétence délivré par le Comité national sur les équivalences des diplômes de droit, constitué par la Fédération des professions juridiques du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada, sans avoir toutefois encore obtenu ledit certificat, mais s'attend à le recevoir dans les sept mois qui suivent le début de l'année académique pour laquelle elle ou il a été admis au Cours de formation professionnelle.

Démarche d'admission au Cours

7. (1) Quiconque désire être admis au Cours de formation professionnelle en tant qu'étudiant ou étudiante au barreau dépose une demande à cet effet auprès du Barreau.

Formulaire de demande

(2) Quiconque désire être admis au Cours de formation professionnelle en tant qu'étudiant ou étudiante au barreau remplit le formulaire de demande prescrit par le Barreau.

Frais de la demande

(3) La demande déposée en vertu du paragraphe (1) est accompagnée du paiement des frais fixés par le Conseil.

Admission au Cours de formation professionnelle

(4) Quiconque répond aux exigences académiques d'admission au Cours de formation professionnelle, remplit la demande d'admission à la satisfaction de la ou du responsable du Barreau et acquitte les frais liés à la demande est admis au Cours de formation professionnelle en tant qu'étudiant ou étudiante au barreau.

Pièces justificatives

(5) L'étudiante ou l'étudiant au barreau dépose les documents suivants auprès de la ou du responsable du Barreau, au moment convenu par celle-ci ou celui-ci au cours de l'année académique pendant laquelle elle ou il a été admis au Cours de formation professionnelle :

a) l'attestation du diplôme de droit, approuvé par le Conseil et obtenu auprès d'une université canadienne, ou le certificat de compétence émis par le Comité national sur les équivalences des diplômes de droit, constitué par la Fédération des professions juridiques du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada;

b) une copie certifiée conforme de son dossier universitaire;

c) la convention de stage signée;

d) tout autre document exigé par la ou le responsable du Barreau qui établit que l'étudiante ou l'étudiant se conforme au présent règlement administratif.

Idem
(6) Nonobstant les dispositions du paragraphe (5), l'étudiante ou l'étudiant au barreau dépose auprès de la ou du responsable du Barreau le document exigé à l'alinéa (5) a),

a) si elle ou il a été admis au Cours de formation professionnelle après avoir répondu aux exigences académiques visées à l'alinéa (6) b), dans les cinq mois à compter du début de l'année académique pour laquelle elle ou il a été admis en tant qu'étudiante ou étudiant au barreau;

b) si elle ou il a été admis au Cours de formation professionnelle après avoir répondu aux exigences académiques visées à l'alinéa (6) d), dans les huit mois à compter du début de l'année académique pour laquelle elle ou il a été admis en tant qu'étudiante ou étudiant au barreau.

Avis au Barreau
(7) Advenant une modification aux renseignements déposés auprès du Barreau par une étudiante ou un étudiant au barreau à la lumière du présent règlement administratif, il incombe à chacune et à chacun d'aviser sans délai la ou le responsable du Barreau à cet effet.

PARTIE IV
FRAIS DE SCOLARITÉ

Frais de scolarité
8. (1) À la date convenue par la ou le responsable du Barreau, ou avant celle-ci, les étudiantes et les étudiants au barreau acquittent les frais de scolarité de la session d'enseignement visée à l'alinéa 3 (1) a) et ceux de chacun des examens de la partie des études personnelles visées à l'alinéa 3 (1) c).

Montant des frais de scolarité
(2) Le montant des frais de scolarité visés au paragraphe (1) est revu périodiquement par le Conseil.

PARTIE V
RÉVOCATION DU STATUT D'ÉTUDIANT AU BARREAU

Radiation du Cours
9. (1) Est immédiatement radié du Cours de formation professionnelle l'étudiant ou l'étudiante au barreau qui néglige de déposer un document requis aux termes du présent règlement administratif.

Avis
(2) Le Barreau remet à l'étudiante ou à l'étudiant au barreau un avis de radiation du Cours de formation professionnelle conformément au présent article.

Retrait du Cours
10. (1) Une étudiante ou un étudiant au barreau peut se retirer du Cours de formation professionnelle en déposant auprès de la ou du responsable du Barreau le formulaire de retrait dûment rempli prescrit par le Barreau.

Idem
(2) L'étudiante ou l'étudiant au barreau se retire du Cours de formation professionnelle dans les circonstances suivantes :

a) ayant répondu aux exigences académiques visées à l'alinéa (6) b), elle ou il a été admis au Cours en tant qu'étudiante ou étudiant au barreau sans toutefois avoir réussi à obtenir son diplôme de droit dans les quatre mois à compter du début de l'année académique pour laquelle elle ou il a été admis au Cours;

b) ayant répondu aux exigences académiques visées à l'alinéa (6) d), elle ou il a été admis au Cours en tant qu'étudiante ou étudiant au barreau sans toutefois avoir réussi à obtenir son certificat de compétence dans les sept mois à compter du début de l'année académique pour laquelle elle ou il a été admis au Cours.

Documents, notes explicatives, décharges, etc.
(3) L'étudiante ou l'étudiant au barreau remet à la ou au responsable du Barreau toute note explicative ou tout document requis selon les circonstances.

Date d'entrée en vigueur du retrait
(4) Une personne cesse d'être étudiante ou étudiant au barreau le jour de l'approbation de son retrait du Cours de formation professionnelle par la ou le responsable du Barreau.

Avis
(5) Le Barreau remet à l'étudiante ou à l'étudiant au barreau un avis qui confirme l'entérinement de la demande de retrait.

PARTIE VI
MESURES TRANSITOIRES

Définitions
11. Les définitions qui suivent s'appliquent à la présente partie.

« date d'entrée en vigueur » Le jour où le présent règlement administratif entre en vigueur.

« début du cours » S'entend du 1er mai 2006.

« jour de l'évaluation » Le jour de l'admission d'une personne au Cours de formation professionnelle, en vertu du présent règlement administratif.

Étudiant actuel au barreau
12. (1) Quiconque était étudiant au barreau admis au Cours de formation professionnelle pris en application du présent règlement administratif, tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, continue, suite à la date précédente, d'être étudiant au barreau inscrit au Cours de formation professionnelle.

Portée de l'ancien règlement administratif

(2) Quant aux personnes mentionnées au paragraphe (1), l'effet des dispositions du présent règlement administratif, telles qu'elles se lisaient avant la date d'entrée en vigueur de ses modifications, est prorogé.

Présomption du statut d'étudiant au barreau

13. (1) Le jour du début du cours, nonobstant les dispositions de l'article 12, quiconque était inscrit en tant qu'étudiant et étudiante du Cours de formation professionnelle pris en application du présent règlement administratif, tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, est réputé être étudiant et étudiante du Cours de formation professionnelle.

Portée du règlement administratif

(2) Les dispositions du présent règlement administratif s'appliquent aux personnes visées au paragraphe (1).

Présomption de réussite de la session d'enseignement

14. (1) Immédiatement avant le début du cours, si l'étudiante ou l'étudiant au barreau visé à l'article 13 réussit toutes les évaluations des modules sur le contentieux civil, le droit criminel et le droit immobilier ainsi que l'examen sur la responsabilité professionnelle, tous dans le cadre du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour du début du cours, avoir réussi la session d'enseignement du Cours de formation professionnelle.

Présomption de réussite de l'examen de procureur

(2) Immédiatement avant le début du cours, si l'étudiante ou l'étudiant au barreau visé à l'article 13 réussit l'évaluation du module sur le droit immobilier ainsi que les examens sur le droit commercial, la planification successorale et la responsabilité professionnelle du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour du début du cours, avoir réussi les examens de procureur de la partie des études personnelles du Cours de formation professionnelle.

Présomption de réussite de l'examen de l'avocat-plaideur

(3) Immédiatement avant le début du cours, si l'étudiante ou l'étudiant au barreau visé à l'article 13 réussit toutes les évaluations des modules sur le contentieux civil et le droit criminel ainsi que les examens sur le droit familial, la responsabilité professionnelle et le droit public du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour du début du Cours, avoir réussi les examens de l'avocat-plaideur de la partie des études personnelles du Cours de formation professionnelle.

Expiration des crédits du Cours

(4) En dépit du paragraphe 4 (2), les crédits supposément accumulés conformément aux paragraphes (1), (2) ou (3) ne sont valides que pendant deux ans à compter du début du cours.

Ancien étudiant au barreau

15. Quiconque avait cessé d'être étudiant au barreau du Cours de formation professionnelle conformément à l'article 6 du présent règlement administratif, tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, est réadmis en tant qu'étudiant au barreau,

a) immédiatement avant le jour de l'évaluation, pourvu qu'elle ou il ait réussi tant les évaluations des modules sur le contentieux civil, le droit criminel et le droit immobilier que l'examen sur la responsabilité professionnelle du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour de l'évaluation, avoir réussi la session d'enseignement du Cours de formation professionnelle;

b) immédiatement avant le jour de l'évaluation, pourvu qu'elle ou il ait réussi tant les évaluations du module sur le droit immobilier que les examens sur le droit commercial, la planification successorale et la responsabilité professionnelle du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour de l'évaluation, avoir réussi l'examen de procureur de la partie des études personnelles du Cours de formation professionnelle;

c) immédiatement avant le jour de l'évaluation, pourvu qu'elle ou il ait réussi tant les évaluations des modules sur le contentieux civil et le droit criminel que les examens sur le droit familial, la responsabilité professionnelle et le droit public du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour de l'évaluation, avoir réussi l'examen d'avocat-plaideur de la partie des études personnelles du Cours de formation professionnelle.

Application de l'ancien paragraphe 2 (5)

16. Aux fins des paragraphes 14 (1), 14 (2) et 14 (3) et de l'article 15, il n'existe aucune présomption de réussite d'une évaluation ou d'un examen d'un module ou de tout autre examen administré dans le cadre du Cours de formation professionnelle préparé en vertu des dispositions du présent règlement administratif telles qu'elles se lisaient avant l'entrée en vigueur de ses modifications si, en vertu du paragraphe 2 (5) du présent règlement administratif tel qu'il se lisait avant l'entrée en vigueur de ses modifications, la personne n'aurait pas été réputée avoir réussi l'évaluation ou l'examen susmentionné.

BY-LAW 15
[ANNUAL FEE]

8. Subsection 2 (9) of the English version of By-Law 15 [Annual Fee] is amended by deleting "is" in the definition of "A" and substituting "if".

9. Subsection 2 (9) of the By-Law is amended by deleting the definition of "B" and substituting the following:

B is the number of whole calendar months remaining in the year beginning with the second month following the month in which the member is admitted or readmitted or in which the person's membership is restored.

B représente le nombre de mois civils entiers restant dans l'année, commençant le second mois qui suit le mois durant lequel ces personnes sont admises ou réadmises, ou durant lequel elles regagnent leur statut de membre.

10. Subsection 2 (10) of the By-Law is deleting and the following substituted:

Same: payment due

(10) Payment of an annual fee by a person to whom subsection (9) applies is due on the first day of the second month following the month in which the person is admitted or readmitted as a member or in which the person's membership is restored.

Idem : date de versement

(10) La cotisation annuelle des personnes visées au paragraphe (9) est exigible le premier jour du mois qui suit celui au cours duquel elles sont admises ou réadmises en tant que membres ou le premier jour du mois qui suit celui au cours duquel elles regagnent leur statut de membre.

11. Section 2 of the By-Law is amended by deleting subsections (11) and (12).

[end of motion]

Introduction and Background

10. In February 2005 Convocation approved the new licensing process that will begin in May 2006. In September 2005 Convocation approved amendments to the call to the bar process. A number of by-law amendments are necessary to implement these changes to the licensing process as well as to the process for call to the bar.

11. The proposed amendments are to By-Law 8 (Convocation), By-Law 11 (Call to the Bar and Enrolment as Solicitor) and By-Law 12 (Bar Admission Course) as set out in English and French, above.

NATIONAL LICENSING PROGRAM

MOTION

12. That Convocation recommends to the Federation of Law Societies of Canada that the Federation begin to study the question of whether a national licensing program is feasible.

Introduction and Background

13. The National Mobility Agreement, which has been signed by eight law societies and implemented by seven, enhances mobility of lawyers across the country.

14. The Agreement is premised on a number of beliefs, one of the most significant being that lawyers educated at a Canadian common-law law school and admitted through any

of the Canadian common-law law societies have undergone an accreditation process that is sufficiently similar to make further testing of their knowledge and abilities unnecessary upon transfer to another signatory jurisdiction.

15. Despite this, law societies continue to have separate licensing processes, although their actual content is increasingly similar. Recently, however, the three Prairie Provinces adopted a common licensing program.

16. The Committee considers that there may be a number of important reasons to consider a national licensing program including the possibility of national standards and competence criteria and the avoidance of duplication of efforts across the country.

17. The Committee is of the view that the Federation of Law Societies is in the best position to bring together representatives from law societies across the country to consider the issue and, if possible, make recommendations law societies can then consider.

FOR INFORMATION
COMMITTEE PRIORITIES

18. In accordance with the Treasurer's request that Committees identify their priorities, the Professional Development, Competence and Admissions Committee has identified 7 issues, set out at Appendix 1.

APPENDIX 1

PRIORITIES FOR THE PROFESSIONAL DEVELOPMENT, COMPETENCE AND ADMISSIONS COMMITTEE, 2005-2007

1. QUALITY ASSURANCE

Flowing out of priorities the benchers set at their planning session at Niagara-on-the-Lake, the Committee will examine and evaluate issues related to quality assurance, including the Law Society's role in continuing legal education and the idea of developing CLE curricula to guide the profession in its professional development choices.

With respect to the Law Society's role in continuing legal education the Committee will establish a subcommittee to consider issues related to delivery and meet with legal organizations to address them.

The Committee will bring options to Convocation for its consideration.

High Priority

Possible Timelines: Spring 2006

2. LEGAL INFORMATION

Under the auspices of LibraryCo and other partners an Integration Task Force is examining library services in LibraryCo, the Great Library and CANLII and the future of the dissemination of legal information.

A survey is currently being distributed to the profession respecting legal information issues. Following receipt of the survey results the Task Force will evaluate its recommended approach.

The Committee is responsible for library issues and as the Integration Task Force's work unfolds the Committee will develop policy options for Convocation's consideration.

High Priority

Possible Timelines: late Spring 2006 (dependent to some degree on survey)

3. EVALUATIVE MEASURES FOR NEW LICENSING PROCESS

The new Licensing Process begins in May 2006. Evaluative measures are part of the process design to ensure that the component parts of the process are operating as anticipated and to ensure that the Law Society is capable of monitoring for unanticipated problems or unacceptable results as the implementation proceeds. Assigned members of the Committee will liaise with the review process benchers that Convocation appointed in February 2005. The Committee will monitor the process on an ongoing basis and report to Convocation periodically.

High Priority

Timeline: Ongoing

4. RELATIONSHIP OF COMPETENCE TO DISCIPLINARY RESULTS

There is an important connection between the regulation of competence and the regulation of conduct and capacity. Matters that proceed as conduct matters may often have a competence or capacity component, or vice versa. Decisions are regularly made whether to proceed with a matter in the competence or conduct stream. Hearing panels often require a member found guilty of professional conduct to participate in the focused practice review program. At an operational level, however, the current legislative and by-law structures create artificial separations between the two streams. As well, current structures hinder the ability of either stream to ensure that the most effective approach to addressing member-related regulatory issues is followed, in both the public's interest and the member's. Convocation also recently agreed to reconsider its policy that capacity and competence proceedings be held in the absence of the public.

These issues will be considered jointly with the Professional Regulation Committee.

High Priority

Possible Timeline: January/February 2006

5. "UNDER PRESSURE"PRACTICE AREAS/UNDER-SERVICED REGIONS OF THE PROVINCE

Work is already being undertaken among legal organizations and the Law Society in the area of residential real estate. Other issues will be considered. The Sole Practitioner and Small Firm Task Force Report includes recommendations relevant to this issue. The Committee will be

better able to consider its most useful involvement in this issue following Convocation's consideration of the Task Force report.

High Long-Term Priority

Time line: to be determined

6. PROPOSED RESIDENTIAL REAL ESTATE GUIDELINES AND AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

The Ontario Bar Association, the County and District Law Presidents' Association and the Law Society are working together on addressing issues related to residential real estate. Draft guidelines for the profession are being developed as well as proposed amendments to the Rules of Professional Conduct. A consultation with the profession is proposed, following which the Committee and the Professional Regulation Committee will consider the options to be provided to Convocation.

High Priority

Possible timeline: dependent upon the consultations

7. COMPETENCE AND MOBILITY

The National Mobility Agreement, which has been signed by eight law societies and implemented by seven, enhances mobility of lawyers across the country. The Agreement is premised on a number of beliefs, one of the most significant being that lawyers educated at a Canadian common-law law school and admitted through any of the Canadian common-law law societies have undergone an accreditation process that is sufficiently similar to make further testing of their knowledge and abilities unnecessary. Despite this, law societies continue to have separate licensing processes, although their actual content is increasingly similar. Recently the three Prairie Provinces adopted a common licensing program.

The Committee has moved a motion, for Convocation's consideration, that it recommend to the Federation of Law Societies of Canada that the Federation begin to study the question of whether a national licensing program is feasible.

High Priority

Possible Timeline: dependent upon the Federation of Law Societies of Canada

<u>Re: New Licensing Process – Proposed By-Law Amendments</u>

It was moved by Mr. MacKenzie, seconded by Professor Backhouse, that the following By-Law amendments be adopted:

That the by-laws made by Convocation under subsection 62(0.1) and (1) of the *Law Society Act* in force on November 24, 2005 be amended as follows:

BY-LAW 8
[CONVOCATION]

1. Subsection 6 (1) of By-Law 8 [Convocation] is deleted and the following substituted:

Order of business
6. (1) Unless otherwise directed by the Treasurer, the order of business at a regular meeting of Convocation shall be as follows:

1. Minutes of last regular meeting of Convocation and of all intervening special meetings of Convocation.

2. Election of benchers to fill vacancies.

3. Business carried forward from last regular meeting of Convocation or from any intervening special meeting of Convocation.

4. Reports of standing committee.

5. Reports of committees other than standing committees.

6. Correspondence.

7. New Business.

Ordre des travaux
6. (1) Sauf décision contraire du trésorier ou de la trésorière, l'ordre des travaux, aux réunions ordinaires du Conseil, se déroule comme suit :

1. l'adoption du procès-verbal de la dernière réunion ordinaire du Conseil et de toutes les réunions extraordinaires du Conseil tenues dans l'intervalle;

2. l'élection de conseillers et de conseillères pour combler les postes vacants;
3. les affaires reportées lors de la dernière réunion ordinaire du Conseil ou de toutes les réunions extraordinaires du Conseil tenues dans l'intervalle;

4. les rapports des comités permanents;

5. les rapports d'autres comités;

6. la correspondance;

7. les affaires nouvelles.

BY-LAW 11

[CALL TO THE BAR AND ADMISSION AND ENROLMENT AS SOLICITOR]

2. Section 2 of By-Law 11 [Call to the Bar and Admission and Enrolment as Solicitor] is amended by adding the following:

Application form

(1.1) Every application under subsection (1) shall be contained in a form provided by the Society.

Formulaire de demande

(1.1) Quiconque désire déposer la demande prise en application du paragraphe (1) remplit le formulaire prescrit par le Barreau.

3. Subsection 6 (1) of the By-Law is deleted and the following substituted:

When person may be called to bar and admitted and enrolled as solicitor

6. (1) A person who is entitled to be called to the bar and admitted and enrolled as a solicitor may be called and admitted and enrolled on any day on which the Treasurer has called a special meeting of Convocation for the purpose of calling persons to the bar and admitting and enrolling them as solicitors.

Moment de la réception au barreau et de l'admission comme procureur

6. (1) Quiconque a le droit d'être reçu au barreau et d'être admis comme procureur peut, pour ce faire, se présenter à l'une des réunions extraordinaires du Conseil convoquées par le trésorier ou la trésorière aux fins de réception au barreau des requérants et de leur admission à titre de procureurs.

4. Subsection 6 (3) of the By-Law is amended by,

(a) deleting "a meeting" / "réunion" and substituting "the special meeting" / "réunion extraordinaire"; and

(b) deleting "an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of so doing" / "le conseiller ou la conseillère ou la personne que le directeur général ou la directrice générale charge de ce faire" and substituting "a Society official" / "la ou le responsable du Barreau".

5. Subsection 6 (4) of the By-Law is amended by deleting "a meeting" / "réunion" and substituting "the special meeting" / "réunion extraordinaire".

6. The By-Law is amended by adding the following:

DEEMED CALL

Application

7. (1) This section applies to a person who,

(a) is qualified under section 4 or 4.1 to be called to the bar and admitted and enrolled as a solicitor, is entitled to be called and admitted and enrolled and elects not to participate in call day under section 6; or

(b) otherwise is qualified to be called to the bar and admitted and enrolled as a solicitor, is entitled to be called and admitted and enrolled and is excused from participating in call day under section 6.

Excused from participating in call day

(2) For the purpose of this section, a person is excused from participating in call day under section 6 if the person establishes, to the satisfaction of the Society official, exceptional circumstances.

Deemed called to the bar and admitted and enrolled as solicitor

(3) The person to whom this section applies shall be deemed to be called to the bar and admitted and enrolled as a solicitor when the person, to the satisfaction of the Society official,

(a) has completed the form provided by the Society; and

(b) has taken the Barristers Oath and Solicitors Oath and, if the person so wishes, the Oath of Allegiance as set out in subsection 6 (6).

PRÉSOMPTION D'ADMISSION

Application

7. (1) Le présent article s'applique aux personnes suivantes :

a) quiconque, en vertu de l'article 4 ou du paragraphe 4.1, possède les qualités requises pour être reçu au barreau et être admis comme procureur et a le droit d'être reçu au barreau et d'être admis comme procureur, mais qui s'abstient de se présenter à la cérémonie visée à l'article 6;

b) quiconque, en tout état de cause, possède les qualités requises pour être reçu au barreau et être admis comme procureur et qui a le droit d'être reçu au barreau et d'être admis comme procureur, mais qui est dispensé de se présenter à la cérémonie visée à l'article 6.

Exonération de se présenter à la cérémonie d'assermentation

(2) Aux fins du présent article, une personne est dispensée de se présenter à la cérémonie d'assermentation visée à l'article 6 si elle établit, de l'avis de la ou du responsable du Barreau, que des circonstances exceptionnelles l'empêchent de s'y rendre.

Présomption de réception au barreau et d'admission comme procureur

(3) Toute personne visée par le présent article est réputée avoir été reçue au barreau et avoir été admise comme procureur si elle a, de l'avis de la ou du responsable du Barreau,

a) dûment rempli le formulaire prescrit par le Barreau;

b) prêté les serments d'avocat-plaideur/d'avocate-plaideuse et de procureur/procureure et, si elle le souhaite, le serment d'allégeance selon la formule énoncée à l'alinéa 6 (6).

BY-LAW 12

[BAR ADMISSION COURSE]

7. By-Law 12 [Bar Admission Course] is revoked and the following substituted:

BY-LAW 12

BAR ADMISSION COURSE

PART I

GENERAL

Definitions

1. In this By-Law,
"academic year" means a period running from May 1 in a year to April 30 of the following year;
"Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this By-Law.

Bar Admission Course continued
2. (1) The Bar Admission Course that was conducted by the Society immediately before the day this By-Law comes into force is continued as the Bar Admission Course.

Bar Admission Course to be conducted by Society
(2) The Society shall conduct the Bar Admission Course.

Exercise of powers by committee

(3) The performance of any duty, or the exercise of any power, given to the standing committee of Convocation responsible for admissions matters under this By-Law is not subject to approval by Convocation.

PART II

BAR ADMISSION COURSE

Content of Bar Admission Course

3. (1) The Bar Admission Course consists of,

(a) a class component;

(b) articles of clerkship served for a period of ten months; and

(c) an independent study component.

Order of components of Bar Admission Course

(2) The class component mentioned in clause (1) (a) shall be completed before the commencement of service under articles of clerkship mentioned in clause (1) (b).

Modification of contents of Bar Admission Course

(3) A Society official, in accordance with policies established by the standing committee of Convocation responsible for admissions matters, may, for an individual student-at-law, vary any aspect of the Bar Admission Course.

Definition: "credit"

4. (1) In this section, "credit" means successful completion of the class component of the Bar Admission Course, successful completion of the solicitor examination of the independent study component of the Course or successful completion of the barrister examination of the independent study component of the Course.

Expiration of Bar Admission Course credits

(2) Subject to subsections (3) and (4), a credit obtained by a student-at-law in an academic year of the Bar Admission Course is valid for a period of two years from the end of the academic year in which the student-at-law was admitted to the Course.

Same

(3) If a student-at-law ceases to be a student-at-law in the Bar Admission Course under section 9, any credit obtained by the student-at-law prior to ceasing to be a student-at-law in the Course is revoked.

Same

(4) If a student-at-law withdraws from the Bar Admission Course pursuant to an obligation to withdraw under subsection 10 (2), any credit obtained by the student-at-law prior to withdrawing from the Course is valid for a period of one year from the end of the academic year in which the student-at-law was admitted to the Course.

Issue of certificate
5. (1) If a student-at-law successfully completes the Bar Admission Course, the Society official shall issue to the student-at-law a certificate of successful completion of the Course.

Withholding of certificate
(2) Despite subsection (1), if a student-at-law successfully completes the Bar Admission Course but fails to pay a fee required to be paid under this By-Law, the Society official may withhold the issue to the student-at-law of a certificate of successful completion of the Course.

PART III

ADMISSION TO BAR ADMISSION COURSE

Academic requirements for admission to Bar Admission Course
6. A person may be admitted to the Bar Admission Course as a student-at-law if the person has,

(a) graduated from a law course that is offered by a university in Canada and is approved by Convocation;

(b) completed all the requirements to graduate, has not graduated but, within four months of the beginning of the academic year in which the student-at-law is admitted to the Course, expects to graduate from a law course that is offered by a university in Canada and is approved by Convocation;

(c) received a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans; or

(d) completed all the requirements to receive, has not received but, within seven months of the beginning of the academic year in which the student-at-law is admitted to the Course, expects to receive a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans.

Procedure for admission to Bar Admission Course
7. (1) A person who wishes to be admitted to the Bar Admission Course as a student-at-law shall apply to the Society.

Application form
(2) An applicant for admission to the Bar Admission Course as a student-at-law shall complete an application form provided by the Society.

Application fee

(3) Every application made under subsection (1) shall be accompanied by an application fee in an amount determined by Convocation from time to time.

Admission to Bar Admission Course

(4) An applicant who meets the academic requirements for admission to the Bar Admission Course, completes an application form to the satisfaction of the Society official and pays the application fee shall be admitted to the Course as a student-at-law.

Supporting documents

(5) A student-at-law shall file with the Society official, at a time specified by the Society official in the academic year in which the student-at-law was admitted to the Bar Admission Course,

(a) a certificate of graduation from a law course that is offered by a university in Canada and is approved by Convocation or a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Canadian Law Deans;

(b) a certified copy of all law course records of the student-at-law;

(c) executed articles of clerkship; and

(d) any other evidence of compliance with this By-Law that the Society official requires.

Same

(6) Despite subsection (5), a student-at-law shall file with the Society official the document mentioned in clause (5) (a),

(a) if the student-at-law was admitted to the Bar Admission Course having met the academic requirement mentioned in clause 6 (b), within five months of the beginning of the academic year in which the student-at-law was admitted to the Course; and

(b) if the student-at-law was admitted to the Bar Admission Course having met the academic requirement mentioned in clause 6 (d), within eight months of the beginning of the academic year in which the student-at-law was admitted to the Course.

Notice to Society

(7) Every student-at-law shall notify the Society official immediately there is any change in the information provided by the student-at-law to the Society under this By-Law.

PART IV

FEES

Fees

8. (1) Every student-at-law shall pay a tuition fee for the class component mentioned in clause 3 (1) (a) and a fee for each sitting of each examination in the independent study component mentioned in clause 3 (1) (c), and each fee shall be paid on or before a day specified by the Society official.

Amount of fees

(2) The amount of fees mentioned in subsection (1) shall be determined by Convocation from time to time.

PART V

CEASING TO BE A STUDENT-AT-LAW

Cease to be a student-at-law in Bar Admission Course

9. (1) A student-at-law ceases to be a student-at-law in the Bar Admission Course immediately the student-at-law fails to file any document required to be filed under this By-Law.

Notice

(2) The Society shall give to the student-at-law notice that the student-at-law has ceased to be a student-at-law in the Bar Admission Course under this section.

Withdrawal from Bar Admission Course

10. (1) A student-at-law in the Bar Admission Course may withdraw from the Course by completing and submitting to the Society official a request to withdraw form provided by the Society.

Same

(2) A student-at-law in the Bar Admission Course shall withdraw from the Course if the student-at-law,

(a) was admitted to the Course as a student-at-law having met the academic requirement mentioned in clause 6 (b) and has not graduated within four months of the beginning of the academic year in which the student-at-law was admitted to the Course; or

(b) was admitted to the Course as a student-at-law having met the academic requirement mentioned in clause 6 (d) and has not received a certificate of qualification within seven months of the beginning of the academic year in which the student-at-law was admitted to the Course.

Documents, explanations, releases, *etc.*

(3) The student-at-law shall provide to the Society official any document and explanation as may be required.

Effective date of withdrawal

(4) A student-at-law who withdraws from the Bar Admission Course under this section ceases to be a student-at-law in the Course on the day on which the Society official approves the withdrawal.

Notice

(5) The Society shall give to the student-at-law notice that the request to withdraw has been approved.

PART VI

TRANSITION

Definitions

11. In this Part,

"amendment day" means the day this By-Law comes into force;

"assessment day" means the day on which a person is admitted to the Bar Admission Course under this By-Law;

"start day" means May 1, 2006.

Existing student-at-law

12. (1) A person who is a student-at-law in the Bar Admission Course under this By-Law as it read immediately before the amendment day continues, on the amendment day, to be a student-at-law in the Course under this By-Law as it read immediately before the amendment day.

Application of former By-Law

(2) The provisions of this By-Law as it read immediately before the amendment day continue to apply to the person mentioned in subsection (1).

Deemed student-at-law

13. (1) Despite section 12, a person who is a student-at-law in the Bar Admission Course under this By-Law as it read immediately before the amendment day shall, on the start day, be deemed to be a student-at-law in the Bar Admission Course under this By-Law.

Application of By-Law

(2) The provisions of this By-Law apply to the person mentioned in subsection (1).

Deemed successful completion of class component

14. (1) If, immediately before the start day, a student-at-law under section 13 has successfully completed all the assessments in the civil litigation module, criminal law module and real estate module, and has successfully completed the professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the start day, be

deemed to have successfully completed the class component of the Bar Admission Course under this By-Law.

Deemed successful completion of solicitor examination

(2) If, immediately before the start day, a student-at-law under section 13 has successfully completed the examination of the real estate module, and has successfully completed the business law examination, estate planning examination and professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the start day, be deemed to have successfully completed the solicitor examination of the independent study component of the Bar Admission Course under this By-Law.

Deemed successful completion of barrister examination

(3) If, immediately before the start day, a student-at-law under section 13 has successfully completed all the examinations in the civil litigation module and criminal law module, and has successfully completed the family law examination, professional responsibility examination and public law examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the start day, be deemed to have successfully completed the barrister examination of the independent study component of the Bar Admission Course under this By-Law.

Expiration of existing Bar Admission Course credits

(4) Despite subsection 4 (2), any credit deemed successfully completed under subsections (1), (2) or (3) are valid for a period of two years from the start day.

Former student-at-law

15. If a person ceased to be a student-at-law in the Bar Admission Course under section 6 of this By-Law as it read immediately before the amendment day and is admitted as a student-at-law in the Bar Admission Course under this By-Law,

(a) if, immediately before the assessment day, the person has successfully completed all the assessments in the civil litigation module, criminal law module and real estate module, and has successfully completed the professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the assessment day, be deemed to have successfully completed the class component of the Bar Admission Course under this By-Law;

(b) if, immediately before the assessment day, the person has successfully completed the examination of the real estate module, and has successfully completed the business law examination, estate planning examination and professional responsibility examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the assessment day, be deemed to have successfully completed the solicitor examination of the independent study component of the Bar Admission Course under this By-Law; and

(c) if, immediately before the assessment day, the person has successfully completed all the examinations in the civil litigation module and criminal law module, and has successfully completed the family law examination, professional responsibility examination and public law examination, of the Bar Admission Course under this By-Law as it read immediately before the amendment day, the student-at-law shall, on the assessment day, be deemed to have successfully completed the barrister examination of the independent study component of the Bar Admission Course under this By-Law.

Application of former subs. 2 (5)
16. For the purposes of subsections 14 (1), 14 (2) and 14 (3) and section 15, a person shall not be considered to have successfully completed any assessment of any module, any examination of any module or any examination of the Bar Admission Course under this By-Law as it read immediately before the amendment day if, under subsection 2 (5) of this By-Law as it read immediately before the amendment day, the person would not have been considered to have successfully completed the assessment or examination.

RÈGLEMENT ADMINISTRATIF NO 12

LE COURS DE FORMATION PROFESSIONNELLE

PARTIE I

GÉNÉRAL

Définitions
1. Les définitions qui suivent s'appliquent au présent règlement administratif.

« année académique » La période qui s'écoule du 1er mai d'une année au 30 avril de l'année suivante.

« responsable du Barreau » Dirigeant, dirigeante, employé ou employée du Barreau que le directeur général ou la directrice générale charge d'appliquer les dispositions du présent règlement administratif.

Maintien du Cours de formation professionnelle
2. (1) Le Cours de formation professionnelle qui était offert par le Barreau immédiatement avant l'entrée en vigueur du présent règlement administratif est reconduit.

Responsabilité du Barreau face au Cours de formation professionnelle
(2) Le Barreau est responsable du Cours de formation professionnelle.
Exercice des pouvoirs d'un comité
(3) L'exercice des fonctions ou des pouvoirs conférés au Comité permanent du Conseil chargé des questions d'admission conformément au présent règlement administratif n'est pas assujetti à l'approbation du Conseil.

PARTIE II

COURS DE FORMATION PROFESSIONNELLE

Contenu du Cours de formation professionnelle

3. (1) Le Cours de formation professionnelle comporte les trois éléments suivants :

a) une session d'enseignement;

b) un stage d'une durée de 10 (dix) mois;

c) des études personnelles.

Ordre des éléments du Cours de formation professionnelle

(2) Avant d'entreprendre le stage de l'alinéa (1) b) précédent, il incombe aux étudiantes et aux étudiants du Cours de formation professionnelle de terminer la session d'enseignement mentionnée à l'alinéa (1) a).

Modification du contenu du Cours de formation professionnelle

(3) Conformément aux politiques énoncées par le Comité permanent du Conseil chargé des questions d'admission, la ou le responsable du Barreau peut, pour répondre aux besoins uniques d'une étudiante ou d'un étudiant au barreau, adapter le contenu du Cours de formation professionnelle.

Définitions de « crédit »

4. (1) Aux fins du présent article, s'entend de « crédit » la réussite de la session d'enseignement du Cours de formation professionnelle, de l'examen de procureur de la partie des études personnelles du Cours ou de celui de l'avocat-plaideur de la partie des études personnelles.

Expiration des crédits du Cours de formation professionnelle

(2) Sous réserve des paragraphes (3) et (4), un crédit du Cours de formation professionnelle obtenu par une étudiante ou un étudiant au barreau lors d'une année académique donnée n'est valide que pendant deux ans à compter de la fin de l'année académique au cours de laquelle l'étudiante ou l'étudiant a été admis au Cours.

Idem

(3) Aux termes de l'article 9, les crédits accumulés par une étudiante ou un étudiant au barreau avant son retrait du Cours de formation professionnelle seront invalidés.

Idem

(4) À la lumière du paragraphe 10 (2), si une étudiante ou un étudiant au barreau doit se retirer du Cours de formation professionnelle, tout crédit accumulé avant son retrait du Cours sera valide pendant un an à compter de la fin de l'année académique au cours de laquelle elle ou il a été admis au Cours.

Émission du certificat
5. (1) Si une étudiante ou un étudiant au barreau réussit le Cours de formation professionnelle, la ou le responsable du Barreau lui remet un certificat de réussite.

Refus d'émission du certificat
(2) Nonobstant les dispositions du paragraphe (1), si une étudiante ou un étudiant au barreau réussit le Cours de formation professionnelle mais néglige d'acquitter des frais requis selon le présent règlement, la ou le responsable du Barreau peut refuser d'émettre le certificat de réussite.

PARTIE III

ADMISSION AU COURS DE FORMATION PROFESSIONNELLE

Exigences académiques d'admission au Cours de formation professionnelle
6. Peut être admis au Cours de formation professionnelle à titre d'étudiante ou d'étudiant au barreau la personne qui remplit les conditions suivantes :

a) elle ou il obtient l'attestation d'un diplôme de droit, approuvé par le Conseil, délivré par une université canadienne;

b) elle ou il répond à toutes les exigences d'obtention du diplôme de droit, n'a toutefois pas encore obtenu ce dernier, mais s'attend, dans les quatre mois à compter du début de l'année académique pour laquelle elle ou il a été admis au Cours de formation professionnelle, à obtenir un tel diplôme décerné par une université canadienne, approuvé par le Conseil;

c) elle ou il a reçu un certificat de compétence délivré par le Comité national sur les équivalences des diplômes de droit, constitué par la Fédération des professions juridiques du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada;

d) elle ou il répond à toutes les exigences d'obtention du certificat de compétence délivré par le Comité national sur les équivalences des diplômes de droit, constitué par la Fédération des professions juridiques du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada, sans avoir toutefois encore obtenu ledit certificat, mais s'attend à le recevoir dans les sept mois qui suivent le début de l'année académique pour laquelle elle ou il a été admis au Cours de formation professionnelle.

Démarche d'admission au Cours
7. (1) Quiconque désire être admis au Cours de formation professionnelle en tant qu'étudiant ou étudiante au barreau dépose une demande à cet effet auprès du Barreau.

Formulaire de demande

(2) Quiconque désire être admis au Cours de formation professionnelle en tant qu'étudiant ou étudiante au barreau remplit le formulaire de demande prescrit par le Barreau.

Frais de la demande

(3) La demande déposée en vertu du paragraphe (1) est accompagnée du paiement des frais fixés par le Conseil.

Admission au Cours de formation professionnelle

(4) Quiconque répond aux exigences académiques d'admission au Cours de formation professionnelle, remplit la demande d'admission à la satisfaction de la ou du responsable du Barreau et acquitte les frais liés à la demande est admis au Cours de formation professionnelle en tant qu'étudiant ou étudiante au barreau.

Pièces justificatives

(5) L'étudiante ou l'étudiant au barreau dépose les documents suivants auprès de la ou du responsable du Barreau, au moment convenu par celle-ci ou celui-ci au cours de l'année académique pendant laquelle elle ou il a été admis au Cours de formation professionnelle :

a) l'attestation du diplôme de droit, approuvé par le Conseil et obtenu auprès d'une université canadienne, ou le certificat de compétence émis par le Comité national sur les équivalences des diplômes de droit, constitué par la Fédération des professions juridiques du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada;

b) une copie certifiée conforme de son dossier universitaire;

c) la convention de stage signée;

d) tout autre document exigé par la ou le responsable du Barreau qui établit que l'étudiante ou l'étudiant se conforme au présent règlement administratif.

Idem

(6) Nonobstant les dispositions du paragraphe (5), l'étudiante ou l'étudiant au barreau dépose auprès de la ou du responsable du Barreau le document exigé à l'alinéa (5) a),

a) si elle ou il a été admis au Cours de formation professionnelle après avoir répondu aux exigences académiques visées à l'alinéa (6) b), dans les cinq mois à compter du début de l'année académique pour laquelle elle ou il a été admis en tant qu'étudiante ou étudiant au barreau;

b) si elle ou il a été admis au Cours de formation professionnelle après avoir répondu aux exigences académiques visées à l'alinéa (6) d), dans les huit mois à compter du début de l'année académique pour laquelle elle ou il a été admis en tant qu'étudiante ou étudiant au barreau.

Avis au Barreau

(7) Advenant une modification aux renseignements déposés auprès du Barreau par une étudiante ou un étudiant au barreau à la lumière du présent règlement administratif, il incombe à chacune et à chacun d'aviser sans délai la ou le responsable du Barreau à cet effet.

PARTIE IV

FRAIS DE SCOLARITÉ

Frais de scolarité

8. (1) À la date convenue par la ou le responsable du Barreau, ou avant celle-ci, les étudiantes et les étudiants au barreau acquittent les frais de scolarité de la session d'enseignement visée à l'alinéa 3 (1) a) et ceux de chacun des examens de la partie des études personnelles visées à l'alinéa 3 (1) c).

Montant des frais de scolarité

(2) Le montant des frais de scolarité visés au paragraphe (1) est revu périodiquement par le Conseil.

PARTIE V

RÉVOCATION DU STATUT D'ÉTUDIANT AU BARREAU

Radiation du Cours

9. (1) Est immédiatement radié du Cours de formation professionnelle l'étudiant ou l'étudiante au barreau qui néglige de déposer un document requis aux termes du présent règlement administratif.

Avis

(2) Le Barreau remet à l'étudiante ou à l'étudiant au barreau un avis de radiation du Cours de formation professionnelle conformément au présent article.

Retrait du Cours

10. (1) Une étudiante ou un étudiant au barreau peut se retirer du Cours de formation professionnelle en déposant auprès de la ou du responsable du Barreau le formulaire de retrait dûment rempli prescrit par le Barreau.

Idem

(2) L'étudiante ou l'étudiant au barreau se retire du Cours de formation professionnelle dans les circonstances suivantes :

a) ayant répondu aux exigences académiques visées à l'alinéa (6) b), elle ou il a été admis au Cours en tant qu'étudiante ou étudiant au barreau sans toutefois avoir réussi à obtenir son diplôme de droit dans les quatre mois à compter du début de l'année académique pour laquelle elle ou il a été admis au Cours;

b) ayant répondu aux exigences académiques visées à l'alinéa (6) d), elle ou il a été admis au Cours en tant qu'étudiante ou étudiant au barreau

sans toutefois avoir réussi à obtenir son certificat de compétence dans les sept mois à compter du début de l'année académique pour laquelle elle ou il a été admis au Cours.

Documents, notes explicatives, décharges, etc.

(3) L'étudiante ou l'étudiant au barreau remet à la ou au responsable du Barreau toute note explicative ou tout document requis selon les circonstances.

Date d'entrée en vigueur du retrait

(4) Une personne cesse d'être étudiante ou étudiant au barreau le jour de l'approbation de son retrait du Cours de formation professionnelle par la ou le responsable du Barreau.

Avis

(5) Le Barreau remet à l'étudiante ou à l'étudiant au barreau un avis qui confirme l'entérinement de la demande de retrait.

PARTIE VI

MESURES TRANSITOIRES

Définitions

11. Les définitions qui suivent s'appliquent à la présente partie.

« date d'entrée en vigueur » Le jour où le présent règlement administratif entre en vigueur.

« début du cours » S'entend du 1er mai 2006.

« jour de l'évaluation » Le jour de l'admission d'une personne au Cours de formation professionnelle, en vertu du présent règlement administratif.

Étudiant actuel au barreau

12. (1) Quiconque était étudiant au barreau admis au Cours de formation professionnelle pris en application du présent règlement administratif, tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, continue, suite à la date précédente, d'être étudiant au barreau inscrit au Cours de formation professionnelle.

Portée de l'ancien règlement administratif

(2) Quant aux personnes mentionnées au paragraphe (1), l'effet des dispositions du présent règlement administratif, telles qu'elles se lisaient avant la date d'entrée en vigueur de ses modifications, est prorogé.

Présomption du statut d'étudiant au barreau

13. (1) Le jour du début du cours, nonobstant les dispositions de l'article 12, quiconque était inscrit en tant qu'étudiant et étudiante du Cours de formation professionnelle pris en application du présent règlement administratif, tel qu'il se lisait

immédiatement avant la date d'entrée en vigueur de ses modifications, est réputé être étudiant et étudiante du Cours de formation professionnelle.

Portée du règlement administratif

(2) Les dispositions du présent règlement administratif s'appliquent aux personnes visées au paragraphe (1).

Présomption de réussite de la session d'enseignement

14. (1) Immédiatement avant le début du cours, si l'étudiante ou l'étudiant au barreau visé à l'article 13 réussit toutes les évaluations des modules sur le contentieux civil, le droit criminel et le droit immobilier ainsi que l'examen sur la responsabilité professionnelle, tous dans le cadre du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour du début du cours, avoir réussi la session d'enseignement du Cours de formation professionnelle.

Présomption de réussite de l'examen de procureur

(2) Immédiatement avant le début du cours, si l'étudiante ou l'étudiant au barreau visé à l'article 13 réussit l'évaluation du module sur le droit immobilier ainsi que les examens sur le droit commercial, la planification successorale et la responsabilité professionnelle du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour du début du cours, avoir réussi les examens de procureur de la partie des études personnelles du Cours de formation professionnelle.

Présomption de réussite de l'examen de l'avocat-plaideur

(3) Immédiatement avant le début du cours, si l'étudiante ou l'étudiant au barreau visé à l'article 13 réussit toutes les évaluations des modules sur le contentieux civil et le droit criminel ainsi que les examens sur le droit familial, la responsabilité professionnelle et le droit public du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour du début du Cours, avoir réussi les examens de l'avocat-plaideur de la partie des études personnelles du Cours de formation professionnelle.

Expiration des crédits du Cours

(4) En dépit du paragraphe 4 (2), les crédits supposément accumulés conformément aux paragraphes (1), (2) ou (3) ne sont valides que pendant deux ans à compter du début du cours.

Ancien étudiant au barreau

15. Quiconque avait cessé d'être étudiant au barreau du Cours de formation professionnelle conformément à l'article 6 du présent règlement administratif, tel qu'il se lisait immédiatement avant la date d'entrée en vigueur de ses modifications, est réadmis en tant qu'étudiant au barreau,

a) immédiatement avant le jour de l'évaluation, pourvu qu'elle ou il ait réussi tant les évaluations des modules sur le contentieux civil, le droit criminel et le droit immobilier que l'examen sur la responsabilité professionnelle

du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour de l'évaluation, avoir réussi la session d'enseignement du Cours de formation professionnelle;

b) immédiatement avant le jour de l'évaluation, pourvu qu'elle ou il ait réussi tant les évaluations du module sur le droit immobilier que les examens sur le droit commercial, la planification successorale et la responsabilité professionnelle du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour de l'évaluation, avoir réussi l'examen de procureur de la partie des études personnelles du Cours de formation professionnelle;

c) immédiatement avant le jour de l'évaluation, pourvu qu'elle ou il ait réussi tant les évaluations des modules sur le contentieux civil et le droit criminel que les examens sur le droit familial, la responsabilité professionnelle et le droit public du Cours de formation professionnelle pris en application du présent règlement administratif tel qu'il se lisait avant la date d'entrée en vigueur de ses modifications, elle ou il est réputé, le jour de l'évaluation, avoir réussi l'examen d'avocat-plaideur de la partie des études personnelles du Cours de formation professionnelle.

Application de l'ancien paragraphe 2 (5)

16. Aux fins des paragraphes 14 (1), 14 (2) et 14 (3) et de l'article 15, il n'existe aucune présomption de réussite d'une évaluation ou d'un examen d'un module ou de tout autre examen administré dans le cadre du Cours de formation professionnelle préparé en vertu des dispositions du présent règlement administratif telles qu'elles se lisaient avant l'entrée en vigueur de ses modifications si, en vertu du paragraphe 2 (5) du présent règlement administratif tel qu'il se lisait avant l'entrée en vigueur de ses modifications, la personne n'aurait pas été réputée avoir réussi l'évaluation ou l'examen susmentionné.

BY-LAW 15

[ANNUAL FEE]

8. Subsection 2 (9) of the English version of By-Law 15 [Annual Fee] is amended by deleting "is" in the definition of "A" and substituting "if".

9. Subsection 2 (9) of the By-Law is amended by deleting the definition of "B" and substituting the following:

B is the number of whole calendar months remaining in the year beginning with the second month following the month in which the member is admitted or readmitted or in which the person's membership is restored.

B représente le nombre de mois civils entiers restant dans l'année, commençant le second mois qui suit le mois durant lequel ces personnes sont admises ou réadmises, ou durant lequel elles regagnent leur statut de membre.

10. Subsection 2 (10) of the By-Law is deleting and the following substituted:

Same: payment due

(10) Payment of an annual fee by a person to whom subsection (9) applies is due on the first day of the second month following the month in which the person is admitted or readmitted as a member or in which the person's membership is restored.

Idem : date de versement

(10) La cotisation annuelle des personnes visées au paragraphe (9) est exigible le premier jour du mois qui suit celui au cours duquel elles sont admises ou réadmises en tant que membres ou le premier jour du mois qui suit celui au cours duquel elles regagnent leur statut de membre.

11. Section 2 of the By-Law is amended by deleting subsections (11) and (12).

Carried

Re: National Licensing Program

It was moved by Mr. MacKenzie, seconded by Professor Backhouse, that Convocation recommends to the Federation of Law Societies of Canada that the Federation begin to study the question of whether a national licensing program is feasible.

Carried

Re: Consultations with Real Estate Practitioners on Proposed Residential Real Estate Transaction Guidelines and Amendments to the *Rules of Professional Conduct*

This item is a joint motion of the Professional Development & Competence and Professional Regulation Committees.

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Ms. Curtis presented the Report of the Professional Regulation Committee.

Report to Convocation
November 24, 2005

Professional Regulation Committee

Committee Members
Carole Curtis, Chair
Mary Louise Dickson, Vice-Chair
Laurence Pattillo, Vice-Chair
Gordon Z. Bobesich
Anne Marie Doyle
George D. Finlayson
Patrick G. Furlong
Alan Gold
Allan Gotlib
Gavin MacKenzie
Ross W. Murray
Judith Potter
Sydney Robins
Bradley Wright

Purposes of Report: Decision and Information

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

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on November 10, 2005. In attendance were Carole Curtis (Chair), Mary Louise Dickson (Vice-chair), George Finlayson, Alan Gold, Judith Potter, Sydney Robins and Bradley Wright. Staff attending were Naomi Bussin, Anne-Katherine Dionne, Terry Knott, Zeynep Onen and Jim Varro.

FOR DECISION

PROPOSAL FOR A MEMBER'S REPORT TO THE LAW SOCIETY
OF CRIMINAL AND OTHER CHARGES

MOTION

2. THAT By-Law 20 [Review of Complaints] made by Convocation on January 28, 1999, and amended by Convocation on May 28, 1999, April 26, 2001 and January 24, 2002, be revoked and the following substituted:

REPORTING REQUIREMENTS

OFFENCES

Requirement to report offences: members

1. (1) Every member shall inform the Society in writing of,

(a) a charge that the member committed,

(i) an indictable offence under the *Criminal Code* (Canada),

(ii) an offence under the *Controlled Drugs and Substances Act* (Canada),

(iii) an offence under the *Income Tax Act* (Canada) or under an Act of the legislature of a province or territory of Canada in respect of the income tax law of the province or territory,

(iv) an offence under an Act of the legislature of a province or territory of Canada in respect of the securities law of the province or territory, or

(v) an offence under another Act of Parliament, or under another Act of the legislature of a province or territory of Canada, where the charge alleges, explicitly or implicitly, dishonesty on the part of the member or relates in any way to the practice of law by the member; and

(b) the disposition of a charge mentioned in clause (a).

Requirement to report offences: student members

(2) Every student member shall inform the Society in writing of,

(a) a charge that the student member committed,

(i) an indictable offence under the *Criminal Code* (Canada),

(ii) an offence under the *Controlled Drugs and Substances Act* (Canada),

(iii) an offence under the *Income Tax Act* (Canada) or under an Act of the legislature of a province or territory of Canada in respect of the income tax law of the province or territory,

(iv) an offence under an Act of the legislature of a province or territory of Canada in respect of the securities law of the province or territory, or

(v) an offence under another Act of Parliament, or under another Act of the legislature of a province or territory of Canada, where the charge alleges, explicitly or implicitly, dishonesty on the part of the student member or relates in any way to the conduct of the student member as such; and

(b) the disposition of a charge mentioned in clause (a).

Requirement to report: private prosecution

(3) Despite subsection (1) and (2), a member or student member is only required to inform the Society of a charge contained in an information laid under section 504 of the *Criminal Code* (Canada), other than an information referred to in subsection 507 (1) of the *Criminal Code* (Canada), and of the disposition of the charge, if the charge results in a finding of guilt or a conviction.

Time of report

(4) A member or student member shall report a charge as soon as reasonably practicable after he or she receives notice of the charge and shall report the disposition of a charge as soon as reasonably practicable after he or she receives notice of the disposition.

Same

(5) In the circumstances mentioned in subsection (3), a member or student member shall report a charge and the disposition of the charge as soon as reasonably practicable after he or she receives notice of the disposition.

Interpretation: "indictable offence"

(6) In this section, "indictable offence" excludes an offence for which an offender is punishable only by summary conviction but includes,

(a) an offence for which an offender may be prosecuted only by indictment; and

(b) an offence for which an offender may be prosecuted by indictment or is punishable by summary conviction, at the instance of the prosecution.

DIVULGATIONS OBLIGATOIRES

INFRACTIONS

Exigence de divulgation d'une infraction commise par un membre

1. (1) Par écrit, le membre avise le Barreau

a) de toute accusation selon laquelle elle ou il aurait perpétré

(i) un acte criminel au sens du *Code criminel* (Canada);

(ii) une infraction prévue dans la *Loi réglementant certaines drogues et autres substances* (Canada);

(iii) une infraction visée dans la *Loi de l'impôt sur le revenu* du Canada ou dans toute autre loi adoptée par une province ou un territoire du Canada relativement à l'impôt sur le revenu;

(iv) une infraction prévue dans une loi entérinée par une province ou un territoire du Canada relativement aux valeurs mobilières;

(v) une infraction visée dans un autre texte législatif adopté par le Parlement, par une province ou par un territoire du Canada, dans le cadre de laquelle on invoque, de façon explicite ou tacite, la malhonnêteté du membre ou qui se rapporte à l'exercice du droit par ce dernier;

b) de la décision relative à l'accusation mentionnée à l'alinéa a).

Exigence de divulgation d'une infraction commise par un membre étudiant

(2) Par écrit, le membre étudiant avise le Barreau

a) de toute accusation selon laquelle elle ou il aurait perpétré

(i) un acte criminel au sens du *Code criminel* (Canada);

(ii) une infraction prévue dans la *Loi réglementant certaines drogues et autres substances* (Canada);

(iii) une infraction visée dans la Loi de *l'impôt sur le revenu* du Canada ou dans toute autre loi adoptée par une province ou un territoire du Canada relativement à l'impôt sur le revenu;

(iv) une infraction prévue dans une loi entérinée par une province ou un territoire du Canada relativement aux valeurs mobilières;

(v) une infraction visée dans un autre texte législatif adopté par le Parlement, par une province ou par un territoire du Canada, dans le cadre de laquelle on invoque, de façon explicite ou tacite, la malhonnêteté du membre ou qui se rapporte à l'exercice du droit par ce dernier;

b) de la décision relative à l'accusation mentionnée à l'alinéa a).

Exigence de divulgation dans le cadre d'un litige privé

(3) Malgré les paragraphes (1) et (2), le membre ou le membre étudiant n'est tenu d'aviser le Barreau d'une accusation visée par les dénonciations faites dans le cadre de l'article 504 du *Code criminel* du Canada, hormis celles visées au paragraphe 507 (1) du *Code criminel,* et de la décision relative à l'accusation, que si cette dernière se solde par une déclaration de culpabilité ou une condamnation.

Moment de la divulgation

(4) Le membre ou le membre étudiant avise le Barreau qu'il fait l'objet d'une accusation dès la réception de l'avis d'accusation; il avise également le Barreau de la décision relative à l'accusation dès la réception de l'avis de la décision.

Idem

(5) Dans les situations visées au paragraphe (3), le membre ou le membre étudiant avise le Barreau d'une accusation et de la décision relative à cette dernière dès la réception de l'avis de la décision.

Interprétation : « acte criminel »

(6) Au présent article, bien qu'elle exclue les infractions punissables seulement sur déclaration sommaire de culpabilité, la définition de l'expression « acte criminel » comprend ce qui suit :

a) l'infraction en vertu de laquelle la poursuite ne peut être intentée que par voie de mise en accusation;

b) l'infraction en vertu de laquelle la poursuite peut être intentée par voie de mise en accusation ou qui est punissable sur déclaration sommaire de culpabilité, sur l'initiative de la Couronne.

Introduction

3. From December 2004 to February 2005, the Committee proposed a number of changes to various regulatory processes. All but one of the proposals were reported to and approved at June 2005 Convocation.

4. The one remaining matter, which the Committee approved in early 2005, is a proposal to require a member to report to the Law Society certain criminal charges, findings of guilt and convictions. This proposal requires a new by-law. The Committee decided to await the draft of the By-Law before reporting this matter to Convocation.

5. The By-Law has now been prepared based on the Committee's policy proposals.

Background to the Policy Proposal and the By-Law

6. The proposal arose from a consideration of the issues that arise where an order for an interlocutory suspension (formerly called an interim suspension) is sought against a member who has been charged with a criminal offence but the trial is pending.

7. In certain circumstances, it would be appropriate for the Law Society to apply for an interlocutory suspension of a member who is charged with a criminal offence. An interlocutory suspension would be pursued because the risk to the public, including the risk of a loss of faith in the administration of justice, may be too great to justify waiting for the member to be convicted in a criminal forum. This does not mean that member is presumed guilty of the criminal charges. Rather, it acknowledges that the need for public protection is of paramount importance to the Law Society in its role as regulator.

8. In June 2005, Convocation approved proposals to relax the notice and evidentiary procedural rules applicable to applications for interlocutory suspensions[1] , and in the Committee's view, this will assist in addressing the issues that arise where a member is charged with a serious criminal offence. However, in these cases, the Crown may or may not share information with the Law Society about a case, and the Law Society usually cannot use Crown evidence in prior or concurrent disciplinary proceedings without interfering with the administration of the criminal justice system. This in turn restricts the Law Society's ability to respond with complete formal discipline until criminal charges are resolved and a complete case can be presented without fear of undermining the criminal prosecution.

9. Where serious charges are involved, the Society should be able to apply for suspension of a member on the basis of more limited evidence. Even in these cases, there is a risk that the Law Society may interfere with the Crown's case. A member, in defending a motion for an interlocutory suspension, could seek to cross-examine witnesses who will be Crown witnesses in the criminal proceedings. Creating a procedural rule for such cases, for example, to restrict a member's ability to cross-examine and/or call *viva voce* evidence in the member's defence of a motion for an interlocutory suspension would not be a solution to avoid interference with the Crown's case, as such a rule would violate the principles of natural justice.

10. The Committee, in considering appropriate solutions, focused on the member, and the imposition of a requirement that he or she report to the Law Society the fact of criminal charges and convictions. The Committee noted other law societies' regulations in this respect. The Law Society of British Columbia requires a written report of charges from its members. The Law Society of Alberta may make an order (without a proceeding) suspending a member upon his or her conviction of an indictable offence. The Law Society of Saskatchewan requires a member's report of a finding of guilt with respect to certain charges. The Law Society of Manitoba requires a member's report of a conviction. The Nova Scotia Barristers' Society requires a member's report of a conviction and in response, can exercise a number of remedies at a show cause hearing, including suspension. [2]

11. In the Committee's view, the member's notice to the Society of the charges will provide the Society with information it needs to take appropriate steps, including a motion for an interlocutory suspension order, to ensure that the public interest is protected.

Overview of the Policy

12. The Committee determined that the requirement for a report should be limited to certain types of serious charges. The following explains the proposal, which is reflected in draft By-Law 20 in the motion on page 4.

---

[1] Convocation made the following amendments among others, to the *Rules of Practice and Procedure:*

a. an amendment to permit a motion for an interlocutory suspension and restriction order to be heard without notice to the member; and
b. an amendment to permit the introduction of a broad range of evidence on such motions by incorporating s. 15 of the *Statutory Powers Procedure Act.*

[2] See Appendix 1 for details of these regulations.

a. The mandatory reporting requirement would extend to all members and student members[3] who are to report to the Law Society, as soon as practicable, and in writing,

   i. any outstanding charges under the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Income Tax Act of Canada* or any Province of Canada, any securities act of any Province of Canada, or under any other federal or provincial statute that involve, implicitly or explicitly, an allegation of dishonesty, or relate to the practice of law;
   ii. the disposition of any of the above charges, including findings of guilt and convictions.

b. No notification would be required where the member or student member has been charged with an offence under the *Criminal Code* that can only be proceeded with summarily. This exemption does not apply to hybrid offences where the Crown has elected, or may elect, to proceed summarily. The proposed by-law does not refer to hybrid offences, as these offences are deemed to be indictable offences until the Crown elects to proceed summarily;

c. No notification would be required where the member or student member has been charged under a private prosecution, as contemplated by section 507.1[4] of

---

[3] The proposal does not extend to individuals who are applying for readmission (as a member) to the Law Society. The Committee proposes that Convocation defer this issue and await the legislative amendments in Bill 14 (introduced October 27, 2005) with respect to paralegal regulation and other matters. The proposed legislative amendments focus on licensees (i.e. distinguishing between lawyers and paralegals by granting to each a different class of license) rather than members. Under this approach, a lawyer would be licensed as a barrister and solicitor and would be entitled to practise law in Ontario.

[4] 504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or
(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

...

the *Criminal Code*, unless and until any finding of guilt has been made against the member or student member.

507.1 (1) A justice who receives an information laid under section 504, other than an information referred to in subsection 507(1), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.

(2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.

(3) The judge or designated justice may issue summons or warrant only if he or she

(a) has heard and considered the allegations of the informant and the evidence of witnesses;

(b) is satisfied that the Attorney General has received a copy of the information;

(c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and

(d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.

(4) The Attorney General may appear at the hearing held under paragraph (3)*(a)* without being deemed to intervene in the proceeding.

(5)If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

(6) If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

(7)If a hearing in respect of an offence has been held under paragraph (3) *(a)* and the judge or designated justice has not issued a summons or a warrant, no other hearings may be held under that paragraph with respect to the offence or an included offence unless there is new evidence in support of the allegation in respect of which the hearing is sought to be held.

(8) Subsections 507(2) to (8) apply to proceedings under this section.

(9) Subsections (1) to (8) do not apply in respect of an information laid under section 810 or 810.1.

Appendix 1

OTHER CANADIAN LAW SOCIETIES' RULES AND REGULATIONS ON REPORTING CRIMINAL AND OTHER CHARGES

British Columbia

Rules of Professional Conduct

Reporting criminal charges
3-90 (1) Subject to subrule (2), a lawyer, articled student or applicant who is charged with an offence under a federal or provincial statute must, as soon as practicable, give written notice to the Executive Director of

(a) the particulars of the charge, and

(b) the disposition of the charge and any agreement arising out of the charge.

(2) No notification is required under subrule (1) if a lawyer, articled student or applicant is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act.*

Alberta

Legal Profession Act

s. 83(2) If a member is convicted of an indictable offence, the Benchers, without any other proceedings under this Part and before the expiration of the appeal period relating to the conviction, may order the suspension of the membership of the member whether or not an appeal is commenced.

Saskatchewan

Legal Profession Act

Notification of Convictions and Proceedings

149A. (1) The following persons shall, in writing, advise The Law Society of Saskatchewan of any plea of guilty or finding of guilt with respect to any offence under The Criminal Code of Canada, The Controlled Drugs and Substances Act, any Securities Act of any Province of Canada, any Income Tax Act of Canada or any Province of Canada, any Act in relation to Bankruptcy, and The Customs and Excise Act, or any legislation similar to any of the foregoing, in any jurisdiction:

(a) a student-at-law;

(b) an active member with respect to any convictions occurring hereafter;

(c) an applicant for admission or reinstatement.

(2) A member shall also advise the Law Society immediately of any investigation or proceedings concerning the member conducted by any other professional or regulatory body.

Manitoba

Code of Professional Conduct

Chapter 15
5.1 The lawyer or law corporation must notify the chief executive officer immediately upon being convicted of an offence under a federal statute. Following such notification, the complaints investigation committee may request the member or a voting shareholder of the law corporation to appear before the committee to discuss the conviction. [see Rule 2-80]

Rule 2-80 (pursuant to the *Legal Profession Act)*

Notice of conviction
2-80(1)A member or law corporation must notify the chief executive officer immediately upon being convicted of an offence under a federal statute.

Nova Scotia

Legal Profession Act

38(1) Where a member of the Society has been convicted or found to be guilty in or out of Canada of any offence that is inconsistent with the proper professional behaviour of a member of the Society, including a conviction under

(a) the Criminal Code (Canada);

(b) the Controlled Drug and Substances Act (Canada);

(c) the Income Tax Act (Canada); or

(d) such other legislation as is prescribed in the regulations,

the Complaints Investigation Committee may, by such notice as it prescribes, require the member to attend a show-cause hearing to establish why the member should not be subject to review by the Complaints Investigation Committee.

(2) During the course of a show-cause hearing pursuant to subsection (1), the Complaints Investigation Committee may, where it considers it proper, take any of the actions authorized by clauses 36(2)(f) to (n) or Section 37.

(3) When the Complaints Investigation Committee has concluded a show-cause hearing pursuant to subsection (1), it may, where it considers it proper, take any of the actions authorized by subsection 36(2) or Section 37.

(4) For the purposes of subsection (1), a certificate of conviction of a member of the Society is conclusive evidence that the member has committed the offence stated therein, unless it is proved that the conviction has been quashed or set aside.

(5) Where a member of the Society has been convicted of an offence referred to in subsection (1), the member shall report the conviction to the Executive Director within thirty days of the conviction having been entered.

36(1) The Complaints Investigation Committee has all the powers conferred by this Act and the regulations in the discharge of its functions as well as the powers, privileges and immunities of a commissioner under the Public Inquiries Act.

(2) The Complaints Investigation Committee may do one or more of the following things during or after an investigation:

(a) require a member of the Society to attend before it for purposes of assisting with the investigation or for any other purpose consistent with the objects of the professional responsibility process;

(b) dispose of a complaint in a manner prescribed by the regulations;

(c) issue a reprimand with the consent of the member of the Society;

(d) authorize the Executive Director to lay a charge against a member of the Society;

(e) recommend approval of a settlement agreement to a hearing panel;

(f) order a financial audit of the practice of a member of the Society to be carried out by a person or persons qualified to do so;

(g) order a review of the practice of a member of the Society to be carried out by any person or persons;

(h) where a review conducted pursuant to clause (g) identifies inadequacies in the member's practice or conduct that pose a substantial risk that the member will face disciplinary action in the future, assist the member to remedy those inadequacies;

(i) require a member of the Society to submit to an assessment or examination, or both, to determine whether the member is professionally competent;

(j) receive reports from the audit, review, examination or assessment referred to in clauses (f), (g), (h) or (i);

(k) after providing a member of the Society with an opportunity to be heard, and where it is in the public interest to do so, direct the member to comply with any reasonable requirements specified by the Complaints Investigation Committee as a result of its consideration of the audit, review, examination or assessment referred to in clauses (f), (g), (h) or (i);

(l) direct that there be an application pursuant to Section 50 regarding the trust account of a practising lawyer;

(m) by resolution, appoint a receiver pursuant to Section 51;

(n) by resolution, direct that the Society apply to the court for the appointment of a custodian pursuant to Section 53;

(o) in addition to the other powers conferred by this subsection, where the member of the Society complained against is a law firm, require the law firm to do what the Complaints Investigation Committee reasonably requires to assist in an investigation.

37(1) The Complaints Investigation Committee may, by resolution, where in its opinion it is in the public interest to do so,

(a) suspend a practising certificate; or

(b) impose restrictions or conditions on a practising certificate, during or following an investigation until the suspension, restrictions or conditions are rescinded or amended by the Complaints Investigation Committee or a hearing panel.

(2) The power of the Complaints Investigation Committee pursuant to subsection (1) may be exercised with or without hearing the practising lawyer.

(3) The Complaints Investigation Committee shall, forthwith after passing a resolution pursuant to subsection (1), provide a copy of the resolution to the practising lawyer to whom the resolution applies, including the reasons for a decision to suspend the practising certificate or impose restrictions or conditions on the practising certificate.

(4) A lawyer who receives written notice pursuant to subsection (3) may request in writing, a meeting with the Complaints Investigation Committee.

(5) Where a request is received pursuant to subsection (4), the Complaints Investigation Committee shall

(a) provide an opportunity for the lawyer to meet with the Complaints Investigation Committee within ten days of the written request; and

(b) after meeting with the lawyer, may confirm, vary or terminate the suspension, restrictions or conditions imposed pursuant to subsection (1).

(6) Where the Complaints Investigation Committee holds a hearing before making a determination under subsection (1), or where a lawyer requests the opportunity to meet with the Complaints Investigation Committee pursuant to subsection (4), the lawyer has the right to

(a) be represented by counsel, at the lawyer's expense;

(b) disclosure of the nature of the complaint; and

(c) an opportunity to present a response and make submissions.

(7) A lawyer may appeal to the Nova Scotia Court of Appeal on any question of law from a decision of the Complaints Investigation Committee pursuant to this Section, in accordance with Section 49.

FOR DECISION

CONSULTATIONS WITH REAL ESTATE PRACTITIONERS ON PROPOSED RESIDENTIAL REAL ESTATE TRANSACTION GUIDELINES AND AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT* (JOINT MOTION OF THE PROFESSIONAL DEVELOPMENT & COMPETENCE AND PROFESSIONAL REGULATION COMMITTEES)

MOTION

13. That Convocation approves consultation with the profession as outlined in Appendix 4 with respect to proposed residential real estate guidelines and amendments to the *Rules of Professional Conduct* relating to real estate issues appearing in Appendices 1, 2 and 3.

Introduction

14. In the spring of 2005, through the efforts of the Chief Executive Officer, the Working Group on Real Estate Issues was created to focus on issues arising in real estate practice that relate to the Law Society's regulatory responsibilities. Mortgage fraud, standards of practice and facilitating the public's access to lawyers knowledgeable about real estate law are examples of the issues being addressed in this forum. The aim is to deal with these matters in a more comprehensive way through the united efforts of the organized bar and the Law Society. The Working Group includes benchers, representatives from the Ontario Bar Association (OBA) Real Property Section and the County and District Law Presidents' Association (CDLPA) and relevant Law Society staff.[5]

15. In a series of meetings beginning in April 2005, the working group has been focusing on two issues: practice guidelines for residential real estate transactions and new *Rules of Professional Conduct* intended to assist in preventing mortgage fraud.

16. A third issue referred to the Society from the OBA some time ago has also been discussed at the working group. It involves a proposal to amend the Rules that require a written consent or written confirmation of an oral consent from an institutional lender in a joint retainer involving a borrower and the lender.

---

[5] Members of the Working Group are Bradley Wright, Alan Silverstein, Ray LeClair (OBA), Clare Brunetta (CDLPA), Syd Troister (Counsel to the Society on real estate issues), Malcolm Heins, Zeynep Onen and staff from the Professional Regulation Division, Professional Development & Competence Department and Policy and Tribunals.

17. The Working Group determined that these proposals, which are described in this report, should be the subject of consultation with the real estate bar before further steps are taken to implement them within the Law Society's regulatory scheme. Following a joint report to the Committee and the Professional Development, Competence & Admissions Committee on the work of the Working Group, the Committees agreed with the Working Group's proposals and seek Convocation's approval to engage in the consultations. A plan for consultations with the profession is outlined at Appendix 4.[6]

18. In a broad sense, the Committees believe that the problems on which the Working Group's regulatory proposals focus are linked to concerns about access to legal services. Using mortgage fraud as an example, if efforts to address these frauds are seen as being ineffective, the risk is that lenders will eventually use selected large law firms for all mortgage work in the province. Alternatively they may use in-house counsel. Given the importance of real estate and mortgage work to many lawyers in smaller firms outside of the greater Toronto area, large-scale reductions in the availability of work will have a large impact on their practice. If this work is no longer available, the viability of these firms will be threatened and the communities they served could lose their local services in all areas of practice. In the Committees' view, the proposals should help to address these concerns.

Proposed Residential Real Estate Transactions Guidelines

Background

19. One of the first issues discussed at the Working Group was the need to formulate minimum standards or guidelines for residential real estate practice. Such guidelines would serve several purposes:

    a. to inform and educate the profession on expected standards of practice by lawyers involved in residential real estate transactions;

    b. to assist practitioners to better inform a client of what he or she may expect of a lawyer whom the client engages for a residential real estate transaction;

    c. as the basis for a communications strategy by legal organizations, to inform the public of the inherent value in retaining a lawyer for a real estate transaction; and

    d. to illustrate to groups external to the Law Society and the legal profession (e.g. realtors, mortgage brokers, financial institutions) the standards that the legal profession has set for itself in residential real estate transactions.

20. The OBA and CDLPA jointly had begun work on practice standards for real estate lawyers and the Working Group decided to use this document as the basis for the residential real estate transactions guidelines that the Law Society and the legal organizations would publish.

The Scope and Content of the Guidelines

[6] The cost of the consultation as proposed will be covered by current operational budgets.

21. The draft guidelines, the first of which appears at Appendix 1 as an example[7] , are based on six broad-based principles that underlie the standards of practice that real estate lawyers should observe.[8] Rather than a detailed "checklist" format, the guidelines offer client-centred professional principles with examples of how they should be practically implemented. While a checklist approach may be useful to a degree, the Committees agreed that it would be difficult if not impossible in a practice area like real estate to maintain detailed and relevant standards for the profession by way of checklist.

22. The guidelines supplement and in some cases mirror the *Rules of Professional Conduct* and other regulatory requirements. They are not intended to be exhaustive, but would be used to indicate the minimum level of competent and professional residential real estate practice. The guidelines essentially build on the Rules, which are intended to be and are used as an enforcement tool, but the guidelines themselves would not be used to enforce standards of practice.

23. The guidelines are modeled after the Law Society's Practice Management Guidelines, using a point-by-point format, with appropriate references to the Rules and By-Laws. The Executive Summary introduces the Guidelines and their purpose, discusses the intentional use of terminology which lends itself to a guideline as opposed to Rule format, and acknowledges that the Guidelines must necessarily evolve to reflect the evolving practice of law.

Consultation on the Guidelines

24. The views of real estate practitioners will be instructive in determining the merits of these Guidelines, and as such, the Committees agree that the profession should be consulted on them.

New Rules to Prevent Mortgage Fraud

Introduction and Background

25. As reported to Convocation by the Director of Professional Regulation on March 24, 2005, the Law Society is aware of increasing instances of fraud in relation to mortgage loan transactions. These frauds usually involve either complicit or fraudulent purchasers, and/or real estate agents, mortgage brokers and unfortunately, in some cases, lawyers. The Law Society is concerned about the increasing incidence of lawyer involvement in these fraudulent real estate transactions. Additional resources have been allocated to address this issue and, as reported in March, the Law Society is working with other institutions, agencies and authorities in an effort to identify ways to prevent, detect and counteract fraudulent activity.

26. As the Law Society is responsible for regulating the legal profession in the public interest, it must be proactive in recognizing problems and taking steps to address them.

---

[7] The format of the first guideline was revised to be consistent with other Law Society guidelines, as described in paragraph 23. The remaining guidelines are currently being similarly revised in consultation with the OBA and CDLPA representatives.

[8] The guidelines cover client/lawyer relationship, due diligence, proper file & record-keeping, document preparation & registration, financial issues and extraordinary matters.

To assist the Society in addressing fraud in relation to real estate transactions, the Committees are proposing changes to the *Rules of Professional Conduct.*

Impact of Mortgage Fraud on the Legal Profession

27. While no one has a precise figure on the cost of fraud, it has been reported that in 2001, the cost of mortgage fraud across Canada was between $150 and $300 million, a substantial increase from prior years. In a press release, First Canadian Title reported that in January 2004 alone, the value of fraud claims made to the title insurer was 28 percent of the value of all fraud claims made since the company's inception in 1991. This year, costs are expected to rise even further.

28. There are also costs to the legal profession. The Law Society's inventory of mortgage fraud investigations is very large and growing, and presents a tremendous cost to the Law Society and thus the individual members of the profession. The cost of mortgage fraud to the profession is already manifesting itself in annual fee increases to cover the high cost of investigating and prosecuting these cases. There is also a huge potential for claims to LawPRO.

29. In addition to the estimated monetary impact, mortgage fraud damages the profession's credibility and reputation with the public.

Particulars of the Proposals

30. The proposed rules will institute preventative measures with respect to the lawyer's representation of clients in a real estate transaction. Three new proposed rules are described below, consisting of amendments to existing rules 2.04 on Avoidance of Conflicts of Interest and Rule 2.02 on Quality of Service. The amendments are also shown in the context of these rules in Appendix 2.

Amendment #1- A general prohibition against acting for both the vendor and the purchaser in a real estate transaction, with certain exceptions: New Rules 2.04(11.1) and (11.2)

31. The text of the proposed new rules is as follows:

> Prohibition Against Acting for More Than One Party in a Real Estate Transaction
>
> 2.04 (11.1) Subject to sub-rule (11.2) a lawyer or two or more lawyers practicing in a law firm shall not act for or otherwise represent both transferor and transferee in an arm's length real estate transaction. For the purposes of this subrule, "arm's length" shall have the same meaning as defined in the *Income Tax Act (Canada)*.
>
> 2.04 (11.2) Provided there is no violation of this rule, a lawyer may act for or otherwise represent both a transferor and a transferee in a real estate transaction if
>
> a. lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the real estate transaction, or

b. the transaction is pursuant to the administration and/or settlement of an estate.

32. The term "remote location" in rule 2.04(11.2)(a) might require more definition. The language in the new rule is borrowed from existing rule 2.04(12) (the "two lawyer rule" for mortgage or lending transactions)

Reasons for the Rule

33. The Law Society's Mortgage Fraud Team has identified certain real estate practices that those committing mortgage fraud are taking advantage of. One example is a lawyer or the lawyer's partner, associate or employed lawyer acting for both vendor and purchaser in a real estate transaction.

34. While it is not known how many real estate practitioners act for more than one of the vendor or purchaser in a residential real estate transaction, it is customary for the lawyer acting for the purchaser/mortgagor to also act for the lender in placing a mortgage to assist in funding the purchase price.

35. The proposed rules have been drafted to have a minimal impact on real estate practitioners, especially in smaller communities, while providing maximum impact on mortgage fraud prevention. As noted earlier in this report, real estate and mortgage work is a large part of the business of small firms and sole practices especially in these smaller communities.

Amendment #2 - Addition to the joint retainer rule: New Rule 2.04 (6.1)

36. The proposed new rule requires a lawyer who acts for both a borrower and lender to make full disclosure to the lender. The proposed rule reads as follows:

> 2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the mortgagee or lender, in writing, before completion of the transaction,
> all material facts that are relevant to the transaction
> *[or]*
> any information that could affect the lender's decision to advance funds.

37. "Material" means any unusual sales activities within the last year, or any changes to the agreement of purchase and sale such as additional deposits or credits to the purchaser. This could be the subject of new commentary to the rule.

38. Alternative wording is provided if it is determined that "material" in this context is intended to mean "any information that could affect the lender's decision to advance funds".

Reasons for the Rule

39. The requirement to provide notice is intended to emphasize the lawyer's existing duty in a joint retainer situation to share information relevant to the joint retainer with each of the

clients and to alert honest lawyers about the "incidents" of fraud. In addition to the examples in paragraph 37, if a lawyer is able to determine the use of false identification before mortgage funds are advanced, the lawyer must inform the lender.

40. In mortgage fraud cases investigated by the Law Society, there has been a lack of full disclosure by the lawyer who acts for both borrower and lender. This rule will make it more difficult for members charged with mortgage fraud to allege that they were only "dupes".[9]

41. The rule should also help to reduce the incidence of lawyer identification theft by fraudsters. In some cases of fraud, a fraudster might pose as a lawyer representing a fictitious purchaser. Notice to the lenders is intended to prompt the lenders to check proper identification and contact particulars before sending instructions to a chosen lawyer.

Amendment #3 - A requirement to provide final reports to lenders within 90 days of the registration of the mortgage: New Rule 2.02 (14)

42. The text of the proposed rule is as follows:

> Requirement to Provide Final Reports to Lenders
>
> 2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 90 days of the registration of the mortgage.

43. One other law society has a rule that deals with reports on mortgage transactions. The Law Society of British Columbia has a very specific rule (the equivalent of our By-Laws) which requires a lawyer to make a written report to the Executive Director of the Law Society if he or she does not receive a discharge within 60 days of closing.

Reasons for the Rule

44. The rule codifies the expected practice in real estate transactions that a lawyer acting for a lender will report on the registration of the mortgage within a reasonable period of time.

Anticipated Effects of the New Rules

45. The new rules should assist the Law Society in enforcing standards of conduct that relate to mortgage fraud activities, and should also help the profession to police itself with respect to mortgage fraud. These standards may also assist lenders in reducing the problems.

46. It is anticipated that these efforts will also increase awareness among police agencies, crown attorneys and judges of the severity and criminal nature of the problem. This

[9] The commentary to Rule 2.02(5) (not assisting a client in criminal activity, etc) state that “A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.”

should reduce the burden on the Law Society, which currently is the primary authority responding to the problem.

47. Over time, these changes should result in a reduction in the number of investigation files, which will also mean reduced costs to the Law Society and to the profession.

The Need for Consultations on the New Rules

48. It is anticipated that the proposed rule amendments may create difficulties for some lawyers. For example, the proposed rules may affect lawyers' ability to act in certain types of transactions where it is common practice for one lawyer to act for both transferor and transferee in the transaction, and may mean less flexibility for lawyers in dealing with their clients.

49. The views of real estate practitioners will be instructive in determining the practical viability of these rules. The practitioners' need to effectively serve clients is an interest the Society must balance with the need to more effectively address mortgage fraud issues.

Amendments to the Joint Retainer Rule for Loan Transactions with Institutional Lenders

Introduction and Background

50. The proposed amendments to rule 2.04 on conflicts of interest would exempt a lawyer from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender.

51. This issue arose some time ago, when the Society received a letter from the then chair of the Ontario Bar Association (OBA) Real Property Section, Steven Pearlstein. He raised a concern about the ability of a lawyer to comply with the requirement to obtain consent from an institutional lender in a joint retainer involving a borrower and the lender. Such transactions are an exception to the rule that prohibits the same lawyer from acting for a borrower and lender (rule 2.04(12)). The lawyer's responsibilities in a joint retainer are set out in rules 2.04(6) through (10).

52. As Mr. Pearlstein explains in his letter, the issue has arisen because of the way "consent" is defined in the Rules, a new feature of the Rules adopted in 2000:

> …a number of lawyers may be having difficulty complying with the requirement to obtain consent when acting for both a borrower and lender…
> …the lawyer is required to give the proposed clients specified information (which varies depending on whether the lawyer has a continuing relationship with one of the clients), and then under subparagraph 2.04(8), "obtain their consent."
> "Consent" is defined in Rule 1.02 as:
>
> > a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or
> >
> > an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent.

> …[O]btaining such consent from a financial institution is almost impossible in the residential context. …[T]he Rules of Professional Conduct do not contemplate a variation on "negative billing". In other words, the lawyer cannot simply send a letter to the lender advising of the conflict and stating that the lawyer will act for both unless advised to the contrary.
>
> Furthermore, the Rules…do not contemplate a blanket "in advance" consent from the financial institution that could be included in the Instructions to Solicitor. The Rule expressly requires that the documenting of the consent occur after the disclosure by the lawyer.
>
> This was not as significant an issue under the old Rules…, as "consent" was not defined and the exact process was not specified in the Rules.
>
> As a result, we would strongly request that you consider amending the Rules…to provide that …a lawyer may rely on a "blanket" consent issued by the lending institution before or after the retainer in that transaction.

53. As a result of staff meetings with LawPRO and OBA representatives, the Committee learned that institutional lenders will not generally provide a separate consent to the lawyer in the transaction. Some financial institutions apparently are not amenable to including a "blanket consent" in their standard form instructions. The assumption is that lenders are consenting to the joint retainer by virtue of the fact that they provide loan documents to a lawyer knowing the lawyer is acting for the borrower.

54. In the summer of 2003, policy staff canvassed financial institutions on the disclosure and consent issue in loan transactions. Some financial institutions include in their loan documentation notice and consent provisions similar to the language in the Society's Rules on joint retainers (rules 2.04(6) and following), but they generally confirmed that they do not provide a separate written consent to the lawyer acting for both parties to the loan transaction. One suggestion made to the banks was to include a standard clause in the mortgage or loan instructions that reflects the disclosure and consent, given the practice noted above. This would avoid a separate written consent/confirmation of consent for every transaction.

55. Ultimately, the decision was made to pursue amendments to the joint retainer rules to exempt lawyers who act jointly for institutional lenders and borrowers from the requirements to advise and obtain consent from institutional lenders.

56. The rules of conduct of other law societies were reviewed. Only the Law Society of British Columbia addresses this issue in a general fashion in an appendix to the rules that deal with real property transactions. The following is the relevant section:

> Advice and consent
>
> 6. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 of this Appendix, then the lawyer must, as soon as is practicable,
>
> (a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are

concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

[amended 11/99]

Suggested Approach

57. The proposal is to amend the Rules to provide the exemption described above. The amendment would take the form of new subrule 2.04(9), with corresponding changes in existing subrules 2.04(6) through (10). The proposed amendments appear in Appendix 3.

58. The amendments would apply to a retainer in which a lawyer is acting for both a lender and borrower in the circumstances described in rule 2.04(12)(c).[10] In these situations, the lenders will be informed of the identity of the borrower's lawyer and proceed on the understanding that that lawyer will be acting for both borrower and lender. By virtue of the amendments, simultaneously with the lawyer's receipt of instructions from the lender for the transaction, the lender will be deemed to have received the disclosure required under subrule (6) and the lawyer will be deemed to have received the lender's consent under subrule (8) as defined in rule 1.02. In effect, the lender's consent would be effective upon the lawyer's acceptance of instructions from the lender to act in the

[10] Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

(a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,

(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,

...

[emphasis added]

transaction. Commentary is also proposed to address certain matters related to these circumstances.

Consultation with the Profession

59. As with the rules to address mortgage fraud, the Committees agree that the profession should be consulted on this proposed amendment. The Committees also suggest that financial institutions be consulted on the proposal following consultations with the profession.

The Plan for Consultation with the Profession

60. Staff in the Professional Development & Competence Department prepared a draft plan for consultation with the real estate bar, which appears at Appendix 4. The Committees agree with this proposal.

61. The plan addresses the stakeholders to be consulted, the activities in advance of in-person meetings with the stakeholders, a proposed timetable for the consultation and a proposed schedule of meetings throughout the province.

62. The Committees believe that in-person consultations, rather than a notice to the profession with a call for input, is necessary for this initiative. These consultations will not only provide the necessary feedback on the proposals, but can be used to create an awareness among and provide a venue for discussion with real estate lawyers about issues relevant to this area of practice. This information will be useful to the Law Society and the legal organizations.

63. Following the consultations, the information obtained will included in a report to the Committees, which will then report to Convocation on these proposals.

Appendix 1

DRAFT

RESIDENTIAL REAL ESTATE TRANSACTIONS
PRACTICE GUIDELINES

Executive Summary

Purpose

The *Residential Real Estate Transaction Practice Guidelines* contain recommended procedures that lawyers should follow when acting for clients in residential real estate transactions. The guidelines focus on six client-centered professional principles: Client/Lawyer Relationship, Due Diligence, Proper File and Recordkeeping, Document Preparation and Registration, Financial Issues and Extraordinary Matters.

The *Guidelines* are not intended to replace a lawyer's professional judgment or to establish a one-size-fits-all approach to the practice of law. Subject to those provisions of the *Guidelines* that incorporate legal, by-law or *Rules of Professional Conduct* requirements, a lawyer should consider the circumstances of the individual transaction and choose and recommend to the

client the procedure that best suits the individual transaction. In appropriate circumstances the lawyer may deviate from the *Guidelines*. Whether a lawyer has provided quality service will depend upon the circumstances of each individual transaction.

Terminology

Certain aspects of the Guidelines are mandatory and others are not.

The term “shall” is used in those instances where compliance is mandated by either the By-laws made pursuant to the *Law Society Act* or the *Rules of Professional Conduct.*

The term “should” or the phrase “should consider” connotes a recommendation. The terms refer to those practices or policies that are considered to be a reasonable goal for maintaining or enhancing client service.

The term “may” or the phrase “may consider” convey discretion. Lawyers may or may not pursue these suggested policies or practices depending upon the particular circumstances of the transaction.

Living Document

By their very nature the *Guidelines* are not static: professional requirements, standards, techniques and practices change. The Guidelines will be reviewed regularly and revised where necessary to reflect the evolving practice of law.

Introduction

A lawyer who undertakes to perform legal services on behalf of a client must perform such services to the standard of a competent lawyer. Rule 2.01 provides a definition of the term “competent lawyer”. A competent lawyer includes a lawyer who ascertains client objectives, develops and advises the client on appropriate courses of action, communicates with the client at all stages of a matter in a timely and effective manner and complies in letter and in spirit with the *Rules of Professional Conduct.*

A lawyer who undertakes professional services on behalf of a client in a residential real estate transaction should be guided by the following principles.

Guideline 1
Client/Lawyer Relationship

Communication

At the commencement of the lawyer-client relationship, the lawyer should ascertain all necessary and relevant information regarding the client, the property and the transaction and clarify and confirm the client’s expectations about the lawyer’s role and responsibilities in the transaction.

- □ he lawyer should communicate with the client at the outset of the retainer to obtain information about the property. This information might include but is not limited to information regarding:

- the number of residential units in the property;
- the manner in which the property is serviced – public or private;
- whether the property tenanted;
- whether the property is located on a ravine, waterfront or highway or adjacent to any significant physical features;
- whether the property is subject to or near hydro installations; and
- any other matter that may impact on the choice of searches.

□ The lawyer should communicate with the client at the outset of the retainer to obtain information about the client's intentions regarding the future use of the property.

□ The lawyer should advise the client of the options available to assure title in order to protect the client's interests and minimize the client's risk. In this regard, the lawyer must comply with his or her obligations regarding title insurance and real estate conveyancing pursuant to subrules 2.02(10) – 2.02(13) of the *Rules*.

□ The lawyer should provide the client with a timely estimate of the fees or disbursements involved so that the client is able to make an informed decision. In discussing fees and disbursements with clients, the lawyer should provide a reasonable estimate of the total cost as opposed to an unreasonable estimate designed solely to garner the client's business.

□ The lawyer should make an early determination as to whether to advise the client to obtain a survey of the property (for instance, based upon the client's statement of anticipated use for the property) and should advise the client accordingly.

□ The lawyer should consider forwarding an initial letter to the client at the commencement of the lawyer-client relationship.

The lawyer may consider including the following topics in the initial letter to the purchaser:

- the name of the lawyer primarily responsible for the matter;
- the name of any person in the firm who will be working on the file and the functions that the person will be performing;
- confirmation that the lawyer will be supervising all non-lawyers who are working on the file and that the lawyer is available to discuss any issues with the client;
- an estimate of fees and disbursements;
- the amount of land transfer tax payable on registration;

- an explanation of the nature of closing adjustments and confirmation that adjustments will be reviewed in detail before closing;
- an explanation of joint retainer issues where lawyer will be acting for more than one client in the transaction (e.g. purchaser and lender), including the inability of the lawyer to keep information confidential as between the two clients;
- a request for instructions regarding title and an explanation of the difference between a joint tenancy and a tenancy in common;
- a request for information regarding the type of property (number of units and approximate age of the property), the type of heating, mortgage and fire insurance policy;
- a request for any available survey and for information on any changes to the property not reflected on the survey, and an explanation of the importance of a survey;
- if the property is a condominium, confirmation of the extent of review of the Status Certificate and attachments;
- instructions regarding arranging utility and other service accounts;
- if the property is a new home, instructions regarding the Tarion inspection, GST and the New Home Rebate and additional types of adjustments that can be expected;
- instructions regarding the form of funds that will be required shortly before closing (certified cheque or bank draft); and
- information regarding how and when keys will be available.

A lawyer may consider including the following topics in the initial letter to the vendor:

- the name of the lawyer primarily responsible for the matter;
- the name of any person in the firm who will be working on the file and the functions that the person will be performing;
- confirmation that the lawyer will be supervising all non-lawyers who are working on the file and that the lawyer is available to discuss any issues with the client;
- an estimate of fees and disbursements;
- a request for the existing transfer, mortgage details (including most recent statement), realty tax bill, and contact address for after closing;

- a request for any available survey and for information on any changes to the property not reflected on the survey;
- instructions regarding arranging final meter readings; and
- explanation of GST.

Responsibility

The lawyer is responsible for carriage of the client's matter and shall have knowledge of legal issues affecting the matter that require a lawyer's expertise to address.

1. The lawyer must comply with the requirements of Rule 5.01 of the *Rules of Professional Conduct* regarding supervision.

2. While a lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations, the lawyer shall not delegate to a non-lawyer the ultimate responsibility for:

   - review of a title search report or of documents before signing;
   - review and signing of a letter of requisition, a title opinion or reporting letter to the client; or
   - provision of a legal opinion regarding the insurance coverage obtained.

□ In transactions using the system for the electronic registration of title documents, only a lawyer may sign for completeness any document requiring compliance with law statements.

□ If the lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall not permit others including a non-lawyer employee to use the lawyer's diskette and must not disclose his or her personalized e-reg™ pass phrase to others.

Accessibility

The lawyer should make him/herself accessible to discuss matters involved in the transaction that should properly be dealt with by a lawyer.

□ A lawyer should be reasonably available to speak to clients as well as the lawyer on the other side of the transaction at their request.

Reporting

The lawyer shall report in a prompt and clear manner to the client(s), as reasonably required throughout the transaction on an interim basis and in all cases at the end of a transaction.

□ Prior to closing, the lawyer should review with the client and receive written confirmation from the client regarding:

- the manner in which title is being assured;
- where title insurance is not being used, the post-policy date coverages which the client is effectively waiving (e.g. regarding post-closing encroachments onto the property and fraud) should be acknowledged by the client;
- the state of title, including the coverage that will be available under the client's title insurance policy, if applicable. The review should include matters such as subdivision/development agreements, easements and restrictive covenants, even if the client is obliged to accept title subject to them;
- where title insurance is being used, whether the client has any adverse knowledge about the property, that could give rise to the insurer relying on the "knowledge" exclusion if the matter is not disclosed and "insured over" pre-closing;
- the manner in which the client is taking title and the implications of joint tenancy as opposed to tenancy in common;
- limitations on the lawyer's retainer, if applicable, regarding private services, condominium documentation, rental property or multi-unit issues;
- any necessary disclosure pursuant to the *Rules of Professional Conduct* regarding payments that the lawyer is receiving from other sources and how that relates, if applicable, to the client's disbursements;
- in a purchase transaction where title insurance has been used to assure title, the reporting letter to the client should not opine on title but should include the title insurance policy issued in favour of the client.

Appendix 2

2.02 QUALITY OF SERVICE

Honesty and Candour

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary
The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organization

(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Commentary
A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

[New – March 2004]

Encouraging Compromise or Settlement

(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal Proceedings

(4) A lawyer shall not advise, threaten, or bring a criminal or quasi criminal prosecution in order to secure a civil advantage for the client.

Dishonesty, Fraud etc. by Client

(5) When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

[Amended – March 2004]

Commentary
A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

A *bona fide* test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

Dishonesty, Fraud, etc. when Client an Organization

(5.1) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

(a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,

(b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,

(c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and

(d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.

(5.2) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and

(c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

Rules 2.02 (5.1) and (5.2) speak of conduct that is dishonest, fraudulent, criminal or illegal, and this conduct would include acts of omission as well as acts of commission. Indeed, often it is the omissions of an organization, for example, to make required disclosure or to correct inaccurate disclosures that would constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, would invoke these rules.

Once a lawyer acting for an organization learns that the organization has acted, is acting, or intends to act in a wrongful manner, then the lawyer may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, then the lawyer reports the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter in accordance with rule 2.09. In some but not all cases, withdrawal would mean resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

[New – March 2004]

Client Under a Disability

(6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary
A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

Medical-Legal Reports

(7) A lawyer who receives a medical legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary
The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medical legal reports to the client.

(8) A lawyer who receives a medical legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report but, if the client insists, the lawyer shall produce the report.

(9) Where a client insists on seeing a medical legal report about which the lawyer has reservations for the reasons noted in subrule (8), the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical legal report.

Title Insurance in Real Estate Conveyancing

(10) A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary
A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

(11) A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client.

(12) A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary
The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

(13) If discussing TitlePlus insurance with the client, a lawyer shall fully disclose the relationship between the legal profession, the Society, and the Lawyers' Professional Indemnity Company (LPIC).

Requirement to Provide Final Reports to Lenders

2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 90 days of the registration of the mortgage.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

a "conflict of interest" or a "conflicting interest" means an interest

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary
Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture financial interests that do not compromise a lawyer's duties to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest, because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

[Amended - May 2001, March 2004, October 2004]

Avoidance of Conflicts of Interest

(2) A lawyer shall not advise or represent more than one side of a dispute.

(3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary
A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's

unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:

a. The vulnerability of the client, both emotional and economic;

b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;

c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;

d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;

e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.

While this subrule does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

Amended – March 2004, October 2004]

Acting Against Client

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

unless the client and those involved in or associated with the client consent.

Commentary
It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if

(a) the former client consents to the lawyer's partner or associate acting, or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
(ii) the extent of prejudice to any party,
(iii) the good faith of the parties,
(iv) the availability of suitable alternative counsel, and
(v) issues affecting the public interest.

Commentary
The term “client” is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

(6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary
Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the mortgagee or lender, in writing, before completion of the transaction,
all material facts that are relevant to the transaction.
[or]
any information that could affect the lender's decision to advance funds.

(7) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary
Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

(i) no legal advice is required, and

(ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary
The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Affiliations Between Lawyers and Affiliated Entities

(10.1) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office,

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

(10.2) Where there is an affiliation, after making the disclosure as required by subrule (10.1), a lawyer shall obtain the client's consent before accepting a retainer under subrule (10.1).

(10.3) Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary
Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

In reference to clause (a) of subrule (10.1), see also subrule 5.01(6) on supervision and delegation.

[New - May 2001]

Prohibition Against Acting for More Than One Party in a Real Estate Transaction

2.04 (11.1) Subject to sub-rule (11.2) a lawyer or two or more lawyers practicing in a law firm shall not act for or otherwise represent both transferor and transferee in an arm's length real estate transaction. For the purposes of this subrule, "arm's length" shall have the same meaning as defined in the *Income Tax Act, Canada.*

2.04 (11.2) Provided there is no violation of this rule, a lawyer may act for or otherwise represent both transferor and transferee, in a real estate transaction if

(a) the lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the real estate transaction, or

(b) the transaction is pursuant to the administration and/or settlement of an estate.

Prohibition Against Acting for Borrower and Lender

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

(a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,

(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,

(d) the consideration for the mortgage or loan does not exceed $50,000, or

(e) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act (Canada)*.

[Amended - May 2001]

Multi-discipline Practice

(13) A lawyer in a multi-discipline practice shall ensure that non-lawyer partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

Unrepresented Persons

(14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(a) urge the unrepresented person to obtain independent legal representation,

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

(c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Commentary
If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Appendix 3

RULE 2.04 AVOIDANCE OF CONFLICTS OF INTEREST

…

(6) Except as provided in subrule (9), before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary
Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

(7) Except as provided in subrule (9), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Except as provided in subrule (9), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(9) If the joint retainer involves and is limited to a loan to a client, including any guarantee of that loan, from a lending client who is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business ("the lending client"),

(a) the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act,

(b) the lawyer is not required to

(i) provide the advice in subrule (6) to the lending client before accepting the employment,

(ii) provide the advice in subrule (7) if the other client is the lending client,

(iii) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing unless the lending client requires that its consent be reduced to writing.

[optional, or include in commentary as "should confirm":]

(c) where the lending client's written instructions are silent with respect to its consent for the lawyer to act, the lawyer shall confirm the lending client's consent in writing as soon as reasonably possible.

Commentary

Subrule (9) is intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

[optional, or include in rule as "shall provide written confirmation":]

Notwithstanding the above, the lawyer should provide written confirmation of the terms of the joint retainer and of the consent to act where such confirmation does not appear in the documentation from the institutional lender relating to the transaction.

(~~9~~10) Save as provided by subrule (~~10~~11), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

(i) no legal advice is required, and
(ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary
The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(~~10~~11) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Appendix 4

Real Estate Working Group
Plan for Consultations with Profession

Objective:
To efficiently and effectively communicate to Ontario lawyers who practice Real Estate law that the Ontario Bar Association, the County and District Law Presidents' Association and the Law Society of Upper Canada will be consulting the profession about new practice standards for real estate law as well as proposed changes to the *Rules of Professional Conduct.*

Target Market (stakeholders):
1. Real Property Section of the Ontario Bar Association
2. County and District Law Presidents' Association
3. Ontario Real Estate Lawyers Association
4. LawPRO
5. Certified Specialists in the area of Real Estate
6. All Members of the Law Society who practice 50% or more in the area of Real Estate law

Message:
To be determined.

Schedule of Activity:
In all instances except the *Ontario Reports* advertisements, the materials developed in support of the consultation process will be sent out with the request to participate. Those materials will include

- Proposed Rules changes documentation and explanations
- Proposed Guidelines
- List of questions prompting and directing the focus of discussions anticipated for the consultations

· Dates and locations for all consultations with a request to RSVP participation

Week	Activity
Week 1 (*five weeks before consultation)*	• Letters to CDLPA Presidents asking them to inform their members who practice Real Estate that consultations will take place • Letter to Michelle Strom at LAWPRO • OR advertisement announcing that consultations will take place
Week 2 *(four weeks before consultation)*	• Announcement that consultations are happening place on LSUC homepage – link to PDF of the OR advertisement • OR advertisement announcing that consultations will take place (repeat) • Announcement that consultations will take place on *e*-Bulletin
Week 3 *(three weeks before consultation)*	• E-mail a reminder to CDLPA Presidents attaching PDF of the OR advertisement • Broadcast e-mail members of Law Society who practice Real Estate Law at least 50% and Certified Specialists in Real Estate Law
Week 4 *(two weeks before consultation)*	• *Ontario Reports* advertisement with schedule • LSUC homepage announcement linking to schedule
Week 5 *(one week before consultation)*	• *Ontario Reports* advertisement with schedule (repeat) • Broadcast e-mail the schedule to members of Law Society who practice Real Estate Law at least 50% and Ce4rtified Specialists in Real Estate Law • Announce that the consultation schedule is available on the *e*-Bulletin
Week 6	• Consultations begin (see Consultation plan and schedule below)

Additional Activity:
Copy the OR advertisement and distribute to registrants at Ontario Bar Association and Law Society Real Estate CLE programs and at Ontario Bar Association's Real Property section meetings, if there are any during this period.

Consultation Plan and Scheduling
This plan assumes that we will begin the communications effort on or around December 1, 2006. Effectively, communications about the consultation will take us into the holiday season. Therefore consultations will begin in the New Year.

One meeting will be scheduled in each of the 8 regions of the province and an additional meeting in the GTA to support the number of practitioners in the area. These dates and locations will be included in all communications sent out to the membership so that the lawyers may plan their participation accordingly.

Consultation Schedule

Date	Location (building to be determined)	Consultation Reps from LSUC, OBA, CDLPA, other (to be determined and confirmed)
January 24	Metropolitan Toronto Region (East York, Etobicoke, North York, Scarborough, Toronto, York) *Location: Law Society of Upper Canada*	
January 26	Northwest Region (Fort Frances, Kenora, Thunder Bay) *Location: Thunder Bay*	
January 31	Metropolitan Toronto Region (extra meeting if necessary) *Location: Law Society of Upper Canada*	
February 2	Northeast Region (Haileybury, North Bay, Parry Sound, Sault Ste. Marie, Sudbury, Timmins) *Location: North Bay*	
February 7	East Region (Belleville, Brockville, Cornwall, Hawkesbury, Kingston, Napanee, Ottawa, Pembroke, Perth) *Location: Kingston*	
February 9	Central East Region (Barrie, Bracebridge, Coburg, Lindsay, Newmarket, Peterborough, Whitby) *Location: Peterborough*	
February 14	Central West Region (Brampton, Guelph, Milton, Orangeville, Owen Sound, Walkerton) *Location: Guelph*	
February 16	Central South Region (Brantford, Cayuga, Hamilton, Kitchener, Simcoe, St. Catherines, Welland) *Location: Hamilton*	
February 21	Southwest Region (Chatham, Goderich, London, Sarnia, St. Thomas, Stratford, Windsor, Woodstock) *Location: London*	

FOR DECISION

CRITERIA WITH RESPECT TO MEMBERS' CONDUCT ELIGIBLE FOR THE NEW REGULATORY MEETING
(REPORT FROM THE PROCEEDINGS AUTHORIZATION COMMITTEE)

MOTION

64. That Convocation approves the following general criteria prepared by the Proceedings Authorization Committee for the types of misconduct that would be eligible for a Regulatory Meeting:

A Regulatory Meeting may be authorized by the Proceedings Authorization Committee ("the PAC") in the following circumstances:

a. The Law Society has conducted an investigation of the member's conduct and the evidence suggests the member may have breached his or her obligations under the *Rules of Professional Conduct*, but in the opinion of the PAC, the circumstances are such that a conduct application may not be warranted if the member agrees to the Meeting;

b. The conduct to be discussed is not substantially in dispute;

c. It is not in the public interest to deal with the matter by an Invitation to Attend, given its confidential nature, because:

i. The conduct of a member has been the subject of comment in a public forum, including, for example:

A. by a court as a matter of public record orally or in writing;

B. in a news report, press report, media release, article, journal, or other publication or public medium; or

C. at a meeting, gathering, conference, etc.; and

ii. As a result of such comment in a public forum, the public is expecting or would reasonably expect to receive a Law Society response to the issue.

Background

65. In June 2005, Convocation approved the policy for a new Regulatory Meeting, which is essentially an Invitation to Attend which can be publicly noted. The policy appears at Appendix 1. The policy contains the following paragraph:

> Only members who engaged in specified types of misconduct, the general criteria for which will be determined by the [Proceedings Authorization Committee], *as approved by Convocation*, would be eligible for a regulatory meeting.
> (Emphasis added)

66. The Proceedings Authorization Committee ("the PAC") has prepared this report, which the Professional Regulation Committee has included in its report for the convenience of Convocation. Pursuant to the paragraph quoted above, the PAC is proposing the criteria set out in the motion at paragraph 64 for Convocation's approval. The report also summarizes the purpose of the regulatory meeting.

Purpose of the Meeting

67. The Regulatory Meeting is intended for cases where the matter could be referred for discipline through conduct proceedings, but in the view of the PAC there is evidence of a breach of the *Rules of Professional Conduct* that has received public attention and there is good reason to follow a remedial process instead of formal discipline.

68. Where the facts of such a case are in the public realm, the Regulatory Meeting permits an informal discussion of the issues with the member, the benchers conducting the Meeting, and any other persons who may attend with the consent of the member and the Law Society.

69. The purpose of the Meeting is to discuss the ethical issues with the member. At the conclusion of the Regulatory Meeting, the fact that the Meeting took place is to be public to allow reference to the conduct that led to the Meeting. After authorization by the PAC, Society staff will advise the member of the information to be made public about the Meeting so that the member may provide his or her informed consent to the Meeting.

70. The public information is limited to the name of the member, a brief description of the member's conduct that led to the Meeting, and the regulatory issues that arose from that conduct. No other information may be disseminated about the Meeting without the agreement of the Meeting participants.

71. The Regulatory Meeting offers an opportunity for frank discussion about difficult issues of conduct where the facts are not in dispute, but there may be differing views on its interpretation in an ethical context. The Meeting provides a forum to generate solutions and closure for the member on issues such as civility. It provides a public response by the Society to the conduct that resulted in the complaint.

72. In accordance with By-Law 21, the decision to authorize a regulatory meeting is at the discretion of the PAC. [11]

Appendix 1

THE REGULATORY MEETING
(as approved by Convocation on June 22, 2005)

1. The Proceedings Authorization Committee ("the PAC") may authorize an invitation to a member to attend a regulatory meeting.

---

[11] 9. (1) After reviewing a matter, the [Proceedings Authorization] Committee may determine that no action should be taken in respect of the matter or, subject to subsections (2) to (4), the Committee may take one or more of the following actions:

...

3. Invite a member or student member to attend before a panel of benchers to receive advice concerning his or her conduct.

3.1 Invite a member to attend before a panel of benchers to receive advice concerning his or her professional competence.

2. In order to proceed with a regulatory meeting, the member must accept (for the purpose of the meeting) the general facts alleged, be willing to participate in the process and be aware of his or her options and rights. These include:

   a. The voluntary nature of attendance at the meeting,

   b. The fact that the PAC may consider further action if the member does not accept the invitation to attend the meeting or having accepted, does not attend,
   c. The fact that the meeting will be a matter of public record, which will also disclose the issue or issues which prompted the authorization of the meeting and the outcome,

   d. The option for the member, in agreement with the PAC, to invite others to attend the meeting, as discussed below,

   e. The option for the member to attend with counsel.

3. The member will be advised that the purpose of the meeting is threefold:

   a. to *educate* the member about the impact of his or her actions,

   b. to hold the member *accountable* for them, and
   c. to *address the harm* inflicted on the public (either the complainant or the larger public interest).

   Identification of general issues around civility or other matters related to the lawyer's conduct and possible solutions could be part of addressing the harm.

4. Only members who engaged in specified types of misconduct, the general criteria for which will be determined by the PAC, as approved by Convocation, would be eligible for a regulatory meeting.

5. Required attendees at the meeting will be the member and two or more PAC members.

6. The member and the PAC members attending the meeting may agree that the following may attend the regulatory meeting:

   a. one or two senior members of the legal profession, depending on the nature of the issue,

   b. a lay bencher (community representative)

   c. the complainant.

7. Although the meeting is restricted to those listed above, there will be a public statement that the meeting occurred which identifies both the member and the issues. The fact that the meeting occurred will be a matter of public record at the Law Society.

8. The outcomes of such a meeting may include:

   a. no further action and closing the file;

b. the member apologizing to the complainant, after which the file will be closed; or

c. a referral back to the PAC for possible authorization of a Conduct Application in the appropriate case.

A key element of the regulatory meeting is its public outcome. The regulatory meeting is not disciplinary, but it will be used where a public disposition is required, for example, where the court has commented publicly on the issue. The Invitation to Attend will continue to be the appropriate remedy where the matter should be private and confidential.

FOR INFORMATION

REPORT FROM THE PROFESSIONAL REGULATION DIVISION

73. The Professional Regulation Division's Quarterly Report (third quarter 2005), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period July to September 2005.

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

(1) Copy of the Professional Regulation Division's Quarterly Report (July – September 2005).

(Pages 65 – 108)

Re: Consultations with Real Estate Practitioners on Proposed Residential Real Estate Transaction Guidelines and Amendments to the *Rules of Professional Conduct*

It was moved by Ms. Curtis, seconded by Ms. Dickson, that Convocation approves consultation with the profession as outlined in Appendix 4 with respect to proposed residential real estate guidelines and amendments to the *Rules of Professional Conduct* relating to real estate issues appearing in Appendices 1, 2 and 3.

Carried

Re: Proposal for a Member's Report to the Law Society of Criminal and Other Charges

It was moved by Ms. Curtis, seconded by Ms. Dickson, that By-Law 20 be amended as set out at page 4.

It was moved by Mr. Gottlieb, seconded by Mr. Bobesich, that the motion be tabled.

Lost

Continuation of the debate is adjourned to December 2005.

REPORTS NOT REACHED

Report of the Tribunals Committee
CEO's Report (in camera)

REPORTS FOR INFORMATION ONLY

Heritage Committee Report
- Committee Priorities

Report to Convocation
November 24, 2005

Heritage Committee

Purpose of Report: Information

Committee Members
Constance Backhouse (Chair)
Andrea Alexander (Vice-Chair)
Robert B. Aaron
Andrew F. Coffey
Patrick G. Furlong
Allan F. Lawrence
Laura L. Legge

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

COMMITTEE PROCESS

1. The Committee met on November 10, 2005. Constance Backhouse (Chair), Andrea Alexander (Vice-Chair), Robert Aaron, Andrew Coffey, Allan Lawrence and Laura Legge attended. Staff members Terry Knott and Sophia Sperdakos also attended.

FOR INFORMATION

COMMITTEE PRIORITIES

2. Committees have been requested to provide Convocation with their list of priorities and activities for the coming months. The Committee's priorities are set out at Appendix 1.

APPENDIX 1

PRIORITIES FOR THE HERITAGE COMMITTEE 2005-2007

SOLE PRACTITIONER AND SMALL FIRM HISTORY PROJECT

This is an ongoing project that encourages retired or soon-to-be-retiring members to write their memoirs, which will be housed in the Law Society's Archives department. The project has been communicated through notices to the profession and correspondence to retired members, as well as through seminars with interested members (one took place in Toronto in June 2005, one will take place in Ottawa on November 30, 2005). It is anticipated that there will be further seminars in 2006 in northern Ontario and one other region of the province.

High Priority

Timeline: Ongoing

ABORIGINAL LAWYERS' HISTORY PROJECT

This is a long-term project to undertake research on the history of First Nations' students and lawyers in Ontario. In 2006 research will be done to identify some of the early First Nation lawyers. It is anticipated that the history project will be developed in collaboration with First Nation organizations.

This project is another step in an ongoing process to capture the profession's history.

High Priority

Timeline: Ongoing

175TH ANNIVERSARY OF THE FIRST CONVOCATION IN OSGOODE HALL

In February 2007 the Law Society will celebrate the 175th anniversary of the first Convocation in Osgoode Hall. The Committee is developing a number of proposals to mark this important anniversary.

High Priority

Timeline: February 2007

FELLOWSHIP PROJECT

The Heritage Committee and the Osgoode Society are developing a fellowship to fund graduate and post-graduate research in Canadian legal history, broadly defined. This would include graduate research from any number of disciplines such as history, law (thesis-based LLMs), criminology, sociology, etc. The fellowship would be tenable at any Ontario university. Applicants from outside of Ontario would be eligible to apply, provided they conduct the

research as part of a graduate program in an Ontario university or, if post-doctoral candidates, in association with an Ontario university.

Funding sources for the fellowship are being pursued.

High Priority

Timeline: Ongoing

HISTORY MOMENTS

Each month in Convocation there will be a brief presentation of an important history moment capturing the lives and events of interest in the profession's and the Law Society's history. The Committee and staff will continue to develop these moments on an ongoing basis.

High Priority

Timeline: Ongoing

Lawyers Fund for Client Compensation Committee Report
- Appointment to the Review Sub-Committee
- Fund Status
- Grants Paid by the Fund
- Grant Limit for Staff Approval Authority
- Allocation of Costs to Lawyers Fund Budget

Report to Convocation
November 24, 2005

Lawyers Fund For Client Compensation Committee

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

Purpose of Report: Information

Prepared by the Lawyers Fund for
Client Compensation Department

COMMITTEE PROCESS

1. The Committee met on November 9, 2005. Members in attendance were Peter Bourque (Chair), Allan Gotlib (Vice-Chair), Marshall Crowe, Richard Filion, Alan Silverstein and Gerald Swaye. Staff and others in attendance were Zeynep Onen, Wendy Tysall, Dan Abrahams, Maria Loukidelis and Craig Allen (LawPRO VP & Actuary).

FOR INFORMATION

APPOINTMENT TO THE REVIEW SUB-COMMITTEE

2. Andrew Coffey is no longer a member of the Lawyers Fund for Client Compensation Committee and therefore no longer on the Review Sub-Committee that reviews the recommendations of staff for all grants in excess of $5,000.00.

3. At Convocation on October 20, 2005, Allan Gotlib was appointed Vice-Chair of the Committee. Dr. Gotlib subsequently agreed to join the Review Sub-Committee at the request of Committee Chair Peter Bourque.

4. The Committee formally approved the appointment of Allan Gotlib to the Review Sub-Committee, to sit along with the Chair Peter Bourque and Richard Filion.

FUND STATUS

5. Craig Allen, LawPRO's Vice-President and Actuary, reported that the Fund balance is $17.8 million as at September 30, 2005, up from $17.1 million as at June 30, 2005. This increase in the balance is a result of favourable claims over the course of the third quarter.

GRANTS PAID BY THE FUND

6. The Committee wishes to report that the following grants were approved and paid from the Fund between August 24, 2005 and October 26, 2005, in the amounts shown. (Only members whose discipline proceedings are completed or who are deceased are identified by name.)

Member (Status if Disciplined)	Number of Claimants	Total Grants Paid ($)
Addo, Mark O. (Deceased November 29, 2002)	1	1,600.00
Adler, Edwin W. (Disbarred July 27, 2005)	1	65,200.00
Dyer, William T. (Disbarred October 29, 2004)	1	10,000.00
Frishette, Karen Lynn (Disbarred June 15, 2005)	2	5,648.45
Gagnon, Marcel (Disbarred April 22, 2004)	1	100,000.00

Gahan, Jeffrey (Disbarred June 2, 2004)	1	1,000.00
Shaw, James V. (Disbarred September 20, 2005)	4	285,914.00
Solicitor #120 (Retired or Not Working January 1, 2004)	1	11,325.00
Solicitor #133 (Suspended October 1, 2004)	2	1,797.32
Solicitor #134 (Suspended October 8, 2004)	2	1,074.57
Solicitor #136 (Suspended October 1, 2004)	1	59,976.68
Solicitor #139 (Suspended September 30, 2005)	2	3,550.00
Solicitor #147 (Suspended March 30, 2005)	2	9,200.00
TOTAL	21	$556,286.02

GRANT LIMIT FOR STAFF APPROVAL AUTHORITY

7. The issue of staff approval limits was placed before the Committee for discussion. Specifically, the Committee considered whether the limit is appropriate, or whether it should be adjusted upward.

8. Prior to May 1998 staff (that is, Fund Counsel and their managers) had authority to approve grants up to $500.00 without obtaining the approval of the Review Sub-Committee of the Fund. In May of 1998 Convocation approved a recommendation from the Lawyers Fund for Client Compensation Committee to increase the staff grant approval limit to $5,000.00.

9. With grant recommendations under $5,000.00 (as with those over $5,000.00 requiring Sub-Committee approval) formal, detailed Recommendation Memoranda are always prepared by experienced staff lawyers and submitted to senior management for approval.

10. It was suggested that increasing the authority of staff to approve grants might streamline the processing of claims to a certain extent and could also reduce the workload of the Review Sub-Committee.

11. Following a discussion, the Committee determined that no adjustment was needed at this time to the maximum grant amount that staff may approve without Bencher involvement. The maximum will remain at $5,000.00.

ALLOCATION OF COSTS TO LAWYERS FUND BUDGET

12. The Committee considered the allocation of certain costs to the Lawyers Fund Budget and whether this practice is appropriate in light of the provisions of section 51 of the *Law Society Act*. These costs include the 100% funding of the Spot Audit Program, a portion of the costs of the Investigation and Discipline Departments and a portion of overall Law Society of Upper Canada operating and administrative costs.

13. In the course of this discussion, the Committee reviewed a memorandum from Wendy Tysall, Director of Finance, relating to this matter.

14. The Committee took no action.

CONVOCATION ROSE AT 1:05 P.M.

Confirmed in Convocation this 9th day of December, 2005.

Treasurer